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April 11, 2023

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: File No. SR-FINRA-2022-033 (Proposed Rule Change to Amend the Codes of Arbitration Procedure to Make Various Clarifying and Technical Changes to the Codes, Including in Response to Recommendations in the Report of Independent Counsel Lowenstein Sandler LLP) – Response to Comments

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority, Inc. (“FINRA”) in response to comments received by the Securities and Exchange Commission (“SEC” or “Commission”) regarding the above-referenced rule filing. The proposed rule change would amend the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) (together, “Codes”) to make changes to provisions relating to the arbitrator list selection process in response to recommendations in the report of independent counsel Lowenstein Sandler LLP.¹ The Proposal would also make clarifying and technical changes to requirements in the Codes for holding prehearing conferences and hearing sessions, initiating and responding to claims, motion practice, claim and case dismissals, and providing a hearing record.

The Commission published the Proposal for public comment in the Federal Register on January 12, 2023, and received five comments in response.² PIABA,

¹ See Securities Exchange Act Release No. 96607 (January 6, 2023), 88 FR 2144 (January 12, 2023) (Notice of Filing of File No. SR-FINRA-2022-033) (“Proposal”). FINRA notes that fn. 63 of the Proposal incorrectly referred to proposed Rules 12504(a)(4) and 13504(a)(4). The correct references are to proposed Rules 12503(a)(4) and 13503(a)(4).

² See Letter from Hugh Berkson, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Secretary, SEC, dated February 1, 2023 (“PIABA”); letter from William A. Jacobson, Clinical Professor and Director & Dustin Hartuv, Erik Olson & Jianing Zhao, Students, Cornell Securities Law Clinic, Cornell University Law School, to Vanessa Countryman, Secretary, SEC,

Cornell, PACE and St. John's expressed general support for the Proposal.³ PACE stated that the Proposal "will improve transparency, consistency, and fairness" for "all dispute resolution forum participants, whether they are pro se claimants, new attorneys, or parties or attorneys with experience in the forum." St. John's stated that the Proposal promotes "clarity and transparency, particularly for pro se filers." The commenters also expressed concerns about certain aspects of the Proposal and suggested modifications.

The following are FINRA's responses to the commenters' material concerns.

I. List Selection Process Amendments

In June 2022, FINRA published the report from Lowenstein Sandler LLP relating to an independent review and analysis of the FINRA Dispute Resolution Services ("DRS") arbitrator list selection process ("Report").⁴ The Report made several recommendations to provide greater transparency and consistency in the arbitrator list selection process, some of which require amendments to the Codes. The Proposal would amend the Codes to implement the Report's recommendations on excluding an arbitrator from lists based on a manual review of conflicts of interest and requiring a written explanation whenever a challenge to remove an arbitrator is granted or denied.⁵ PIABA, PACE, Cornell and St. John's expressed general support for these proposed changes, but suggested modifications.

dated February 2, 2023 ("Cornell"); letter from Carolina Carasa & Roberto Quiroga, Student Interns & Elissa Germaine, Supervising Attorney, Fairbridge Investor Rights Clinic at the Elisabeth Haub School of Law at PACE University, to Vanessa Countryman, Secretary, SEC, dated February 2, 2023 ("PACE"); letter from Gavriel Rosenbaum, Julia Shea, Jacob Wetter, Legal Interns & Christine Lazaro, Director of the Securities Arbitration Clinic and Professor of Clinical Legal Education, St. John's University School of Law, to Vanessa Countryman, Secretary, SEC, dated February 2, 2023 ("St. John's"); and letter from George Friedman, dated February 3, 2023 ("Friedman").

³ Friedman took no position on the Proposal.

⁴ See Proposal, supra note 1, 88 FR 2144, 2144; see also FINRA, The Report of the Independent Review of FINRA's Dispute Resolution Services – Arbitrator Selection Process, <https://www.finra.org/sites/default/files/2022-06/report-independent-review-drs-arbitrator-selection-process.pdf>.

