

subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BX-2023-021 and should be submitted on or before October 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Sherry R. Haywood,**  
Assistant Secretary.

[FR Doc. 2023-19730 Filed 9-12-23; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-156, OMB Control No. 3235-0288]

### Submission for OMB Review; Comment Request; Extension: Form 20-F

*Upon Written Request Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget this

request for extension of the previously approved collection of information discussed below.

Form 20-F (17 CFR 249.220f) is used to register securities of foreign private issuers pursuant to Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78l) or as annual and transitional reports pursuant to Sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)). The information required in the Form 20-F is used by investors in making investment decisions with respect to the securities of such foreign private issuers. We estimate that Form 20-F takes approximately 2,629.92 hours per response and is filed by approximately 729 respondents. We estimate that 25% of the 2,629.92 hours per response (657.48 hours) is prepared by the issuer for a total reporting burden of 479,303 (657.48 hours per response × 729 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: [www.reginfo.gov](http://www.reginfo.gov). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by October 13, 2023 to (i) [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain) and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street, NE, Washington, DC 20549, or by sending an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

Dated: September 8, 2023.

**Sherry R. Haywood,**  
Assistant Secretary.

[FR Doc. 2023-19792 Filed 9-12-23; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98317; File No. SR-FINRA-2022-033]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, 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

September 7, 2023.

#### I. Introduction

On December 23, 2022, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes<sup>3</sup> ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes<sup>4</sup> ("Industry Code") (together, "Codes"). The proposed rule change, as modified by Amendment No. 1 (defined below), would amend provisions of the Codes governing the arbitrator list-selection process to: (1) exclude arbitrators from the arbitrator ranking lists based on certain conflicts of interest;<sup>5</sup> (2) permit the removal of an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins;<sup>6</sup> and (3) provide parties with a written explanation of the decision by the Director of FINRA Dispute Resolution Services ("DRS Director")<sup>7</sup> to grant or deny a request to remove an arbitrator.<sup>8</sup> In addition, the proposed rule change, as modified by Amendment No. 1, would amend procedural rules in the Codes, such as those pertaining to holding prehearing conferences and

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See FINRA Rule 12000 Series (Code of Arbitration Procedure for Customer Disputes).

<sup>4</sup> See FINRA Rule 13000 Series (Code of Arbitration Procedure for Industry Disputes).

<sup>5</sup> See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

<sup>6</sup> See proposed Rules 12407(a), 13410(a).

<sup>7</sup> Unless the Codes provide otherwise, the DRS Director may delegate their duties when it is appropriate. FINRA Rule 12103 (Director of FINRA Dispute Resolution Services).

<sup>8</sup> See proposed Rules 12407(c), 13410(c).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

hearing sessions,<sup>9</sup> initiating and responding to claims,<sup>10</sup> motion practice,<sup>11</sup> claim and case dismissals,<sup>12</sup> and providing a hearing record.<sup>13</sup>

The proposed rule change was published for comment in the **Federal Register** on January 12, 2023.<sup>14</sup> On February 14, 2023, FINRA consented to extend until April 12, 2023, the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>15</sup> The Commission received five comment letters in response to the Notice.<sup>16</sup> On April 11, 2023, FINRA responded to the comment letters received in response to the Notice and filed an amendment to the proposed rule change (“Amendment No. 1”).<sup>17</sup> On April 12, 2023, the Commission published a notice of filing of Amendment No. 1 and an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 (hereinafter referred to as the “proposed rule change” unless otherwise specified).<sup>18</sup> The Commission received two comment letters in response to that notice and order.<sup>19</sup> On July 3, 2023, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to September 8, 2023.<sup>20</sup> On August 10,

2023, the Commission received a letter from FINRA responding to comments received in response to the Order Instituting Proceedings prior to that date.<sup>21</sup> This order approves the proposed rule change.

## II. Description of the Proposed Rule Change

### A. Background

FINRA’s Dispute Resolution Services (“DRS”) provides a forum for disputes between customers, member firms, and associated persons of member firms through two non-judicial proceedings: arbitration<sup>22</sup> and mediation.<sup>23</sup> FINRA’s arbitration forum accommodates two broad categories of proceedings, and each has its own rules of procedure. The Customer Code governs any dispute between a customer and a member or associated person.<sup>24</sup> The Industry Code governs any dispute exclusively among associated persons and/or member firms.<sup>25</sup> The Codes govern all aspects of an arbitration claim, including: initiating and responding to claims; appointment, disqualification, and authority of arbitrators; prehearing procedures and discovery; and hearings, evidence, and closing the record.<sup>26</sup>

In particular, the Codes govern the number of arbitrators on a panel for a

proceeding based, in part, on the value of the underlying claim.<sup>27</sup> If the amount of a claim is \$50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator<sup>28</sup> who will decide the claim based solely on the written pleadings and other materials submitted by the parties (“Simplified Arbitration”).<sup>29</sup> If the amount of a claim is greater than \$50,000 but not more than \$100,000, exclusive of interest and expenses, the panel will consist of one arbitrator (unless the parties agree in writing to a three-arbitrator panel) who will decide the claim after a hearing.<sup>30</sup> If the amount of a claim is more than \$100,000 (exclusive of interest and expenses), is unspecified, or does not request money damages, the panel will consist of three arbitrators (unless the parties agree in writing to one arbitrator) who will decide the claim after a hearing.<sup>31</sup>

FINRA maintains a roster for each of the three types of arbitrators that may be appointed to a panel: public, non-public, and chairperson arbitrators.<sup>32</sup> In general, a “public” arbitrator is a person who is otherwise qualified to serve as an arbitrator and is not disqualified from service as a public arbitrator due to their current or past ties to the financial industry.<sup>33</sup> A “non-public” arbitrator is a person who is otherwise qualified to serve as an arbitrator and is disqualified from service as a public arbitrator due to their current or previous association with the financial industry.<sup>34</sup> An arbitrator is eligible to serve as a “chairperson” if she has completed FINRA’s chairperson training and (1) has a law degree, is a member of a bar of at least one jurisdiction, and has served as an arbitrator through award on at least one arbitration administered by a self-regulatory organization (“SRO”) in which hearings were held or (2) has served as an arbitrator through award on

<sup>9</sup> See proposed Rules 12500(b), 12501(c), 12504(a)(5), 12600(b), 12800(c)(3)(B)(i), 13500(b), 13501(c), 13504(a), 13600(b), 13800(c)(3)(B)(i).

<sup>10</sup> See proposed Rules 12303(b), 12309, 13303(b), 13309.

<sup>11</sup> See proposed Rules 12503, 13503.

<sup>12</sup> See proposed Rules 12700(b), 13700(b).

<sup>13</sup> See proposed Rules 12606(a)(2), 12606(b)(2), 13606(a)(2), 13606(b)(2).

<sup>14</sup> See Exchange Act Release No. 96607 (Jan. 6, 2023), 88 FR 2144 (Jan. 12, 2023) (File No. SR-FINRA-2022-033) (hereinafter, the “Notice”).

<sup>15</sup> See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, U.S. Securities and Exchange Commission (Feb. 14, 2023), <https://www.finra.org/sites/default/files/2023-02/sr-finra-2022-033-extension-no-1.pdf>.

<sup>16</sup> The comment letters are available at <https://www.sec.gov/comments/sr-finra-2022-033/srfinra2022033.htm>.

<sup>17</sup> See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Apr. 11, 2023) (“FINRA April Letter”), <https://www.sec.gov/comments/sr-finra-2022-033/srfinra2022033-20164047-333995.pdf>.

<sup>18</sup> Exchange Act Release No. 97291 (Apr. 12, 2023), 88 FR 23720 (Apr. 18, 2023) (File No. SR-FINRA-2022-033) (“Order Instituting Proceedings”).

<sup>19</sup> See *supra* note 16.

<sup>20</sup> See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel,

Division of Trading and Markets, U.S. Securities and Exchange Commission (July 3, 2023), <https://www.finra.org/sites/default/files/2023-07/sr-finra-2022-033-extension-no2.pdf>.

<sup>21</sup> See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Aug. 10, 2023) (“FINRA August Letter”), <https://www.sec.gov/comments/sr-finra-2022-033/srfinra2022033-242999-511962.pdf>.

<sup>22</sup> See FINRA Rules 12101(a) (Applicability of [Customer] Code), 13101(a) (Applicability of [Industry] Code).

<sup>23</sup> See FINRA Rule 14000 Series (Code of Mediation Procedure) (“Mediation Code”). Because the proposed rule change would amend the Customer Code and Industry Code, and not the Mediation Code, this order does not provide background on the mediation process.

<sup>24</sup> See FINRA Rules 12200, 12201. Under FINRA Rule 12200, parties must arbitrate disputes about the non-insurance business activity of a member or associated person if the customer requests arbitration or arbitration is required by written agreement; under FINRA Rule 12201, parties may agree in writing to arbitrate their disputes about the non-insurance business activity of a member or associated person.

