PIABA
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Via Email Only @ pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K. Street, NW
Washington, DC 20006

Re: FINRA Regulatory Notice 26-06 – Modernizing FINRA Arbitration Rules, Guidance and Process

Dear Ms. Mitchell:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities litigation. Since its formation in 1990, PIABA has promoted the interests of public investors in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members represent and advocate for investors harmed by fraud, misconduct, and the damage caused by members of the securities industry who put their interests ahead of their clients. As a result of representing the public investors, PIABA is in the unique position to uncover patterns of conduct and regulatory inefficiencies that lead to customers being misled, misinformed, or mistreated and abuses in the arbitration and dispute resolution of customer disputes.

Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") relating to 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] Central to that confidence is the integrity of FINRA's own dispute resolution forum. Investors cannot have confidence in the markets if they lack confidence that, when harmed by the very firms entrusted with their retirement savings, they will have access to a fair, neutral, and meaningful forum for redress. A dispute resolution system that systematically favors the industry over the investors it is designed to protect does not inspire confidence; it erodes it. FINRA's arbitration forum is therefore not peripheral to its mission, it is one of its most consequential expressions.

We write to you to urge you to stay faithful to your stated mission and reject the bulk of the recommendations made in FINRA Regulatory Notice 26-06. These recommendations would betray your mission and allow the securities industry to escape accountability for damage caused by bad actors and industry members.

Background

Mandatory pre-dispute arbitration clauses are a common feature of the consumer landscape. Investors, like other consumers, are frequently required to agree to arbitrate disputes with financial institutions as a condition of opening or maintaining a brokerage account. This lack of meaningful choice imposes a heightened responsibility on FINRA, as a congressionally authorized self-regulatory organization, to ensure that its arbitration forum operates in a manner that genuinely protects investors and provides a fair and effective mechanism for resolving disputes.

Outside of the FINRA framework, arbitration clauses often direct disputes to private providers such as American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services (JAMS). These forums are selected by firms, not investors, and often impose procedural

[1] "About FINRA," https://www.finra.org/about (last visited July 22, 2025).

limitations that would not exist in court.[2] Their arbitration pools are largely composed of repeat, professional arbitrators whose backgrounds are more closely aligned with institutional interests than with individual investors. As a result, these forums are not a meaningful substitute for the jury system they replace.

In some cases, arbitration provisions also impose prohibitive costs. Requirements such as three-arbitrator panels in high-cost venues can force investors to commit tens of thousands of dollars simply to pursue a claim, effectively deterring them from seeking any remedy at all. As a result, Main Street investors are too often priced out of justice. This creates an inequity in a system where fairness and equal access to redress should be fundamental.

FINRA's arbitration forum was created to mitigate these structural disadvantages within a mandatory arbitration system that investors generally cannot avoid. Over time, reforms—such as limiting pre-hearing motions to dismiss and broadening the arbitrator pool—have improved fairness and accessibility. Those protections remain essential to preserving meaningful access to justice for investors. As a regulator, FINRA stands in a unique position compared to private arbitration forums that may be motivated to bend to the will of their constituent mega corporations since FINRA should be better able to safeguard investor protections and the integrity of its arbitration forum.

Despite some progress, arbitration through FINRA still overwhelmingly favors brokerage firms. In 2025, investors prevailed in final arbitration hearings in FINRA less than 30% of time.[3] Said another way, the industry won more than seven out of ten times. Unfortunately, the tilt

[2] Securities and Exchange Commission: *Response to Congress: Mandatory Arbitration Among SEC-Registered Investment Advisers. As Directed by the House Committee on Appropriations, H.R. Rep. No. 117-393* (June 27, 2023).
[3] FINRA, Dispute Resolution Statistics (last accessed March 1, 2026), available at https://www.finra.org/arbitration-mediation/dispute-resolution-services-statistics

towards the industry is not an aberration. Investors fared even worse in 2024, winning only 26% of the final arbitration hearings. In 2023, investors won less than one in four arbitrations.

Regulatory Notice 26-06 should be evaluated against this background. Although framed as modernization, numerous proposals risk increasing procedural barriers while obliterating investor protections. The questions FINRA asks virtually all appear responsive towards large FINRA member firms' desire (and direct requests) to control the outcomes in FINRA arbitration and handicap the process. The industry's demanded changes would increase the formal procedural hurdles for investors while decreasing the ability to get discovery and a fair opportunity for relief, straying from the goal of an equitable FINRA Arbitration forum. Any changes to the forum must be judged by a single standard: whether they enhance or diminish investors' ability to obtain fair and meaningful relief.

Recent FINRA Changes and Concerns

Over the last year, PIABA has grown increasingly concerned with the direction of FINRA Dispute Resolution. Recent developments suggest a shift away from investor-protection principles that should guide FINRA's actions.

One of the most consequential changes relates to arbitrator eligibility. Without meaningful notice or opportunity for public comment, FINRA implemented new requirements that significantly narrowed the pool of eligible arbitrators. By requiring a four-year college degree and a minimum level of "professional" experience, FINRA has excluded a substantial portion of the investing public from serving, instead favoring candidates whose professional backgrounds more closely resemble those of the firms appearing before them. While characterized as an effort to improve "arbitrator quality," the practical effect is to move the forum further away from a representative cross-section of investors and closer to a professionalized, repeat-player pool that reflects the industry's peers, not the investors they harmed.

PIABA firmly stands by its position which it has maintained for years: investors deserve arbitration panels that look more like the communities they come from, not the professional class that the industry prefers. It is a panel that sees the world the way the industry sees it, not the way an ordinary investor who trusted a broker with their life savings does. Likewise, PIABA's position has remained steadfast that it benefits investors to have arbitrators well-trained on dispute resolution rules, process, and procedures. This training can come from continuing education training, FINRA training such as the Arbitrator's Guide, and even the guidance and argument of the parties.

PIABA is also concerned by FINRA's recent application of Rule 12407(a), which permits the removal of arbitrators prior to ranking in limited circumstances. In practice, FINRA has granted requests by brokerage firms to remove arbitrators based on prior rulings adverse to those firms. This approach departs from established principles under the Federal Arbitration Act, where prior rulings are not treated as evidence of bias. It also undermines the integrity of the ranking process by allowing repeat respondents to effectively strike arbitrators without using their allotted strikes. The resulting dynamic disproportionately advantages repeat players and risks further shrinking an already limited arbitrator pool.

These developments must be viewed alongside broader industry efforts to reshape the arbitration forum. In July 2025, SIFMA, the self-proclaimed voice of the U.S. securities industry, demanded a series of changes that included limiting punitive damages, expanding dispositive motion practice, reintroducing mandatory industry arbitrators, and permitting greater use of non-FINRA forums. Collectively, these proposals would materially disadvantage investors and reduce the effectiveness of arbitration as a forum for resolving claims.

Regulatory Notice 26-06 sadly reflects many of these same themes. Although framed as modernization, the Notice raises the prospect of increased procedural complexity combined with reduced investor protections. The breadth and structure of the notice, spanning dozens of multipart questions, also place a disproportionate burden on individual investors and their representatives, while institutional participants are far better positioned to respond comprehensively.

Taken together, these changes suggest a broader trajectory that warrants careful scrutiny. FINRA's arbitration forum exists to provide a fair and accessible means of redress within a mandatory system. Any reforms should strengthen that function, not weaken it. Maintaining investor confidence in the forum requires adherence to that principle.

PIABA Response to FINRA 26-06

In summary, PIABA opposes proposals that would reduce investor access to FINRA arbitration, expand pre-hearing dismissal practice, professionalize the arbitrator pool at the expense of representativeness, or otherwise increase industry leverage in a mandatory forum. PIABA supports reforms that improve investor protections, procedural training, discovery enforcement, technology, transparency, and the payment of awards.

Forum Selection/Customer Disputes

> **Request for Comment A(i)(1)** *Should certain categories of claims (e.g., of a certain complexity or value) or customer dispute types (e.g., those involving institutional customers or holders of institutional accounts) be subject to different requirements under FINRA rules?*
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> *a. Should certain categories of claims or customer dispute types be subject to different procedural requirements under FINRA rules, such as allowing the parties to have more control over the administration of their case? What customer protection and fairness considerations should be part of evaluating this question?*

PIABA opposes creating different procedural regimes for categories of customer claims or customer dispute types where those differences would diminish investor protections or permit firms to obtain greater control over how disputes are administered.

There are myriad ways such amendments can be abused to the detriment of the customer. First, the distinction between an "institutional" customer and a retail customer is often far less meaningful in practice than it appears on paper. Retail investors are frequently advised by their brokers to establish a corporate entity or trust and to invest the proceeds, rather than investing in the customer's own name. This recommendation is sometimes made in the context of purported estate planning, or asset protection, or even as a claimed "benefit" for the customer to allow them to invest in products that are only available to the "elite." The customer's sophistication does not change merely because they followed their broker's advice to form a single member LLC, or something comparable. Nor does that customer typically understand that the use of such an entity may later be invoked to argue for reduced procedural protections or a different arbitration framework. FINRA should be especially wary of any rule that would allow firms to alter the forum protections available to customers based on account structures or transactional forms the firms themselves recommended. The more FINRA permits the rules to differentiate based upon decisions and recommendations being made *by the very FINRA member involved*, the more opportunities bad actors have to try to exculpate themselves from misconduct by changing the form of a recommended transaction, without changing the substance of it.

PIABA is also strongly opposed to any pre-dispute mechanism that would allow firms to contract around FINRA's customer-protective procedures. In practice, broker-dealers draft the contracts, customers do not negotiate them, and customers do not make account-opening decisions based on fine-grained procedural provisions governing a future arbitration they reasonably hope never to have. Any rule permitting firms to build different procedural tracks into customer agreements would predictably result in standardized, boilerplate provisions designed to favor the

firm, not the investor. It would also undermine consistency in the FINRA forum and create avoidable administrative complexity for parties, counsel, arbitrators, and FINRA itself.

That said, PIABA does not object in principle to parties agreeing, ***post-dispute***, to reasonable procedural modifications tailored to the needs of a specific case. Once a dispute has arisen, and particularly once the investor is represented by counsel familiar with the FINRA forum, negotiated procedural flexibility can sometimes promote efficiency without sacrificing fairness. FINRA arbitration already permits substantial process decisions to be made by agreement of the parties, and that approach is sufficient. The governing principle should be simple: no pre-dispute erosion of customer protections, but room for informed, post-dispute agreement where the investor is in a position to make a meaningful choice.

> *b. For some types of claims in FINRA's arbitration forum, FINRA requires arbitrators to have additional qualifications to be eligible to serve on a panel considering such claims. Should certain other categories of claims or customer dispute types be considered by a panel with additional qualifications or experience? If so, what types of claims or customer disputes and what should be the minimum additional qualifications or experience of the panel? What customer protection and fairness considerations should be part of evaluating this question?*

PIABA firmly opposes any further increases to artificial arbitrator qualification requirements based on claim type, customer type, supposed complexity, or dollar amount.

FINRA has already moved in the wrong direction by narrowing the arbitrator pool through additional credentialing requirements that exclude large portions of the public and favor candidates with more traditionally "professional" backgrounds. Those changes do not make the forum more neutral. They make it less representative and also less efficient with a narrowed arbitrator pool. The more FINRA conditions service on advanced credentials, professional titles, or industry-adjacent experience, the more the arbitrator roster begins to resemble the world of the respondents rather than the world of the investors compelled to appear before them.

That is precisely backwards. Investors do not choose FINRA arbitration. They are forced into it through mandatory pre-dispute arbitration clauses. The principle at stake here is not abstract. It is the same principle that underlies the Seventh Amendment right to a jury trial that investors are forced to waive the moment they sign a brokerage firm's account agreement. Jurors are not selected for their credentials. They are selected because they are members of the community, people who bring with them the experiences, values, and common sense of the world in which the parties to a dispute actually live. That is the foundation of the American civil justice system: not that the decision-maker be the most educated person in the room, but that the decision-maker be a genuine peer of the people whose lives will be affected by the outcome.

FINRA's mandatory arbitration system asks investors to accept that forum as a substitute for the courtroom. The least FINRA can do in return is ensure that the arbitrators who decide those cases bear some reasonable resemblance to the investors who are compelled to appear before them. A retired firefighter who spent thirty years contributing to a pension fund knows what it means to trust a financial professional with your savings. A teacher who invested modest amounts over a career knows what it means to discover that the investments you were sold were not what you were told they were. A small business owner who handed over retirement savings to a broker knows what it means to see those savings disappear. None of those people need a four-year degree to understand what happened to them or to assess the credibility of the broker who caused it.

The securities industry understands this dynamic, which is precisely why it lobbied for the qualification changes it got. An arbitrator pool composed primarily of lawyers, accountants, and business executives is a pool whose members have spent their professional lives closer to the boardroom than the brokerage client's kitchen table. Those arbitrators are not neutral in the way that a truly diverse cross-section of the community would be neutral. They may be technically

neutral in the formal sense, but they may also bring with them certain professional worldviews or a set of assumptions about how financial transactions work and why people make the decisions they do that is more likely to align with the industry's view of the world than with the investor's. That is not an accusation of bias. It is a recognition of the basic reality that where you sit shapes how you see.

FINRA could of course offer investor choice and give investors back their Seventh Amendment rights. But even if FINRA does not offer investors a choice, FINRA can commit to building an arbitrator pool that takes seriously the obligation to provide a genuine substitute. That means actively recruiting arbitrators from working-class communities, from underserved communities, and from communities that have historically been targeted by the predatory sales practices that most frequently end up in FINRA arbitration. It means measuring the success of arbitrator recruitment not only by the size of the pool but by its demographic breadth. And it means resisting, firmly and on principle, every industry-backed effort to professionalize the pool in ways that predictably and systematically exclude the very people whose interests the forum is obligated to serve.

To be clear, PIABA does not oppose FINRA creating additional ***training*** on dispute resolution procedure, ethics, case management, and the rules governing the forum.[4] The solution in arbitration is not to require every arbitrator to arrive pre-credentialed as though they were a judge, but to train arbitrators on the procedural rules they will apply and to provide experienced chairpersons to lead the proceedings. FINRA already does this. The Basic Arbitrator Training Program exists precisely to ensure that arbitrators understand their role. The answer to any gap in

[4] *See infra* Response to Question E.1.

that training is more procedural training, not a college degree requirement that excludes two-thirds of the American public from ever serving.

> **Request for Comment A(i).2.** *Should FINRA no longer allow in its arbitration forum certain categories of claims (e.g., of a certain complexity or value) or customer dispute types (e.g., those involving institutional customers or holders of institutional accounts)? What customer protection and fairness considerations should be part of evaluating this question?*

PIABA opposes any rule that would remove categories of claims or customer disputes from the FINRA arbitration forum in favor of other industry preferred private arbitration forums. The question is concerning not only because of what it suggests, but because of how little it defines. FINRA has not identified what it means by "complex," what it means by "certain value," or where such claims would go. That vagueness is not neutral. It is an open invitation for member firms to argue that disfavored claims should be pushed out of FINRA arbitration whenever those claims are too large, too difficult, too expensive, or too embarrassing for the industry to defend in a forum designed to protect investors.

PIABA points out that this has been considered and rejected before. FINRA previously maintained a "Large and Complex Cases Rule" that was abandoned in 2000.[5] FINRA, in 2012, started another "Large Arbitration Cases" Pilot Program for cases involving claims of $10 million or more.[6] This program was also ultimately abandoned by FINRA. That history matters. It suggests there is no demonstrated basis for reviving the broader premise that certain customer cases should be diverted from FINRA arbitration because of size or complexity alone.

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[5] FINRA Notice to Members 01-03 (Jan. 2001), *Sunset of Large and Complex Cases Rule*, available at https://www.finra.org/sites/default/files/NoticeDocument/p003937.pdf.

[6] Jim McConville, FINRA Launches Pilot Program for Large Arbitration Cases, Financial Advisor Magazine (July 2, 2012), available at https://www.fa-mag.com/news/finra-launches-pilot-program-for-large-arbitration-cases-11186.html.

More fundamentally, investors with large or complex claims are not less in need of FINRA's protections; they are often more in need of them. Complexity usually benefits the repeat player. The more complicated the product, account structure, supervision issues, or damages presentation, the greater the danger that a brokerage firm will use procedure, cost, and delay as weapons. Redirecting those claims to other private forums would not level the playing field. It would likely tilt it further against investors. Private arbitration providers such as JAMS or AAA are not substitutes for a forum operating under FINRA's investor-protection mandate. If FINRA believes some investor claims require more active case management, the answer is to improve the FINRA forum's ability to handle those cases—not to exclude them from the forum altogether.

The same is true for disputes involving so-called institutional customers or holders of institutional accounts. Labels of that sort often conceal more than they reveal. Investors may hold assets through trusts, LLCs, family entities, retirement structures, or other vehicles for reasons having little or nothing to do with sophistication or bargaining power. A customer does not become less deserving of investor protections merely because the account was opened in an entity name, sometimes at the recommendation of the very broker later seeking to reduce those protections. FINRA should be extremely cautious about using account form or customer labels as a basis to strip away access to the forum.

If FINRA were to permit any deviation from the current framework, that permission must belong exclusively to the investor, exercised post-dispute and with the benefit of counsel. It cannot be handed to firms through pre-dispute contracts or vague categorical carve-outs. The bargaining power between a customer and a broker-dealer is not equal at account opening, and any rule that gives firms greater power to select the forum will predictably be used to the customer's

disadvantage. Investor choice, if any, must be real, informed, and exercised only after the dispute has arisen.

PIABA therefore urges FINRA to reject any proposal that would remove categories of customer claims or disputes from the FINRA arbitration forum. The better course is to preserve investor access to the forum and, where necessary, strengthen FINRA's capacity to administer larger or more complex cases fairly and efficiently.

> **Request for Comment A(i).3.** *Should FINRA allow parties to contractually agree in advance to opt out of FINRA arbitration and arbitrate disputes in alternative fora for certain categories of claims (e.g., of a certain complexity or value) or customer dispute types (e.g., those involving institutional customers or holders of institutional accounts)? What customer protection and fairness considerations should be part of evaluating this question?*

PIABA strongly opposes any rule that would permit parties to contract in advance to opt out of FINRA arbitration for categories of customer claims or customer disputes. In practice, such a rule would not create meaningful choice for investors. It would create additional choice for brokerage firms and less protection for customers.

Customers do not negotiate pre-dispute arbitration clauses with broker-dealers. They do not sit across the table from firms and bargain over forum-selection language, procedural rights, or the comparative advantages of FINRA, JAMS, AAA, or any other forum. They open accounts on a take-it-or-leave-it basis using agreements drafted entirely by the firm. Any rule allowing pre-dispute contractual opt-outs from FINRA arbitration would therefore operate exactly as one would expect: firms would draft the clauses, firms would select the circumstances in which FINRA protections no longer apply, and customers would have no realistic ability to object, negotiate, or even understand the consequences at the time of account opening.

That is not investor choice. It is firm choice masquerading as party agreement. And in a mandatory system, that distinction is everything. Pursuant to FINRA Rule 12200(2), customers

already have the right to elect to file a claim in FINRA arbitration even when a contract does not otherwise require it. Permitting that rule to be changed by the contract written by FINRA member firms does nothing but give the choice of potential forum to the firm, rather than the customer. This is unquestionably against the customer's best interests. It is industry protection, not investor protection. That would be contrary to the core investor-protection function the FINRA forum is supposed to serve.

PIABA therefore urges FINRA to reject any proposal that would allow firms and customers to contract in advance to opt out of FINRA arbitration for categories of claims or customer disputes. In the real world, such a rule would not expand customer autonomy. It would give firms another tool to evade the investor protections FINRA's forum is supposed to provide.

> **Request for Comment A(i).4.** Should customers be allowed to unilaterally choose, post dispute, between arbitration and litigation even if they signed a customer agreement with an alternative forum selection clause? Alternatively, should FINRA permit arbitration in its forum only where both parties agree to such arbitration post dispute? What fairness considerations should be part of evaluating this question?

Yes. Investors did not choose arbitration. They were placed into it as a condition of opening a brokerage account, on a take-it-or-leave-it basis, without negotiation, and without any meaningful ability to opt out. That reality alone is sufficient to justify giving investors the right to choose, post-dispute, whether to proceed in the forum that was imposed on them or pursue their claims in a court of law to which they would otherwise be constitutionally entitled. Allowing investors to make that election after a dispute arises, when they have a concrete understanding of what is at stake and the ability to consult with counsel, costs FINRA nothing and restores to investors a measure of the agency they surrendered at account opening.

If FINRA's forum is as fair and investor-protective as FINRA and the industry claim, it has nothing to fear from investor choice. Competition with the court system would simply give FINRA

the incentive to continue improving the forum rather than eroding it. If FINRA stays true to its mission, many claims would continue to be filed in FINRA Arbitration even if customers were allowed to choose between FINRA Arbitration and court.

The second proposal, permitting FINRA arbitration only where both parties agree post-dispute, presents a different and more nuanced concern. A post-dispute agreement to arbitrate, entered into voluntarily by both parties with the benefit of counsel, is not objectionable in principle. The problem arises when that framework is used as a mechanism for firms to escape arbitration obligations they imposed on investors at account opening. FINRA members chose to include mandatory arbitration clauses in their customer agreements. Having made that choice, it would be fundamentally inequitable to then permit those same firms to opt out of arbitration selectively, when the facts of a particular dispute make the courtroom a more attractive forum for the firm. Investor choice must be the governing principle. If both parties genuinely agree post-dispute to arbitrate, that agreement is unproblematic. What cannot be permitted is a rule that gives firms the unilateral ability to walk away from their own mandatory clauses when doing so serves their interests at the investor's expense.

> **Request for Comment A(i).5.** *Do participants still experience FINRA arbitration as less expensive and faster than litigation? Are there changes that FINRA should consider making to its arbitration forum to make it more expeditious and cost effective relative to courts?*

The answer to this question varies somewhat by jurisdiction. In general, FINRA arbitration is still faster and less expensive than most court systems in terms of upfront costs and calendar time. However, the question of cost cannot be answered honestly without acknowledging a significant and growing problem: FINRA's forum fees are assessed against winning investors in a way that meaningfully erodes their recoveries. Hearing session fees, which are allocated by the panel at the conclusion of the case, regularly run into the thousands of dollars per hearing day and

are frequently imposed on claimants even when they prevail. Conversely, certain arbitration forums like AAA under the consumer rules are materially less expensive than FINRA. Yet, in FINRA, an investor who wins a $50,000 award and is assessed $8,000 in hearing session fees has not simply paid for justice. They have had their recovery quietly diminished by the very forum they were compelled to use. FINRA should examine whether its forum fee structure is consistent with its investor protection mission and should consider whether prevailing investor claimants should be presumptively relieved of hearing session fees, or whether fee-shifting toward the industry respondent should become the default upon an investor's success on the merits.