⁵ The Report recommended that DRS should consider amending its policies to require a written explanation whenever a challenge to remove an arbitrator is granted or denied, if a written explanation is requested by either party. See Report, supra note 4. Effective September 1, 2022, DRS updated its policy to provide a written explanation whenever a party-initiated challenge to remove an arbitrator is granted or denied, regardless of whether an explanation is requested by either party.

A. Conflicts of Interest

The Proposal would codify current practice whereby the Director excludes arbitrators from the arbitrator lists generated by the list selection algorithm based upon a manual review of current conflicts of interest not identified within the list selection algorithm.⁶ This manual review is described on FINRA’s website and in rule filings with the SEC, but not in the Codes.⁷

Cornell supported the proposed amendment because it “correctly recognizes . . . the importance of conducting manual reviews to supplement the algorithmic review for conflicts of interests.” Cornell continued that “[b]y allowing the Director to directly exclude arbitrators from the lists based on a manual review, FINRA helps prevent scenarios where the parties would have to initiate a challenge to remove arbitrators due to blatant conflicts of interest once a panel has been appointed.” St. John’s supported the proposed amendment because it “will help parties feel confident in the selection process” and “help pro se filers, as well as others who are not familiar with the arbitration process, understand and be comfortable with the process.”

St. John’s, however, suggested that FINRA upgrade the list selection algorithm for a “more comprehensive and effective computerized process” to “limit the necessity for manual review.” As explained in the Report, the manual review is necessary because the list selection algorithm cannot accurately capture certain data (e.g., familial relationships or unregistered financial affiliate conflicts).⁸ In the interest of fairness and efficiency, FINRA believes that obvious conflicts of interest should be addressed before panel appointment to prevent unnecessary challenges to arbitrators and the attendant disruption to the case that would ensue. For these reasons, manual review will continue to be necessary.

⁶ See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5) and 13403(b)(5). The term “Director” means the Director of DRS. Unless the Codes provide that the Director may not delegate a specific function, the term includes FINRA staff to whom the Director has delegated authority. See Rules 12100(m) and 13100(m).

⁷ See FINRA, How Parties Select Arbitrators, <https://www.finra.org/arbitration-mediation/arbitrator-selection>. See also Securities Exchange Act Release No. 40261 (July 24, 1998), 63 FR 40761, 40769 (July 30, 1998) (Notice of Filing of File No. SR-NASD-98-48) (stating that DRS will perform a manual review for conflicts of interests between parties and potential arbitrators); Securities Exchange Act Release No. 40555 (October 21, 1998), 63 FR 56670, 56675 (October 22, 1998) (Order Approving File No. SR-NASD-98-48) (describing the manual review for conflicts of interests between parties and potential arbitrators).

⁸ See Report, supra note 4.

In addition, FINRA notes that, in response to a recommendation in the Report, it has begun the process to “conduct an external procedural review of the [list selection algorithm] to determine if FINRA's current technology is still the most effective means in creating random, computer-generated arbitrator lists for the arbitrator participants.”⁹

B. Written Explanation of Director’s Decision on Party-Initiated Challenges

The Codes do not require the Director to provide a written explanation when deciding a party-initiated challenge to remove an arbitrator. The Proposal would amend the Codes to require the Director to provide a written explanation whenever a party-initiated challenge to remove an arbitrator is granted or denied.¹⁰ In support of the proposed amendment, PACE stated that “[r]equiring a written explanation should improve transparency in the arbitrator selection process overall and provide an understanding for the basis of a decision in a particular case.” St. John’s added that “the practice of providing written explanations for the Director’s decisions provides extra transparency to the arbitration process.” PIABA commented that “[r]equiring the Director to issue a written decision when deciding a party-initiated challenge to an arbitrator is another improvement to the Codes that improves the transparency of the arbitration process.”

PIABA, however, suggested that FINRA place the Director’s written explanations regarding party-initiated challenges “in a publicly available database, such as the one currently maintained for FINRA awards.”¹¹ PIABA stated that “such a database would give parties insight that would help them in understanding what FINRA considers to be a legitimate ground for a challenge to a potential arbitrator and provide greater transparency, consistency and fairness to the process.”