<sup>25</sup> See FINRA Rules 13101 (Industry Code applies to any dispute filed under Rules 13200, 13201, or 13202), 13200 (requiring arbitration “if the dispute arises out of the [non-insurance] business activities of a member or an associated person and is between or among” members and/or associated persons), 13201 (permitting arbitration of employment discrimination, whistleblower, and sexual misconduct cases), 13202 (requiring arbitration if the dispute involves the business activity of a registered clearing agency that has entered into an agreement to use FINRA’s arbitration forum).

<sup>26</sup> See FINRA Customer Code (FINRA Rule 12000 Series), Parts III–VI; FINRA Industry Code (FINRA Rule 13000 Series), Parts III–VI.

<sup>27</sup> See FINRA Rules 12401, 13401.

<sup>28</sup> See FINRA Rules 12401(a), 13401(a).

Alternatively, parties may agree in writing to have a three-person panel decide their simplified case. See FINRA Rules 12800(b), 13800(b).

<sup>29</sup> See FINRA Rules 12401(a), 13401(a). Simplified Arbitration is governed by FINRA Rule 12800 (Simplified Arbitration) or FINRA Rule 13800 (Simplified Arbitration), respectively. In general, no hearing will be held in Simplified Arbitration unless the customer or claimant requests a hearing. FINRA Rules 12800(c)(1), 13800(c)(1).

<sup>30</sup> See FINRA Rules 12401(b), 13401(b); see also FINRA Rules 12600(a), 13600(a) (hearing is required unless it is a Simplified Arbitration or default proceeding).

<sup>31</sup> See FINRA Rules 12401(c), 13401(c); see also FINRA Rules 12600(a), 13600(a) (hearing is required unless it is a Simplified Arbitration or default proceeding).

<sup>32</sup> See FINRA Rules 12400(b), 13400(b).

<sup>33</sup> See FINRA Rules 12100(aa), 13100(x).

<sup>34</sup> See FINRA Rules 12100(t), 13100(r).

at least three arbitrations administered by a SRO in which hearings were held.<sup>35</sup>

### B. The Arbitrator-Selection Process

Whatever the size of the claim or nature of the dispute, the arbitrator-selection process typically follows the same steps for each proceeding: (1) the Neutral List Selection System (“NLSS”), a computerized list-selection algorithm, randomly generates a list (or lists) of arbitrators from DRS’s rosters of eligible arbitrators for the selected hearing location for each proceeding;<sup>36</sup> (2) the DRS Director sends the list(s) to the parties;<sup>37</sup> (3) the parties exercise limited strikes to eliminate candidates from the list(s);<sup>38</sup> (4) the parties express preferences by ranking the remaining candidates on the list(s);<sup>39</sup> and (5) the DRS Director combines the strike and ranking lists to identify and appoint the arbitrator(s) to the panel.<sup>40</sup>

For example, for a customer claim of \$100,000 or less, the NLSS would generate one list of 10 public arbitrators from the chairperson roster.<sup>41</sup> For a customer claim of more than \$100,000, the NLSS would generate three lists: one with 10 chair-qualified public arbitrators; one with 15 public arbitrators; and one with 10 non-public

arbitrators.<sup>42</sup> After each party exercises limited strikes against each list and ranks the remaining arbitrators on each list in order of preference,<sup>43</sup> the DRS Director consolidates the strike and ranking lists and appoints the highest-ranking arbitrator(s) who survived the parties’ strikes.<sup>44</sup>

The arbitrator-selection process differs in industry disputes. For an industry claim of \$100,000 or less, the NLSS would generate one list of 10 arbitrators from the chairperson roster.<sup>45</sup> For an industry claim of more than \$100,000 between members, the NLSS would generate two lists: one with 10 chair-qualified non-public arbitrators; and one with 20 non-public arbitrators.<sup>46</sup> For an industry claim of more than \$100,000 between associated persons or between or among members and associated persons, the NLSS would generate three lists: one with 10 chair-qualified public arbitrators; one with 10 public arbitrators; and one with 10 non-public arbitrators.<sup>47</sup> Once the DRS Director sends the NLSS-generated list(s) to the parties, each party exercises limited strikes against the list(s) and ranks the remaining arbitrators in order of preference.<sup>48</sup> The DRS Director then consolidates the strike and ranking

list(s) and appoints the highest-ranking arbitrator(s) who survived the parties’ strikes.<sup>49</sup>

### C. The Lowenstein Report

In a January 2022 order, a Georgia trial court vacated a FINRA arbitration award, finding (among other things) that FINRA had a “secret agreement” with an attorney to remove certain arbitrators from any lists generated in that attorney’s cases.<sup>50</sup> The trial court concluded that such an agreement “calls into question the entire fairness” of FINRA’s arbitration forum.<sup>51</sup> The Court of Appeals of Georgia subsequently reversed the trial court’s order, holding (among other things) that “there is no evidence that [a secret] agreement was at play here” given that the arbitrator in question appeared on the ranking list notwithstanding the alleged existence of a “secret agreement” to exclude him.<sup>52</sup>

Prior to the order’s reversal on appeal, the Audit Committee of FINRA’s Board of Governors engaged a law firm, Lowenstein Sandler LLP (“Lowenstein”), to: (1) independently review the trial court’s finding about the arbitrator-selection process in that case; and (2) “determine generally whether any improvements to the arbitrator selection process [are] necessary to ensure neutrality and improve DRS’s transparency.”<sup>53</sup> Lowenstein began its review in February 2022, and in June 2022, it delivered a 37-page report.<sup>54</sup> The Lowenstein Report concluded that there was not any agreement between the attorney and FINRA regarding the panels for that attorney’s cases.<sup>55</sup> “Nonetheless, . . . Lowenstein identified a series of potential improvements to the FINRA arbitrator selection process intended to increase transparency and ensure neutrality in the work undertaken by DRS.”<sup>56</sup>

In response to the recommendations made in the Lowenstein Report, FINRA proposed amendments to its arbitrator list-selection process, as well as additional changes to its procedural

<sup>35</sup> See FINRA Rules 12400(c), 13400(c). In customer disputes, the chairperson must be a public arbitrator. See FINRA Rule 12400(c).

<sup>36</sup> See FINRA Rules 12402(b) (Generating Lists in Customer Cases with One Arbitrator), 12403(a) (Generating Lists in Customer Cases with Three Arbitrators), 13403(a) (Lists Generated in Disputes Between Members), 13403(b) (Lists Generated in Disputes Between Associated Persons or Between or Among Members and Associated Persons); see also FINRA Rules 12400(a), 13400(a).

<sup>37</sup> See FINRA Rules 12402(c), 12403(b), 13403(c).

<sup>38</sup> See FINRA Rules 12402(d)(1) (Striking and Ranking Arbitrators in Customer Cases with One Arbitrator), 12403(c)(1)(A) and (2)(A) (Striking and Ranking Arbitrators in Customer Cases with Three Arbitrators), 13404(a) and (b) (Striking and Ranking Arbitrators in Industry Disputes).

<sup>39</sup> See FINRA Rules 12402(d)(2), 12403(c)(1)(B) and (2)(B), 13404(c). Parties must deliver their ranked lists to the DRS Director no more than 20 days after the date upon which the DRS Director sent the lists to the parties. Except for certain pro se parties, parties must complete and deliver their ranked lists via the DR Party Portal (“Portal”). See FINRA Rules 12402(d)(3), 12403(c)(3), 13404(d). The Portal permits arbitration case participants to, among other things, file an arbitration claim, view case documents, submit documents to FINRA and send documents to other Portal case participants, and schedule hearing dates. See FINRA, Dispute Resolution Services: DR Portal, <https://www.finra.org/arbitration-mediation/dr-portal>.

<sup>40</sup> See FINRA Rules 12402(e) (Combining Lists in Customer Cases with One Arbitrators), 12402(f) (Appointment of Arbitrators in Customer Cases with One Arbitrator), 12403(d) (Combining Lists in Customer Cases with Three Arbitrators), 12403(e) (Appointment of Arbitrators in Customer Cases with Three Arbitrators), 13405 (Combining Lists in Industry Disputes), 13406 (Appointment of Arbitrators in Industry Disputes).

<sup>41</sup> See FINRA Rule 12402(b)(1).

<sup>42</sup> See FINRA Rule 12403(a)(1).

<sup>43</sup> See FINRA Rules 12402(d), 12403(c)(1), 12403(c)(2). The number of strikes available varies for each type of case. For a customer claim of \$100,000 or less, each party may exercise up to four strikes against the list. See FINRA Rule 12402(d)(1). For a customer claim of more than \$100,000, each party may exercise up to four strikes of chair-qualified arbitrators, up to six strikes of public arbitrators, and up to 10 strikes of non-public arbitrators. See FINRA Rule 12403(c).