> **Request for Comment A(ii).1.** *Should FINRA amend its rules to no longer require disputes arising out of the business activities of members or associated persons to be arbitrated under the Industry Code? What fairness considerations should be part of evaluating this question?*

PIABA generally opposes any change that would broadly eliminate the requirement that disputes arising out of the business activities of members or associated persons be arbitrated under the Industry Code.

As a practical matter, not all industry participants stand on equal footing. Large FINRA member firms often have the resources, leverage, and institutional advantages to negotiate forum terms and litigate disputes aggressively. Smaller firms and individual associated persons often do not. For those smaller participants, FINRA arbitration can provide a forum that is more accessible, less expensive, and more efficient than court, even if it is still imperfect. Removing mandatory arbitration in this area would not create a level playing field. In many cases, it would tilt the field further in favor of the largest firms.

PIABA's mission is to protect investors, but our members also routinely see the same power imbalance in disputes involving smaller industry participants. A large brokerage firm can inflict severe professional and economic consequences on an individual associated person or

smaller firm through terminations, Form U5 disclosures, internal investigations, and other employment-related or business-related actions. In appropriate cases, arbitration provides a realistic means for those smaller participants to challenge unfair, retaliatory, or abusive conduct without the prohibitive cost and delay that often accompany court litigation.

The fairness question, therefore, should not be analyzed as though all industry disputes involve sophisticated parties with equal bargaining power. Many do not. To the extent large firms wish to negotiate different arrangements with one another, they are generally capable of doing so. But FINRA should be cautious about changing the default rules in a way that would disproportionately harm smaller firms and individual associated persons. The current framework at least preserves a comparatively accessible forum for those participants. FINRA should not take that protection away.

> **Request for Comment A(ii).2.** *Should FINRA no longer require specific types of disputes arising out of the business activities of members or associated persons to be arbitrated under the Industry Code? If so, what types of disputes and among which parties? What fairness considerations should be part of evaluating this question?*

PIABA generally does not support carving out specific categories of intra-industry disputes from mandatory arbitration under the Industry Code.

Any attempt to exempt certain "types" of disputes would create line-drawing problems, invite satellite litigation, and risk inconsistent application across jurisdictions and fact patterns. FINRA's forum is not well served by turning threshold forum questions into complicated debates over how a claim should be labeled, whether a dispute fits within a carve-out, or whether particular causes of action should be treated differently from others. Those kinds of disputes would increase cost, delay, and uncertainty for all concerned.

More importantly, categorical carve-outs would predictably benefit the parties with the greatest resources. Large firms are far better positioned to exploit ambiguity, litigate forum disputes, and pressure smaller opponents through cost and delay. Smaller firms and individual associated persons are not. A rule that appears neutral on paper may operate in practice as a powerful tool for larger firms to avoid arbitration when arbitration is inconvenient to them and to force weaker parties into more burdensome forums.

PIABA is also concerned that carving out categories of disputes would draw FINRA further into making quasi-judicial determinations about substantive legal classifications and forum entitlement questions. That is not a productive direction for the forum. FINRA's role should be to administer a fair and efficient dispute resolution process, not to create elaborate threshold disputes over which causes of action belong where.

If FINRA nevertheless considers any change in this area, it should proceed with extreme caution and only with clear, narrowly drawn rules that do not expand the ability of larger firms to use forum selection as a weapon against smaller parties. But PIABA's view is that FINRA should not adopt such carve-outs at all. The better course is to preserve the existing framework rather than create new opportunities for strategic behavior, delay, and unfairness

Eligibility and Motions to Dismiss

> **Request for Comment B(i).1.** *Should FINRA eliminate the eligibility rule and allow eligibility to be determined solely by applicable statutes of limitations? What would be the impacts on parties, if any, including on recordkeeping burdens and forum accessibility? What fairness considerations should be part of evaluating this question?*

PIABA opposes eliminating the eligibility rule and replacing it with a regime based solely on "applicable statutes of limitations." PIABA's longstanding concern is that it is fundamentally unfair to require investors to arbitrate their claims and then require those investors to be subjected to motions to dismiss on eligibility grounds that force investors out of the arbitration process (often

at the last minute) and back into court. Investors could find themselves litigating disputed and highly technical timeliness questions based on varying state laws, federal doctrines, accrual rules, tolling principles, and repose concepts—only to be sent to court after months or even years in arbitration. In some cases, panels could split claims or parties between court and arbitration, requiring investors to pursue related disputes in multiple forums at once. That is not efficiency. It is procedural attrition.

It is also PIABA members' shared experience that broker-dealers file eligibility motions to dismiss reflexively regardless of the presence of ongoing activity including continuing investment advice, reinvestment of dividends, additional investment transactions in the same issuer or strategy, hold recommendations that clearly occur within the eligibility time period, or even actual evidence of losses or damage.

The proposal is especially ill-suited to the kinds of products and misconduct that most often generate eligibility disputes today. It is PIABA members' experience that eligibility motions are on the rise due in large part to the type and nature of the most commonly abused products being sold for the past twenty years. Relatively few eligibility motions are being filed based on individual recommendations related to publicly traded stock. Most eligibility motions are related to long-term and illiquid products such as private placements, non-traded REITs and BDCs, oil & gas offerings, and annuities. These products are marketed as having long-term investment cycles of more than seven years. Due to the non-public nature of these offerings, they do not trade on public markets and have their share prices set by the sponsor – often at intervals that exceed one year - who is incentivized to keep investors in the dark as to what a true market price would be. For instance, when the non-traded REIT American Healthcare REIT went public the sponsor specifically informed investors that the sponsor's net asset value ("NAV") price set by the sponsor bore little

to no relation to how a functioning public market would value the company's shares.[7] ("The estimated per share NAV…does not represent the fair value of the Company's assets less its liabilities according to GAAP, nor does it represent a liquidation value of the Company's assets and liabilities or the amount its shares of common stock would trade at on a national securities exchange.") The false stability created by investment sponsors setting their own NAVs masks the poor performance of these investments for many years. Often times these assets are written down or revalued in a transaction many years later resulting in instantaneous and massive losses that can reach 70% or more of the prior stated value.

In addition, PIABA members also report situations where associated persons conduct long-tailed Ponzi schemes that can last for a decade or longer. In these cases, broker-dealer supervision fails to stop their associated person from engaging in fraudulent transactions, selling away activity, or even outright theft of client funds for many years. Brokerage firms often terminate the associated person many years later, fail to warn or notify their own clients as to their employee's misdeeds, and then argue that the claims are ineligible for arbitration simply due to the length that the firm improperly failed to catch the activity.

Any attempt by FINRA to implement an overarching use of state or federal statutes of limitation to its arbitration proceedings would run afoul of the well-established case law in most jurisdictions. The overwhelming majority of states do not apply statute of limitations time periods that apply to claims in arbitration proceedings because arbitrations are not "actions," as that term is used in the statutory constructs.[8] Other states leave it in the discretion of the arbitrators whether

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[7] American Healthcare REIT Shareholder Letter (Feb. 12, 2024) (available at: https://s203.q4cdn.com/231149128/files/doc_news/pdf/2024/NewFolder/AHR-Letter-to-Shareholders-and-FAQ.pdf)

[8] *Egan Jones Ratings Co. v. Pruette,* No. CV 16-MC-105, 2017 WL 4883155, at *3 (E.D. Pa. Oct. 30, 2017), aff'd, 765 F. App'x 659 (3d Cir. 2019) (noting many jurisdictions that do not apply statute of limitations to arbitration proceedings) (*citing NCR Corp. v. CVS Liquor Control, Inc.,* 874 F.Supp. 168, 172 (S.D. Ohio 1993); *Broom v.*

or not to apply statute of limitations.[9] Statutes of limitations were enacted to manage court dockets and protect against the prosecution of truly stale judicial claims in court. They have no natural application to a forum that operates outside the judicial system entirely, under procedural rules agreed to by the parties and enforced through contract rather than through the authority of any court.

Moreover, statute of limitations do not apply to FINRA rule violations which form the basis of many claims brought in the forum. FINRA's Submission Agreement specifically states that the FINRA rules will apply to disputes agreed to be brought in the forum by the parties. *See* Submission Agreement ("parties…hereby submit the present matter…to arbitration in accordance with the FINRA By- Laws, Rules, and Code of Arbitration Procedure."). Further, as FINRA has stated, firms are prohibited from inserting any language into a client agreement that would have the effect of contradicting or limiting any FINRA Rule. FINRA Rule 2268(d) (provides that no customer pre-dispute arbitration agreement shall include any condition that "limits or contradicts the rules of any [SRO]," "limits the ability of a party to file any claim in arbitration," or "limits the ability of arbitrators to make any award."). Arbitrators are empowered to enforce any FINRA Rule or provision of the code. FINRA Rule 12409 ("The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties.") Accordingly, statute of limitations arguments would not even apply to many causes of action brought on behalf of investors that are available in the forum.

Morgan Stanley DW, Inc., 236 P.3d 182 (Wash. 2010); *Manhattan Loft, LLC v. Mercury Liquors, Inc.,* 173 Cal. App. 4th 1040, 1051 (Cal. App. 2d Dist. 2009); *Lewiston Firefighters Ass'n v. City of Lewiston,* 354 A.2d 154, 167 (Me. 1976); *Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co.,* 197 A.2d 83 (Conn. 1963); *Moore v. Ominicare, Inc.,* 118 P.3d 141, 153 (Idaho 2005); *In re Cameron,* 370 S.E.2d 704 (N.C. Ct. App. 1988)).

[9] N.Y. C.P.L.R. 7502 ("…the arbitrators, who may, in their sole discretion, apply or not apply the bar.").

There is a more fundamental problem with importing statutes of limitations into FINRA arbitration: the forum does not require claimants to identify legal claims at all. Under FINRA Rule 12302, a claimant need only file a statement of claim 'specifying the relevant facts and remedies requested.' That is it. No causes of action. No legal theories. No statutory hooks. A defrauded investor can walk into this forum, describe what happened to them, and ask for what they lost. That is by design. FINRA arbitration is an equitable forum, not a court of law, and it does not operate on the premise that investors must be able to match their grievance to a legal cause of action before they are entitled to be heard. A statute of limitations, by definition, runs against a legal claim. Where no legal claim is required to be pled, there is no legal claim against which the clock can run. The question of what statute of limitations would apply to a claimant who has described misconduct, identified a remedy, and invoked the forum's equitable authority is not a difficult one. The answer is: none.

FINRA's questions also fail to address whether FINRA is considering allowing motions to dismiss based on statute of limitations arguments. As shown above, such claims would not make sense in many jurisdictions or for FINRA based claims. Further, FINRA issued the current eligibility and motion to dismiss rules in response to abusive motion practice by the industry in customer cases. As FINRA stated at the time, the current rules were designed to "ensure that parties have their claims heard in arbitration by significantly limiting motions to dismiss filed prior to the conclusion of a party's case-in-chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rules."[10] Further,

> 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

[10] FINRA NTM 09-07: Motion to Dismiss and Eligibility Rules (Jan. 2009).

> 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. FINRA believes that the enforcement mechanisms in the rules will minimize parties' costs and ensure strict compliance with the rules.[11]

There is no reason to believe that permitting motions to dismiss based on other grounds other than eligibility will do anything but realize the very fears of abusive motion practice and limiting investor forum access that prompted the drafting of the current rules.

> ***Request for Comment B(i).2.*** *Should FINRA amend the eligibility rule to expressly allow claims in FINRA's arbitration forum that arise from transactions or wrongful events that occurred more than six years prior to the claim being filed if, for example, there are ongoing damages or concealment of the harm? What fairness considerations should be part of evaluating this question?*

Yes, but only if the standard for invoking such an exception is not so demanding that it defeats the purpose of having one.

PIABA supports expressly codifying that claims arising from transactions or wrongful events that occurred more than six years prior to filing remain eligible where there are ongoing damages or concealment of harm. The current eligibility rule already permits panels to reach such conclusions, and most do. An express codification of that principle would be a clarifying improvement, reducing the volume of eligibility motions filed by broker-dealers who weaponize the six-year period as though it were a hard statute of repose, regardless of the facts and case law before them.

The concern, however, is in the framing. FINRA's question gestures toward two specific exceptions: ongoing damages and concealment of harm. PIABA urges FINRA not to treat those two categories as an exhaustive list, and not to impose threshold pleading requirements or

[11] *Id.*

evidentiary standards that investors must satisfy at the motion-to-dismiss stage, before discovery, in order to invoke them. The eligibility rule was designed to be applied by arbitrators based on the facts developed in each case. It was not designed to be a pleading gauntlet. If FINRA codifies exceptions in a way that requires investors to *prove* concealment or ongoing harm with specificity before they have had any meaningful opportunity to conduct discovery, the rule will be weaponized in precisely the same way the existing rule has been: as a tool for early dismissal of meritorious claims.

The practical reality, which PIABA members encounter regularly, is that the very documents needed to establish concealment or ongoing harm are in the possession of the respondent firm. They are not in the investor's hands at the time of filing. An investor defrauded through a long-running Ponzi scheme does not typically have the internal communications, supervision records, or account documentation necessary to demonstrate concealment until after the firm is required to produce them in discovery. A rule that requires the investor to prove what can only be learned through discovery, in order to survive a motion filed before discovery, does not protect investors. It eliminates them.

PIABA therefore supports the direction of this question, with the following clear conditions: any codified exception should be illustrative rather than exhaustive; the standard for invoking the exception should require only a good-faith allegation supported by the facts as the investor reasonably understands them at the time of filing; and motions to dismiss on eligibility grounds should continue to be disfavored and decided by the panel based on the full factual record, not on the bare pleadings. As FINRA itself has recognized, eligibility is fundamentally a fact-based inquiry, and it should remain one.

Request for Comment B(i).3. *Should FINRA amend the eligibility rule to expressly provide that the rule is a statute of repose, barring claims based on securities transactions or wrongful events that occurred more than six years before a claim is filed? How would this approach affect claims related to a continuing occurrence (e.g., allegations of ongoing fraud starting with the purchase of a stock 10 years ago but continuing to a date within six years of the date the arbitration claim was filed)? What fairness considerations should be part of evaluating this question?*

The eligibility rule is not a statute of repose. It should not be made into one. The difference is not semantic; it is the difference between a forum that gives investors a fair opportunity to be heard and one that rewards the worst actors for how long they managed to conceal their wrongdoing. The rule purposefully neither refers to purchases, sales, or monetary transactions as being the triggering event due to the nature of cases commonly brought in the FINRA forum.

The eligibility rule reflects a legal reality that many statutes of limitations also recognize: harm caused by an ongoing professional relationship cannot be measured from any single transaction or event. Most states recognize doctrines such as the continuing representation rule that extends applicable statutes of limitations time periods during the time-period that the victim is under the care of a professional who is continuously breaching their duty.[12]

In the context of fraud discovery, the Supreme Court and many states have recognized that in order to satisfy heightened pleading standards the victim of fraud must be able to have enough time to gather the information necessary to meet such standards.[13] Finally, the absence of vigilant

[12] *Murphy v. Smith,* 411 Mass. 133, 137, 579 N.E.2d 165, 167–68 (Ma. 1991) (collecting cases finding that the "continuing representation doctrine has been recognized in many jurisdictions.") (*citing Succession of Smith v. Kavanaugh, Pierson & Talley,* 565 So.2d 990, 995 (La.Ct.App.1990); *Greene v. Greene,* 56 N.Y.2d 86, 93–95, 451 N.Y.S.2d 46, 436 N.E.2d 496 (1982); *Schoenrock v. Tappe,* 419 N.W.2d 197, 200 (S.D.1988); *McCormick v. Romans,* 214 Va. 144, 148–149, 198 S.E.2d 651 (1973). The doctrine "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Id., quoting Greene v. Greene, supra,* 56 N.Y.2d at 94. Under the doctrine, the statute of limitations period does not begin to run until "the termination of the undertaking." *McCormick v. Romans, supra,* 214 Va. at 148.

[13] *Merck v. Reynolds,* 559 U.S. 633 (2010) (Stating "where a defendant's deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded…the law which was designed to prevent fraud could become the means by which it is made successful and secure.").

supervision may be the root cause in some circumstances that prevent investment fraud victims from being able file claims earlier.[14]

FINRA currently trains arbitrators to look for allegations of ongoing fraud starting with the purchase of a stock ten years ago but continuing to a date within six years of the date the arbitration claim was filed. But as discussed above, most modern-day eligibility motions relate to long-term and illiquid products such as private placements, non-traded REITs and BDCs, oil & gas offerings, and annuities. These products are marketed as having long-term investment cycles and do not provide accurate value information to investors to test against the claims and representations made by associated persons. FINRA directors have in the past indicated that an investor becoming aware of their damages was a relevant criterion in deciding eligibility motions.[15] Including examples in arbitrator training materials that include ongoing investment advice and long-term illiquid products would help reduce the number of eligibility motions filed under circumstances where there was either ongoing misconduct or where illiquid products with long time horizons obscured the true health of the investment.

PIABA rejects any attempt to create a statute of repose eligibility rule. As discussed above, such a rule would make no sense given ongoing misconduct and the nature of modern financial advisor and client relationships. Such a rule would incentivize negligent supervision and reward the worst actors for the length of their malfeasance. Investors interact with their advisors on an ongoing basis for professional advice, are recommended investment strategies, and are often

[14] *Hantz Financial Services, Inc. v. Monroe,* 2012 WL 205830 (Mich. Ct. App., 2012) (where fraudulent misrepresentations are present "[Claimants] may have been damaged by their inability to discover [the broker's] embezzlement scheme at an earlier date." "In the absence of…the negligent supervision, defendants could have discovered the embezzlement sooner and taken ameliorative steps such as filing an earlier statement of claim…"**).**

[15] Susan Antilla, *Wall Street; When Time to Complain Runs Out,* N.Y. TIMES, (Sept. 27, 1992) ("In the case of limited partnership disputes, Ms. Masucci [,director of arbitration at the NASD,] has surprised the industry by beginning to interpret the 'occurrence or event' as being the date an investor becomes aware of a precipitous decline in a partnership's value on a statement.")

ignorant of the harm that has occurred. Investor claims in the FINRA context are often not tied to a specific transaction event and are unlike claims that have statutes of repose – such as claims against an issuer related to statements made by a prospectus.[16]

PIABA also flatly rejects any attempt to tie the eligibility period to securities transactions as many claims do not involve securities transactions. Investment strategies may relate to securities and non-securities components. An associated person's or a third-parties' theft of funds is not a securities transaction either but raises supervisory claims. There are also numerous circumstances where the securities transaction is simply not what gives rise to the claim. For example, an associated person might recommend an inappropriate investment but then five years later begin creating fraudulent account statements for several years in order to hide the fact that the client's funds were largely lost. The fraudulent statements are what prevent the claim from being discovered and filed earlier and is an event or occurrence that gives rise to the investor's claims. The flexibility of the current rule allows arbitrators to analyze the specific fact pattern before them and make ruling based on the situation at hand.

In sum, most panels follow FINRA's current guidance on eligibility and allow claims where events or occurrences are plead within six years of the filing of the Statement of Claim. However, it would be helpful to train arbitrators on additional examples of events of occurrences that give rise to claims such as realization of loss, products with long term investment cycles, and other types of ongoing fraud or failure to supervise claims.

[16] *See* 15 U.S.C. § 77m ("No action shall be maintained to enforce any liability created under [§ 11] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence.... In no event shall any such action be brought to enforce a liability created under [§ 11] more than three years after the security was bona fide offered to the public...."). The date of the filing of an offering bears little relation to an investor continually receiving investment advice from a financial advisor.

Request for Comment B(i).4. *Are there other approaches to the applicability of the eligibility rule that FINRA should consider?*

Request for Comment B(ii).1. *Should FINRA change the timing or expand the circumstances under which the panel may act upon a prehearing motion to dismiss a party or claim? If so, what should those changes be? What customer protection and fairness considerations should be part of evaluating this question?*

Under the rules, the panel cannot act upon a motion to dismiss a party or claim, unless the panel determines that: (1) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; (2) the moving party was not associated with the account(s), security(ies) or conduct at issue; (3) the non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision; or (4) the claim does not meet the criteria of the eligibility rule.

PIABA believes that providing the securities industry with additional methods or means to dismiss investor cases will increase the filings of motions to dismiss and prevent customers from having their matters heard on the merits. FINRA's position has consistently been that dismissing investor claims prior to their case-in-chief is strongly discouraged. FINRA Rule 12504(a)(1) ("Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration."). Investors today already face staggering odds against meaningful recovery. FINRA's own members are permitted to handle the nation's retirement assets while remaining severely undercapitalized and chronically underinsured against the very arbitration liability they create. Tens of millions of dollars in investor awards go unpaid every year, and that figure understates the problem by an order of magnitude: the investors most likely to hold uncollectable claims are precisely the investors least likely to ever file. FINRA has known this for years. It has done nothing. Given the tremendous barriers to investor recovery that already exist, only increased investor harm can result from erecting more pre-hearing barriers to recovery.

Expanding the use of motions to dismiss based on either fact or law is patently unfair to investors. FINRA arbitration rules do not include specific pleading standards like those required in civil litigation. FINRA rules do not account for the procedural protections used by courts to ensure plaintiffs have a fair opportunity to replead their claims to make them fit within the procedural context required of specific causes of action. It is routine in litigation for a plaintiff's complaint to be dismissed with leave granted to refile the complaint based on the court's findings and rulings. Plaintiffs in court also have the right to appeal the trial court's decision to dismiss a complaint. FINRA has no procedural context for this. FINRA abandons its mission to protect investors when it insists on providing brokerage firms with more opportunities to treat FINRA arbitration like litigation, while investors receive none of the same procedural protections concomitant with civil litigation.