FINRA acknowledges PIABA’s concern that there should be more transparency regarding the arbitrator list selection process. To that end, FINRA notes that it has created a webpage dedicated to explaining, in plain English, the process of selecting arbitrators.¹² The webpage contains information about the arbitration selection process, the list selection algorithm random list selection process, conflicts of interest, challenges to arbitrators, and more. Instead of creating a separate database as suggested by PIABA, which FINRA believes would have little precedential value as these decisions are based on the facts and circumstances of each case, FINRA will update the webpage with the most common

⁹ See FINRA, Status Report on Lowenstein Sandler LLP Recommendations, <https://www.finra.org/rules-guidance/guidance/reports/report-independent-review-finra-dispute-resolution-services-arbitrator-selection-process>.

¹⁰ See proposed Rules 12407(c) and 13410(c). See also *supra* note 5.

¹¹ See FINRA, Arbitration Awards Online, <https://www.finra.org/arbitration-mediation/arbitration-awards>.

¹² See FINRA, How Parties Select Arbitrators, <https://www.finra.org/arbitration-mediation/arbitrator-selection>.

reasons for granting or denying party-initiated challenges. FINRA believes this approach would make the process more transparent—making the information easily accessible on the webpage would provide parties with useful information when considering potential challenges to remove an arbitrator and help ensure that parties are aware of the procedures and how they are applied.

II. Procedural Amendments

Over the course of many years, DRS has developed practices to facilitate the timely and efficient administration of cases in the DRS forum. The Proposal would amend the Codes to incorporate some of these practices.

A. Redacting Personal Confidential Information in Simplified Arbitrations

The Proposal would amend the Codes to require that parties in simplified arbitrations must redact personal confidential information (“PCI”) when they submit pleadings and supporting documents to DRS.¹³ PACE suggested that “[t]his procedural amendment adds a layer of protection against fraud, identity theft, and other concerns related to [PCI].”¹⁴ Cornell commented that it “addresses the legitimate concern that failing to redact confidential information may increase the risk of fraudulent activity.”

1. Guidance to Pro se Parties

In proposing this change, FINRA noted its plans to update guidance on its website regarding the steps parties can take to protect PCI, to include guidance to pro se parties on the importance of safeguarding PCI and on how to redact PCI from documents filed with DRS.¹⁵ PACE expressed concern that the proposed website guidance would not be sufficient for pro se parties, and made additional suggestions.¹⁶ Further, PACE and PIABA recommended adding guidance directly to the Party Portal, with PACE suggesting that the information be “visible and accessible” “at the point in time when customers are

¹³ See proposed Rules 12300(d)(1) and 13300(d)(1).

¹⁴ See also PIABA (stating that “the safeguarding of personal confidential information is of paramount importance”).

¹⁵ See Proposal, supra note 1, 88 FR 2144, 2146. See also FINRA, Resources for Investors Representing Themselves, <https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves>.

¹⁶ See PACE (suggesting that the guidance on FINRA’s website should (1) “use clear, plain English instructions to spell out to pro se customers the need to redact PCI”; (2) provide “specific information that should be redacted”; (3) provide “examples of what a properly-redacted document looks like”; (4) provide “basic suggestions about how to make the redactions”; and (5) use terms such as “omit,” “delete,” or “black out” instead of “redact”).

likely to be uploading documents that may contain PCI (e.g., when they are filing a Statement of Claim).”¹⁷

FINRA agrees with the commenters that its guidance on redaction procedures should provide clear, plain English instructions. If the SEC approves the Proposal, FINRA will update its website to include guidance on redaction procedures and include the guidance on the Party Portal.

2. Waive Redaction Requirement or DRS to Make Redactions

St. John’s suggested that extending the redaction requirement to simplified cases “will lead to unintended harm to some of the investors FINRA is trying to protect.” St. John’s further opined that “merely providing guidance to pro se filers may create barriers for those who are not able to redact their PCI” because “[s]ome pro se filers simply do not have the resources.”¹⁸ Thus, St. John’s recommended that FINRA provide pro se parties with “the ability to waive the PCI redaction requirement, or alternatively, that DRS undertake the redactions itself.”

