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Via E-mail: pubcom@finra.org

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

Re: FINRA Special Notice – Request for Comment Regarding Engagement Programs

Dear Ms. Mitchell:

We write on behalf of Proskauer Rose LLP, an international law firm headquartered in New York City that represents FINRA member firms and other clients in the financial services industry in various capacities, including employment arbitrations administered by FINRA Dispute Resolution. We write in response to FINRA's Special Notice dated March 21, 2017 ("Special Notice"), which seeks comments regarding potential enhancements to certain FINRA engagement programs. We appreciate FINRA issuing the Special Notice and soliciting comments from interested parties concerning its activities.

Because of the breadth of our representations in employment arbitration, this letter focuses on how we believe FINRA can improve its dispute resolution programs. For ease of reference, we have included quotations from the Special Notice below along with our comments.

1. **Request for Comment on Engagement in Advisory, Ad Hoc and District Committees** – Are there additional areas not addressed by existing committees where FINRA should obtain periodic input? If so, would a new advisory or *ad hoc* committee be an appropriate vehicle for obtaining that advice? (Special Notice at 10.)

We believe that FINRA should establish an *ad hoc* committee to analyze issues concerning employment disputes and recommend improvements to the processes and procedures used when employment disputes are arbitrated, including employment-specific revisions to the Code of Arbitration for Industry Disputes. As recognized by FINRA's establishment of a separate Industry Code, employment arbitrations between associated persons and member firms present unique issues that deserve to be considered separately and fully. According to the latest statistics available, there are 633,822 registered representatives and 3,813 member firms,[1] and FINRA has

[1] Statistics as of April 2017. *See* https://www.finra.org/newsroom/statistics.

taken the position that FINRA Dispute Resolution is the sole forum for adjudication of employment disputes. *See* Regulatory Notice 16-25 (interpreting Rule 13200).

In 2014, we supported FINRA's decision to form an *ad hoc* Dispute Resolution Task Force to study the dispute resolution process and make recommendations to the National Arbitration and Mediation Committee. The Task Force issued its Final Report and Recommendations ("Final Report") in December 2015, which noted that the Task Force "focused its attention on securities disputes involving customers of brokerage firms." (Final Report at 4.) We believe that a new task force should be convened to focus on employment disputes involving associated persons and member firms and a similar *ad hoc* committee structure would work well for this purpose.

While we believe that the committee should conduct a thorough and fulsome review of the issues, we specifically note the following topics that should be analyzed. As an initial matter, we agree with the Final Report that "the most important investment in the future of the FINRA forum is in the arbitrators." (Final Report at 5.) We therefore recommend that FINRA should provide mandatory substantive training to arbitrators—or at the minimum to chairpersons—on common legal claims that are adjudicated in intra-industry cases.[2] The statistics demonstrate that claims for breach of contract, unpaid compensation, wrongful termination, and Form U5 defamation are among the most common claims in intra-industry arbitrations.[3] We believe that arbitrators would benefit from training in these areas. For example, FINRA provides training materials that explain the standard for expungement of customer information under Rule 2080. However, there is not similar training concerning the standard for expungement of employment information. Nor is there training on the absolute and qualified privileges applicable to Form U5 language or the fact that an award of monetary damages for Form U5 defamation is barred by New York law. The *ad hoc* committee we suggest could consider what substantive training should be provided to arbitrators to ensure that they are sufficiently qualified to adjudicate employment claims, which often seek substantial damages. Much like the training required for statutory employment discrimination claims, we believe that employment-specific training would benefit the arbitrators, parties, and public through the just and efficient resolution of claims.

We also believe that the committee should consider additional training for arbitrators regarding discovery issues that are common to employment disputes, including electronic discovery. Based on our experience handling employment arbitrations, we believe that arbitrators would benefit from training on all aspects of the electronic discovery process, including, but not limited to, the methods for searching for electronically stored information, the associated costs, the need

[2] We agree with the Task Force's recommendations of "increased training for chairpersons" (Recommendation No. 17) and that "[c]ompulsory training requirements should be considered for arbitrators with a record of poor evaluations, as well as inexperienced arbitrators and arbitrators who have not been recently selected for panels and who do not arbitrate regularly" (Recommendation No. 16). (*See* Final Report at 54.)