<sup>44</sup> See FINRA Rules 12402(e), 12402(f), 12403(d), 12403(e)(1).

<sup>45</sup> See FINRA Rules 13403(a)(1), 13403(b)(1). For disputes between members, the arbitrator would generally be non-public unless the parties agree in writing otherwise. See FINRA Rule 13402(a)(1). For disputes between associated persons or between or among members and associated persons, the arbitrator would generally be public unless the parties agree in writing otherwise. See FINRA Rule 13402(b).

<sup>46</sup> See FINRA Rule 13403(a)(2). The panel would consist of three non-public arbitrators, one of which must be chair-qualified, unless the parties agree in writing otherwise. See FINRA Rule 13402(a)(1).

<sup>47</sup> See FINRA Rules 13403(b)(2). The panel would consist of two public arbitrators and one non-public arbitrator. One of the public arbitrators would serve as the chairperson unless the parties agree in writing otherwise. See FINRA Rule 13402(b).

<sup>48</sup> See FINRA Rule 13404. The number of strikes available varies for each type of case. For industry disputes with a single arbitrator, each party may exercise up to four strikes against the list. See FINRA Rule 13404(a). For industry disputes of more than \$100,000 between members, each party may exercise up to four strikes from the chair-qualified non-public arbitrator list and up to eight strikes from the non-public arbitrator list. See FINRA Rule 13404(b). For industry disputes of more than \$100,000 between members and/or associated persons, each party exercises as many as four strikes against each list. See FINRA Rule 13404(a).

<sup>49</sup> See FINRA Rules 13405, 13406.

<sup>50</sup> See *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 2019-CV-328949, 2022 WL 1522096, at \*10 (Ga. Super. Ct. Jan. 25, 2022).

<sup>51</sup> *Id.* at \*10.

<sup>52</sup> *Wells Fargo Clearing Servs., LLC v. Leggett*, 876 SE2d 888, 895 (Ga. Ct. App. 2022).

<sup>53</sup> Christopher W. Gerold, Lowenstein Sandler LLP, The Report of the Independent Review of FINRA’s Dispute Resolution Services—Arbitrator Selection Process at 2, <https://www.finra.org/rules-guidance/guidance/reports/report-independent-review-finra-dispute-resolution-services-arbitrator-selection-process> (June 28, 2022) (hereinafter, the “Lowenstein Report”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 35.

<sup>56</sup> *Id.*

rules governing arbitration cases, as described below.<sup>57</sup>

#### D. Proposed Rule Change

##### 1. Arbitrator List-Selection Amendments

The proposed changes to the arbitrator list-selection process would address: (1) manual reviews for conflicts of interest prior to sending the ranking lists to parties; (2) the timing of conflict-of-interest and bias challenges to remove arbitrators; and (3) written explanations of the DRS Director's decision on a party-initiated challenge to an arbitrator.

##### a. Removal of Arbitrators for Conflicts of Interest Before Ranking Lists are Sent to the Parties

As stated above, the NLSS randomly generates a list or lists of arbitrators from which parties in each arbitration case select a panel to hear and decide the case. As part of the list-generation process, the NLSS “exclude[s] arbitrators from the lists based upon current conflicts of interest.”<sup>58</sup> FINRA stated that DRS then “conducts a manual review [of the list(s)] for other conflicts not identified within the list selection algorithm.”<sup>59</sup> The Codes do not, however, describe this manual review process.<sup>60</sup> The Lowenstein Report recommended that FINRA amend the Codes to require that, prior to sending the arbitrator list(s) to the parties, DRS's Neutral Management Department must conduct a manual review for conflicts of interest.<sup>61</sup> This proposed rule change would codify existing practice by expressly requiring the DRS Director to manually review arbitrators on each list for current conflicts of interest not identified within the NLSS and authorizing the DRS Director to remove arbitrators based on the existence of such conflicts.<sup>62</sup> Under this proposed rule change, “[i]f an arbitrator is removed due to such conflicts, the list selection algorithm will randomly select an arbitrator to complete the list.”<sup>63</sup>

##### b. Removal of Arbitrators for Conflicts of Interest or Bias After Lists are Sent to the Parties but Before the First Hearing Session

Currently, the Codes permit the DRS Director to remove an arbitrator for a conflict of interest or bias, either upon request of a party or on the DRS Director's own initiative, before the first hearing session begins.<sup>64</sup> The Codes do not expressly specify, however, when the DRS Director may first initiate, or a party may first bring, such a challenge. FINRA stated that in practice parties may “challenge an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins[.]”<sup>65</sup> The proposed rule change would expressly codify this timing by authorizing the DRS Director to remove an arbitrator for a conflict of interest or bias, either upon request of a party or on the DRS Director's own initiative, “[a]fter the Director sends the list(s) generated by the list-selection algorithm to the parties,” but before the first hearing session begins.<sup>66</sup>

##### c. Written Explanation of the DRS Director's Decision

Currently, the Codes do not require the DRS Director to issue a written explanation of their decision on a party-initiated challenge to remove an arbitrator.<sup>67</sup> The Lowenstein Report recommended that FINRA consider amending the Codes to require the issuance of a written explanation of such a decision upon the request of either party.<sup>68</sup> FINRA stated that its current practice is “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.”<sup>69</sup> The proposed rule change would codify this practice by expressly requiring the DRS Director to provide the parties with a written explanation of their decision to grant or deny a party's request to remove an arbitrator.<sup>70</sup>

<sup>64</sup> FINRA Rules 12407(a), 13410(a). The DRS Director must first notify the parties before removing an arbitrator on the DRS Director's own initiative. The DRS Director may not remove the arbitrator if the parties agree in writing to retain the arbitrator within five days of receiving notice of the DRS Director's intent to remove the arbitrator. FINRA Rules 12407(a)(2), 13410(a)(2).

<sup>65</sup> See Notice at 2145 (indicating that FINRA wants to “ensure that the parties are aware that they may challenge an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins”).

<sup>66</sup> See proposed Rules 12407(a), 13410(a).

<sup>67</sup> Notice at 2145.

<sup>68</sup> Lowenstein Report at 37.

<sup>69</sup> Notice at 2145.

<sup>70</sup> See proposed Rules 12407(c), 13410(c).

##### 2. Procedural Rules Governing Arbitration Cases

The proposed rule change would also amend certain procedural rules governing FINRA arbitration cases. The proposed rule change would address thirteen such procedural issues, and this Order discusses each in turn.

##### a. Virtual Prehearing Conferences

A “prehearing conference” is any hearing session “that takes place before the hearing on the merits begins.”<sup>71</sup> Currently, the Codes indicate that prehearing conferences may generally be held by telephone.<sup>72</sup> However, FINRA stated that based on forum users' experiences during the COVID-19 pandemic, DRS updated its practice to provide that all prehearing conferences would be held by video.<sup>73</sup> The proposed rule change would codify this practice by expressly requiring 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.”<sup>74</sup>

##### b. In-Person Hearings

A “hearing” is “the hearing on the merits of an arbitration.”<sup>75</sup> Currently, the Codes do not establish a default format for hearings but FINRA stated that “hearings are generally held in person,” and forum users “have not similarly expressed a preference for making video conference the default for hearings.”<sup>76</sup> Accordingly, other than for special proceedings (defined below),<sup>77</sup> the proposed rule change would provide that all hearings “will generally be held in person unless the parties agree to, or the panel grants a motion for, another type of hearing session.”<sup>78</sup>

##### c. Virtual Option for Special Proceedings

As stated above, a Simplified Arbitration generally is decided by a single arbitrator based on the parties' written submissions, unless the

<sup>71</sup> FINRA Rules 12100(y), 13100(w).

<sup>72</sup> See FINRA Rules 12500(b), 12501(c), 13500(b), 13501(c).

<sup>73</sup> Notice at 2145. See FINRA, Dispute Resolution Services: Pre-Hearing Conferences, <https://www.finra.org/arbitration-mediation/prehearing-conferences>.

<sup>74</sup> Proposed Rules 12500(b), 12501(c), 12504(a)(5), 13500(b), 13501(c), 13504(a).

<sup>75</sup> FINRA Rules 12100(o), 13100(o).

<sup>76</sup> Notice at 2145.

<sup>77</sup> Under the proposed rule change, a special proceeding (defined below) would 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. See proposed Rules 12800(c) and 13800(c); see also *infra* notes 79–82 and accompanying text.

<sup>78</sup> Proposed Rules 12600(b), 13600(b).

<sup>57</sup> See Notice at 2144.

<sup>58</sup> FINRA Rules 12402(b)(2), 12403(a)(3), 13403(a)(4), 13403(b)(4).

<sup>59</sup> Notice at 2144.

<sup>60</sup> *Id.*

<sup>61</sup> See Lowenstein Report at 36. The Lowenstein Report recommended that FINRA amend Rule 12400. Although FINRA has elected to follow this recommendation, it did so by amending rules elsewhere in the Codes. See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

<sup>62</sup> See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5); Notice at 2145.