Instead, there are steps that FINRA could take to make motion practice fairer to investors. First, FINRA can make it clear that its pleading standards are not meant to replicate court style pleadings. While FINRA Rule 12302(a)(2) states that all that need be filed is "A statement of claim specifying the relevant facts and remedies requested" many broker-dealers attempt to cause investors to file detailed court style pleadings. Firms often argue in motions to dismiss filings that heightened pleading standards have not been met or otherwise attempt to make arguments to deny relief based on more informally plead statements of claims; or arguments that violations of FINRA rules do not create private rights of action. FINRA should make it clear that the forum does not enforce a heightened pleading standard or require court style pleadings for an investor to oppose eligibility and other available grounds for motions to dismiss.

Another requirement that FINRA could implement would be to require firms to fully comply with their discovery obligations under FINRA Rule 12504 prior to permitting the filing of

motions to dismiss. PIABA members report that broker-dealers often file motions to dismiss alongside their answer in order to prevent investors from obtaining discovery related to their claims. Investors often lack complete records of all of the transactions, investments, account statements, emails, and other documents that would be helpful to the panel to evaluate the events or occurrences that give rise to the claims. FINRA should implement a requirement that prior to the filing of motions to dismiss firms must comply with their NTM 11-17 discovery requirements and that any dispute over compliance can be resolved by the Chair. It would still be possible for Respondents to file motions to dismiss with their answers so long as they also fully comply with their basic discovery requirements at the time of the filing. This rule change would also incentivize speedier discovery if a firm intended to file a motion to dismiss and ensure that panels would have a more complete record to draw upon in making their determinations.

In sum, PIABA opposes imposing on investors additional burdens or barriers to having their cases heard on the merits.

Arbitrator Qualifications

PIABA Remains Opposed to FINRA's Recent Changes to Arbitrator Qualifications and Its Willingness to Apparently Consider More Pursuant to SIFMA's Push for Industry-Dominated Panels

As noted in PIABA's June 2, 2025 press release, June 11, 2025 letter regarding FINRA Regulatory Notice 25-04, and August 4, 2025 letter responding to SIFMA's recommendations for FINRA arbitration, PIABA remains adamant in its opposition to any proposed rule that arbitrarily disqualifies anyone from serving on a FINRA arbitration panel, including the new requirement that arbitrators have a four-year degree and at least five years of full-time paid professional work experience, which is limited to professions that require advanced training and education.

FINRA arbitration exists in large part as a result of FINRA member firms' arbitration clauses inserted in their contracts of adhesion. In other words, brokerage firms insist that their

customers give up their Seventh Amendment right to a jury trial in order to become participants in the securities markets.

As an alternative tribunal most used as a result of brokerage firms' contracts of adhesion, FINRA should provide an arbitrator pool that is as close to a jury pool as possible. Members of juries do not have any required subject matter expertise to serve, and neither do state or federal court judges for that matter. In fact, many judges throughout the United States are not even lawyers. Efforts to create a more industry-tilted or professional arbitrator pool will only further deteriorate the fairness of the forum where the industry presently wins nearly 75% of customer cases.

FINRA's new rule requiring a four-year college degree narrows the pipeline of otherwise qualified applicants and excludes many capable candidates. According to 2023-2025 data from the U.S. Census Bureau, only approximately 38% of Americans ages 25 and older hold a bachelor's degree. FINRA has effectively cut off two-thirds of the adult population from qualifying as arbitrators even though FINRA readily admits that the depth of the arbitrator pool is a serious problem in many locations. FINRA's new rule also has the effect of excluding participants with significant industry experience or knowledge but who lack a four year college degree.

Of course, FINRA's membership wants everyone – irrespective of their education level – to become customers of brokerage firms. FINRA is even willing to give non-college educated individuals licenses to sell and supervise the sale of securities. In fact, FINRA's new rule makes becoming a part-time arbitrator more difficult than becoming a series 7 or series 24 licensed financial advisor. Indeed, no college degree is required to become a series 7 licensed financial advisor or series 24 principal.

It is unreasonable to assume that individuals without a college degree cannot grasp or adjudicate the issues that arise in a FINRA arbitration. Arbitrators without four-year college degrees have valuable and significant experience, including sometimes even as financial professionals and perhaps even investing experience as brokerage firm customers, that offer value and fairness to the arbitration process.

Finally, if a party in arbitration wants to insist on having a college educated arbitrator, they can use strikes to eliminate any arbitrator without a degree. The current system provides parties the ability to strike arbitrators whose education, experience or qualifications they do not want on their respective arbitration panel, so FINRA should not engage in an industry requested effort to stack the deck more in favor of the industry.

Contrary to what FINRA's recent rule changes do, PIABA supports efforts to expand the qualified public pool. This would make appointing arbitrators easier, increase diversity and get FINRA ever closer to providing an arbitration panel that more closely resembles the investing public.

> **Request for Comment C.1.** *What is the appropriate composition of the arbitrator roster in FINRA's arbitration forum for customer disputes and intra-industry disputes? Should the arbitrator rosters be the same or different? Should FINRA continue to seek candidates from a variety of backgrounds, or should FINRA be guided more by other considerations such as specific types of expertise?*

FINRA should continue to seek candidates from a variety of backgrounds. Again, as discussed at length in this comment, as with judges and juries, there is no need for specific expertise. In some locations FINRA already does not have enough arbitrators. Limiting the pool further will only worsen that problem.

Request for Comment C.2. *What further changes, if any, should FINRA make to its arbitrator standards? How should FINRA identify minimum employment, experience and educational qualifications that would assure a broad candidate pool while maintaining its decision-making quality? For example, should FINRA accept equivalent professional certifications or specialized credentials in lieu of a four-year college degree?*

The pool should be broadened. Anyone who is or has been a customer of a FINRA brokerage firm who can successfully complete FINRA's arbitrator training program should be eligible to serve. Customers are participants in the securities markets and should be eligible to adjudicate disputes between a customer and brokerage firm.

Arbitration Classification and Selection

Request for Comment D.1. *Should FINRA amend the definition of "public arbitrator" provided in Rules 12100(aa) and 13100(x) to modify or remove any of the criteria that disqualify an arbitrator from service as a public arbitrator to expand the public roster? If so, which criteria and why?*

PIABA generally opposes amending the definition of "public arbitrator" in a manner that would dilute existing protections or expand the classification to include individuals with meaningful ties to the securities industry. FINRA's obligation under 15 U.S.C. § 78o-3(b)(6) to protect investors and the public interest requires maintaining a clear and rigorous distinction between public and non-public arbitrators.

For most investors, FINRA arbitration is not a voluntary forum. It is imposed through mandatory pre-dispute arbitration agreements that eliminate access to a jury trial. In that context, the integrity of the "public arbitrator" designation is critical. These arbitrators function as the closest substitute for a jury of peers, and their independence must be preserved. Any weakening of the current standards risks further eroding confidence in a system that already lacks many of the procedural safeguards of the court system.

FINRA is required to have rules that are "designed . . . in general, to protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6). For the reasons discussed below, amendments to the

definition of "public arbitrator" would only serve to undermine investor protection by allowing arbitrators with ties to the industry to be classified as "public arbitrators."

What is clear is that investors should continue to have the right to an all-public panel, should they so choose. Former FINRA Chairman and CEO Richard Ketchum had it right: "giving each individual investor the option of an all-public panel will enhance confidence in and increase the perception of fairness in the FINRA arbitration process."[17] Any effort to force an industry-affiliated arbitrator on a victimized investor would unquestionably create a more unfair arbitration process and erode trust in the system.

However, PIABA does not support the continued classification of attorneys who represent investors as "non-public" arbitrators. There is no principled basis for treating investor-side attorneys as equivalent to industry participants. Unlike defense counsel or industry consultants, these attorneys do not have economic or professional ties to brokerage firms or the securities industry. To the contrary, their work is adverse to industry interests and aligned with investor protection. Classifying such individuals as non-public is inconsistent with the purpose of the rule and unnecessarily restricts the pool of qualified public arbitrators.

Accordingly, FINRA should maintain its existing public arbitrator standards but revise the rules to permit attorneys who primarily represent investors to be classified as public arbitrators. This targeted change would expand the pool of qualified arbitrators without compromising the independence that the "public" designation is intended to ensure.

[17] Investment News, SEC Gave Investors Half a Loaf in Arb Panel Ruling (March 17, 2011), available at https://www.investmentnews.com/regulation-legal-compliance/sec-gave-investors-half-a-loaf-in-arb-panel-ruling/34385.

Request for Comment D.2. *Should FINRA amend Rule 12403(c)(1)(A) to remove parties' ability to strike all the arbitrators from the non-public list for any reason? What customer protection and fairness considerations should be part of evaluating this question?*

FINRA should not amend Rule 12403(c)(1)(A) for the same fundamental reasons that it should not amend Rule 12100(aa). In particular, those amendments would force brokerage firms' customers to have their cases decided by arbitrators with significant ties to the financial industry.

Rule 12403(c)(1)(A), which was approved by the SEC in 2011, was a landmark victory for investor protection. It addressed the systemic concern that having a mandatory industry representative on every three-person panel created an inherent bias—or at the very least, a "thumb on the scale"—in favor of the brokerage firms. Notably, the SEC's 2011 Approval Order for this rule specifically stated that it was "intended to enhance the perception of neutrality."[18] Nothing in the industry has changed since 2011 to suggest that the need for this perception has decreased; if anything, in the age of "Finfluencers" and complex digital assets, it is more important than ever. Reverting this rule would be a regressive move that undermines the credibility of the FINRA arbitration process.

Request for Comment D.3. *At initial panel selection, should each separately represented party strike and rank arbitrators, or should FINRA amend its rules to provide that all claimants, collectively, and all respondents, collectively, share the same number of strikes during arbitrator selection?*

FINRA should amend its rules to provide that all claimants, collectively, and all respondents, collectively, share the same number of strikes. In the past, the industry has suggested that FINRA amend its rules to only prevent separately represented Claimants from striking and ranking arbitrators separately, while preserving separately represented Respondents' ability to strike and rank arbitrators separately. That amendment would blatantly favor the industry over its

[18] Available at https://www.sec.gov/files/rules/sro/finra/2011/34-63799.pdf

customers, and PIABA would vehemently oppose it. So long as the amendment applies to both Claimants and Respondents, however, PIABA supports the amendment. Providing Claimants collectively and Respondents collectively with the same number of strikes is more likely to result in impartial arbitration panels; if one side effectively has more strikes because it includes more "separately represented parties," that side has unfair extra influence over the arbitrator selection process. Under the current system, it is not uncommon for one claimant to pursue claims against multiple Respondents (e.g., multiple broker dealers, a broker dealer and a financial advisor, a broker dealer and control persons), and often those parties' interests are aligned almost entirely but they can gain a tactical advantage in being separately represented and further stacking the arbitrator selection deck against the customer claimants. PIABA members' experiences often shows a great level of coordination at all points in litigation in such cases where the brokerage firms utilize each opportunity, including arbitrator selection, as an effort to pool resources against the customer claimant.

> **Request for Comment D.4.** *To increase parties' choice of arbitrators during the selection process, should FINRA increase the number of arbitrators on each list and the proportional number of strikes for each list?*

PIABA opposes increasing the number of arbitrators on ranking lists or expanding the proportional number of strikes available to the parties.

The current list and strike framework reflects a deliberate balance between party choice and administrative efficiency. Expanding the number of arbitrators would not meaningfully improve the quality of arbitrator selection but would increase the burden on parties, particularly investor claimants, who must investigate and evaluate each potential arbitrator within limited time and resources. More names do not necessarily produce better outcomes; they often produce more noise.

FINRA's focus should remain on improving the quality, diversity, and availability of arbitrators, not on expanding the mechanics of list selection. The existing framework provides sufficient opportunity for party input while maintaining efficiency and balance in the selection process.

Arbitrator Training

Request for Comment E.1. *Should FINRA implement additional training requirements on the arbitration process for all arbitrators beyond the Basic Arbitrator Training Program? If so, what elements should be added or reinforced?*

PIABA supports enhanced training on procedure, ethics, case management, and forum administration, but opposes FINRA-sponsored training on substantive law, industry standards, or product-specific subject matter. PIABA supports additional dispute resolution training for FINRA arbitrators, but it bears emphasizing that the key element in this question is training "on the arbitration process." The distinction between substance and procedure is one of the basic principles learned in law school. A fair process is not just a procedural ideal; it is the mechanism by which a fair substantive outcome becomes possible.

A few areas where additional procedural training might make sense include:

- A short refresher course designed to be taken just before an arbitrator participates in a final hearing (whether their first or any subsequent hearing). For example, this refresher could remind arbitrators about ethics rules and decorum, and the structure of a hearing such as who presents evidence first, etc.
- A similar refresher course designed for chairpersons who are preparing to preside over a final hearing.
- "Continuing education" type courses. One example might be an annual update highlighting any new rules or changes to FINRA arbitration, or topics addressed in the Neutral Corner that arbitrators may have missed.
- Training aimed at avoiding late arbitrator withdrawals, which disrupt the entire arbitration process and cause problems for both parties as well as FINRA staff. This training could emphasize the role of the arbitrator and the fact that the arbitrator was selected by the parties to decide their dispute, as well as consequences for both the parties and the arbitrator that may stem from withdrawal.

It is not appropriate for FINRA to conduct any arbitrator training that relates to investment or product specific training. If FINRA proposes to use industry training to train their arbitrators, then the wall between public arbitrator and industry arbitrator is eliminated. PIABA opposes any proposed arbitrator training modules that refer or relate to financial industry standards, securities products, or securities laws. Whatever training arbitrators require on standards of conduct and securities products has been, and should be, provided by the parties, counsel, and experts during the arbitration proceeding.

> **Request for Comment E.2.** *Should FINRA implement additional training requirements for arbitrators who decide certain categories of claims (e.g., of a certain complexity or dollar amount) beyond the Basic Arbitrator Training Program (e.g., like how certain arbitrators must complete the enhanced expungement training FINRA provides prior to considering certain requests to expunge customer dispute information)? If so, what should that training encompass? Should it be focused on process issues or include substantive elements?*

The premise of this question implies that "certain categories of claims" are more important than others. PIABA is strongly opposed to any training for arbitrators that might create this impression. As a dispute resolution forum, FINRA should be completely neutral and treat all participants with the same level of respect and dignity. Under FINRA's rules, an individual's hard-earned five-figure retirement nest egg should be just as important as a multi-million-dollar options trading account that no one will ever rely on to fund their health care expenses in their elder years.

Moreover, as a basic principle, inconsistent procedures tend to produce inconsistent results, undermining confidence that outcomes are based on principle rather than chance or discretion. FINRA should strive for consistency to maintain the legitimacy it has established to date as a dispute resolution forum.

If any additional training requirements are instituted by FINRA, PIABA insists that they be focused squarely on procedure only. For example, arbitrators hearing "complex" cases (as well as the parties) might benefit from thoughtful additional training on managing multi-party disputes, overseeing extensive document production and electronic discovery, or structuring hearings involving complex factual records or that may continue over an extended period of time.

> **Request for Comment E.3.** *Should FINRA implement additional training requirements on substantive elements of law or complex investment products for all arbitrators beyond the Basic Arbitrator Training Program? If so, would this raise concerns from forum participants with respect to FINRA maintaining neutrality as the administrator of the forum?*

PIABA is strongly opposed to any training whatsoever for arbitrators "on substantive elements of law or complex investment products." As the question itself recognizes, straying from training arbitrators on procedure into training arbitrators on substance significantly undermines FINRA's neutrality. Any presentation to arbitrators with respect to substantive elements of the law or investment products are areas that should be left to parties' advocates and their chosen expert witnesses in the applicable fields.

To train arbitrators on substantive concepts would not only raise concerns as to the neutrality of the FINRA dispute resolution forum but provide the opportunity for the forum to put a thumb on the scales with possible bias, real or perceived. This would clearly undermine the very legitimacy of FINRA arbitration and harm the reputation the forum has established over many years. Maintaining neutrality – real and perceived – should be the cornerstone of everything FINRA does as a dispute resolution forum.

Request for Comment E.4. *To what extent should additional training be voluntary versus mandatory? What might be the potential impact on arbitrators' willingness to serve in FINRA's arbitration forum if FINRA imposes additional mandatory training requirements to serve on cases in FINRA's arbitration forum?*

In PIABA's view, basic and continuing education, in the procedural space, should be mandatory with the opportunity for voluntary refreshers as individual arbitrators feel are needed to remain current and engaged in the FINRA arbitration process. As long as the mandatory elements are efficiently presented, they will likely be seen by FINRA arbitrators as positive (as opposed to a burden) as they encourage competency and professionalism. Indeed, having regular short but meaningful touch points between FINRA dispute resolution staff and arbitrators could remind them of why they initially applied to be a FINRA arbitrator and foster an overall positive impression of the forum, which should ultimately serve to benefit the parties.

Discovery

Since 1968, the FINRA-NASD has operated an arbitration forum for resolution of disputes between investors and member firms and brokers.[19] Since the advent of SRO-sponsored arbitration, investors have been fighting an uphill battle to obtain basic discovery to prove their cases. From the Ruder Report to NTM 99-90, and RN 11-17 and amendments thereto, FINRA and stakeholders have tried to push broker-dealers towards fairness and adequate disclosure. Fifteen years after the new discovery guide was passed through RN 11-17, obtaining basic discovery mandated for disclosure by rule is still like pulling teeth. FINRA has taken few effective steps to address these ongoing problems other than burying critically important issues into endless debate in the NAMC. It is time for FINRA to act.

[19] *See* NASD Manual, July 1, 1974, noting the March 9, 1972 effective date of Code of Arbitration Procedure ¶ 3701, § 2(a)(2).

PIABA appreciates the functionality of arbitration in any forum must keep cost effectiveness and efficiency at the forefront, as compared to a court of law. After all, "[A]n arbitrator 'need not follow all the niceties observed by the federal courts.'"[20] Still, discovery is critical to plaintiff's ability to carry their burden of proof. To promote better efficiency and ensure all FINRA members follow Rules FINRA 12506 and 12507, FINRA should enforce procedures that punish serial violators of the Discovery Guide as opposed to considering "heightened standards" for restricting discovery or appointing special arbitrators to handle discovery issues. For instance, many brokerage firms routinely issue frivolous objections in every single case to the entirety of the *presumptively discoverable* Discovery Guide under FINRA Rule 12506. FINRA has permitted this to continue without any true resolution. PIABA continues to support procedures that result in fairness and efficiency which save both time and resources.

> **Request for Comment F.1.** *Are the Document Production Lists in the Discovery Guide appropriately tailored to facilitate the efficient exchange of relevant information in customer arbitrations? Do the Document Production Lists impose burdens associated with overly broad or duplicative document production requirements?*

The Document Production Lists in the Discovery Guide were designed to eliminate the most basic and recurring discovery fights in FINRA arbitration by requiring automatic production of categories of documents that are, by definition, relevant in virtually every customer case. That design has failed in practice, not because the lists are poorly drafted, but because brokerage firms routinely refuse to comply with them and face no meaningful consequences for doing so. PIABA members spend an enormous portion of their time in prehearing proceedings fighting for documents that respondents were already required to produce without being asked. Compliance and supervisory manuals, exception reports, commission runs, account documentation, and

[20] *Tempo Shain Corp. v. Bertek, Inc.* 120 F.3d 16, 20 (2d Cir. 1997), quoting *Bell Aerospace Co. Div. of Textron v. Local 516* 500 F.2d 921,923 (2d Cir. 1974).

correspondence that are expressly enumerated in the Lists are withheld behind boilerplate objections, rolling production timelines, and claims of undue burden that evaporate the moment a panel orders production. This is not a discovery problem. The problem is that FINRA has allowed the securities industry to treat them as optional, and arbitrators have been insufficiently trained and insufficiently empowered to do anything about it. FINRA must make clear, unambiguously and in the rules themselves, that objecting to a presumptively discoverable document without specific, substantiated justification is sanctionable conduct, and that arbitrators are expected to impose sanctions when firms engage in it.

As it currently stands, the Discovery Guide needs to be updated to reflect the reality of both the securities industry and investors in 2026 but remains an important part of streamlining discovery in customer arbitrations.

> **Request for Comment F.2.** *Should FINRA establish a process or resource to assist arbitrators in resolving complex discovery disputes? Would such a mechanism improve consistency and efficiency, or would it create routine delays and undermine arbitrator decision making?*

PIABA does not support FINRA establishing a separate process or resource to assist arbitrators in resolving complex discovery disputes if that process would involve FINRA staff or some other institutional intermediary participating in live discovery decision-making. Such a mechanism is more likely to create delay, increase motion practice, and undermine arbitrator independence than to improve consistency or efficiency.

If FINRA wants greater consistency and efficiency in discovery, there are better and more appropriate ways to achieve it. FINRA should strengthen arbitrator training on discovery obligations, objections, and sanctions; revise the Discovery Guide and related training materials so that expectations are clearer; and make plain in the rules that unsupported objections to presumptively discoverable material are sanctionable. FINRA should also encourage arbitrators to

enforce existing discovery deadlines and orders more consistently. Those measures would improve discovery practice without injecting FINRA into the adjudicative process.

To the extent that this question intends for FINRA to have any direct, real-time oversight of arbitrators or arbitration proceedings related to discovery, PIABA opposes that direction. Such a change would not improve the process. Instead, it would likely create routine delays, encourage additional satellite disputes, and risk undermining the independence of arbitrators while eroding confidence in the neutrality of the forum. The better course is to improve training, clarify the rules, and enforce the existing discovery framework more effectively.

Arbitration is structured around the principle that arbitrators—not the forum administrator—control the conduct of the proceeding and decide the issues before them. Expanding FINRA's role beyond administrative support into active, real-time monitoring or intervention would blur that line. Even the perception that FINRA staff could influence case management decisions, evidentiary rulings, or procedural direction would be damaging, particularly given FINRA's status as an industry-funded organization.

To the extent FINRA seeks to address concerns about arbitrator performance or case management, those issues are more appropriately handled through existing mechanisms. For these reasons, FINRA should not adopt any framework that contemplates real-time oversight of arbitrators or active intervention in ongoing proceedings.

> **Request for Comment F.3.** *Should FINRA impose limitations or heightened standards for making discovery requests beyond the Document Production Lists? How should FINRA balance efficiency and cost effectiveness of the arbitration process with parties' desire to obtain more information to present their cases?*

FINRA must resist the urge to impose more limitations on parties' rights to discovery. FINRA should also reframe the issue properly. Access to a fair and efficient discovery process is not intended to satisfy any party's "desire to obtain more information." Discovery is a right any

party must have if an adjudicatory process is to be considered anything more than a kangaroo court. This issue is not about desires or best wishes; it is about civil rights. If arbitration is to be a search for the truth, parties should have access to discovery.