[3] FINRA Dispute Resolution Statistics, https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics.

for proportionality between potential relevance and search cost, and reasonable expectations regarding the time and effort it takes for searches and reviews to be performed. In addition, because employees of financial services institutions often have supervisors and/or colleagues who work abroad, arbitrators would benefit from training on cross-border data privacy issues and how the laws of other jurisdictions impact the production of electronically stored information.

Moreover, an *ad hoc* committee could consider whether additional rules should be added to the Industry Code. We note that the Task Force's Final Report recommended that Rule 13504 be amended to add a new basis for a motion to dismiss prior to the conclusion of the case-in-chief, where a party had previously litigated the same claim and lost. We support this amendment and believe that an *ad hoc* committee should consider other motions to dismiss that similarly advance the goals of efficiency and fairness in arbitration. For example, FINRA should consider permitting a pre-hearing motion to dismiss because a claim is barred by the statute of limitations.

The above are merely examples of the type of issues that FINRA could consider as part of a committee's review of issues concerning employment arbitration, but we believe that they illustrate the value that could be gained by such a review.

2. **Request for Comment on Transparency Regarding Dispute Resolution Programs –** How helpful are the tools and resources currently available on FINRA's dispute resolution web page? What additional tools and resources regarding FINRA's arbitration and mediation processes would be helpful? If you have accessed the Awards Online database, how user-friendly did you find the database? Should FINRA consider making any changes to the accessibility of the database, or the information available through the database? (Special Notice at 22.)

We believe that the recent improvements and additions to FINRA's Dispute Resolution website are positive steps. For example, we appreciate that FINRA now makes public certain information concerning the number of pending cases and number of arbitrators by type (*i.e.*, public or non-public) in each hearing location. (*See* Special Notice at 22.) We find the statistics section of the website to be particularly useful and trust that FINRA will continue to provide detailed statistics concerning the number and type of claims adjudicated in the forum.

As to FINRA's Awards Online database, we believe that the database is fairly user friendly but further changes could be made to increase its utility and usefulness. We suggest adding functionality that would permit a user to do the following: (i) search by arbitrator, counsel, or party name; (ii) filter by case type (*i.e.*, industry versus customer case); (iii) filter to include or exclude stipulated awards; and (iv) filter to include or exclude cases seeking only expungement relief. These changes would permit parties and the public to review past arbitration awards more efficiently. To the extent that this is challenging from a technological perspective, we suggest that FINRA begin cataloging awards on a prospective basis to permit this functionality.

3. **Request for Comment on Transparency Regarding Dispute Resolution Programs –** How else might FINRA enhance its dispute resolution forum's operational transparency?

We share FINRA's view that operational transparency is of paramount important for the success of the dispute resolution process. For this reason, we believe that FINRA should provide additional information concerning the Neutral List Selection System ("NLSS") and how arbitrator candidates are selected for ranking lists that are provided to the parties. FINRA has recently published information concerning the process on its website[4] but we believe that more information should be shared concerning the process. For example, FINRA's website explains that the "NLSS automatically excludes arbitrators from the lists based upon known conflicts of interest, such as when the arbitrator is currently employed by or currently has a securities account with a party." But we believe that more information could be provided concerning how arbitrators are excluded automatically because of conflicts. Using the example from the website, is an arbitrator excluded because he or she currently has a securities account with a subsidiary of a party? Moreover, FINRA should explain the procedure by which a party can request information concerning the operation of the NLSS in its case and how a party can lodge a for-cause challenge to an arbitrator based on concerns about the operation of the NLSS.

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We appreciate FINRA issuing the Special Notice and soliciting comments from stakeholders concerning its activities. Should you have any questions, please feel free to communicate with our firm regarding these comments.

Respectfully submitted,

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[4] Arbitrator Selection, http://www.finra.org/arbitration-and-mediation/arbitrator-selection.