<sup>63</sup> Proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

customer or claimant requests a hearing.<sup>79</sup> If the customer or claimant requests a hearing, the Codes permit the customer or claimant to request an abbreviated telephonic hearing (*i.e.*, a “special proceeding”) on the merits.<sup>80</sup> FINRA stated that it received indications that customers “would prefer also to have the option to have a special proceeding by video conference.”<sup>81</sup> The proposed rule change would require any special proceeding to be held by video conference, unless: (1) the customer requests at least 60 days before the first scheduled hearing that it be held by telephone; or (2) the parties agree to another type of hearing session.<sup>82</sup>

#### d. Redacting Confidential Information

The Codes require a party to redact any personal confidential information (“PCI”) from documents they file with the DRS Director.<sup>83</sup> Currently, this requirement does not apply to parties in a Simplified Arbitration.<sup>84</sup> FINRA stated that “[d]ue to increasing concerns with customers’ identities being used for fraudulent purposes in the securities industry,” the proposed rule change would expand this redaction requirement to require a party in a Simplified Arbitration to redact any PCI from documents filed with the DRS Director.<sup>85</sup> In addition, FINRA stated that it would “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.”<sup>86</sup>

#### e. Number of Hearing Sessions per Day

Arbitrators are paid for each hearing session in which they participate.<sup>87</sup> The Codes define a “hearing session” as “any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing

conference.”<sup>88</sup> FINRA stated that “some arbitrators have the misunderstanding that they may be compensated for time spent outside of the hearing session, such as on lunch breaks, because the Codes do not specify when the next hearing session begins.”<sup>89</sup>

FINRA explained that DRS’s current practice is to calculate the total number of hearing hours, subtract any time spent for lunch, and divide the remainder by four (as in four hours) to identify the number of hearing sessions.<sup>90</sup> FINRA stated that consistent with that practice, the proposed rule change would amend the definition of “hearing session” to indicate that, during a single day, “the next hearing session begins after four hours of hearing time has elapsed.”<sup>91</sup>

#### f. Update Submission Agreement When Filing a Third-Party Claim

The Codes define the term “Submission Agreement” to mean the agreement “that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.”<sup>92</sup> In general, if a claim does not include a complete and properly executed Submission Agreement, the claim would be considered deficient and would not be served by the DRS Director on the other parties (*e.g.*, if a Submission Agreement fails to name all of the parties named in a claim, the claim would be considered deficient).<sup>93</sup> Thus, in practice, when a respondent includes a third-party claim<sup>94</sup> in their answer to a statement of claim, the respondent must serve a fully executed Submission Agreement and an answer on each other party, including the third party.<sup>95</sup> However, FINRA stated that because the Codes do not expressly require the respondent to file an updated Submission Agreement with any third-party claim, respondents often file deficient claims because they neglect to add the third party to the Submission Agreement.<sup>96</sup> The proposed rule change would address this confusion. Specifically, the proposed rule change would require a respondent filing an answer containing a third-party

claim to: (1) execute a Submission Agreement that lists the name of the third-party; and (2) file the updated Submission Agreement with the DRS Director.<sup>97</sup>

#### g. Amending Pleadings or Filing Third-Party Claims

FINRA stated that the Codes do not include express procedures related to the filing of third-party claims other than those filed in an answer to a statement of claim.<sup>98</sup> Rather, FINRA indicated that FINRA rules relating to amended pleadings currently govern the filing of third-party claims.<sup>99</sup> FINRA stated that the proposed rule change would amend the Codes to expressly extend the procedures that apply to amended pleadings to the filing and serving of third-party claims.<sup>100</sup> The proposed rule change also would “restructure the provisions related to amending pleadings and filing third-party claims and add titles to clarify what processes are available based on various milestones in a case, including before and after panel appointment and before and after ranked arbitrator lists are due to the Director.”<sup>101</sup>

The proposed rule change would make other changes to the Codes relating to amended pleadings, including specifying that: (1) arbitrators would be “appointed to” the panel, not placed “on” the panel;<sup>102</sup> (2) the version of an amended pleading or third-party claim that should be included with a motion need not be a hard copy;<sup>103</sup> (3) once the ranked arbitrator lists are due, no party would be permitted to amend a pleading to add a party or file a third-party claim until a panel has been appointed and the panel grants a motion to amend a pleading or file the third-party claim;<sup>104</sup> (4) service by first-class mail or overnight mail service would be accomplished on the date of mailing and service by any other means would be accomplished on the date of

<sup>79</sup> FINRA Rules 12800, 13800.

<sup>80</sup> FINRA Rules 12800(c)(3)(B), 13800(c)(3)(B).

<sup>81</sup> Notice at 2146.

<sup>82</sup> Proposed Rules 12800(c)(3)(B)(i), 13800(c)(3)(B)(i).

<sup>83</sup> FINRA Rules 12300(d)(1)(A), 13300(d)(1)(A). According to FINRA, PCI includes social security numbers; brokerage, bank or other financial account numbers; taxpayer identification numbers; and medical records. See FINRA, Dispute Resolution Services: Protecting Personal Confidential Information, <https://www.finra.org/arbitration-mediation/protecting-personal-confidential-information> (last visited May 11, 2023) (“PCI Guidance”).

<sup>84</sup> FINRA Rules 12300(d)(1)(C), 13300(d)(1)(C).

<sup>85</sup> Notice at 2146 and n.29 (explaining that FINRA Rules 12300(d)(1)(C) and 13300(d)(1)(C) would be deleted); proposed Rules 12300(d)(1), 13300(d)(1).

<sup>86</sup> See Notice at 2146; see also PCI Guidance, *supra* note 83.

<sup>87</sup> See Notice at 2146 (citing FINRA Rules 12214, 13214).

<sup>88</sup> FINRA Rules 12100(p), 13100(p).

<sup>89</sup> Notice at 2146.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see proposed Rules 12100(p), 13100(p).

<sup>92</sup> FINRA Rules 12100(dd), 13100(ee); see Notice at 2146 n.35.

<sup>93</sup> FINRA Rules 12307(a)(1)–(3), 13307(a)(1)–(3).

<sup>94</sup> A “third-party claim” is a “claim asserted against a party not already named in the statement of claim or any other previous pleading.” FINRA Rules 12100(ee), 13100(gg).

<sup>95</sup> See Notice at 2146; FINRA Rules 12307(a)(1)–(3), 13307(a)(1)–(3).

<sup>96</sup> FINRA Rules 12303(b), 13303(b); see Notice at 2146.

<sup>97</sup> Proposed Rules 12303(b), 13303(b).

<sup>98</sup> Notice at 2147; see FINRA Rules 12303(b), 13303(b).

<sup>99</sup> Notice at 2147; see FINRA Rules 12309, 13309. FINRA Rules 12309(a)(2) and 13309(a)(2) address the amendment of a pleading to add a party, but they do not address the filing of a third-party claim other than in an amended pleading.

<sup>100</sup> See Notice at 2147; proposed Rules 12309, 13309.

<sup>101</sup> *Id.*

<sup>102</sup> Notice at 2147; see proposed Rules 12309(a), 13309(a).

<sup>103</sup> Notice at 2147; see proposed Rules 12309(b)(1), 13309(b) (deleting “a copy of”).

<sup>104</sup> Notice at 2147; see proposed Rules 12309(c)(1), 13309(c)(1).

delivery;<sup>105</sup> (5) the provisions in the Codes relating to responding to amended pleadings would be separate from the current provisions relating to answering amended claims;<sup>106</sup> and (6) before panel appointment, the DRS Director would be authorized to determine whether any party may file a response to an amended pleading.<sup>107</sup>

In addition, the proposed rule change would update the Customer Code's provisions governing "filing amended pleadings when a customer in an arbitration is notified by FINRA that a member or associated person in the arbitration has become inactive."<sup>108</sup> Currently, under the Customer Code, if a respondent member or associated person becomes inactive during a pending arbitration, FINRA will notify the customer of the respondent's inactive status.<sup>109</sup> Within 60 days of receiving that notice, the customer may: (1) withdraw the claim(s) against the inactive member or associated person;<sup>110</sup> (2) amend a pleading (if a panel has been appointed);<sup>111</sup> or (3) amend a pleading to add a new party (if the notification is after the ranked arbitrator lists are due to the DRS Director).<sup>112</sup> However, the Customer Code does not expressly authorize the customer in an arbitration to file a third-party claim when they are notified by FINRA that a member or associated person in the arbitration has become inactive.<sup>113</sup> FINRA stated that the proposed rule change would modify the Codes relating to amended pleadings to expressly authorize a customer in an arbitration to file a third-party claim when they are notified by FINRA that a member or associated person in the arbitration has become inactive after a panel is appointed, as well as after the ranked arbitrator lists are due.<sup>114</sup>