The intent of the proposed amendment is to ensure that PCI is removed from documents filed with FINRA,¹⁹ which would help safeguard investors’ information and their financial resources. Investors face the same risk of harm from disclosure of PCI, whether the submitting party is pro se or represented by counsel. Thus, allowing pro se investors to waive the redaction requirement would defeat the purpose of the Proposal. Further, in response to the alternative suggestion that FINRA make the redactions, FINRA notes that its rules relating to the redaction of PCI state that PCI must be removed from the documents *before* they are filed with FINRA.²⁰ This requirement also helps safeguard

¹⁷ Parties must use the Party Portal to file initial statements of claim and to file and serve pleadings and any other documents on the Director or any other party, except as otherwise provided. See Rules 12300(a) and 13300(a). See also FINRA Dispute Resolution Services, DR Portal, <https://www.finra.org/arbitration-mediation/dr-portal>.

¹⁸ See also Cornell (expressing its “concern that requiring redactions may prove difficult for pro se customers”).

¹⁹ See Rules 12300(d)(1)(A) and 13300(d)(1)(A).

²⁰ See Rules 12300(d)(1)(A) and 13300(d)(1)(A). If FINRA receives a claim, including supporting documents, with a full Social Security, taxpayer identification or financial account number, FINRA will deem the filing deficient under Rule 12307 or Rule 13307, as applicable, and will request that the party refile the document without the PCI within 30 days from the time the party receives notice. If a party files a document with PCI that is not covered by Rules 12307 or 13307 (a document other than a claim, such as a motion), FINRA

investors' information and their financial resources. The risks associated with the loss of PCI (e.g., identity theft) will remain as long as parties continue to file documents containing PCI. Thus, FINRA believes it is important that all parties, including pro se claimants, remove PCI from their documents before filing with FINRA.²¹

FINRA recognizes, however, that pro se claimants may not have much experience with filing claims in the DRS forum. For this reason and as stated in the Proposal, if the SEC approves the Proposal, FINRA will update its website with guidance on redaction procedures.²² Further, as suggested by commenters, including PACE and PIABA, FINRA will include such guidance on the Party Portal and will ensure that the instructions are clear, concise and in plain English. FINRA believes the benefits of safeguarding customers' identities and sensitive information balance the concerns relating to pro se parties' lack of experience with filing claims in the forum.

B. Combining Claims

The Proposal would codify current practice regarding combining claims by amending the Codes to provide that if a panel has been appointed to the lowest numbered case (i.e., the case with the earliest filing date), the panel in that case may: (a) combine separate but related claims into one arbitration and (b) reconsider the Director's decision upon motion of a party.²³ In addition, if a panel has been appointed to the highest numbered case (i.e., the case with the latest filing date), but not to the lowest numbered case, the panel appointed to the highest numbered case may: (a) combine separate but related claims into one arbitration and (b) reconsider the Director's decision upon motion of a party.²⁴ PIABA, PACE, St. John's and Cornell generally supported the proposed amendment.

The Proposal only contemplated two cases with combinable claims as this is the most common scenario. Cornell, however, suggested that FINRA "specify further what happens if a panel has only been appointed to cases numbered in the middle (i.e., neither

will deem the filing to be improper and will request that the party refile the document, with the required redaction, within 30 days from the time the party receives notice. See also Regulatory Notice 14-27 (June 2014).

²¹ See Securities Exchange Act Release No. 72269 (May 28, 2014), 79 FR 32003 (June 3, 2014) (Order Approving File No. SR-FINRA-2014-008) (approving FINRA rules requiring redaction of PCI from documents filed with FINRA and discussing the risks associated with pleadings and attachments being filed with PCI).

²² See Proposal, 88 FR 2144, 2146.

²³ See proposed Rules 12314(b)(1) and 13314(b)(1).

²⁴ See proposed Rules 12314(b)(2) and 13314(b)(2).

the lowest nor the highest numbered case) if more than two combinable claims are involved.” Although this scenario would be rare, FINRA notes that under the proposed amendment, the default would be for the panel appointed to the lowest numbered case with a panel to preside over the combined case. Thus, if, for example, there were four cases and a panel has been appointed to the two middle cases, the panel appointed to the lowest numbered middle case (i.e., the case with the earliest filing date) would preside.