FINRA once more seeks comments on important issues without providing any facts or context to consider for a thorough response. FINRA inquires about balancing efficiency and cost effectiveness but does not provide any examples of cost issues. For example, is there a particular record or type of record that broker-dealers produce in discovery that is particularly costly to produce? If so, it would be helpful to identify the record so that a thoughtful dialogue may take place. PIABA's experience is that broker-dealer's often claim discovery requests are extremely burdensome only to have documents produced efficiently and in relatively narrow scope when the brokerage firms are ordered to produce such materials.

Virtually all documents and information sought by claimants in FINRA discovery are those that broker-dealers are required to maintain in a readily available format by regulation. (*See e.g.* SEC Rules 17a-3 and 17a-4). Likewise, virtually every broker-dealer has robust document retention policies which outline how and where these records are to be maintained. Specific to email, brokerage firms routinely outsource email storage to data collection services which can then be searched so that relevant email communications can be captured for production.

The discovery process includes procedures to address issues related to cost of production and it works in litigation nationwide. It is not a special process requiring any particular training or experience. FINRA's procedural rules in effect facilitate this very process. A party has the right to object to producing discovery based on burden, cost, or expense. *See* FINRA Rule 12508. Importantly, FINRA must appropriately train arbitrators that any objection based on cost or burdens of production must be accompanied by evidence of those costs and that burden, like a

declaration or affidavit from a records custodian that explains where the documents are maintained and how much it would cost to produce them. This process is common throughout the litigation landscape, and it works. To be clear, PIABA has already expressed concerns about respondent's abusing boilerplate objections in discovery, and this suggestion is no invitation to further than abuse.

> **Request for Comment F.4.** *Should FINRA amend the Discovery Guide – and more specifically, Document Production List 1 – to require members and associated persons in customer disputes to produce, on a confidential basis during discovery, documents concerning the existence and extent of any insurance coverage? How would this impact the efficiency and fairness of the arbitration process?*

A. Discovery of Insurance Coverage Information Must Be Mandated by the Discovery Guide.

It has been almost seven years since FINRA released Regulatory Notice 18-22, requesting comments from stakeholders on a proposed amendment to List 1 of the Discovery Guide to mandate disclosure of certain documents related to liability insurance coverage. Despite momentum to the contrary, that proposal went nowhere. It died on the vine, but the problem still persists and is only growing worse.

It is fundamentally unfair to force plaintiffs into arbitration and rob them of their rights to fully investigate who or what may be legally liable for their claims. FINRA has held Broker-Dealer's water for too long, being gaslit into believing that disclosure of insurance information would only guarantee more claims. Such an argument proves that FINRA member firms use their lack of capitalization and under-insurance as bargaining chips.

This lack of disclosure of insurance information is also related to the scourge of unpaid arbitration awards. Certainly, awards have gone unpaid due to a member firm or registered representative's failure to disclose claims to the insurer. There are obviously investors who have won cases and whose awards remain unpaid to this day, where, had the investor had the opportunity

to re-plead their case and pursue insurance coverage, they would have received compensation. But when investors and their lawyers are not allowed to see what is in the black box, they cannot adequately strategize and plan their claims and that costs everyone involved, including broker-dealers and their owners.

The fact that Broker-Dealers and registered representatives use FINRA to force arbitration upon investors and then refuse to even disclose the existence of potentially applicable liability insurance coverage, let alone provide the documents, is fundamentally unfair. In federal court, pursuant to Fed. R. Civ. Pro. 26(a)(1)(D), all litigants are required – as an initial disclosure – to automatically produce:

> for inspection and copying under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Courts take this disclosure requirement quite seriously and will sanction defense lawyers who do not adequately investigate their client's insurance coverage situation,[21] which highlights a few important facts germane to this disclosure issue. First, this mandated disclosure is taken seriously by federal courts for a reason: the existence or non-existence of applicable insurance coverage is critical to the parties' ability to gauge whether settlement is possible, or collection is practicable. This is a fundamental issue and drives the purpose for this routine disclosure. Second, this case accentuates the complicated nature of insurance and how companies may or may not choose to layer multiple policies, including umbrella coverage, general liability, or even directors-officer (D&O) coverage. Investors in FINRA arbitration should not be robbed of their fundamental

[21] *See Palacino v. Beech Mountain Resort, Inc.,* 2015 WL 8731779 (W.D.N.C. December 11, 2015) where the court sanctioned a defense lawyer $1,000 for failing to determine the full existence of her client's liability insurance coverage. The disclosure of a $1 million general liability policy had been made, but not the disclosure of the $10 million umbrella policy.

right to basic information that is critical to determine who may be liable for their damages by virtue of submitting to a forum they did not pick and waiving rights they had no idea they were waiving.

Almost every state in the Union separately requires the disclosure of liability insurance information to litigants in state courts. Recently, New York enacted a robust disclosure law requiring the broad disclosure of insurance information within sixty days of filing an answer. The Comprehensive Insurance Disclosure Act requires defendants to provide "complete copies of all potentially applicable primary, umbrella, and excess agreements, (2) insurance applications, (3) impairment or exhaustion information under the policies, and (4) contact information for persons responsible for adjusting the claim, including any third-party administrators and the person within the insuring entity to whom the third-party administrator reports.[22] The law, which was effective March 1, 2022, is a continuing obligation that requires the defendant to update the disclosures within thirty days of discovering new information about coverage. The information required for disclosure includes the amount paid in attorney's fees that have eroded the policy.

Most states require the disclosure of information related to insurance coverage upon demand, even before a suit is filed, if requested. For example, in 2022, New Jersey broadened its prefiling insurance disclosure statute, requiring insurers to disclose policy limits in response to a written demand from a New Jersey licensed attorney. *See* N.J.S.A. 39:6B-1.1. In Illinois, the standard form personal injury interrogatories promulgated by the Illinois Supreme Court under Ill. Sup. Ct. R. 213(j), require the routine disclosure of insurance coverage information. Similarly, California requires the disclosure of the existence and contents of any agreement under which an insurance carrier may be liable to satisfy in whole in or part a judgment. Cal. Code Civ. Pro. § 2017.210.

[22] N.Y.C.L CVP § 3101(f).

The automatic production of liability insurance information seems to fail in arbitration due to the potential prejudice to the disclosing party. FINRA tried to address the issue in Regulatory Notice 18-22, and proposed the following amendment to List 1:

> 23) (a) If requested, the firm/associated persons shall produce documents sufficient to provide details concerning the coverage and limits of any insurance policy under which any third party insurance carrier might be liable to satisfy in whole or in part an award issued by an arbitrator in the subject arbitration proceeding or to indemnify or reimburse a party for payments made to satisfy an award.
>
> (b) It may be prejudicial for arbitrators to be given information related to the coverage or lack of coverage by liability insurance. Therefore, any party wishing to submit evidence at a hearing relating to insurance must demonstrate to the arbitration panel that: (1) there are extraordinary circumstances warranting admission of the insurance information; or (2) the existence of an insurance policy is directly related to the dispute outlined in the statement of claim. The party must seek express authorization from the arbitration panel to submit the evidence.

Even though the proposed amendment limited the disclosure and expressly warned about the disclosure to the arbitrators, this proposed Amendment has languished in bureaucracy for eight years.

An amendment to the Discovery Guide to require, upon request, information related to insurance coverage must include, at a bare minimum, the production of 1) the policy declarations pages; 2) the applicable insurance policy; and 3) any declination or reservation of rights letters for any potentially applicable liability insurance, Directors/Officer insurance, Error/Omissions insurance, excess coverage, or umbrella coverage. Proposed List 1, 23(b) should also be amended to remove any doubt about the admissibility to the coverage information and state that it should not be disclosed to the arbitrators, absent extraordinary circumstances.

B. FINRA Needs to Implement a New Discovery Guide

FINRA-Forward needs to be more than a marketing slogan or a set of proposals designed to appease the securities industry. FINRA must adopt a new discovery guide that moves forward

on fairness and efficiency. In addition to mandating disclosure of liability insurance, FINRA must mandate acceptable forms of production. Discovery in 2026 is almost entirely electronic. The days of printed paper documents are a relic of a bygone era, but as many courts have noted the same basic principles applicable to paper discovery apply to electronic discovery.[23] The Discovery Guide must fully implement electronic storage and electronic discovery rules that reflect reality. The court system has adapted to this changing landscape and so should FINRA.[24] E-Discovery is not complicated or difficult to understand. Instead of shying away from it, FINRA should move towards it through robust training for its arbitrators so that they understand its importance and how simple it can really be.

FINRA must also make clear that the methods by which advisors and their clients communicate have also changed, despite rules to the contrary. Notwithstanding both the SEC and FINRA levying tens of billions of dollars in fines against broker-dealers for the off-channel communications of their employees and representatives, financial advisors still text with their clients: it is reality.[25,26] In response to these fines and enforcement actions, many broker-dealers allow their advisors to text with clients using closed or on-channel devices that capture the communications and allow for their review and supervision in accordance with SEC and FINRA rules. The industry and regulators have adapted so it is time for FINRA to adapt too. Therefore, the New Discovery Guide List 1, Item 2. Communications, should be revised to capture these communications for discovery automatically, and should state:

> All correspondence, including emails, text messages, WhatsApp messages, or any other similar electronic messaging service, application or software, sent to the

[23] *DR Distribs. v. 21 Century Smoking*, No. 12 CV 50324 (N.D. Ill. Jan. 19, 2021) ("E-discovery is still discovery. Unquestionably, at times, ESI discovery can be complex. But complex issues were not at play here. The same basic discovery principles that worked for the Flintstones still work for the Jetsons.")
[24] *See* e.g. FED. R. CIV. P. 34.
[25] https://www.sec.gov/newsroom/press-releases/2024-98
[26] https://www.thinkadvisor.com/2024/04/08/finra-hits-firm-with-500k-fine-over-texting/

> customer parties or received by the firm/associated persons relating to the claims, accounts, transactions, or products or types of products at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the products and/or account types that are at issue or that were used by the firm/associated persons to solicit or provide services to the customer parties.

Likewise, List 1, Item 10 of the Discovery Guide currently requires brokerage firms to produce all statements of claim filed against them involving the same products or conduct alleged in the arbitration. To ensure fairness and a level playing field, brokerage firms should also be required to produce all answers filed in response to those claims. These answers often contain critical admissions, defenses, and explanations regarding a firm's practices, policies, and risk disclosures. By limiting production to only the statements of claim, firms retain the ability to selectively frame their past litigation history while keeping key rebuttals and defenses hidden from future claimants. Requiring the production of both the claims and the corresponding answers would impose no real burden and provide arbitrators and claimants with a more complete picture of a firm's past disputes, reducing discovery issues, and enhancing the integrity of the arbitration process.

The next issue that FINRA must address in a new Discovery Guide, is to clarify that all "product" cases not only require different discovery but are also part of the Discovery Guide. There is no need to have a preamble explaining the differences between "product cases" and any other case. Therefore, the New Discovery Guide should be simplified to remove the preamble language and instead must include a new List Item that states:

> For all "product cases", all selling agreements, placement agent agreements, or escrow agreements between the Firm and the issuer, all documents relating to due diligence relied upon by the Firm that led to the Firm's approval of the product(s) at issue for sale to firm customers, and all communications, including emails, amongst and between the individuals who performed due diligence on the product(s) at issue and

anyone affiliated with the issuer, the associated person(s), or anyone with the Firm related to the product(s) at issue.

Next, to combat gamesmanship which leads to inefficiency and time-wasting motion practice, FINRA must require Broker-Dealers to produce entire manuals without delay. Respondents *routinely* fail to provide even a table of contents until a confidentiality agreement is executed, and then requires claimant's counsel to identify what specific sections should be produced which then results in objections to producing specified sections and a time-consuming meet and confer process that ultimately leads to motion practice. The actual directives of current List 1, Item No. 11 are very rarely complied with by brokerage firms. Compliance and supervisory manuals are critical discovery and delaying their production is a tactic abused by Respondents far too often. FINRA can remedy this by simplifying List 1, Item 11 to mandate the production of all operative compliance, supervision, and Reg BI manuals in their entirety for the relevant time period, and should state:

> The firm's compliance, supervision, and Regulation Best Interest manuals and all updates thereto for all years in which the Statement of Claim alleges that the conduct occurred, including separate or supplemental manuals governing the duties and responsibilities of the associated persons and supervisors, all bulletins (or similar notices) the firm issued for all years in which the Statement of Claim alleges that the conduct occurred, and the entire table of contents and index to each such manual or bulletin. In responding to this request, the firm must provide a list of all of its manuals and bulletins which may contain directives related to the conduct, claims, or product or types of products at issue in the claim.

Likewise, FINRA can address the delays created by confidentiality agreements, not by inserting more preamble language in the Discovery Guide, but by amending the prehearing scheduling order to include a section which requires the parties to come to an agreement on confidentiality prior to the deadline for producing Discovery Guide documents. Requiring the arbitrators to address confidentiality issues early in the case and include them as part of the

prehearing script would cause the parties to commit to a date certain to meet and confer on protective order or confidentiality agreement so that discovery advances without delay. This procedural step is routine in other arbitration forums and has the effect of streamlining an issue that can cause delays in the production of routine discovery.

However, FINRA must also train their arbitrators that confidentiality agreements for product cases raise unique issues because they frequently involve production of the same exact documents in dozens, and often hundreds, of cases. FINRA's guidance to arbitrators and to the parties should more clearly acknowledge that confidentiality orders should consider the nature of cases and provide for efficient production of confidential materials in multiple cases to reduce the burden on all parties. The Manual for Complex Litigation has multiple sections which discuss using discovery material from one case in other related cases.[27] Confidentiality orders that protect actually confidential documents while recognizing benefits of global production are *routinely* entered in state and federal courts around the country.[28] Confidentiality orders requiring production of documents for use in any related actions are also routine in complex litigation, including mass tort and MDL litigation.[29] The FINRA Arbitration process, particularly where there are mass action

[27] Manual for Complex Litigation, Fourth §§11.423, 20.14, 40.27 (Same Confidentiality Order provides: "any discovery material produced in this litigation may be used in all actions encompassed by this [insert product or other litigation name] litigation and in any other action brought by or on behalf of any other [insert product name] user who agrees to be bound by the terms of this order.")

[28] *Rogers v. Brindle*, No. 12108807, 2013 WL 12226948, *1 (Ga. Super. Jan. 31, 2013) (Trial Order) ("Any discovery material produced in this litigation may be used in all actions encompassed by this action **and** *in any other action brought by or on behalf of any party regarding the allegations alleged in this lawsuit*."); *Sunrise Partners Ltd. v. Team Health Holdings, Inc.*, Nos. 2017-0154-TMR, et al., 2017 WL 2268995, *2 (Del.Ch. May 23, 2017) (Trial Order) ("Subject to the terms of a confidentiality order substantially similar to that entered in this Consolidated Action, **counsel and petitioners bringing any Related Action shall have access to all discovery**.")

[29] *In re Roundup Products Liability Litigation*, No. 3:16-md-02741-VC, *4 (N.D. Cal. Dec. 9, 2016) (Protective and Confidentiality Order).(allowing for confidential material to be used "for any other action brought by or on behalf of a former user of Monsanto glyphosate-containing products alleging injuries or other damages therefrom" subject to agreement to confidentiality provisions); *In re Xarelto (Rivaroxaban) Products Liability Litigation*, MDL No. 2592, *9 (E.D. La. May 4, 2015) (Pre-Trial Order No. 12) (permitting use of confidential documents by ""Any attorney of

claims or product based claims could significantly reduce burden and expense for the parties by acknowledging and expressly permitting for use of the documents in numerous cases, subject to compliance with the confidentiality provisions, in other or future related cases.

The next substantive revision to a List Item that must be implemented is to amend List 1, Item 16 to make documents relating to investigations by FINRA, the SEC, or any regulator presumptively discoverable. The new List Item should state:

> Documents relating to investigations, inquiries, charges, or findings by any regulator (state, federal or self-regulatory organization), including but not limited to any and all FINRA Rule 8210 requests for information and SEC Wells notices, and the firm's and/or the associated person's responses to such investigations, inquiries, charges or findings for the firm's and/or associated persons' alleged improper behavior related to the Claimant, the claims, the product(s), or the violations of state or federal securities laws and/or violations of FINRA Rules at issue in the Statement of Claim.

The current discovery guide makes much of the records sought by this amended Item presumptively discoverable. This amended version, however, specifies what records should be produced, like Rule 8210 requests and written responses thereto, and specifically defines what records would be considered relevant – i.e., related to the Claimant, claims, products, or violations related to those in the statement of claim. This amendment is more specific and makes it less likely that an objection based on clarity or scope would carry any weight.

The Discovery Guide also needs to be amended to address repeated and virulent abuse of the process. Respondents repeatedly file long-form and boilerplate objections to the List Items. These objections result in respondents typically refusing to produce documents responsive to specific list items.

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record for plaintiffs in other pending U.S. litigation alleging personal injury or economic loss arising from the alleged use, purchase, or payment of Xarelto for use in such other Xarelto action, provided that the proposed recipient is: (a) already operating under a Protective or Confidentiality Order in another jurisdiction where the Xarelto action is pending; or (b) agrees to be bound by this Order…").

Specifically, under the existing discovery guide, Broker-Dealers routinely object to producing documents responsive to List 1, Item 13(b), List 1 Item 20(a), and List 1 Item 12. With respect to 13(b) (exception reports) and 20(a) (commission runs), the broker-dealers refuse to produce records that identify "other customers", the basis of which is typically some combination of relevance and privacy. In many instances, broker-dealers falsely cite the Graham-Leach-Bliley Act as affirmatively preventing the disclosure of the very discovery FINRA defines as "presumptively discoverable". Despite this objection lacking any merit whatsoever[30], it does not stop broker-dealers from raising it and arbitrators from agreeing with them. Regarding commission runs, broker-dealers routinely argue that the firm would have to generate a commission run and that it is not kept in the regular course of business. The Discovery Guide should update List 1, Item 20 to require firms to generate commission runs in a readily usable format, such as excel or other applicable spreadsheet format.

Abusing the Discovery Guide and ignoring its call to expedite and streamline this process must end. FINRA needs to make it clear to the parties and to arbitrators that objecting to producing documents responsive to the List Items is sanctionable misconduct absent compelling reasons. FINRA needs to make it clear that protecting the identity of non-parties is contemplated by the Discovery Guide, which instructs Broker-Dealers to redact that information before making the document productions required by the Guide. The purpose of arbitration is efficiency and fairness. As it stands, the Discovery Guide is grossly tilted in favor of Broker-Dealers due in no small part to their coordinated efforts over many years to refuse to comply with the terms of the Guide. This must stop and only FINRA can put a stop to it, through a clear mandate to the parties and through arbitrator training on the issue.

[30] *See* e.g. *Lamorte v. Mansfield,* 438 F.2d 448 (2d Cir. 1971).

While the FINRA Discovery Guide has improved over time, it still favors brokerage firms by allowing excessive objections, delays, and selective document production. Expanding the scope of required disclosures, strengthening sanctions for non-compliance, and improving arbitrator oversight and training would help claimants obtain the evidence they need to prove their cases. These changes are necessary to ensure a fair and transparent arbitration process which better reflects the FINRA-Forward campaign.

> **Request for Comment F.5.** Should FINRA consider additional methods to address discovery abuses? If so, what methods should be considered?

PIABA believes it is essential that arbitrators be properly trained and emboldened to combat the nonstop abuse of the Discovery Guide by brokerage firms. The FINRA Code of Arbitration Procedure outlines clearly that arbitrators are authorized to issue sanctions against parties who "fail[] to comply with the discovery provisions of the Code…or frivolously object to the production requested…"[31] The Rule does not require a motion by a party and sanctions can clearly be issued *sua sponte.* FINRA provided arbitrators with significant authority to issue sanctions which are a serious penalty reserved for intentional misconduct of a party or their counsel who flout the rules or ignore orders and are intended to deter misconduct. Brokerage firms clearly have no fear and continuously make boilerplate objections to producing documents responsive to the Discovery Guide without consideration for sanctions or any penalty. When an arbitrator sees that a brokerage firm is ignoring the Discovery Guide, objecting to producing documents that are deemed to be presumptively discoverable, without taking any steps to rebut that presumption and instead issuing boilerplate objections, the arbitrators are able to issue their own sanctions order without request of a party. FINRA should increase arbitrator training on issuing sanctions orders

[31] *See* FINRA Rule 12511.

and should also be emboldened to make a disciplinary referral for brokerage firms that ignore the List Items or ignore discovery orders.

Hearing Oversight and Efficiency

> **Request for Comment G1.** *Should FINRA establish a central contact point or support system to assist arbitrators with procedural or evidentiary questions during proceedings? What should that resource look like? How should FINRA balance the possibility of that resource improving efficiency and consistency with the possibility that it could result in delays or undermine arbitrator decision making?*

No. FINRA should not provide guidance or interpretation of the FINRA Rules or the law. Rather than creating a new role or division of support staff, FINRA should instead focus on improving the usability, accessibility, and clarity of the resources already available to arbitrators, while also mandating enhanced training on procedural and evidentiary issues. At all times, FINRA must take care to avoid providing, either explicitly or implicitly, legal advice or interpretations of the law or the Code to either parties or arbitrators.

The principal concern with FINRA providing interpretive guidance through "support staff" is that arbitrators may place undue reliance on information conveyed by FINRA personnel, rather than evaluating the arguments, briefing, and evidence presented by the parties themselves. Because arbitrators understandably view FINRA as the administrator of the arbitration forum, even informal guidance could carry disproportionate weight and inadvertently influence decision-making. Maintaining a clear separation between FINRA's administrative role and the arbitrators' adjudicative function is therefore essential to preserving the fairness and perceived neutrality of the forum.

With respect to procedural questions, the applicable standards should be clearly articulated in the FINRA Code of Arbitration Procedure and accompanying arbitrator training materials. If those standards are ambiguous, outdated, or otherwise insufficient, FINRA should revise the Code

and training materials accordingly. In most circumstances, arbitrators should be able to resolve procedural issues through reference to the Code and the Arbitrator's Guide. Any additional commentary or interpretive guidance from FINRA staff risks exceeding FINRA's administrative role and effectively providing answers to questions that should instead be resolved by the arbitrators based on the parties' submissions.