#### h. Combining Claims

Under the Codes, a party may move to join multiple claims together in the same arbitration if: (1) the claims contain common questions of law or fact; and (2)(a) the claims assert any right to relief jointly and severally, or (b) the claims arise out of the same transaction or occurrence, or series of

transactions or occurrences (*i.e.*, separate but related claims).<sup>115</sup> The Codes are unclear, however, with respect to who has authority (*e.g.*, the DRS Director or a panel) to combine separate but related claims in response to such motions after a panel has been appointed to one or more cases.<sup>116</sup>

Before a panel has been appointed in any of the arbitration cases hearing the separate but related claims, only the DRS Director is authorized to combine such claims into one arbitration.<sup>117</sup> Once a panel has been appointed in at least one of the related cases, the Codes authorize the panel to "reconsider the Director's decision upon motion of a party."<sup>118</sup> The Codes do not address whether the panel has independent authority to combine such claims.<sup>119</sup> Nor do the Codes specify which panel—if more than one has been appointed to hear the separate but related claims—may reconsider the DRS Director's decision to combine the claims.<sup>120</sup>

FINRA explained the current practice typically is for the panel appointed to the "lowest-numbered case with a panel" (*i.e.*, the case with the earliest filing date) to have this authority. Where a panel has been appointed to the highest-numbered case (but not any other case) subject to the motion to combine, the panel in the highest-numbered case has the authority.<sup>121</sup> Where a panel has been appointed to a middle-numbered case (but not any other case filed earlier) subject to a motion to combine, the panel in that middle-numbered case has the authority.<sup>122</sup> The proposed rule change, as modified by Amendment No. 1, would codify this existing practice.<sup>123</sup>

#### i. Motions in Arbitration

The Codes do not address the timing of DRS's delivery of motions, responses, and replies to the arbitrator(s) on a panel.<sup>124</sup> In practice, however, DRS distributes a motion, along with all the

related responses and replies to that motion, to the panel after the last reply date has elapsed, unless the panel directs otherwise.<sup>125</sup> The proposed rule change would codify that practice, expressly providing that the DRS Director will send all motions, responses, and replies to the panel after the last reply date expires, unless the panel directs otherwise.<sup>126</sup> If the DRS Director receives any submissions on the motion after the last reply date has elapsed, this proposed rule change would require the DRS Director to forward them to the panel upon receipt, and the panel would determine whether to accept them.<sup>127</sup>

In addition, this proposed rule change would amend the Codes to add cross-references to: (1) FINRA Rules 12312 (Multiple Claimants), 12313 (Multiple Respondents), 13312 (Multiple Claimants), or 13313 (Multiple Respondents), as applicable, to indicate that motions related to separating claims or arbitrations would be decided by the DRS Director before a panel is appointed and by the panel after the panel is appointed;<sup>128</sup> and (2) proposed FINRA Rules 12314 (Combining Claims) and 13314 (Combining Claims), as applicable, to indicate which panel among multiple cases may combine separate but related claims into one arbitration or reconsider the DRS Director's decision to combine claims upon motion of a party.<sup>129</sup>

Finally, the Codes require a motion to amend a pleading after panel appointment to "be accompanied by copies of the proposed amended pleading when the motion is served on the other parties and filed with the Director."<sup>130</sup> In practice, "accompanied by copies" has been interpreted to mean "accompanied by hard copies."<sup>131</sup> To clarify that parties may serve on other parties and file with the DRS Director electronic copies (as well as hard copies) of a proposed amendment pleading (*i.e.*, to "clarify that hard copies are not required"), this proposed rule change would provide that a motion to amend a pleading need only "include," rather than "be accompanied

<sup>105</sup> Notice at 2147; *see* proposed Rules 12309(a)(3), 13309(a)(3).

<sup>106</sup> Notice at 2147; *see* proposed Rules 12309(d), 13309(d); FINRA Rules 12310, 13310.

<sup>107</sup> *Id.*

<sup>108</sup> Notice at 2147.

<sup>109</sup> FINRA Rule 12202(b).

<sup>110</sup> *Id.*

<sup>111</sup> FINRA Rule 12309(b)(2).

<sup>112</sup> FINRA Rule 12309(c)(2); *see supra* note 39.

<sup>113</sup> *See supra* notes 109–112 and accompanying text.

<sup>114</sup> *See* Notice at 2147; proposed Rules 12309(b)(2), 12309(c)(2).

<sup>115</sup> *See* FINRA Rules 12312, 13312.

<sup>116</sup> *See* Notice at 2147.

<sup>117</sup> More specifically, "the [DRS] Director may combine separate but related claims into one arbitration" before the ranked arbitrator lists are due to the DRS Director. FINRA Rules 12314, 13314; *see* Notice at 2147; *supra* note 39.

<sup>118</sup> FINRA Rules 12314, 13314.

<sup>119</sup> Notice at 2147.

<sup>120</sup> *Id.*

<sup>121</sup> *See* Notice at 2147; Amendment No. 1 at 4.

<sup>122</sup> Amendment No. 1 at 4 (expressing that this proposed rule change would "provide transparency and consistency regarding the current practice"). "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." *Id.*

<sup>123</sup> *Id.*; proposed Rules 12314(b), 13314(b).

<sup>124</sup> Notice at 2148.

<sup>125</sup> *Id.*

<sup>126</sup> Proposed Rules 12503(d), 13503(d).

<sup>127</sup> *Id.*

<sup>128</sup> Proposed Rules 12503(e)(3), 13503(e)(3); *see* Notice at 2148.

<sup>129</sup> Proposed Rules 12503(e)(4), 13503(e)(4). The addition of the proposed text to Rules 12503(e) and 13503(e) requires the renumbering of some paragraphs in that subsection. *See* Notice at 2148 n.63.

<sup>130</sup> FINRA Rules 12503(a)(4), 13503(a)(4).

<sup>131</sup> *See* Notice at 2148 n.63.

by copies of,” the proposed amended pleading.<sup>132</sup>

**j. Witness Lists Shall Not Be Combined With Document Lists**

Under the Codes, at least 20 days before the first scheduled hearing, all parties must: (1) provide all other parties—but not the DRS Director or arbitrators—with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced;<sup>133</sup> and (2) provide each other party—as well as the DRS Director—with the names and business affiliations of all witnesses they intend to present at the hearing.<sup>134</sup>

Separately, FINRA stated that parties often file a single document with the DRS Director that includes a list of documents and other materials, such as exhibits, they intend to use at the hearing that have not already been produced and their witness list.<sup>135</sup> Because the list of documents and other materials “could contain prejudicial or inadmissible material, as a service to forum users, the DRS Director will manually remove this information from the document containing the witness list before forwarding [the witness list] to the panel.”<sup>136</sup> But, at times, the DRS Director “may inadvertently disseminate the list of documents and other materials to the arbitrators, which could reveal potentially prejudicial or inadmissible information to the arbitrators before the hearing.”<sup>137</sup>

The proposed rule change protects against this risk of inadvertent disclosure by expressly providing that if parties create lists of documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced, the parties may serve the lists on all other parties, but shall not combine the lists with the witness lists filed with the DRS Director pursuant to Rule 12514(b) or 13514(b), as applicable.<sup>138</sup>

<sup>132</sup> Proposed Rules 12503(a)(4), 13503(a)(4); *see* Notice at 2148 n.63 (erroneously citing proposed Rules 12504(a)(4) and 13504(a)(4) when describing this proposed rule change); FINRA April Letter at 1 n.1 (correcting the error).

<sup>133</sup> *See* FINRA Rules 12514(a), 13514(a) (“The parties should not file the documents with the [DRS] Director or the arbitrators before the hearing.”).

<sup>134</sup> FINRA Rules 12514(b), 13514(b).

<sup>135</sup> Notice at 2148.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Proposed Rule 12514(a), 13514(a); *see* Notice at 2148.

**k. Hearing Records**

The official record of an arbitration hearing is the DRS Director’s tape, digital, or other recording of every arbitration hearing; however, if a party chooses to make a stenographic record of a hearing, a panel may decide in advance of a hearing that a party’s stenographic record will be the official record of the hearing.<sup>139</sup> If the DRS Director’s recording is the official record, the panel “may order the parties to provide a transcription of the recording” and “copies of the transcription must be provided to each arbitrator, served on each party, and filed with the Director.”<sup>140</sup> If a party’s stenographic record is the official record, “a copy must be provided to each arbitrator, served on each other party, and filed with the Director.”<sup>141</sup> Further, “[t]he cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties should bear all or part of the costs.”<sup>142</sup> But the Codes do not specify which party must provide to each arbitrator, serve on each other party, and file with the DRS Director a copy of a transcription of the official record.<sup>143</sup> The proposed rule change would assign that responsibility to the party or parties: (1) ordered to provide a transcription; or (2) electing to make a stenographic record.<sup>144</sup>

In addition, FINRA indicated that “executive sessions” are not recorded because they are not part of the official record of the hearing.<sup>145</sup> Rather, they are “discussions among arbitrators” outside the presence of the parties, the parties’ representatives, witnesses, and stenographers.<sup>146</sup> FINRA stated that to promote “transparency and consistency,” this proposed rule change would expressly provide that executive sessions would not be recorded.<sup>147</sup>

**l. Dismissal of Proceedings for Insufficient Service**

The Codes require parties, other than those proceeding pro se, to serve all pleadings and other documents through the Portal.<sup>148</sup> Service is accomplished on the date of submission in the

<sup>139</sup> FINRA Rules 12606, 13606.