FINRA intended for the Proposal to provide transparency and consistency regarding the current practice by codifying it in the rules. In response to Cornell’s comment and to provide additional clarity, FINRA has determined to amend proposed Rules 12314(b) and 13314(b) in Partial Amendment No. 1 to provide that if a panel has been appointed to one or more cases, the panel appointed to the lowest numbered case with a panel may: (1) combine separate but related claims into one arbitration and (2) reconsider the Director’s decision upon motion of a party. Partial Amendment No. 1 would also remove proposed paragraph (b)(2) of Rules 12314 and 13314 as this paragraph would no longer be necessary.

C. Transcription of Hearing Records

The Proposal would amend the Codes to provide that if the panel orders a transcription, or the stenographic record is the official record of the proceeding, a copy of the transcription or stenographic record must be provided to each arbitrator, served on each party, and filed with the Director by the party or parties ordered to make the transcription or electing to make the stenographic record, as applicable.²⁵ The proposed amendment would clarify that the party or parties ordered to make the transcription or stenographic record must provide copies to each party, each arbitrator and file them with the Director. PIABA, PACE and St. John’s generally supported the proposed amendment.

Cornell expressed concern about “the appropriateness of imposing” “the high costs associated with providing” “a transcription of hearing records.” Cornell suggested that FINRA “(1) provide guidelines on the circumstances under which the panel might order hearing records from a party; (2) consider only allowing the panel to order hearing records from member firms; and (3) provide waivers or other forms of financial and legal assistance to indigent parties who cannot afford to provide the hearing records and whose case might be jeopardized as a result.”

As explained in the Proposal, the Codes currently provide that, the Director will make a tape, digital or other recording of every hearing with certain exceptions as

²⁵ See proposed Rules 12606(a)(2), 13606(a)(2), 12606(b)(2) and 13606(b)(2). See also FINRA Dispute Resolution Services Arbitrator’s Guide, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

specified in the Codes.²⁶ As all hearings are digitally recorded, the digital recording is the official record of the proceeding, even if it is transcribed pursuant to FINRA rules.²⁷ With regard to the concern about the cost of ordering a transcript of the hearing record, FINRA notes that in practice, a panel would order a transcript only upon a motion of a party.²⁸ In the event of such a motion, parties would have the opportunity to object, including on financial grounds. As is currently the case, the panel determines which party or parties must pay the cost of the transcription.²⁹ In deciding a motion, the panel may determine that a party other than the one ordered to provide the transcription should pay the costs of the transcription. FINRA believes the panel is in the best position to determine how the costs should be allocated and, therefore, declines to amend the Proposal to allow the panel to order hearing records only from member firms.

For similar reasons, FINRA also declines to amend the proposal to provide for waivers or other forms of financial and legal assistance to parties who may not have the financial resources to pay for hearing records. As noted above, the panel considers all factors when deciding how to allocate costs, which could include the financial means of the parties.³⁰ FINRA reiterates that the digital recording is the official record of a hearing and the Director will provide a copy to any party upon request.³¹ Thus, parties will always have access to a record of a hearing, regardless of whether the hearing record is transcribed.

FINRA believes that guidance on the process for ordering a transcript from a party may be helpful to parties in preparing their case. If the SEC approves the Proposal, FINRA will add such guidance to its website.

²⁶ See Proposal, supra note 1, 88 FR 2144, 2148. See also FINRA Rules 12606(a) and 13606(a).

²⁷ See FINRA Dispute Resolution Services Arbitrator's Guide, p. 56, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

²⁸ As the digital recording is the official record of a hearing, these motions are rare.

²⁹ See Rules 12606(a)(2) and 13606(a)(2). The panel's authority would not change under the Proposal.

³⁰ Under the Codes, the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship. See Rules 12900(a)(4) and 13900(a)(4). Information on how to request an arbitration fee waiver is available at <https://www.finra.org/arbitration-mediation/arbitration-fee-waivers>. In addition, in the award, the panel may order a party to reimburse another party for all or part of any filing fee paid. See Rules 12900(d) and 13900(d).

³¹ See Rules 12606(a)(1) and 13606(a)(1).