Finally, while evidentiary questions are often resolved in similar ways across U.S. jurisdictions, the local and jurisdiction-specific nature of many evidentiary rules makes it difficult to develop standardized or boilerplate guidance that would be appropriate in all cases. As with procedural issues, providing interpretive guidance through FINRA staff would likely be afforded disproportionate weight by arbitrators and could erode the clear separation between FINRA's administrative responsibilities and the adjudicative process. Simply put, these legal disputes are issues that can be argued and if necessary briefed by the parties to an arbitration proceeding. FINRA need not serve in the role as a secret "Master Hand" behind the scenes with unpublished decisions and rulings and direction that could provide incomplete, inaccurate, or unbalanced information to the arbitrator which the parties may not have a fair opportunity to correct.

Providing arbitrators with stronger foundational training will better equip them to address such issues independently, and to weigh the parties' arguments on such topics, when they arise during proceedings.

> **Request for Comment G2.** *Should FINRA implement more stringent case management requirements? If so, what would those requirements look like and how should possible gains in efficiency be balanced with a party's ability to present their case?*

No additional case management requirements are needed. However, FINRA should aim to encourage arbitrators to more consistently and effectively enforce the current timelines and procedural rules within the arbitral process.

From the perspective of attorneys who represent public investors harmed by industry misconduct, the more pressing concern is not the absence of procedural standards, but rather the inconsistent enforcement of the existing standards. For example, member firms frequently fail to comply with the discovery obligations and timelines set forth in the Discovery Guide as discussed above, including the requirement to provide written responses and produce responsive materials within the prescribed timeframe. Such conduct often occurs because firms recognize that arbitrators may be reluctant to impose meaningful sanctions or penalties for non-compliance, particularly against the parties they may see on a repeat basis.

Rather than creating new deadlines that are not regularly enforced, FINRA should instead consider reforms aimed at strengthening enforcement mechanisms and encouraging arbitrators to apply the existing rules consistently and effectively. Ensuring that case management deadlines are meaningfully enforced would significantly improve the fairness and efficiency of the forum and help maintain its credibility as a venue for resolving disputes between investors and industry participants.

> **Request for Comment G3.** *Should FINRA increase its direct oversight of arbitrators and arbitration proceedings to identify and address case management and other issues in real time? If so, how should these issues be addressed***?**

PIABA opposes any increase in FINRA's direct oversight of arbitrators or arbitration proceedings for the purpose of monitoring and addressing case management or substantive issues in real time.

Arbitration is designed to be an adjudicative process conducted by neutral decision-makers who are independent of the forum administrator. Increased real-time oversight by FINRA risks blurring the line between administration and adjudication, undermining the neutrality of the process. Arbitrators—not FINRA staff—are responsible for managing proceedings, making evidentiary determinations, and resolving disputes. Introducing active oversight during the

pendency of a case would create the perception, and potentially the reality, of institutional influence over case outcomes.

Moreover, such oversight would disproportionately impact investor claimants. FINRA is an industry-funded organization, and increased intervention in live proceedings could reasonably be perceived as favoring repeat-player respondents. Even if no actual bias occurs, the erosion of confidence in the neutrality of the forum would be significant.

To the extent there are concerns regarding case management or arbitrator performance, those concerns are more appropriately addressed through existing mechanisms, including arbitrator training, post-case evaluation, and removal from the roster where warranted. These approaches preserve arbitrator independence while allowing FINRA to maintain appropriate administrative oversight.

In short, increasing direct, real-time oversight would not improve the arbitration process. It would compromise the independence of arbitrators and undermine confidence in the fairness of the forum.

> **Request for Comment G4.** *What technological enhancements to FINRA's dispute resolution systems (e.g., the DR Portal) would further improve case efficiency, accessibility or user experience? Are there further features that FINRA should consider implementing?*

FINRA should consider several technological and procedural improvements designed to enhance transparency, efficiency, and cost management within the arbitration process.

First, FINRA should consider developing a mobile application for party representatives modeled after the beta application currently available to arbitrators. A similar platform for counsel and party representatives would facilitate more efficient access to case materials, filings, and scheduling information.

Second, FINRA should improve the integration between its accounting and billing systems and its case management systems. At present, invoices for forum fees and related charges are frequently issued long after a matter has been fully resolved and closed. This creates significant practical difficulties for counsel, who are often placed in the untenable position of either absorbing the additional costs themselves or contacting clients who have already received their settlement or award funds to request payment of newly issued fees. Ensuring that costs are calculated and invoiced promptly would materially improve fairness and administrative efficiency.

Third, FINRA's billing system should allow apportionment of costs across groups of Claimants. As designed currently, FINRA's system only allows one customer to be assigned the "responsible party" for billing purposes, even though that would be unusual for such an apportionment in the real world. This creates substantial issues and wastes time for FINRA, the parties, and counsel. FINRA should fix this logistical issue promptly.

Fourth, FINRA should modify the Dispute Resolution Portal ("DR Portal") interface so that docket information is displayed in a format more consistent with federal court systems such as PACER. At a minimum, each entry should clearly display the date of filing, the title of the document, and any applicable response or reply deadlines. Currently, users must navigate multiple layers of drop-down menus or open individual documents to determine the nature of a filing and associated deadlines, which unnecessarily complicates routine case management. The system should also allow parties to filter by document category (e.g., Motions, Orders, etc…).

Fifth, the available filing types within the DR Portal should be updated to reflect the motions most frequently filed in arbitration proceedings. For example, commonly filed motions—such as motions to compel discovery—should appear as selectable filing types rather than requiring counsel to select generic or catch-all options.

Sixth, FINRA should require arbitrator training on the use of electronic evidence and digital presentation technology. Parties or arbitrators may have preferences or needs for electronic or printed copies of exhibits, and those needs may vary depending on the particular case. Parties should have the option to request a fully digital final hearing in which documentary evidence is presented electronically rather than through paper binders, although the arbitrators should retain discretion to receive the evidence in the manner they prefer. FINRA should also provide arbitrators with the training, tools and resources so that they are capable of reviewing and considering at least some portion of the documentary evidence electronically. The cost of printing and assembling hearing binders frequently reaches several thousand dollars, an expense that is increasingly unnecessary given the widespread availability of tablets and other electronic devices capable of managing large document sets. Arbitrator's preferences for paper copies or electronic copies, particularly if the arbitrator insists on the use of one or the other, should be disclosed on the arbitrator's profile report and profile.

Finally, FINRA should consider having hybrid videoconferencing capability in all final hearing locations that are in person, even when the hearing is held at a location other than a FINRA office. At a minimum, the technology should be available to allow parties to present documentary evidence electronically and to accommodate remote witnesses. In practice, many in-person final hearings require testimony from at least one remote witness. Providing hybrid capability as a standard feature would reduce logistical disruptions and ensure consistency regardless of whether a hearing is conducted at a FINRA facility or at an alternative venue such as a hotel conference room. At minimum, FINRA should ensure that dedicated hard-wired internet is provided for use of Zoom functionality at any in-person hearing locations and FINRA should bear the costs

associated with same. Arbitrator's profile reports should disclose if they are only willing to participate in hearings via Zoom or if they are only willing to appear at in-person hearings.

Collectively, these technological and procedural improvements would modernize the arbitration process, reduce unnecessary costs for parties, and improve the overall efficiency of FINRA's dispute resolution forum.

Punitive Damages

PIABA's position is that any contemplated changes to the current framework allowing arbitrators to award punitive damages constitute an attempt to manufacture a remedy for a problem that does not exist.

Punitive damages are an extraordinarily rare occurrence in FINRA arbitrations. Punitive damages are awarded in far less than 1% of FINRA arbitrations.[32] 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. For instance, based on the review of substantive non-expungement related FINRA Awards for the year 2024, customers were awarded punitive damages in approximately five total cases in 2024. In comparison, the industry was awarded punitive damages in at least four cases in 2024 – nearly just as often as a customer claimant was awarded punitive damages. In the first four months of 2024 alone, Customers who filed a claim to attempt to recover their losses were actually held liable for monetary damages owed to brokerage firms and Respondents more times than punitive damages were awarded to customers in the entire year. Thus, it is more likely for the brokerage firm to receive an award against a victimized customer Claimant who stands up for their rights in FINRA Arbitration than it is for a customer claimant to receive an award of punitive damages against a member firm.

[32] Comparing the punitive damages awarded to customer claimants in 2024 versus the number of cases filed in 2024 suggests that punitive damages were awarded in approximately .2% of cases.

Indeed, one of those awards of punitive damages for a customer in 2024 amounted to just $28,800. The median amount of punitive damages awarded in 2024 was approximately $200,000. Further, one of the cases in which punitive damages were awarded was against a defunct broker dealer that was expelled over a year before the award was issued. There is no evidence that any of the limited punitive damages awarded in the FINRA Arbitration forum are inappropriate or without merit.

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 put, 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 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. 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.

Request for Comment H.1. *Should FINRA maintain the current framework that allows arbitrators to award punitive damages?*

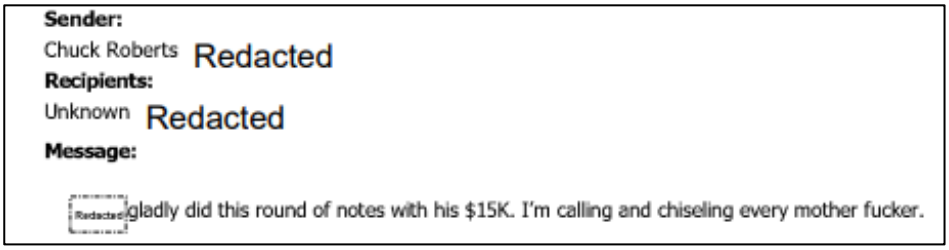
Punitive damages are an extraordinarily rare occurrence in FINRA arbitrations. According to FINRA's own published data, from 2021 to 2025, there were 10,393 arbitration cases closed in the FINRA forum involving customer disputes.[33] Of those 10,393 customer disputes, only 734 cases were closed by an arbitration award after a hearing on the merits, and just 313 cases included an award of *any* damages at all to customers.[34] According to FINRA, during the nearly 38 year period from March 1988 to December 2025, only 3 percent of all arbitration awards included an award of punitive damages.[35] This figure includes customer disputes and industry/ employment disputes arbitrated in the FINRA forum.

The premise that remedial efforts are required to address the miniscule probability of a customer being awarded punitive damages is absurd and appears to be an overreaction to two recent high-profile cases involving two prominent FINRA member firms, Stifel, Nicolaus & Company, Inc. ("Stifel") and UBS AG ("UBS"), that were properly the subject of significant punitive damage awards.[36]

The recent punitive damage award involving Stifel and its disgraced former employee, Chuck Roberts ("Roberts") presented a unique situation involving allegations of widespread misconduct and supervisory failures related to an associated person with a disturbing history of

[33] *See* FINRA Regulatory Notice 26-06, p. 6.
[34] *Id.*
[35] *Id.* at 28.
[36] *See Hansen et al. v. UBS Financial Services, Inc.,* FINRA DR Case No. 21-00488 (Award dated Feb. 27, 2025); *See* also, *Jannetti et al. v. Stifel, Nicolaus & Company, Inc.*, FINRA DR Case No. 23-01342 (Award dated Mar. 12, 2025)

past misconduct, whose employment has since been terminated and who was subsequently banned from the securities brokerage industry for life by FINRA. The conduct by Stifel and Mr. Roberts is precisely the type of conduct that clearly justifies an award of punitive damages. For instance, the evidence suggests either intentional misconduct or reckless disregard for the rights of the customers, as demonstrated by the brokers own words[37]:



FINRA needs to conduct some serious soul searching if FINRA would seek to condone or protect the brokerage firms that engage in egregious misconduct from responsibility for those actions.

Furthermore, both the *Hansen* and the *Jannetti* cases involved the extensive use of clandestine and unsupervised "off-channel" business communications in the form of text messages to and from the financial advisor's personal mobile device, both of which were examples of firmwide systemic supervisory failures regarding off-channel business communications and Securities and Exchange Commission ("SEC") record keeping violations.[38] In other words, the punitive damage awards in the *Jannetti* and *Hansen* cases represent examples of the FINRA arbitration system working as intended. In fact, the punitive damages award against Stifel in the *Jannetti* matter was recently confirmed by the U.S. District Court.[39] There is no evidence that these punitive damages awards were improper or did not comply with the law. Instead, while the

[37] *See* Ex. 7 to Pet'rs' Mem. of Law in Opp'n to Resp't's Mot. to Vacate, *Jannetti v. Stifel, Nicolaus & Co.*, No. 1:25-cv-21176-DPG (S.D. Fla. July 18, 2025).
[38] *See UBS Financial Services, Inc. et al. v. Hansen et al.*, 4:25-cv-00120-SMR-HCA (S.D. Ia. Mar. 31, 2025); *See* also, *Jannetti et al. v. Stifel, Nicolaus & Company, Inc.*, FINRA DR Case No. 23-01342 (Award dated Mar. 12, 2025)
[39] *See Jannetti et al. v. Stifel, Nicolaus & Company, Inc.,* 1:25-CV-21176-DPG, 2026 WL 810916 (S.D. Fla. Mar. 24, 2026). The U.S. District Court has not yet ruled UBS' Motion to Vacate the *Hansen* award.

occurrence of punitive damages remains far too rare in the FINRA forum, some firms who have engaged in reckless and egregious misconduct have properly faced the consequences of their own choices and failures.

As stated above, FINRA's own published data is clear that the two recent high-profile punitive damage awards in the *Jannetti* and *Hansen* matters are outliers, and that the probability of punitive damages being awarded in a FINRA arbitration proceeding remains extraordinarily low.

In fact, according to Stifel, the Respondent in the *Jannetti* matter, during the 20 year period from 2005 to 2025, there have been 5,411 FINRA customer arbitration cases that resulted in an award of damages, and just 386 of such cases resulted in an award of punitive damages.[40] According to Stifel, of the 386 FINRA arbitration awards that have resulted in an award of punitive damages during the 20 year period from 2005 to 2025, there were just 58 cases where the punitive damages award exceeded $1 million, and only ten (10) cases where the punitive damages exceeded $5 million (three of which were default awards against parties who did not appear at the evidentiary hearing.)[41] The issuance of punitive damages in FINRA arbitration proceedings is an exceptionally rare occurrence that does not warrant any policy or rule changes on the part of FINRA.

According to FINRA, of the 1,391 FINRA arbitration cases involving customer disputes that closed by award from 2021 to 2025, customers were awarded damages in just 29 per cent of cases.[42] It is PIABA's position that FINRA's reform efforts are better directed at leveling the playing field for investors by understanding and addressing the underlying root causes of why

[40] *See* Declaration of Jeff Bindon. S.D. Fla. Case 1:25-cv-21176-DPG, Document 27-57.
[41] *Id.*
[42] *See* FINRA Regulatory Notice 26-06, p. 6.

customers in FINRA arbitration claims prevail at a dramatically lower rate than plaintiffs in civil tort litigations in state and federal court.

Punitive damages serve an important and necessary purpose, namely to punish the wrongdoer and deter future wrongdoing.[43] It is deeply concerning that FINRA would even contemplate limiting or eliminating arbitrators' right to enter an award of punitive damages to punish FINRA member firms for conduct that the arbitrator has determined warrants such damages.

There are numerous safeguards already in place to ensure that punitive damages are awarded in only the most extreme and egregious of circumstances. For example, while the standards for awarding punitive damages vary from state to state[44], all states require that the party seeking punitive damages must meet certain higher standards than the standards applicable for awarding compensatory damages.

For example, in order to obtain an award of punitive damages in most states, a party must prove that the conduct in question was "malicious or intentional."[45] In addition, most states require that parties must meet a heightened burden of proof for punitive damages. Specifically, the burden of proof for compensatory damages in FINRA arbitration proceedings is a "preponderance of the evidence" (*i.e.* more likely than not).[46] However, the standard of proof for punitive damages in most states is the heightened and significantly more rigorous "clear and convincing evidence" standard.

[43] *See* FINRA Dispute Resolution Services Arbitrator's Guide (Mar. 2026. Ed.), p. 70;
[44] *Id.*
[45] A minority of states permit arbitrators to award punitive damages for reckless indifference to the rights of others or gross negligence. *See* FINRA Dispute Resolution Services Arbitrator's Guide (Mar. 2026. Ed.), p. 70.
[46] *See* FINRA Dispute Resolution Services Arbitrator's Guide (Mar. 2026. Ed.), p. 67.

In addition, many states also require heightened proof for the issuance of punitive damages against a corporation or employer. For example, many states require that in order to obtain punitive damages against an employer or corporation for the conduct of an employee or agent, the party seeking punitive damages must not only demonstrate by clear and convincing evidence that the employee or agent was guilty of intentional misconduct or gross negligence, but must also prove that the employer or a corporate officer, director or manager knowingly participated, condoned, ratified and/or consented to the employee's misconduct, had advance knowledge that the employee was unfit or engaged in gross negligence or acted with conscious disregard which contributed to the claimant's injury.[47]

These significantly heightened requirements for punitive damages help to explain why punitive damages have been awarded in only the rarest of FINRA arbitration cases.

In addition, the Federal Arbitration Act (FAA) and the myriad of state specific arbitration statutes ensure that there are appropriate safeguards in place to address arbitration awards issued by corruption, fraud, undue means, evident partiality or arbitrator misconduct.

FINRA Regulatory Notice 26-06 states that FINRA has received feedback that FINRA should amend its rules to permit pre-dispute arbitration agreements that limit or preclude punitive damages in FINRA arbitration, and that "FINRA should impose specific caps on punitive damages awards."[48] It is telling that the feedback FINRA refers to came from SIFMA, the securities industry trade group whose board of directors is chaired by Ronald Kruszewski ("Kruszewski"), the Chief Executive Officer (CEO) of Stifel, one of the aforementioned two broker-dealers that were recently the subject of significant punitive damages awards. It is similarly revealing that SIFMA's feedback

[47] *See* Fla. Stat. §768.72(3); *See* also, Ca. Civil §3294(b); N.C. Stat. §1D-15; Ks. Stat. §60-3701(d); Ky. Stat. §411.184(3); and Minn. Stat. §549.20.
[48] *See* FINRA Regulatory Notice 26-06 at 29.

to FINRA was submitted just a few months after the aforementioned punitive damages awards. The fact that SIFMA's Chairman is the CEO of a brokerage firm that was recently the subject of an embarrassing and highly publicized punitive damage award stemming from the conduct of a disgraced former employee who has since been banned from the securities industry by FINRA, does not constitute grounds for FINRA to implement wholesale changes to its arbitration system with regard to punitive damages.

It is disturbing that FINRA has chosen to focus its remedial efforts on the extraordinarily remote chance that a customer could be awarded punitive damages, rather than making the FINRA arbitration forum more fair and equitable for customers who are denied any relief whatsoever in more than seven out of ten FINRA customer arbitration hearings.[49]

> **Request for Comment H.2.** *Should FINRA permit parties to agree in predispute arbitration agreements to preclude or limit punitive damages? What customer protection and fairness considerations should be part of evaluating this question?*

FINRA should not permit pre-dispute arbitration agreements that preclude or limit punitive damages. Permitting pre-dispute arbitration agreements that limit an arbitrator's ability to award punitive damages will create a Hobson's choice whereby any investor seeking to open an account with any FINRA member firm will be forced to forfeit their right to seek punitive damages.

Pre-dispute arbitration agreements that preclude or limit punitive damages would create a perverse incentive for FINRA member firms and their associated to engage in a broad range of egregious and intentional misconduct, with the assurance that they can never be held accountable by FINRA arbitrators for punitive damages, no matter how malicious the misconduct is proven to have been.

[49] *See* FINRA Regulatory Notice 26-06 at 6.

Furthermore, permitting such provisions in pre-dispute arbitration agreements would create a dangerous precedent and open the door to the proverbial "slippery slope" whereby FINRA member firms will undoubtedly seek additional limitations on arbitrators' ability to award remedies available under the law such as attorneys' fees, costs, rescission and disgorgement.

Finally, such provisions would be in contrast to the legal doctrine preventing parties from contracting out of liability for intentional misconduct. In fact, there is significant doubt as to whether such contractual language would even be enforceable.[50]

> **Request for Comment H.3.** *Should FINRA impose a cap on punitive damages awards to address concerns about excessive awards in the absence of judicial safeguards? If so, how should FINRA structure such a limitation or cap? What customer protection and fairness considerations should be part of evaluating this issue?*

PIABA's position is that FINRA should not impose any cap on punitive damages. Caps on punitive damages already exist under state and federal law. For example, many state arbitration statutes already specify that an arbitrator's ability to award punitive damages is subject to the same limitations and standards of proof that would be applicable in a court action.[51]

PIABA does not believe that FINRA should create separate standards and limitations on the availability of punitive damages when such standards and limitations already exist under current state and federal law.

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[50] *See Armendariz v. Foundation Health Psychcare Services, Inc.*, 99 Cal.Rptr.2d 745 (2000) (Limitation in arbitration agreement on remedies for employee to only backpay and not allowing employee in anti-discrimination claim to attempt recovery of punitive damages or attorney's fees contributed to determination that the arbitration clause was void as unconscionable.)

[51] *See* Fla. Stat. §682.11(a) ("An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim."); *See* also, Mich. Stat. §691.1701(1) (same); Minn. Stat. §572B.21 (same); N.J. Stat. §2A:23B-21 (same); and N.C. Stat. §1-569.21 (same).

Request for Comment H.4. *Are there procedural safeguards—such as bifurcated hearings for liability and damages, enhanced standards for awarding punitive damages, or mandatory explained decisions when punitive damages are awarded—that FINRA should consider in response to this issue? Are there other procedural safeguards FINRA should consider? What customer protection and fairness considerations should be part of evaluating this question?*

PIABA's position is that FINRA should not consider imposing any additional procedural safeguards governing an arbitrator's authority to award punitive damages because, amongst other things: (i) the procedural safeguards currently in place are already more than adequate; and (ii) the imposition of additional requirements will make the FINRA arbitration process simultaneously more costly and less efficient, thus undermining FINRA's goal of providing "impartial dispute resolution that is less costly and faster than traditional litigation."

The existing procedural safeguards in place are already more than sufficient. As stated above, state law already imposes significantly heightened requirements for an arbitrator to award of punitive damages. For example, state law already requires that in order to prevail on a claim for punitive damages in arbitration a party must prove that the conduct in question was "malicious or intentional", or in a minority of states the party must prove gross negligence or a reckless indifference to the rights of others. In addition, most states require that parties must prove their claim for punitive damages by "clear and convincing evidence", which is significantly more stringent than the "preponderance of the evidence" standard required to prevail on a claim for compensatory damages.