<sup>140</sup> FINRA Rules 12606(a)(2), 13606(a)(2).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Notice at 2148.

<sup>144</sup> Proposed Rules 12606(a)(2), 13606(a)(2), 12606(b)(2), 13606(b)(2).

<sup>145</sup> Notice at 2148.

<sup>146</sup> *Id.*

<sup>147</sup> Proposed Rules 12606(a)(1), 13606(a)(1).

<sup>148</sup> FINRA Rules 12300, 13300; *see supra* note 39.

Portal.<sup>149</sup> If a party who is served fails to submit an answer, DRS reviews the service history with the panel and asks the panel to decide whether service was complete and sufficient before the case may proceed to hearing.<sup>150</sup> Although the Codes do not address what action the panel should take if it determines that service was insufficient,<sup>151</sup> current practice permits a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service.<sup>152</sup> The proposed rule change would codify this practice, expressly permitting a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service upon a respondent.<sup>153</sup>

The proposed rule change would also make non-substantive changes to the Codes. FINRA Rules 12700 (Dismissal of Proceedings Prior to Award) and 13700 (Dismissal of Proceedings Prior to Award) currently include cross-references to specific rules in which a panel may dismiss a claim or an arbitration, including dismissals of time-barred claims,<sup>154</sup> dismissals as a “sanction for material and intentional failure to comply with an order of the panel,”<sup>155</sup> and dismissals due to multiple postponements.<sup>156</sup> The rules do not, however, include cross-references to FINRA rules generally governing motions to dismiss (*i.e.*, FINRA Rules 12504 and 13504). The proposed rule change would amend Rules 12700(b) and 13700(b) to add a cross-reference to Rule 12504 or 13504, as applicable.<sup>157</sup>

**m. Dismissal of Claims Requires Issuance of an Award**

An “award” is a document stating the final disposition of an arbitration at its conclusion.<sup>158</sup> It may include, among other things, a “summary of the issues . . . in controversy,” the damages or relief requested, the damages or relief the panel has awarded, and the panel’s reasoning.<sup>159</sup> The Codes require FINRA to publish awards, which it does on its

<sup>149</sup> *Id.*

<sup>150</sup> Notice at 2148.

<sup>151</sup> *Id.* at 2148–49.

<sup>152</sup> *Id.* at 2149.

<sup>153</sup> Proposed Rules 12700(c), 13700(c).

<sup>154</sup> FINRA Rule 12700(b) (citing Rule 12206); FINRA Rule 13700(b) (citing Rule 13306).

<sup>155</sup> FINRA Rule 12700(b) (citing Rule 12212(c)); FINRA Rule 13700(b) (citing Rule 13212(c)).

<sup>156</sup> FINRA Rule 12700(b) (citing Rule 12601(c)); FINRA Rule 13700(b) (citing Rule 13601(c)).

<sup>157</sup> Proposed Rules 12700(b)(1), 13700(b)(1). The proposed rule change also would replace the bulleted list with a numbered list. Proposed Rules 12700(b), 13700(b).

<sup>158</sup> FINRA Rules 12100(c), 13100(c), 12904(b), 13904(b).

<sup>159</sup> *See* FINRA Rules 12904, 13904.



website.<sup>160</sup> Although the Codes permit a panel to grant a motion to dismiss a party's entire case after the conclusion of that party's case-in-chief,<sup>161</sup> the Codes do not address whether such a dismissal requires the issuance of an award.<sup>162</sup> FINRA stated that current practice is "to require the issuance of an award" in this situation because "the dismissal of all a claimant's claims disposes of the case."<sup>163</sup> The proposed rule change would codify this practice by requiring any panel that grants a motion to dismiss all claims to issue a "decision" containing the elements of a written award and make the decision "publicly available as an award."<sup>164</sup>

### III. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letters, and FINRA's response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.<sup>165</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.<sup>166</sup> In particular, as set forth below, the Commission finds that the proposed rule change is reasonably designed to protect investors and the public interest. It promotes transparency about FINRA's arbitration process and helps ensure consistent requirements across arbitration cases. The Commission addresses each aspect of the proposed rule change, and any related comments, in turn.

<sup>160</sup> See FINRA Rules 12904(h) and 13904(h); see also FINRA, Arbitration Awards Online, <https://www.finra.org/arbitration-mediation/arbitration-awards>.

<sup>161</sup> See FINRA Rules 12504(b), 13504(b).

<sup>162</sup> Notice at 2149.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*; see proposed Rule 12504(b), 13504(b); FINRA Rules 12904(e), 13904(e) (describing elements of an award).

<sup>165</sup> In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>166</sup> 15 U.S.C. 78o-3(b)(6).

#### A. Arbitrator List-Selection Amendments

##### 1. Removal of Arbitrators for Conflicts of Interest Before Ranking Lists Are Sent to the Parties

As stated above, the proposed rule change would codify existing practice by expressly requiring the DRS Director to manually review arbitrators on each arbitrator ranking list for current conflicts of interest not identified within the NLSS selection process and authorizing the DRS Director to remove arbitrators based on the existence of such conflicts before sending the arbitrator ranking lists to the parties.<sup>167</sup> Under this proposed rule change, "[i]f an arbitrator is removed due to such conflicts, the list selection algorithm will randomly select an arbitrator to complete the list."<sup>168</sup> FINRA stated that this proposed rule change responds to the Lowenstein Report's recommendation that the Codes require DRS's Neutral Management Department to conduct a manual review for conflicts of interest prior to sending the arbitrator list to the parties.<sup>169</sup> FINRA believes that this proposed rule change would enhance the transparency of the arbitrator-selection process by codifying DRS's practice of conducting a manual review for conflicts of interest that the NLSS may have missed prior to sending an arbitrator ranking list to the parties.<sup>170</sup>

Four commenters supported this proposed rule change.<sup>171</sup> One commenter emphasized that this

<sup>167</sup> See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5); Notice at 2145.

<sup>168</sup> Proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5). The DRS Director will send the lists generated by the NLSS to all parties at the same time, within approximately 30 days after the last answer is due, regardless of the parties' agreement to extend any answer due date. See FINRA Rules 12402(c), 12403(b), 13403(c).

<sup>169</sup> See Notice at 2144; Lowenstein Report at 36.

<sup>170</sup> See Notice at 2144-45, 2149.

<sup>171</sup> Letter from Hugh Berkson, President, Public Investors Advocate Bar Association ("PIABA"), to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 1, 2023) ("PIABA Letter") at 2; letter from Elissa Germaine, Supervising Attorney, Fairbridge Investor Rights Clinic, Pace University School of Law, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 2, 2023) ("Pace Letter") at 1; letter from Christine Lazaro, Professor of Clinical Legal Education & Director of the Securities Arbitration Clinic, St. John's University School of Law, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 2, 2023) ("St. John's Letter") at 1; and letter from William Jacobson, Clinical Professor & Director, Cornell Law School's Securities Law Clinic, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 2, 2023) ("Cornell Letter") at 1-2 (Cornell's pagination is mistaken; throughout this Order, the Commission refers to the actual page number as it appears in the sequence of the PDF document).

proposed rule change would provide "much greater transparency to internal FINRA processes."<sup>172</sup> A second commenter indicated that it would boost confidence in the arbitrator list-selection process.<sup>173</sup> A third commenter stated that it would promote efficiency and fairness in the arbitration process by "prevent[ing] 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."<sup>174</sup>

A fifth commenter offered no objection to this proposed rule change provided that the DRS Director's authority would be limited to "conflicts of interest of the type screened out by the [NLSS]," and the DRS Director would not have "unlimited discretion to strike arbitrators for potential or suspected conflicts of interest or bias."<sup>175</sup> The commenter acknowledged that FINRA publishes some general guidance on conflicts of interest<sup>176</sup> but suggested that "the Codes define 'conflicts of interest' to clarify to the parties what relationships will cause an arbitrator to be struck by NLSS or manually by the Director."<sup>177</sup>

In response, FINRA stated that the "non-exhaustive list of potential conflicts . . . published on [its] website

<sup>172</sup> PIABA Letter at 2.