D. Virtual Options for Special Proceedings and Prehearing Conferences

Under the Proposal, FINRA would amend the simplified arbitration rules of the Codes to provide that a special proceeding will be held by video conference, unless the customer requests at least 60 days before the first scheduled hearing that it be held by telephone, or the parties agree to another type of hearing session.³² PACE expressed strong support for default virtual special proceedings, stating that “[t]his medium provides participants the ability to read body language and facial expressions, thereby increasing the quality and effectiveness of the communications.”³³ In expressing its support, PIABA stated that “[c]laimants will benefit from having video conferencing as the default method of presenting their ‘special proceedings’ cases” as it “aligns with PIABA’s belief that investors must be provided with a full and fair opportunity to present their cases.” Moreover, St. John’s strongly supported “the proposed procedural amendment to provide for video conferencing as the default for special proceedings,” suggesting that it “allows for investors with small claims to present their case to the arbitrator without added expenses or travel.”³⁴

The Proposal would also amend the Codes to provide that prehearing conferences will generally be held by video conference unless the parties agree to, or the panel grants a motion for, another type of hearing session.³⁵ PACE expressed strong support for default virtual prehearing conferences for the same reason it supported the default virtual special proceedings. St. John’s also expressed support for default virtual prehearing conferences, stating that the Proposal would “provide more clarity for pro se filers by providing a codification of the policy changes already made as a result of the COVID-19 pandemic.”

Cornell generally supported the proposed amendment for holding prehearing conferences by video conference, but suggested “specifying, in the [] Proposal or in guidance to arbitrators, that the panel consider the parties’ access to and level of

³² See proposed Rules 12800(c)(3)(B)(i) and 13800(c)(3)(B)(i).

³³ See also PACE (supporting “the option for customers to request a telephonic hearing before the 60-day deadline or for both parties to agree to another type of hearing session. Maintaining the opportunity to request a telephonic hearing provides customers choosing this option in simplified cases with additional ownership over the process and allows them to choose the best mode of communication for their individual case and circumstances.”).

³⁴ See also St. John’s (expressing support for the alternative telephonic format for special proceedings with sufficient notice of at least 60 days before the first proceeding, suggesting “that this will ensure that Respondents will have sufficient notice, to plan and prepare accordingly.”).

³⁵ See proposed Rules 12500(b), 12501(c) and 12504(a); see also proposed Rules 13500(b), 13501(c) and 13504(a).

comfort with technology when deciding on motions to use alternative prehearing formats, in order to prevent imposing undue burden on claimants.” FINRA notes that during the COVID-19 pandemic, FINRA developed policies and procedures around conducting arbitration cases using virtual hearings and created resource guides for parties and arbitrators for such hearings.³⁶ Over time, parties have become proficient with using this technology and have embraced it as an alternative to other hearing methods. The proposed amendment reflects the preference of parties to have the ability to conduct prehearings virtually. In addition, FINRA notes that once fully briefed, a panel will decide a motion regarding the hearing format based on all the information provided, which could include a party’s access to and comfort level with technology. That said, if the SEC approves the Proposal, FINRA will update its resource guides, as appropriate, to help ensure that parties have the guidance they need to participate fully in virtual prehearing conferences.

Conclusion

FINRA believes that by codifying and clarifying the DRS forum practices and procedures, the Proposal will reduce uncertainty among forum users, provide greater transparency regarding these practices and procedures, and enhance the efficiency and timeliness of administering cases in the forum. Further, by aligning the forum’s practices and procedures with the relevant rules of the Codes, the Proposal will help ensure that the rules are consistently applied.

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FINRA believes that the foregoing responds to the material issues raised by the commenters on the Proposal. If you have any questions, please contact me on 212-858-4106, email: Kristine.Vo@finra.org.

Sincerely,

/s/ Kristine Vo

Kristine Vo
Assistant General Counsel
Office of General Counsel

³⁶ See FINRA, Resource Guide for Self-Represented Parties with Virtual (“Zoom”) Hearings: Frequently Asked Questions, <https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves/virtual-hearings-faq> and Party Resource Guide for Virtual Hearings, <https://www.finra.org/arbitration-mediation/party-resource-guide-virtual-hearings>.