Similarly, many states also already require explained decisions when punitive damages are awarded in arbitration.[52]

[52] *See* Fla. Stat. §682.11(a) ("When an award of punitive damages is made in an arbitration proceeding, the arbitrator who renders the award must issue a written opinion setting forth the conduct which gave rise to the award and how the arbitrator applied the standards in s. 768.72 to such conduct."); *See* also, Mich. Stat. §691.1701(1) ("If an arbitrator awards punitive damages or other exemplary relief under subsection (1), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive

As such, "enhanced standards for awarding punitive damages" already exist under existing law. PIABA's position is that these requirements under state law are already more than sufficient.

PIABA opposes the requirement for bifurcated hearings for liability and damages, as this would significantly increase the costs and time associated with FINRA arbitration proceedings, and undermine the goal of FINRA arbitration providing an efficient and economical alternative to litigation.

> **Request for Comment H.5.** *For some types of claims in FINRA's arbitration forum, FINRA requires arbitrators to have additional qualifications to be eligible to serve on a panel considering such claims. Should FINRA require that arbitrators considering requests for punitive damages have additional experience and qualifications? If so, what would be appropriate additional experience and qualifications? What customer protection and fairness considerations should be part of evaluating this question?*

PIABA's position is that FINRA should not require arbitrators considering requests for punitive damages to have additional experience and qualifications. If FINRA has determined that an arbitrator is competent and qualified to decide the merits of a claim, including issues such as liability, eligibility, compensatory damages, statutory claims and attorney's fees, then that arbitrator is certainly also qualified to decide the issue of punitive damages.

In addition, this proposal is severely impractical. Punitive damages are requested in the majority or at least a significant portion of cases. As noted above, although they are often requested, punitive damages have been awarded in only the rarest of circumstances.

Furthermore, it is common that the evidentiary grounds for punitive damages may not be readily apparent at the time the claim is filed and are only uncovered during the discovery process, prompting parties to seek leave to amend to add a claim for punitive damages. Creating a separate set of qualifications required for arbitrators to serve on a panel considering punitive damages

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damages or other exemplary relief."); Minn. Stat. §572B.21 (same); N.J. Stat. §2A:23B-21 (same); and N.C. Stat. §1-569.21 (same).

claims would create an incentive for some arbitrators to deny parties leave to amend to add a claim for punitive damages in order to remain on the panel, and/or require the parties to needlessly go through the arbitrator selection process for a second time, months after the original panel was appointed.

Finally, FINRA already requires a separate set of heightened qualifications required for an arbitrator to serve as a chairperson on a FINRA arbitration panel. The enhanced requirements for service as a chairperson should already ensure that FINRA arbitration panels are guided by arbitrators with more robust training, education and/or experience. There is no need for additional experience or qualifications for arbitrators to resolve the issue of punitive damages.

> **Request for Comment H.6.** *Should FINRA develop an arbitration appeals process relating to awards of punitive damages? If so, what should such a process look like? For example, should both the amount of the award and the decision itself to award punitive damages be appealable? Should any party be able to appeal or only the party against whom punitive damages are assessed? Should arbitrators with specific experience and qualifications make up the appellate roster? If so, what would be appropriate additional experience and qualifications? What else should FINRA consider if it were to develop an arbitration appeals process relating to awards of punitive damages? Should FINRA consider an arbitration appeals process that is not limited only to a review of punitive damages awards (e.g., interim appeals of certain dispositive panel rulings)? What customer protection and fairness considerations should be part of evaluating these questions?*

PIABA strongly opposes the imposition of an appeals process related to awards of punitive damages. The FAA and the myriad of state arbitration statutes already provide adequate remedies for vacating arbitration awards issued as a result of corruption, fraud, undue means, evident partiality or arbitrator misconduct.

There is no justification for FINRA to single out arbitration awards that include punitive damages to be the subject of an appeals process, when no such process exists for any other type of arbitration award, including awards imposing sanctions or pre-hearing dismissals. Such a change would represent an egregious departure from any semblance of a fair process, making it even more

unlikely that arbitrators would ever award such damages in the first place to avoid additional special appeal opportunities.

The imposition of an appeals process for awards of punitive damages would needlessly increase the costs and time associated with the FINRA arbitration process and undermine the goal of providing an efficient and economical alternative to litigation. Similarly, an appeals process would act as a disincentive for arbitrators to award punitive damages because it would expose arbitrators awarding punitive damages to the increased likelihood that their decision may be overturned.

Finally, FINRA member firms that wish to have their disputes subject to a traditional appeals process already have the right to waive their arbitration agreement and permit customers to pursue their claims in court. The imposition of an appeals process would unfairly render some claims subject to an appeals process, but only when the outcome is unfavorable to the FINRA member firm. Such a process would severely undermine the actual and perceived fairness of the FINRA arbitration process.

Moreover, the procedural issues related to in-house arbitration forum appellate process are many. What standard of review would the FINRA appeals process take? Would it be a *de novo* review? The fact that FINRA arbitration awards are not reasoned makes any in-house appeals process a useless and unnecessary review of the entire record. Finally, the Federal Arbitration Act already provides parties with their rights to seek judicial review of arbitration awards.

Explained Decisions in Awards

Request for Comment I.1. *Should FINRA require explained decisions in all, or certain categories of, arbitration cases? Would explained decisions increase transparency and improve the quality of decision-making and consistency among awards? What impact would explained decisions have on the finality of arbitration awards?*

FINRA should not require an explanation of an award. Unlike state or federal court decisions, a party does not have unlimited right of appeal of the decision of the arbitration panel, but consistent with the goal of arbitration there are statutory bases and rights to review contained in the Federal Arbitration Act. The goal of FINRA Arbitration is to have expedited or streamlined processing and finality of awards. In comparison to state and federal courts, the Judge or jury, as factfinders, typically must articulate sufficient details to give an indication of the factual basis for their decision. The purpose of reciting a finding of fact in state and federal courts is to allow the Appellate Court to determine whether the trial court reached the proper outcome, based on the record. Thus, mandating explained decisions would serve no purpose other than providing the losing party with possible issues for appeal in the state or federal court system, no matter how unlikely to succeed on appeal, so as to delay the prevailing party from collecting the award. As it stands today, parties have the right to jointly request an explained decision, and parties may even file a motion asking for an explained decision. There is no evidence this current process is insufficient.

Request for Comment I.2. *Should arbitrators be required to provide additional detail in explained decisions? If so, what information should be required?*

An arbitrator should not be required to provide additional detail in explained decisions, unless the parties request an explanation in accordance with the present FINRA Rules. No purpose is served by requiring an explanation where not requested or demanded by the parties, except to cause greater issues and delay. Further, writing a fully explained award is time-consuming.

FINRA would need to increase training and require significant additional arbitrator compensation for drafting said reasoned award.

> **Request for Comment I.3.** *If FINRA were to require explained decisions in all, or certain categories of, arbitration cases, what impact, if any, would there be on the efficiency of the program including case resolution timelines?*

This will clearly have costs both in financial and efficiency terms. There will be additional costs because the Chairperson, if required to write an explanation of the Panel's award would need additional time to review the record, the Panel's notes and the Exhibits. The Chairperson should not be required to do this without adequate compensation. Further, this will also cause additional strain on FINRA staff as detailed explained awards will create additional processing inefficiencies and delays. Thus, additional cost would be incurred, and there would be the potential for substantial delay in the rendering of decisions.

> **Request for Comment I.4.** *Would mandatory or expanded use of explained decisions impact arbitrator recruitment and retention, particularly among chairperson-eligible arbitrators? If so, would higher compensation make up for the additional workload?*

Mandatory or expanded use of explained decisions will substantially impact arbitrator recruitment and retention of a Chairperson, especially if the Chairperson is not adequately compensated. Rendering written decisions requires additional time. It should not be required of the Chairperson without additional and adequate compensation. And further, it will likely result in only more petitions to vacate arbitration awards, further delaying the process and likely discouraging at least some arbitrators from further service.

Request for Comment I.5. *FINRA currently provides guidance to arbitrators on writing explained decisions. Should FINRA provide additional guidance or training? If so, what additional guidance or training would be most beneficial to arbitrators?*

FINRA's current guidance regarding writing explained decisions is adequate. No further guidance or training as to explained decisions should be implemented, and should the parties require something particular in an explained decision they can address that with the arbitrators in the particular case

Arbitration Awards Online

Request for Comment J.1. *Who currently uses AAO and for what purposes?*

FINRA's Arbitration Awards Online ("AAO") database is a free, publicly searchable repository of nearly 60,000 written arbitration decisions.[53] It serves a broad range of users and fulfills multiple functions essential to the integrity and fairness of the securities arbitration system. PIABA urges FINRA to consider these diverse uses, and the critical investor-protection interests they serve, as it evaluates any changes to the AAO. Sunlight remains the best disinfectant, and FINRA should continue to expand information it makes available through its arbitration awards database, BrokerCheck, and the disciplinary actions database.

Parties to FINRA Arbitrations.

Parties to current or upcoming FINRA arbitrations are the single most important user group. During the arbitrator selection process, FINRA provides both sides with a list of cases in which each potential arbitrator has participated, and parties can view those awards for free on the AAO. Claimants' counsel use AAO to research prospective arbitrators' track records—how they rule, what damages they award, whether they tend to favor claimants or respondents, and whether

[53] FINRA, Arbitration Awards Online, https://www.finra.org/arbitration-mediation/arbitration-awards (last visited Mar. 15, 2026).

they grant expungement. This research is critical during the arbitrator ranking and striking process. Without AAO, investors would be at a severe informational disadvantage relative to broker-dealer respondents who maintain proprietary databases and institutional memory across hundreds or thousands of prior arbitrations.[54]

Securities Attorneys and Law Firms.

Securities attorneys on both the claimant and defense sides use AAO extensively for case preparation and strategy. FINRA's terms of use permit the data to be used to assist clients in arbitration proceedings relating to securities or commodities transactions and for compliance with securities laws and regulations.[55] Claimant-side attorneys—including PIABA members—mine the database to identify patterns of misconduct by particular brokers or firms, to locate comparable awards supporting damages arguments, and to evaluate arbitrator tendencies. Defense-side attorneys use it to prepare counter-arguments and assess risk exposure.

Third-Party Research and Data Organizations.

Organizations such as Securities Arbitration Commentator ("SAC") rely on AAO as the foundational data source for commercial analytical products. SAC maintains its proprietary ARBchek database of over 52,000 award summaries with twenty-seven or more customizable data fields per award.[56] SAC's periodic Award Surveys have provided industry-wide statistics on recovery rates, damages patterns, and forum comparisons. SAC's 2007–2013 Award Survey found that recovery rates for customers are inversely proportional to claimed amounts, and that

[54] Mark Egan, Gregor Matvos & Amit Seru, *Arbitration with Uninformed Consumers*, 92 REV. ECON. STUD. (2025).
[55] FINRA Arbitration Awards Online Terms of Use (Nov. 17, 2023), https://www.finra.org/arbitration-mediation/arbitration-awards/finra-arbitration-awards-online-terms-use (last visited Mar. 15, 2026).
[56] Sec. Arb. Commentator, Inc. (SAC), *ARBchek*, https://www.arbchek.com (last visited Mar. 15, 2026).

arbitrators do not "split the baby"—in over 93% of cases, outcomes clearly favored one party.[57] These commercial products, while valuable, are accessible only to parties with resources to purchase subscriptions—underscoring the importance of maintaining and improving the free, public AAO as a baseline resource for all participants.

Academic Researchers.

Legal and economics scholars have used AAO data to produce a substantial body of empirical research essential to understanding the fairness and functioning of FINRA's arbitration forum. Choi, Fisch, and Pritchard drew on 6,724 awards to demonstrate that arbitrators who also represented brokerage firms awarded significantly less compensation to investor-claimants.[58, 59] Egan, Matvos, and Seru merged approximately 9,000 FINRA arbitration cases with BrokerCheck data and found that industry-friendly arbitrators accounted for 36% of the variation in awards, and that if arbitrators were selected randomly, consumer awards would increase by roughly $60,000 on average.[60] Alexander and Iannarone applied computational text-mining to approximately 60,000 AAO decisions, revealing that FINRA's own binary win-rate metric systematically misrepresents the complexity of actual outcomes and recommending that FINRA adopt structured data formats to enable better research.[61] PIABA and the PIABA Foundation have drawn on AAO data to conduct multiple empirical studies of expungement patterns and arbitration outcomes.[62]

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[57] Sec. Arb. Commentator, SAC Award Recovery Rates Survey 2013, https://www.secarbalert.com/blog/recovery-rates-award-survey-2013/ (last visited Mar. 15, 2026).

[58] Stephen J. Choi, Jill E. Fisch & Adam C. Pritchard, *Attorneys as Arbitrators*, 39 J. LEGAL STUD. 109 (2010).

[59] Stephen J. Choi, Jill E. Fisch & Adam C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43 (2014).

[60] Egan, Matvos & Sera, *supra* note 47.

[61] Charlotte Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695 (2021).

[62] PIABA Found. & PIABA, *New FINRA Steps to Fix Flaws in Brokers Misconduct "Expungement" Process Won't Work, Independent Investor Advocate Needed* (May 18, 2021), https://piaba.org/press-release-piaba-foundationpiaba-new-finra-steps-fix-flaws-brokers-misconduct/ (last visited Mar. 18, 2026).

This body of scholarship demonstrates that AAO data has been indispensable to identifying systemic problems in the arbitration forum. Without publicly accessible award data, none of this research—which has directly informed regulatory reform efforts—would have been possible.

Investors and the General Public.

Although BrokerCheck is the more commonly used tool for background checks, AAO provides the actual text of arbitration awards rather than summaries, which can reveal important details about the nature and circumstances of disputes. Sophisticated investors and consumer advocates use AAO to research the background of brokers and brokerage firms beyond what BrokerCheck discloses.

Regulators and Compliance Professionals.

FINRA itself, the SEC, state securities regulators affiliated with NASAA, and broker-dealer compliance departments use AAO for oversight and enforcement. State regulators have used award data to track unpaid awards and pursue enforcement actions, and they reference awards in the context of expungement proceedings and broker registration decisions.

Journalists and Media.

Journalists covering the securities industry rely on AAO as a primary source for reporting on significant arbitration outcomes, trends in investor disputes, and systemic issues such as unpaid awards and expungement patterns. Media scrutiny of the arbitration system serves an important public accountability function.

Request for Comment J.2. *Should FINRA consider amending its rules so that FINRA could remove awards from AAO or redact information from awards published on AAO? If so, in what circumstances would it be appropriate for FINRA to remove awards from AAO or redact information from awards published on AAO? What impact would such removal of awards or redaction of information from awards have on transparency into FINRA's arbitration process and the utility of displaying awards to parties and users of AAO? What customer protection and fairness considerations should be part of evaluating these questions?*

No. FINRA should not amend its rules to permit the removal of awards from AAO or the redaction of information from published awards. The AAO database is one of the most important transparency mechanisms in American dispute resolution, and any rule permitting removal or redaction would undermine investor protection, impair regulatory oversight, and eliminate a critical check on an expungement process that remains deeply flawed despite recent reforms.

The Transparency Rationale for Public Awards Is Longstanding and Sound.

The requirement that FINRA arbitration awards be made publicly available dates to 1989. In its approval order, the SEC specifically found that making awards public was "very significant in promoting investor confidence in the arbitration system" and observed that information about past awards had previously been compiled by industry participants for their own cases while investors—"typically one time users of the arbitration system"—had no access to any such information. The Commission concluded that "it is preferable for information on past arbitrations to be equally available to all parties."[63] This rationale remains fully applicable today. Any rule permitting removal of awards from AAO risks recreating the very information asymmetry that transparency was designed to eliminate.

[63] *Order Approving Proposed Rule Changes by NYSE, NASD, and ASE Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses*, Release Nol. 34-26805, 54 Fed. Reg. 21144, 21152 (May 16, 1989) (SEC approval order requiring public availability of arbitration awards).

Information Asymmetry and the Repeat-Player Problem.

The academic literature on arbitration has consistently confirmed that repeat-player firms enjoy systematic advantages over one-shot investor-claimants.[64] Egan, Matvos, and Seru found that the average securities firm had participated in 81 prior arbitrations while most consumers had never been in one, and that approximately 60% of the firm advantage in arbitrator selection came from superior information about arbitrators' track records.[65] The AAO is the principal mechanism through which investors and their counsel can begin to close this information gap. Removing awards from the database would widen it.

The Expungement Process Remains Too Flawed to Justify Removal of Awards.

The principal argument for allowing removal of awards from AAO rests on the claim that awards containing information that has been expunged from the CRD and BrokerCheck should not remain on a public database.[66] This argument proceeds from the assumption that the expungement process produces reliable, well-considered outcomes. The empirical evidence overwhelmingly demonstrates otherwise.

Honigsberg and Jacob's study of 6,660 expungement requests from 2007–2016 found that arbitrators approved expungement 84% of the time when adjudicated on the merits. Most strikingly, brokers with prior expungements were 3.3 times as likely to engage in new misconduct as the average broker. Using instrumental variable analysis, they demonstrated that brokers who received expungement were more likely to reoffend than those denied—meaning expungement

[64] On repeat vs. one-shot players, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).
[65] Egan, Matvos, and Seru, *supra*.
[66] Petition for Rulemaking from Paul J. Bazil, Pickard Djinis and Pisarri LLP, to Vanessa Countryman, Sec'y, SEC (Mar. 17, 2021) (Petition No. 4-770), https://www.sec.gov/files/rules/petitions/2021/petn4-770.pdf.

does not merely select for less culpable brokers but may actively enable future misconduct by removing warning signals from the public record.[67]

Edwards has documented how expungement regularly proceeds without genuine adversarial scrutiny—brokerage firms, nominally the respondents, rarely oppose their own registered representatives' requests.[68] PIABA's research found that brokerage firms opposed expungement in fewer than 2% of cases and investors opposed in only 13%, largely because of inadequate notice, the cost of participation, and an investor-unfriendly process.[6970] With Tierney, Edwards has argued that FINRA's 2023 expungement reforms—though the most significant to date—remain structurally insufficient and that expungement decisions should be removed from arbitration entirely and assigned to FINRA's Office of Hearing Officers.[71]

If FINRA were to permit the removal of awards from AAO upon court confirmation of expungement, it would further incentivize what many view as a broken process by increasing the payoff of obtaining expungement. The AAO currently serves as a partial check on this problem: even when information disappears from BrokerCheck and CRD, a diligent researcher can still find the underlying award. Eliminating that safeguard would deprive future investors, researchers, and regulators of vital information.

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[67] Colleen Honigsberg & Matthew Jacob, *Deleting Misconduct: The Expungement of BrokerCheck Records*, 139 J. Fin. Econ. 800 (2021).
[68] Benjamin P. Edwards, *Adversarial Failure*, 77 WASH. & LEE L. REV. 1053 (2020).
[69] PIABA & PIABA Found., *2019 Study on FINRA Expungements* (Oct. 15, 2019), https://piaba.org/report-piaba-foundation-2019-study-finra-expungement-s-october-15-2019/ (last visited March 18, 2026).
[70] PIABA & PIABA Found., *2021 Updated Study on FINRA Expungements* (May 18, 2021), https://piaba.org/report-2021-updated-study-finra-expungements-may-18-2021/ (last visited March 18, 2026).
[71] James Fallows Tierney & Benjamin P. Edwards, *Stockbroker Secrets*, 26 U. PA. J. BUS. L. 793 (2024).

The "Inconsistency" Argument Does Not Support Removal.

Pickard Djinis and Pisarri LLP have argued that it is inconsistent for FINRA to remove expunged matters from CRD and BrokerCheck while leaving the underlying awards on AAO.[72] But the appropriate response to this inconsistency is not to reduce transparency further. The AAO and BrokerCheck serve different purposes: BrokerCheck is a regulatory disclosure system; the AAO is a public archive of adjudicatory outcomes. The fact that CRD information has been expunged does not mean that the underlying arbitration proceeding did not occur or that the public interest in knowing about it has been extinguished. As Lazaro and Copeland have emphasized, because FINRA arbitration proceedings are private, publicly mandated disclosures take on heightened importance.[73]

Customer Protection and Fairness Considerations.

The customer protection and fairness considerations relevant to this question uniformly counsel against permitting removal or redaction. FINRA should consider whether removal from AAO would create an informational "memory hole" that deprives future investors of information about patterns of misconduct; whether the expungement process is sufficiently robust and adversarial to justify treating its outcomes as definitive (the evidence says it is not); whether removing awards would undermine the ability of researchers and regulators to study systemic issues in the securities industry (it would); and whether investors' collective interest in a transparent arbitration system should yield to individual brokers' interest in concealing past disputes (it should not).

[72] Pickard Djinis and Pisarri, *supra* note 59.

[73] Christine Lazaro & Albert Copeland, *An Overview of BrokerCheck and the Central Registration Depository* (St. John's Legal Studies Research Paper No. 22-0008, 2022).

To the extent FINRA identifies narrow circumstances warranting action—such as awards containing inadvertently disclosed Social Security numbers or protected medical information—limited redaction of specific data elements (not removal of entire awards) may be appropriate. FINRA should also consider a notation system for vacated awards (marking them as vacated without deleting them) rather than any form of removal. Under no circumstances should FINRA adopt a rule that would permit removal of awards upon expungement alone, given the well-documented deficiencies in the expungement process.

> **Request for Comment J.3.** *Are there ways in which FINRA could enhance the search capabilities of AAO to be more helpful to users?*

Yes. FINRA's current search capabilities, while functional, are substantially less sophisticated than what modern legal research platforms offer. Meaningful enhancements to AAO would directly advance investor protection by narrowing the information asymmetry between repeat-player broker-dealers and one-shot investor-claimants. We recommend the following improvements.

Structured Data Fields and Faceted Search.

The most impactful improvement would be converting awards from unstructured PDFs into structured, searchable data. Platforms such as Westlaw and LexisNexis allow users to filter by claim type (e.g., churning, unsuitability, breach of fiduciary duty), security type (e.g., municipal bonds, variable annuities), damages requested, damages awarded, whether the claimant or respondent prevailed, and specific legal theories. FINRA could extract these data points from awards—most of which are already semi-structured under Rules 12904(e) and 13904(e)[74]—and make them searchable and sortable or able to be filtered as discrete fields (including by

[74] FINRA Rules 12904(e), 13904(e).