<sup>173</sup> St. John's Letter at 1 ("Codifying this process will help parties feel confident in the selection process."). St. John's couples its support with a recommendation that FINRA "upgrad[e] the archaic algorithm by which the conflicts are screened," thus "limit[ing] the necessity for manual review." St. John's Letter at 1. This comment is outside the scope of this proposed rule change, as FINRA has not proposed any changes to the NLSS itself. FINRA indicated, however, that it is in the process of assessing whether the NLSS remains "the most effective means in creating random, computer-generated arbitrator lists for the arbitrator participants." FINRA April Letter at 4.

<sup>174</sup> Cornell Letter at 2.

<sup>175</sup> Letter from Aleah Jones, Pickard Djinis and Pisarri LLP, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (May 9, 2023) ("Pickard Letter") at 3.

<sup>176</sup> *Id.* at 3 n.8 (citing FINRA, How Parties Select Arbitrators, <https://www.finra.org/arbitration-mediation/arbitrator-selection>). In the Notice, FINRA cited the same web page and identified the following potential conflicts of interest: "the arbitrator is employed by a party to the case; the arbitrator is an immediate family member or relative of a party to the case or a party's counsel; the arbitrator is employed at the same firm as a party to the case; the arbitrator is employed at the same law firm as counsel to a party to the case; the arbitrator is representing a party to the case as counsel; the arbitrator is an account holder with a party to the case; the arbitrator is employed by a member firm that clears through a clearing agent that is a party to the case; or the arbitrator is in litigation with or against a party to the case. DRS may also remove an arbitrator for other reasons affecting the arbitrator's ability to serve, such as if DRS learns the arbitrator has moved out of the hearing location." Notice at 2145 n.11.

<sup>177</sup> Pickard Letter at 3.



sufficiently explains to forum users what types of relationships or connections FINRA looks for to determine whether a conflict of interest exists.”<sup>178</sup>

The Commission believes that expressly requiring the DRS Director to manually review arbitrators on each arbitrator ranking list for current conflicts of interest not identified within the NLSS and authorizing the DRS Director to remove arbitrators based on the existence of such conflicts should improve fairness in the arbitration process. Specifically, the proposed rule change should help ensure that each arbitrator ranking list is composed of arbitrators that are free of conflicts of interest with the parties to the arbitration. The Commission further notes that the proposed rule change does not expand the DRS Director’s discretion to remove arbitrators from the ranking lists due to a conflict of interest. Instead, the DRS Director’s review of ranking lists will continue to be limited to current conflicts of interest not identified within the NLSS selection process and consistent with those described by FINRA on its website. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

## 2. Removal of Arbitrators for Conflicts of Interest or Bias After Lists Are Sent to the Parties but Before the First Hearing Session

In addition to authorizing the DRS Director to remove an arbitrator for a conflict of interest before the NLSS-generated ranking lists are sent to the parties,<sup>179</sup> the proposed rule change would expressly authorize the DRS Director to remove an arbitrator for a conflict of interest or bias on the DRS Director’s own initiative or upon a party’s request “[a]fter the Director sends the lists generated by the list selection algorithm to the parties, but before the first hearing session begins.”<sup>180</sup> FINRA explained that this change would “ensure that the parties are aware that they may challenge an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins.”<sup>181</sup>

Four commenters supported this proposed rule change.<sup>182</sup> One of these

four commenters reasoned that it “would assist parties unfamiliar with the arbitration process by helping them understand their rights and abilities as it relates to challenges to remove arbitrators.”<sup>183</sup> A fifth commenter objected to the proposed rule change, expressing concern that parties could “exert greater control over the arbitral selection process than they had under the previous rule set” and assert a “conflict of interest or bias” as a form of gamesmanship.<sup>184</sup> This commenter urged FINRA to “restore the arbitration ranking system previously in place.”<sup>185</sup>

In response, FINRA stated that the proposed rule change would not amend the process related to the removal of arbitrators on the DRS Director’s own initiative or upon a party’s request.<sup>186</sup> Rather, the proposed rule changes would clarify the timing for the process (*i.e.*, after the DRS Director sends the lists generated by the NLSS to the parties, but before the first hearing session begins).<sup>187</sup> Accordingly, to challenge an arbitrator, the Codes would continue to require a party to file a written motion with DRS and serve the motion on each party so that the motions are available to all parties.<sup>188</sup> Thus, if a party challenges an arbitrator, all other parties are provided an opportunity to make their arguments prior to any decision by the DRS Director.<sup>189</sup>

The Commission believes the fifth commenter’s objection reflects a mistaken reading of this proposed rule change. The Codes currently permit the DRS Director to remove an arbitrator for a conflict of interest or bias, either upon request of a party or on the DRS Director’s own initiative at any point after parties’ receipt of the arbitrator ranking lists until the first hearing session begins.<sup>190</sup> The proposed rule change does not alter the DRS Director’s or parties’ ability to challenge an arbitrator for cause but rather would make the process more transparent by making explicit in the rule text that such challenge may take place at any point after receipt of the arbitrator ranking lists until the first hearing session begins. The Commission believes that the proposed rule change is reasonably designed to help ensure

that all parties are equally informed of their ability to challenge arbitrators for cause. For these reasons, the Commission finds that it is reasonably designed to protect investors and in the public interest.

## 3. Written Explanation of DRS Director’s Decision

As stated above, the proposed rule change would codify existing practice by expressly requiring the DRS Director to provide the parties to an arbitration with a written explanation of their decision “to grant or deny a party’s request to remove an arbitrator . . . .”<sup>191</sup> FINRA stated that it codified this current practice in response to a recommendation in the Lowenstein Report.<sup>192</sup>

Four commenters supported this proposed rule change, explaining that written explanations would improve transparency, consistency, and fairness in the arbitrator-removal process.<sup>193</sup> One commenter also emphasized that written explanations would promote “confidence in the integrity of the arbitration selection process.”<sup>194</sup> Two commenters indicated that written explanations would help parties to understand the DRS Director’s decisions.<sup>195</sup> But another commenter coupled its support for this proposed change with a recommendation for improvement: the written explanations should be published in a “publicly available database, such as the one currently maintained for FINRA awards.”<sup>196</sup> According to this commenter, publishing such information—even in redacted form—would illuminate the nature and scope of the factors that FINRA considers to be “legitimate ground[s] for a challenge to a potential arbitrator.”<sup>197</sup> A fifth commenter offered no objection to this proposed rule change provided, as stated above, that the DRS Director would not have unlimited authority to strike potential arbitrators.<sup>198</sup>

In response, FINRA acknowledged the commenter’s recommendation to publish the DRS Director’s written explanation in a publicly available database in order to enhance “transparency regarding the arbitrator

<sup>191</sup> See proposed Rules 12407(c), 13410(c); Notice at 2145.

<sup>192</sup> See Notice at 2145; Lowenstein Report at 37.

<sup>193</sup> See PIABA Letter at 2; Cornell Letter at 2; Pace Letter at 2; St. John’s Letter at 2.

<sup>194</sup> See Pace Letter at 2 (supporting the proposed rule change and noting the importance of “confidence in the integrity” of the system).

<sup>195</sup> *Id.* at 2; Cornell Letter at 2.

<sup>196</sup> See PIABA Letter at 2.

<sup>197</sup> *Id.* at 2.

<sup>198</sup> See Pickard Letter at 3.

its support for the written-decision proposed rule change); Cornell Letter at 2; St. John’s Letter at 2.

<sup>183</sup> See St. John’s Letter at 2.

<sup>184</sup> See Pickard Letter at 3–4.

<sup>185</sup> *Id.* at 4.

<sup>186</sup> See FINRA August Letter at 3–4.

<sup>187</sup> See proposed Rules 12407(a), 13410(a).

<sup>188</sup> See *id.* at 4; see also FINRA Rules 12503 (Motions) and 13503 (Motions).

<sup>189</sup> See FINRA August Letter at 4.

<sup>190</sup> See FINRA Rules 12407(a) and 13410(a).

<sup>178</sup> See FINRA August Letter at 4.

<sup>179</sup> See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

<sup>180</sup> See proposed Rules 12407(a), 13410(a).

<sup>181</sup> See Notice at 2145.