Respondent, Arbitrator, etc…). This would bring AAO closer to the functionality that SIFMA has urged and that commercial databases already provide.

Outcome Analytics and Arbitrator Statistics.

AAO should integrate aggregate statistical views allowing users to see an arbitrator's overall record: win/loss rates, average award amounts relative to amounts claimed, and frequency of expungement grants. Third-party services such as SAC's ARBchek already provide this analytical overlay, but building comparable functionality directly into AAO would democratize access—particularly for pro se investors, who represent nearly 50% of claimants with claims under $100,000[75] and who cannot afford commercial database subscriptions. Equalizing access to arbitrator data is consistent with the SEC's original rationale that information about past arbitrations should be equally available to all parties.

Linking to Related Proceedings and Court Actions.

FINRA currently acknowledges that AAO may not reflect whether a court has confirmed, modified, or vacated an award. Rather than relying on parties to perform independent research, AAO should systematically link awards to subsequent court orders (confirmations, vacatur decisions), related expungement proceedings, and corresponding BrokerCheck entries. This enhancement would address legitimate concerns about stale or misleading information while increasing transparency rather than reducing it—a superior alternative to the removal or redaction approach discussed in Question J.2.

Full-Text Search Improvements.

The current keyword search functions as a basic text search across PDFs. FINRA could implement improved relevance ranking, phrase and proximity searching, Boolean operators, and

[75] Nicole G. Iannarone, *Small Claims Securities Arbitration*, 26 U. PA. J. BUS. L. 731 (2024).

the ability to search within specific sections of awards (e.g., searching only the damages-awarded portion rather than the entire document). Alexander and Iannarone's text-mining research demonstrates both the potential and the limitations of working with AAO's current data structure, and their recommendation that FINRA adopt richer metadata and standardized templates deserves serious consideration.[76]

API Access and Bulk Data.

FINRA's terms of use already permit data mining and scraping for investor protection, academic, compliance, or regulatory purposes.[77] Providing a formal API or bulk data download would make this access more reliable and efficient, enabling researchers, regulators, and advocacy organizations to conduct the large-scale empirical studies that have been essential to understanding how the arbitration system functions in practice.

Cross-Referencing with BrokerCheck and CRD.

AAO should provide direct links between awards and the BrokerCheck profiles of the parties and arbitrators involved, creating an integrated information ecosystem rather than the currently siloed databases that users must navigate independently. Iannarone's research on investor justice has emphasized that procedural barriers and informational fragmentation disproportionately harm small and unsophisticated investors.[78] Integration across FINRA's own systems would be a meaningful step toward reducing those barriers.

* * *

Each of these enhancements would serve the user groups identified in our response to Question J.1 and would be particularly valuable for investors—who bear the structural

[76] Alexander and Iannarone, *supra* note 54.
[77] FINRA, Arbitration Awards Online Terms of Use § 4 (permitting data mining for investor protection, academic, compliance, or regulatory purposes).
[78] Nicole Iannarone*, Investor Justice*, 109 MINN. L. REV. 1153 (2025).

disadvantages of one-shot participants in a forum dominated by repeat players. FINRA should prioritize improvements that make AAO's data equally useful to all parties, not merely accessible in form while remaining practically opaque to those without the resources to purchase commercial analytical tools.

Unpaid Awards

> **Response for Comment K.1.** *In its Discussion Paper on customer recovery,258 FINRA identified potential approaches to enhancing the resources available to pay awards, including policy considerations these approaches raise and the need for Congressional and SEC involvement or action. How should these approaches be considered?*

PIABA has addressed the issue of unpaid arbitration awards for over a decade, including through three white papers beginning in 2016. [79] Despite that work, and FINRA's own 2018 Discussion Paper on customer recovery, the problem remains largely unchanged.[80]

At the time of PIABA's initial report, more than one-third of investor awards went unpaid, totaling approximately $62 million. Subsequent data showed no meaningful improvement. As of 2024, approximately 25% of investor awards remain unpaid, with roughly 37 cents on the dollar uncollected. These figures reflect a persistent structural deficiency rather than an isolated issue.

The core issue is that firms are permitted to operate without sufficient financial resources to satisfy arbitration awards. As a result, investors may prevail after years of litigation yet recover nothing. A dispute resolution system that produces unenforceable awards does not provide meaningful investor protection.

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[79] Hugh D. Berkson, *Unpaid Arbitration Awards, A Problem the Industry Created – a Problem the Industry Must Fix*, available at https://piaba.org/wp-content/uploads/2016/02/Unpaid-Arbitration-Awards-A-Problem-The-Industry-Created-A-Problem-The-Industry-Must-Fix-February-25-2016.pdf.

[80] FINRA's report is available at https://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf.

After PIABA's initial report was published, FINRA started publishing unpaid award data on a regular basis. 2017 statistics revealed that 36% of the investors who won their arbitration claims collected nothing. Stated differently, 28 cents on the dollar went unpaid. Things had grown worse, not better.

Several targeted reforms would address this problem. First, FINRA should require member firms to maintain adequate errors and omissions insurance. Evidence from jurisdictions that have implemented such requirements, including Oregon and Oklahoma, indicate that insurance mandates do not materially reduce access to investment advisory services.

The view concerning the viability of insurance as a corrective measure has changed based on empirical evidence. In 2018, Oregon imposed for the first time a requirement that investment advisers maintain $1 million of errors and omissions insurance coverage.[81] The concern that insurance would be too expensive and would drive participants out of the market proved to be ill founded. NASAA reported that there were 273 investment advisers registered in Oregon in 2017 – the year before the implementation of the state's insurance requirement.[82] NASAA's statistics for 2018 – the first year of Oregon's insurance requirement, saw 269 investment advisers registered in the state.[83] The number climbed to 270 in 2019.[84] And it climbed again in 2020 to 275.[85] In short, Oregon did not see a meaningful impact on the number of state-registered investment advisers after the imposition of an insurance requirement.

The contention that insurance mandates have no statistically significant effect on access to investment advisers is borne out not only by the basic NASAA statistics, but by robust statistical

[81] Or. Rev. Stat. Ann. § 59.175 (LexisNexis, Lexis Advance through amendments effective on January 1, 2026).
[82] https://www.nasaa.org/wp-content/uploads/2018/05/2018-NASAA-IA-Report-Online.pdf.
[83] https://www.nasaa.org/wp-content/uploads/2019/06/2019-IA-Section-Report.pdf.
[84] https://www.nasaa.org/wp-content/uploads/2020/04/2020-IA-Section-Report-FINAL.pdf
[85] https://www.nasaa.org/wp-content/uploads/2021/04/2021-IA-Section-Report-FINAL.pdf

analysis of data regarding number of investment advisers per capita in two states that had imposed insurance requirements: Oregon and Oklahoma.[86] The findings were summarized:

> We find no evidence that E&O insurance mandates reduce access to investment advisory services. The raw number of registered IARs per capita did not decrease after the law went into effect in Oregon or Oklahoma. More rigorously, a difference-in-difference (DID) analysis shows that the per capita number of IARs in Oregon and Oklahoma did not fall relative to other US states after the laws requiring insurance became effective.

In short, we have seen two real-world examples of insurance mandates going into effect for registered investment advisers and we have seen *no* difference in the access to investment advisory services.

While problems concerning the extent of coverage, and fraud exclusions remain, there has been little pushback on discussions concerning imposing a wide-ranging insurance requirement, including a requirement that FINRA members maintain coverage (if they are not already self-insured with adequate reserves). Instead, it appears that the most popular topic PIABA addressed in 2016 is a reasonable insurance mandate. The imposition of an insurance mandate upon its members is a simple matter of FINRA rulemaking and does not require Congressional input.

PIABA also endorses FINRA's eight-year-old suggestion that a disclosure mandate be adopted (which FINRA could enact through the rulemaking process alone). Disclosures of unpaid awards, capital reserves, and insurance would all allow investors to make well-informed decisions regarding the financial services providers with which they want to do business. While nobody expects their broker or adviser to abuse their trust, knowing that the broker or adviser has the wherewithal to cure a problem of their own making provides an investor comfort, promotes public confidence in the industry, and ensures that investors do not find themselves facing the need to

[86] Craig McCann and Chuan Quin, *RIA Insurance Mandates Didn't Reduce Access to Advisory Services*, August 2024, available at: https://www.slcg.com/resources/blog/713.

draw on social services to help them when they'd saved enough money for a self-funded and comfortable retirement.

Similarly, FINRA's suggestion that the '34 Act be amended to include more instances in which a firm or individual who fails to pay an award would be statutorily disqualified is a good one. Likewise, barring bankruptcy discharge of unpaid awards would serve as yet another deterrent from ill conduct and unpaid awards. Those are obvious legislative matters, but FINRA's outspoken support for such measures would be invaluable in the effort to turn those sorts of bills into laws.

FINRA should also adopt enhanced disclosure requirements, including disclosure of unpaid awards, capital reserves, and insurance coverage, to allow investors to make informed decisions.

FINRA should support measures that increase accountability for unpaid awards, including expanded statutory disqualification and limitations on the discharge of such obligations in bankruptcy.

Finally, PIABA continues to believe that an industry-funded recovery pool would provide the most effective backstop for investors who prevail against insolvent respondents. FINRA could fund this solution with the annual refunds it has provided the industry in the last two years which have totaled $150,000,000.

The problem of unpaid awards is well documented,[87] and the available solutions have been identified for years. What is needed now is meaningful action. FINRA should be decisive and take action to directly fix the scourge of unpaid awards.

[87] Adam J. Gana & Benjamin P. Edwards, *The Insurance Solution for Financial Advice Failures*, 14 Mich. Bus. & Entrepreneurial L. Rev. 1 (2025).

Response for Comment K.2. *Are there any considerations not identified by FINRA in the Discussion Paper on customer recovery that should also be identified?*

PIABA has heard from industry members and certain legislators that insurance requirements and/or a national investor recovery pool led to a moral hazard. The thought is that bad actors will be incentivized to act in inappropriate ways if they know there's a safety net available to make their victims whole. While emotionally appealing, those arguments are bereft of simple logic and defy anyone's actual experience. For example, one could not with a straight face contend that a driver on their way to work would intentionally ram the car who cut them off on the freeway for the simple reason that the driver knew their insurance would cover any damages and claims that arise out of their conduct. On one hand, intentional conduct typically cannot be covered by insurance and on the other hand, people generally want to avoid the time, stress, and expense of litigation. Nor could one argue that a national investor recovery pool would incentivize ill conduct for the simple reason that every model of the pool under discussion would allow the pool, or a regulator, to continue to pursue claims against the wayward broker or adviser. The mere existence of the pool would not immunize the bad actor from liability.

The biggest consideration FINRA failed to address, but which is addressed in some detail above, is that the unpaid award problem must be addressed no matter the title of the financial professional or forum in which the dispute is resolved. While both FINRA members and registered investment advisers must be held accountable for their misconduct, and society demands that a safety net be put in place for the vulnerable retirement community, the mere fact that FINRA can only address those under its jurisdiction cannot serve as a justification for its failure to act on a claim "But there are investment advisers who get off scott free!" FINRA must fix the problem under its control. FINRA's race should be "Forward" as its new initiative says, not a "Race to the

Bottom." In taking action, FINRA can enact a regime tolerable by its members and not be forced to adopt a program implemented by Congress that may be far less workable.

> **Response for Comment K.3.** *Are there other approaches that would enhance member resources to pay awards that FINRA should consider? What regulatory, legislative, or other steps would be required to implement those approaches?*

FINRA's 2018 Discussion Paper addressed a number of potential approaches to address the unpaid award problem, yet has done nothing to implement or further explore the viability of any particular approaches. Asking whether there are yet other approaches that could or should serve to be considered seems premature until and unless FINRA commits to exploring and implementing the various approaches under consideration for the last decade.

Form U5 Defamation Claims

Accurate, complete, and truthful U5 disclosures are vital not only to the integrity of the regulatory framework but also to the protection of investors who rely on BrokerCheck to evaluate whether a financial professional is suitable to handle their savings. Accordingly, PIABA generally opposes many of the proposals set forth by FINRA in L.1 through L.6.

PIABA's position is grounded in two related principles. First, brokerage firms must be held to a rigorous standard of accuracy and good faith when completing Form U5, and the civil remedies available to associated persons (and customers) who are harmed by false or defamatory U5 statements must be preserved and strengthened — not curtailed. Second, investor protection is best served by a robust CRD system that contains accurate, complete information. Any procedural reforms in this area must therefore safeguard the integrity of the disclosure record, not shield firms from accountability for misrepresentations.

Request for Comment L.1. *How should the regulatory need for the reporting of complete and accurate information to CRD be balanced with concerns from members regarding adverse arbitration awards based on required reporting and associated persons' expectation for recourse if they believe the reported information is untrue or misleading?*

FINRA asks how the regulatory need for complete and accurate CRD reporting should be balanced against member firms' concerns about adverse arbitration awards arising from required Form U5 disclosures. PIABA's response is clear: the regulatory mandate for accuracy must take precedence, and the appropriate mechanism to protect firms is to require genuine good-faith compliance — not to erect procedural barriers that shield inaccurate reporting.

FINRA is mandated by federal statute to collect and maintain registration information that is complete and accurate. That mandate exists for the benefit of investors, not for the convenience of member firms. The proper balance is not achieved by limiting arbitrators' authority to award damages when firms violate the duty of accuracy; it is achieved by ensuring firms take that duty seriously from the outset. Where a firm reports false, misleading, or defamatory information on a Form U5, arbitration provides an indispensable check on that misconduct.

PIABA further notes that the framing of this question — suggesting a tension between regulatory completeness and defamation liability — mischaracterizes the actual dynamic. A firm that accurately reports true and complete information faces no defamation liability. Defamation claims arise precisely when firms report false statements of fact. Reducing liability for such false statements does not advance the goal of regulatory completeness; it undermines it by removing the financial incentive for accuracy. For instance, investors who rely on BrokerCheck are the ultimate victims when firms falsify or embellish termination disclosures to harm former employees, and PIABA urges FINRA to resist any reform framed as a "balance" that would diminish the quality of CRD data.

Request for Comment L.2. *Should FINRA amend its rules to require that before making an award of monetary damages for Form U5 defamation claims, arbitrators should be required to find that the alleged defamatory statement is a false statement of fact and was made in bad faith and with malice in fact? Is this the appropriate standard for damages claims based on allegations of defamation? Are there other standards FINRA should consider?*

FINRA asks whether arbitrators should be required to find expressly that an alleged defamatory statement on Form U5 is (1) a false statement of fact and (2) was made in bad faith and with malice in fact, before awarding monetary damages. It also asks in L.3 whether it should provide guidance, training, or instructions to arbitrators on the substantive elements of defamation claims and, if so, what form such guidance should take given FINRA's role as a neutral administrator. PIABA opposes such concepts, as it is not advisable for FINRA to set the terms for the contours of substantive law for arbitrators to follow. Advocates and parties bear the responsibility of proving and defending their case, including providing any legal basis for their claims.

PIABA also opposes such additional training specific to Form U5 Defamation claims based on the same principles. Arbitrators are required to render decisions based on the evidence and law presented to them. For FINRA to prescribe and detail the substantive law via training materials runs counter to this principle. PIABA is not opposed to FINRA providing general context and information about Form U5 defamation cases they encounter as a neutral, but FINRA should not be in the business of reviewing, restating, and continually updating the substantive laws (here, defamation case law) for arbitrators. The legal basis can vary widely according to jurisdiction, and FINRA should not be in the business of attempting to capture the state of case law as it develops across the country.

Request for Comment L.3. *Should FINRA implement guidance, training or instructions to arbitrators on the substantive elements of defamation claims? If so, what form should such guidance, training or instructions take given concerns regarding FINRA maintaining neutrality as the administrator of the forum?*

PIABA is strongly opposed to any training for arbitrators that might create this impression that some categories of claims are stronger than others. As a dispute resolution forum, FINRA should be completely neutral and treat all participants with the same level of respect and dignity.

As a basic principle, inconsistent procedures tend to produce inconsistent results, undermining confidence that outcomes are based on principle rather than chance or discretion. FINRA should strive for consistency to maintain the legitimacy it has established to date as a dispute resolution forum.

If any additional training requirements are instituted by FINRA, PIABA insists that they be focused squarely on procedure only.

Request for Comment L.4. *For some types of claims in FINRA's arbitration forum, FINRA requires arbitrators to have additional qualifications to be eligible to serve on a panel considering such claims. Should FINRA require that arbitrators considering Form U5 defamation claims have additional experience and qualifications? If so, what would be the appropriate additional experience and qualifications?*

PIABA opposes imposing additional experience or qualification requirements for arbitrators presiding over Form U5 defamation claims. Such claims do not warrant a separate or heightened standard, and doing so would unnecessarily narrow the arbitrator pool without improving the quality or fairness of decision-making. Creating claim-specific qualification requirements risks introducing inconsistency across the forum and undermining the principle that arbitrators are capable of applying established legal standards with appropriate guidance from the parties.

Request for Comment L.6. *Should FINRA and other regulators revisit the question of providing members with further immunity against Form U5 defamation claims? If FINRA and other regulators were to revisit such a proposal, what would a national, uniform standard look like and why? What regulatory authority would support such a standard?*

FINRA asks whether it and other regulators should revisit the question of providing members with further immunity — qualified or absolute — against Form U5 defamation claims, and what a national, uniform immunity standard might look like. PIABA strongly opposes the creation of any new immunity — whether qualified or absolute — for member firms against Form U5 defamation claims.

The proposal for expanded immunity rests on the premise that firms should be encouraged to report more information on Form U5 without fear of legal liability. PIABA respectfully rejects this premise. The problem regulators should be concerned with is not that firms are deterred from complete reporting by the threat of defamation suits; the problem is that firms at times weaponize or misuse the U5 as a retaliatory or self-protective tool, reporting false or misleading information to harm departing brokers or to shift regulatory scrutiny away from the firm's own misconduct. Immunity does not solve this problem — it exacerbates it by eliminating the principal check on such abuse. Any immunity would serve as a disaster for associated persons and the investing public, serving as a sword for the industry rather than a shield for the integrity of the CRD system and investor protection issues.

PIABA urges FINRA to recognize that the interests of investors, which is PIABA's interest, and the interests of registered representatives in this context are aligned, not adverse. Investors benefit from a BrokerCheck system populated with accurate, complete, and reliable disclosures. They are harmed when the system is corrupted — either by the suppression of legitimate adverse disclosures or by the inflation of false or retaliatory ones. Creating immunity

for false U5 statements would harm investors by degrading the reliability of BrokerCheck, harm brokers by leaving them without recourse against abusive firms, and harm the regulatory framework by reducing firms' accountability for the accuracy of their statutory reporting obligations.

General Request for Comment

> **Request for Comment M.1.** *Are there any other FINRA rules, guidance, operations or administrative processes that should be updated or amended that would help ensure that customers, members and their associated persons are treated fairly and support an efficient and transparent arbitration forum? If so, what has been your experience with these rules, guidance, operations or processes and what are your suggestions for improving them?*

PIABA and its members represent investors in FINRA arbitration on a daily basis and have extensive experience with the rules that govern the forum. Based on that experience, we identify several areas where targeted reforms would meaningfully improve the fairness, efficiency, and transparency of the arbitration forum.

Arbitrator Diversity

The composition of the arbitrator pool remains a significant concern. Although FINRA has taken steps toward broader recruitment, the roster continues to skew toward older, white, male professionals and does not adequately reflect the diversity of the investing public. This lack of diversity is not merely cosmetic. It affects how claims are perceived, how credibility is evaluated, and whether investors from underrepresented communities view the forum as fair and accessible.

Recent changes to arbitrator qualification standards risk exacerbating this problem. Requiring a four-year degree and defined “professional” experience narrows the pool and disproportionately excludes candidates from communities that have faced barriers to traditional career paths. These changes move the forum further from a representative cross-section of investors.

FINRA should recommit to active, diversity-focused recruitment and reassess whether current qualification thresholds can be structured to preserve competence while expanding access. A neutral forum requires both fairness in individual arbitrators and diversity across the roster as a whole.

Unpaid Awards

FINRA should strengthen its rules and enforcement mechanisms regarding non-payment of arbitration awards. The existing framework leaves too many investors with uncollectible awards, and the problem is, to a significant degree, one of FINRA's own making. FINRA has set net capital requirements for member broker-dealers that are wholly inadequate to ensure that firms have the financial resources to satisfy arbitration awards when they are entered against them. A small broker-dealer can be admitted to FINRA membership, can take on hundreds or thousands of customer accounts, can cause those customers substantial losses through fraud or misconduct, and can exit the industry leaving a trail of unpaid awards, all while having been required to maintain only a nominal capital cushion. FINRA has known about this dynamic for years and has not fixed it.

The financial services industry asks investors to trust it with their savings and retirement assets. The very least that FINRA should require in return is that the firms and individuals in its membership have sufficient financial resources to stand behind an adverse arbitration award. Yet FINRA's net capital rules, which are set by the SEC but which FINRA administers and enforces, do not account for potential arbitration liability in any meaningful way. A firm facing a single significant customer claim may have no realistic ability to pay a substantial award, and FINRA has no mechanism to flag that reality to the investor before the case proceeds through years of

litigation. The result is that investors spend years pursuing their claims, prevail at hearing, and then discover that the award is worthless paper.

FINRA should work with the SEC to evaluate whether broker-dealer net capital requirements should be recalibrated to account for potential arbitration liability, including by requiring firms with a history of customer complaints or pending claims to maintain enhanced capital reserves. In addition, FINRA should require member firms to maintain liability insurance sufficient to cover reasonably anticipated arbitration awards. PIABA has previously urged FINRA to adopt a liability insurance requirement, and we reiterate that call here. The industry routinely objects to such a requirement on cost grounds, but that objection is entitled to little weight. The cost of insurance is simply the cost of being in the business of handling other people's money. If a firm cannot afford adequate liability insurance, that is a strong signal that it cannot afford to be in business at all.

An industry-funded recovery pool, as PIABA has long advocated, would also provide a meaningful backstop for investors who prevail against respondents that lack the resources to pay. FINRA has deflected this proposal for years, citing questions about its authority and concerns about moral hazard. Those objections do not withstand scrutiny. FINRA's own members benefit enormously from operating within a mandatory arbitration system that channels investor claims away from courts and juries. The price of that benefit should include a collective responsibility to ensure that investors who prevail in that system are actually paid. Moreover, the argument that a recovery pool creates a moral hazard for firms that do honor their obligations is undermined by the fact that FINRA already disciplines members who fail to pay, and has other tools available to disincentivize misconduct. We also note the irony that FINRA recently returned approximately $100 million in profits to its member firms while investors with unpaid awards wait for relief that

may never come. That money could have funded a meaningful recovery pool. FINRA's choice to reward its members rather than protect the investors those members harmed speaks for itself.

Prior Customer Relationships as a Disqualifying Conflict for Arbitrator List Placement

FINRA's arbitrator selection process contains a structural inconsistency that undermines the neutrality of the arbitrator roster from the outset. Under FINRA Rule 12407(a), the Director of Arbitration will likely grant a challenge for cause to remove a sitting arbitrator if that arbitrator "is **or was** a business partner, vendor, customer or client of a party." (emphasis added). In other words, FINRA recognizes that a prior customer relationship between an arbitrator and a respondent firm constitutes precisely the kind of conflict that disqualifies an arbitrator from serving on that party's case. Those prior relationships also create a conflict because the past brokerage relationships provide firms with granular insight into the arbitrators' financial situation and trading history which may provide a treasure trove of data and information that customers do not have.

Yet FINRA does not screen for this conflict before placing arbitrators on the ranking list that is presented to the parties for selection. The result is that arbitrators who would be removable for cause upon challenge are routinely appearing on ranking lists in cases against firms where they previously held brokerage accounts or maintained a relationship. PIABA members have experienced this problem firsthand. When they have identified prospective arbitrators on the ranking list who are former customers of the respondent firm and requested that those arbitrators be removed and replaced before rankings are submitted, FINRA has denied those requests, forcing investor claimants to expend their limited strikes to remove conflicts that FINRA's own screening process should have caught before the list was ever generated.

This places the burden of identifying and curing a known, pre-existing conflict entirely on the parties, and it does so in a manner that is fundamentally unfair to investor claimants. The

information asymmetry in this process is particularly troubling. When a former customer of a respondent firm appears on the arbitrator list, the firm has access to confidential information about that individual that the claimant does not: the arbitrator's investment history, account type, risk profile, net worth, and relationship history with the firm. The respondent can use this information to make a fully informed decision about whether to strike or rank that arbitrator. The investor claimant has no such information and no way to obtain it. Allowing a process that gives one party a meaningful informational advantage over the other in arbitrator selection is inconsistent with any reasonable definition of a neutral forum.

The practical harm compounds the structural one. When a conflicted arbitrator appears on the list and FINRA refuses to remove him or her upon request, the investor claimant who has identified the conflict is forced to use one of their limited strikes on an arbitrator who should never have been on the list in the first place. Each such forced strike depletes the claimant's ability to remove other arbitrators they may have legitimate concerns about, distorting the entire selection process to the investor's detriment.

FINRA should address this problem on two levels. First, FINRA should implement a pre-list screening process that prevents arbitrators from being placed on a ranking list in any case involving a party with whom the arbitrator has or previously had a customer or client relationship. This is a conflict that FINRA already treats as grounds for removal after empanelment; there is no principled reason not to screen for it before the list is generated. Second, where a conflicted arbitrator does appear on a list and a party identifies the conflict before rankings are submitted, FINRA should remove and replace that arbitrator as a matter of course, without requiring the party to expend a strike. The denial of such requests, as PIABA members have experienced, is indefensible. Strikes are a finite resource intended to address legitimate uncertainty about arbitrator

fitness, not to cure conflicts that FINRA's own processes should have prevented. As FINRA's own Arbitrators' Guide recognizes, the public perception of fairness in the arbitral forum is of paramount importance. Allowing arbitrators with known conflicts to populate the neutral list, and then denying investor requests to remove them, is incompatible with that principle.

Holding Company

FINRA currently permits non-FINRA member holding companies and individual non-FINRA registered control persons to own and control FINRA-registered broker-dealers while remaining outside FINRA's regulatory jurisdiction and exempt from mandatory customer arbitration. Despite these holding companies, in many cases, owning the majority interest if not being the sole and exclusive owner of broker-dealers, being listed as "Control Persons" on Form BD filings, and exercising complete operational control over member firms, FINRA claims it lacks authority to regulate these entities or compel them to arbitrate customer disputes.

PIABA has met with FINRA and outlined the regulatory gap. This regulatory gap is being systematically exploited through a scheme that operates as follows: (1) a holding company owned by FINRA-registered individuals acquires a broker-dealer; (2) the broker-dealer engages in sales practices that harm customers; (3) the profits derived from those very sales practices are passed from the broker-dealer to its unregulated holding company; (4) as customers' claims accrue—and even as they file claims in FINRA arbitration—but before awards are paid, the holding company closes the broker-dealer or transfers profitable operations to another entity it controls; (5) investors may be left holding uncollectible judgments against the shell broker-dealer while the same individuals continue operating in the securities industry under FINRA membership.

One recent matter illustrates how this scheme operates with apparent FINRA acquiescence. Center Street Securities, Inc. ("Center Street") was owned by Center Street Holdings, Inc.

("CSH"), which was listed as a Control Person on Form BD. CSH was owned primarily by the firm's president, a FINRA-registered Associated Person. In late 2020/early 2021, Arete Wealth, Inc.—owned and controlled primarily by FINRA-registered individuals including who ran the broker-dealer entity—acquired CSH through a stock purchase agreement. Arete issued press releases announcing the firms would "strategically combine their entities" and operate under the Arete Wealth brand. This represented to the market that Arete was assuming responsibility for Center Street's operations and, by implication, its obligations.

After Center Street faced dozens of FINRA arbitration claims in 2022-2023 for the same unsuitable sales practices FINRA had sanctioned Center Street for in 2014 (FINRA AWC No. 2012034936004), Arete's registered owners allegedly abandoned the merger plan. Instead, they strategically shut down Center Street Securities, filed Form BDW, and reportedly placed the firm into a "Delaware Liquidating Trust."

Center Street ceased defending arbitration cases and failed or refused to comply with discovery orders. This damage was immediate and ongoing, with more than $2 million in unpaid FINRA Awards in January and February 2025 alone.[88] These victims are not sophisticated institutional investors—they are retirees, farmers, and working Americans who relied on the regulatory system to protect them.

Meanwhile, Arete Wealth Management, LLC (CRD #44856) continues operating as a FINRA member with the same controlling individuals. These individuals enjoy all benefits of FINRA membership and registration as Associated Persons while investors who won awards against their affiliated entity received no restitution for the harm they suffered.

[88] *See* FINRA Case Nos. 22-01937, 22-01620, and 22-02391, totaling almost $2.18 million in awards on which investors have still not yet collected against Center Street.

As of today, FINRA has not taken action without SEC direction, with indications that this issue involves "control person" definitions that require SEC approval. PIABA has also identified a gap in FINRA Rule 1017, which governs "continuing membership applications" (CMAs) for changes in ownership of broker-dealers. That Rule requires disclosure of unpaid awards and pending settlements but does not address (1) pending arbitration claims that have not yet resulted in awards; (2) corporate restructurings, spin-offs, or asset transfers designed to avoid liability; (3) use of shell companies and non-registered entities to exercise control while avoiding arbitration obligations; or (4) liability of holding companies and owners for awards against affiliated entities.

When FINRA attempts to assert jurisdiction over holding companies under FINRA Rule 1011(b)(3)—which defines them as "associated persons" when they control members—arbitration panels routinely refuse to accept jurisdiction, and holding companies successfully obtain restraining orders in federal court.

FINRA should require all holding companies, control persons, and direct or indirect owners of FINRA members to agree to FINRA jurisdiction over disputes arising from the member firm's activities. Further, FINRA should establish that holding companies, control persons, and owners with 25% or greater ownership interest are jointly and severally liable for arbitration awards against member firms they own or control.

> **Request for Comment M.2.** *Where have FINRA rules related to arbitration been particularly effective or ineffective, and why? Are there areas where a revised approach might enhance the effectiveness and efficiency of the dispute resolution process while preserving customer protection?*

FINRA's arbitration forum serves an essential function in the investor protection ecosystem. When the forum works well, it provides investors with an accessible, lower-cost, and faster means of resolving disputes with their brokerage firms. Our members have had numerous

experiences in which the forum operated efficiently and fairly. However, there are areas where the rules and their application have fallen short.

Discovery Guide Abuse

One of the most persistent and frustrating failures in FINRA's arbitration forum is the routine disregard by respondent firms of FINRA's own Discovery Guide. The Discovery Guide was designed to provide a baseline of documents that each party is obligated to produce automatically, without the need for a formal request or a ruling from the panel. In practice, however, that baseline is largely fictional. Our members regularly encounter firms that produce little or nothing in response to their Discovery Guide obligations, forcing investors to fight, item by item, for documents they were already entitled to receive as a matter of course.

Firms assert boilerplate relevance and proportionality objections to categories of documents that are expressly listed in the Guide. They produce documents in formats designed to be difficult to search or use, such as unseparated bulk PDF files with no labeling or organization. They produce documents on rolling bases that stretch across months, leaving investors uncertain whether production is complete as hearing dates approach. They claim that responsive documents do not exist, without any certification or explanation, leaving investors with no practical way to test that assertion. And when investors bring these issues to the panel, they too often encounter arbitrators who are reluctant to impose meaningful sanctions, treating discovery disputes as minor inconveniences rather than the fundamental fairness issues they are.

The consequences for investors are serious. Investor claimants in FINRA arbitration are almost entirely dependent on documents in the possession of the respondent firms to prove their cases. Account statements, trade confirmations, suitability records, supervisory review notes, email communications between brokers and their supervisors, surveillance reports, and complaint

histories are all in the firm's possession and control. When firms delay or withhold this material, investors are forced to spend additional time and money bringing motions to compel, attending additional prehearing conferences, and in some cases proceeding to hearing without the complete evidentiary record they are entitled to. FINRA's existing sanction tools, including monetary sanctions and adverse inferences, are available to arbitrators, but they are used inconsistently and rarely with the force necessary to deter continued non-compliance.

FINRA should take concrete steps to address this chronic problem. First, FINRA should update the Discovery Guide to make clear that respondents' Discovery Guide obligations are mandatory and that objections to listed categories of documents are disfavored and must be supported by specific, non-boilerplate justification. Second, FINRA should provide stronger guidance to arbitrators on imposing sanctions for unjustified Discovery Guide non-compliance, including through enhanced training that treats discovery enforcement as a core component of hearing management. Third, FINRA should consider adopting a rule requiring parties to certify, under penalty of sanctions, that their Discovery Guide production is complete, similar to the certification requirements in federal civil litigation. The Discovery Guide is only as useful as FINRA's willingness to enforce it, and the current enforcement framework has proven inadequate.

Application of Rule 12808 to Elderly and Seriously Ill Investors Whose Claims Are Filed Through Legal Entities

FINRA's new Rule 12808, which provides for accelerated proceedings in cases involving elderly or seriously ill claimants, reflects an important and long-overdue recognition that delay in arbitration can be devastating for investors who may not survive to see an award. PIABA strongly supports the rule's underlying purpose. However, FINRA's current administrative application of the rule has revealed a serious interpretive gap that threatens to render the rule meaningless for a substantial class of the very investors it was designed to protect.

FINRA has taken the position that Rule 12808's accelerated procedures will not apply when the named claimant on the arbitration filing is a legal entity, such as a single-member LLC or a trust, even when the sole member, managing member, or beneficial owner of that entity is an elderly or seriously ill individual who is the real party in interest. Under FINRA's current approach, an 80-year-old investor whose brokerage account is held in the name of his trust or a single-member LLC he controls would be denied accelerated treatment simply because the legal title to the account rests in the entity rather than in his name.

FINRA should clarify the application of Rule 12808 to make clear that the accelerated procedures apply whenever the individual whose age or medical condition would otherwise qualify for acceleration is the real party in interest behind a named claimant entity, including as the sole member, managing member, settlor, or primary beneficiary of the filing entity.

> **Request for Comment M.3.** *What ambiguities in FINRA rules related to arbitration should FINRA address? Are there any other modifications to FINRA rules related to arbitration that should be considered to clarify their application?*

Hearing Format: In-Person Versus Virtual Hearings

FINRA's rules and guidance do not currently establish a clear standard for whether arbitration hearings will be conducted in person or by videoconference. This lack of clarity has produced inconsistent outcomes across cases, with some panels defaulting to virtual hearings even when one or both parties have requested an in-person hearing. This inconsistency is unfair to investors, who may be presenting live testimony and documentary evidence in a dispute that will determine their financial recovery.

At the same time, a rigid in-person default would not serve the interests of all investors. Some claimants have practical reasons to prefer virtual hearings. For example, there may be health concerns or the claimant may reside outside the United States and face significant practical barriers

to attending in-person hearings, including the cost and logistics of international travel. In such circumstances, requiring an investor to appear in person would impose a substantial and inequitable burden that could effectively foreclose access to the forum altogether.

FINRA's rules should therefore provide that the claimant should have the choice whether to have an in-person or zoom hearing and give the respondent the ability to move to change that determination only upon a showing of good cause. At a minimum, where a claimant resides outside the United States, the claimant should be entitled to participate virtually as a matter of right, without the need for a motion or a showing of good cause, and without the ability of any other party to object.

Jurisdiction Over Non-Securities Insurance Products Sold by Registered Representatives

A significant and recurring source of confusion arises in cases involving the sale of non-securities insurance products, including indexed annuities, indexed universal life insurance, and whole life insurance, when those products are sold or recommended by a registered representative of a FINRA member broker-dealer as part of an investment strategy. Investors who suffer losses in these products often find themselves in a procedural no-man's land: FINRA has in some cases refused to process claims involving these products entirely, or has sent claimants' counsel interrogative correspondence demanding that they explain and justify their legal theories before the case is even opened, a practice that has no basis in FINRA's rules and that improperly inserts FINRA staff into a gatekeeping role that belongs exclusively to the arbitrators. Panels in other cases have granted respondents' motions to dismiss on jurisdictional grounds, only to wind up in court where the firm argues that the securities losses belong in FINRA.

The problem is not one of ambiguous rules. The problem is that FINRA staff and, in some cases, arbitrators are failing to apply the rules correctly. FINRA should develop and implement

mandatory training for both DRS staff and arbitrators that makes clear these cases belong in the FINRA forum when the jurisdictional prerequisites of Rule 12200 are satisfied. FINRA staff should be trained to process cases that involve non-securities insurance products sold by associated persons without imposing threshold merits review or demanding that claimants' counsel pre-justify their theories before a case is opened. Arbitrators should be trained to recognize that the presence of an insurance product in a claim does not, by itself, strip the panel of jurisdiction.

> **Request for Comment M.4.** *Can FINRA make any of its administrative processes or interpretations related to the arbitration process more efficient and effective while protecting customers? If so, which ones and how? Are there any processes or interpretations that should be added?*

Multiple Users on the DR Portal

FINRA's Dispute Resolution Portal currently permits only a single user per firm to register for a given case. This is a significant and unnecessary operational limitation. In practice, it forces law firms to make a difficult threshold choice between designating counsel or an administrative assistant as the registered user, and between different attorneys at the firm where more than one attorney is involved in the matter. Because all case notifications flow only to the single registered user, a missed notification, due to vacation, illness, or a change in staffing, can have serious consequences for the handling of the case.

Federal courts have long addressed this problem through PACER's notification system, which allows any number of attorneys at a firm to be added as counsel of record and to receive electronic notifications on a case. There is no apparent technical or policy reason why FINRA's DR Portal could not function the same way. FINRA has not provided any explanation for this limitation, and we urge FINRA to update the DR Portal to allow for multiple registered users and

notification recipients per case. This is a straightforward administrative improvement that would reduce the risk of missed notifications and improve the management of cases for all parties.

Technical and AV Services for Hearings Outside FINRA Offices

FINRA operates 69 hearing locations across the country, but not every city or region where cases are heard has a FINRA office. When hearings are conducted at hotel or other off-site locations, FINRA currently provides no zoom administrator, no AV support, and no technical assistance whatsoever. The practical consequence of this policy falls hardest on investors and their counsel. When witnesses appear remotely in hearings at off-site locations, the parties, who are most often investors, are required to bear the full cost of internet access, AV equipment, and technical support, which can easily exceed $3,000 per hearing day. This is an inequitable allocation of costs that disadvantages investors, who are already paying FINRA's filing fees and other forum costs in order to pursue their claims. FINRA has offered no justification for why these costs should be borne by the parties rather than treated as a cost of administering the forum. FINRA should either provide technical and AV support for hearings at off-site locations, contract with vendors to make such services available at standardized rates, or offset the costs through the forum's existing fee structure.

Staffing and Responsiveness

FINRA's ability to administer the dispute resolution forum effectively depends on having an adequate number of experienced staff. Over the past several years, staff reductions have made it increasingly difficult to reach a live person at FINRA when questions or issues arise, and have resulted in meaningful delays in the processing of motions and other filings. These delays harm investors, who are waiting for resolution of their claims, and they compromise the fairness of proceedings when procedural questions cannot be promptly resolved.

We note that in a recent fiscal year, FINRA elected to return approximately $100 million in profits to its member firms. FINRA should prioritize the operational health of its dispute resolution forum, which serves the investing public, over profit distributions to member firms. We urge FINRA to use available resources to restore adequate staffing levels for its Dispute Resolution Services staff, and to recall a portion of prior profit distributions if necessary to fund those positions.

Billing Practices and Case Accounting

FINRA's billing practices for arbitration cases are unreliable, opaque, and frequently result in invoices or refund notices being issued to the parties months, and in some instances more than a year, after a case has closed. Our members regularly receive unexpected invoices for hearing session fees and other forum costs long after the underlying arbitration has concluded, with no explanation of how the amount was calculated or why it was not billed contemporaneously with the hearing sessions to which it relates. We also receive refund checks for amounts that FINRA has apparently over-collected, again with little or no explanation, arriving so long after the case closed that our clients have difficulty reconciling the payment to any particular matter.

This is not a minor administrative inconvenience. Delayed and unexplained billing creates real problems for law firms and their clients. Investors who have already closed the chapter on a difficult and costly dispute are blindsided by invoices they were not expecting and cannot verify. Law firms managing large dockets of arbitration cases cannot accurately account for the costs of individual matters when billing is unreliable and untimely. And the lack of transparency in how FINRA calculates its fees makes it impossible to determine whether any given invoice is accurate.

FINRA should overhaul its billing processes to ensure that all invoices are issued promptly, no later than ten days after the close of a case, and that every invoice includes a clear, itemized

breakdown of each hearing session, filing fee, or other charge being assessed, with the applicable date and the rule authorizing the charge. Failure to timely bill should result in the waiver of payment. Similarly, any refund of overpaid amounts should be issued on the same timeline and accompanied by an explanation of the basis for the refund. FINRA administers a forum that charges mandatory fees to parties who have no choice but to participate in it. The basic obligation of accurate, timely, and transparent billing is not an unreasonable expectation in return.

> **Request for Comment M.5.** *Are there interdependencies among the topics identified in this Notice such that addressing certain concerns would reduce or eliminate the need to address others? For example, would enhanced arbitrator qualifications or training, or an arbitration appeals process, address concerns about punitive damages awards, explained decisions or case management efficiency? Please identify which issues you believe are most interdependent and explain how addressing one would impact the need to address the other(s).*

Many of the issues identified in this Notice are interconnected, but FINRA should be cautious about accepting the premise embedded in certain of the Notice's framing questions, which suggest that enhanced arbitrator training or an appeals process might serve as substitutes for, or mitigating factors against, punitive damages awards.

First, arbitrator training and punitive damages are not meaningfully interdependent in the way the Notice implies. The parties instruct arbitrators that punitive damages are a remedy available upon a showing of serious misconduct meeting the applicable legal standard. The rarity of punitive damages awards in FINRA arbitration demonstrates that arbitrators are not awarding punitive damages casually or without adequate basis. The suggestion that arbitrators receiving additional training would award punitive damages more or less frequently is not supported by the data, and the framing of this question betrays an assumption that current punitive damages awards are the product of arbitrator error rather than legitimate findings of serious misconduct. PIABA rejects that assumption. Punitive damages have long served an important deterrent and punishment

function, and the answer to concerns about any particular award is the existing judicial review process under the Federal Arbitration Act, not a wholesale restructuring of arbitrator incentives through training designed to produce different outcomes.

Second, an arbitration appeals process would fundamentally undermine both the purpose of arbitration and the framework established by the Federal Arbitration Act and its state law counterparts. The defining characteristic of arbitration, and the principal reason FINRA's members insist on it as the exclusive forum for customer disputes, is finality. Investors who are compelled to arbitrate rather than litigate in court are told that the tradeoff is speed, lower cost, and a definitive resolution. An appeals process eliminates that tradeoff entirely, while preserving all of the other features of arbitration that disadvantage investors relative to court, including limited discovery, no jury, and no right of appeal on the merits under existing law. An appellate layer within the FINRA forum would dramatically increase the time and cost of dispute resolution, would allow well-resourced firms to use the appeals process as a tool to pressure investors into accepting reduced settlements after a favorable award, and would introduce a new mechanism for eroding awards that investors have already won. FINRA should reject any proposal for an internal arbitration appeals process. The existing framework under the FAA, which permits vacatur of awards in narrow circumstances involving corruption, evident partiality, or arbitrator misconduct, provides sufficient judicial oversight without converting arbitration into a two-stage litigation proceeding.

Finally, and perhaps most fundamentally, the problem of unpaid awards is interdependent with virtually every other issue in this Notice. A forum in which investors regularly prevail but cannot collect is not a functional investor protection mechanism, regardless of how well its discovery rules, arbitrator training, or hearing procedures are designed. Every other improvement FINRA might make to its arbitration rules is undermined if the awards those rules produce are

unenforceable in practice. Addressing the structural causes of unpaid awards is not one item among many on FINRA's reform agenda. It is the predicate on which the legitimacy of the entire forum depends.

CONCLUSION

In sum, PIABA encourages FINRA to ensure that any considered changes would prioritize the strengthening of investor protection and integrity of the markets. We urge FINRA to review all proposals in response to 26-06 and then proceed with any changes using your current approved system of both notice and comment and use of the National Arbitration and Mediation Committee (NAMC). FINRA should not make changes to placate its board or industry members as the expense of investor protection. The core principles of fairness, transparency, and acting in the customer's best interest must remain intact and be upheld. PIABA looks forward to the opportunity to comment on any future proposals.

Sincerely,

Michael C. Bixby, President
Public Investors Advocate Bar Association