<sup>182</sup> See PIABA Letter at 2; Pace Letter at 1 (noting its “support [for] FINRA’s proposed list selection process amendments,” though it only emphasizes

list selection process.”<sup>199</sup> However, FINRA declined to make public the DRS Director’s written explanations to grant or deny a party’s request to remove an arbitrator.<sup>200</sup> FINRA explained that these decisions have “little precedential value”—and their publication therefore offers limited public value—because each decision is based on the facts and circumstances of a single case.<sup>201</sup> But to address the commenter’s recommendation to enhance transparency, FINRA stated that it would publish “the most common reasons for granting or denying party-initiated challenges” on its website.<sup>202</sup> FINRA believes that the publication of this information on its website would make the arbitrator-challenge process more transparent by providing parties with “useful information when considering potential challenges to remove an arbitrator.”<sup>203</sup>

The Commission believes that expressly requiring the DRS Director to provide the parties to an arbitration with a written explanation of the DRS Director’s decision to grant or deny a party’s request to remove an arbitrator improves the perception of fairness in the arbitration forum by enhancing transparency into the removal process. Because the proposed rule change would not expand the DRS Director’s discretion to remove a conflicted or biased arbitrator, the DRS Director’s authority to remove such arbitrator would remain limited. In addition, with respect to public access to decisions on motions to remove arbitrators, the Commission believes that FINRA’s approach of publishing the most common reasons for granting or denying such requests on its website would provide participants considering whether to file a motion to remove an arbitrator for conflicts or bias with a valuable source of information regarding such challenges. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

## B. Procedural Amendments

### 1. Virtual Prehearing Conferences

As stated above, the Codes currently indicate that prehearing conferences will generally be held by telephone.<sup>204</sup> The proposed rule change would 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.”<sup>205</sup> FINRA stated that parties “have expressed a preference for holding prehearing conferences by video conference[.]”<sup>206</sup> explaining that some parties “may perceive an increase in their ability to participate or interact in the hearings by video.”<sup>207</sup>

Three commenters supported this proposed rule change, and a fourth did not address this specific issue.<sup>208</sup> One commenter emphasized that video conferences would “enhance[ ] communication between the parties, counsel, and arbitrators [by providing] the ability to read body language and facial expressions.”<sup>209</sup> Motivated by a concern that video conferencing could impose an “undue burden on claimants,” one commenter recommended that this proposed rule change require a panel to consider the parties’ access to and comfort with technology when evaluating motions for hearings in formats other than video.<sup>210</sup> A fifth commenter offered general support for this proposed rule change but recommended that this proposed rule change permit “another type of hearing session . . . if agreed to by a majority of the parties.”<sup>211</sup> This commenter explained that “the majority should prevail without the matter needing to be put to a motion and considered at a prehearing session” where there are more than two parties to an arbitration.<sup>212</sup>

In response, FINRA stated that the COVID–19 pandemic required the development of “policies and procedures around conducting arbitration cases using virtual hearings and [therefore FINRA] created resource guides for parties and arbitrators for such hearings.”<sup>213</sup> Approximately three years later, “parties have become proficient with using this technology and have embraced it as an alternative to other hearing methods.”<sup>214</sup> The proposed rule change would reflect this preference. FINRA also stated that it would update, as appropriate, the guidance it makes available to participants to help ensure that all

<sup>205</sup> See proposed Rules 12500(b), 12501(c), 12504(a)(5), 13500(b), 13501(c), 13504(a).

<sup>206</sup> See Notice at 2145.

<sup>207</sup> See Notice at 2150.

<sup>208</sup> See Cornell Letter at 2; Pace Letter at 2; St. John’s Letter at 2; see PIABA Letter at 2–3 (noting general support for all procedural amendments, but not addressing this one specifically).

<sup>209</sup> See Pace Letter at 2.

<sup>210</sup> See Cornell Letter at 2.

<sup>211</sup> See Pickard Letter at 4 (emphasis removed).

<sup>212</sup> *Id.* at 4.

<sup>213</sup> See FINRA April Letter at 11.

<sup>214</sup> *Id.*

participants have the information they need to “participate fully in virtual prehearing conferences.”<sup>215</sup> If a party nonetheless prefers to have an in-person prehearing conference, FINRA stated that it could file a motion seeking that relief, and the panel can consider, among other things, “a party’s access to and comfort level with technology.”<sup>216</sup>

In addition, FINRA stated that it believes a panel, once fully briefed, is in the best position to determine whether an alternative prehearing format is more suitable to the parties than the proposed default format of video conference. Therefore, FINRA declined to amend the proposed rule change to allow a majority of the parties to agree to another type of hearing.<sup>217</sup>

The Commission believes that requiring prehearing conferences to be held by video conference provides parties the opportunity to see and interact with the other participants in the case, enhancing their participation. But because this proposed rule change also permits a motion by a party for another hearing format, every party has a fair opportunity to request an alternative format based upon, among other things, access to or comfort with technology. Furthermore, the Commission believes FINRA reasonably determined that the arbitrator panel is in the best positioned to evaluate and determine whether another prehearing format is appropriate in situations where there is not agreement among the parties to another type of hearing. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

### 2. In-Person Hearings

The proposed rule change would also amend the provision governing the format for hearings on the merits of a case. Currently, the Codes do not articulate a definitive format for hearings.<sup>218</sup> FINRA stated, however, that “hearings are generally held in person,” and forum users “have not similarly expressed a preference for making video conference the default for hearings.”<sup>219</sup> The proposed rule change would codify existing practice,

<sup>215</sup> *Id.*

<sup>216</sup> See *id.* (stating that “[i]n 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.”).

<sup>217</sup> See FINRA August Letter at 5.

<sup>218</sup> See FINRA Rules 12600(b) and 13600(b) (stating that the panel will decide the time and date of the hearing at the initial prehearing conference or otherwise in another manner).

<sup>219</sup> See Notice at 2145.

<sup>199</sup> See FINRA April Letter at 4.

<sup>200</sup> See *id.* at 4–5.

<sup>201</sup> *Id.* at 4.

<sup>202</sup> See *id.* at 4–5.

<sup>203</sup> *Id.* at 5.

<sup>204</sup> See *supra* note 77.

providing that all hearings “will generally be held in person unless the parties agree to, or the panel grants a motion for, another type of hearing session.”<sup>220</sup> No commenter offered specific support or opposition to this proposed change.

In light of FINRA’s experience with forum users, the Commission believes FINRA’s determination to require that hearings on the merits generally be held in person is reasonable. It will clarify the default format of the hearing, which should enhance transparency and efficiency, and eliminate potential misunderstandings among parties. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

### 3. Virtual Option for Special Proceedings

As stated above, the proposed rule change would require parties to hold special proceedings in Simplified Arbitrations by video conference, unless: (1) the claimant requests at least 60 days before the first scheduled hearing that it be held by telephone; or (2) the parties agree to another type of hearing session.<sup>221</sup> This proposed rule change follows FINRA’s receipt of “suggestions from customers that they would prefer . . . to have the option to have a special proceeding by video conference.”<sup>222</sup>

Four commenters supported this proposed rule change, and a fifth offered no objection.<sup>223</sup> One commenter emphasized that it would “facilitate more accurate communication compared to telephone conferences” by permitting participants to view facial expressions and reactions.<sup>224</sup> Another commenter indicated that video conferences would permit “investors with small claims to present their case to the arbitrator without added expenses or travel.”<sup>225</sup>

The Commission believes that requiring parties to hold special proceedings in Simplified Arbitrations by video conference (with limited exceptions) should improve the format and delivery of claimants’ cases to arbitrators in Simplified Arbitration. In addition, given the proliferation of video-conferencing technology to the

public, this proposed rule change should not impose logistical or financial burdens on parties. At the same time, however, the proposed rule change makes clear the flexibility to alter the format of these hearings as necessary where a claimant requests or the parties agree. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

### 4. Redacting Confidential Information

As stated above, the proposed rule change would require any party in a Simplified Arbitration to redact any PCI from documents filed with the DRS Director.<sup>226</sup> FINRA stated that this change would address “increasing concerns with customers’ identities being used for fraudulent purposes in the securities industry.”<sup>227</sup> It would also align the redaction requirements for Simplified Arbitrations with those of other arbitration cases.<sup>228</sup> FINRA acknowledged that it previously declined to extend this requirement to Simplified Arbitrations due to a concern that pro se litigants would have difficulty complying.<sup>229</sup> To address this concern, FINRA stated that it would update guidance on its website regarding how to redact PCI from documents filed with DRS.<sup>230</sup>

Four commenters broadly supported FINRA’s effort to protect investors’ PCI in Simplified Arbitrations, and a fifth offered no objection.<sup>231</sup> But the four supportive commenters each expressed concern that this proposed rule change would disproportionately impact pro se claimants who may lack the technological experience to effectively and efficiently redact PCI.<sup>232</sup> Notwithstanding that concern, one commenter concluded that “the benefits to privacy outweigh the increased complexity, assuming that the guidance provided by FINRA adequately assists pro se parties in making redactions.”<sup>233</sup>

The other three supportive commenters recommended changes to the rule or its implementation to help mitigate their concern over pro se

parties.<sup>234</sup> Two of these commenters suggested that FINRA post redaction guidance both on its website and the Portal.<sup>235</sup> One commenter emphasized the importance of FINRA providing clear, comprehensive, and plain-English guidance for the benefit of pro se claimants, as well as “examples of what a properly redacted document looks like, and basic suggestions about how to make the redactions.”<sup>236</sup> For cases in which claimants are unable to redact PCI notwithstanding the guidance, another commenter recommended that FINRA either apply the required redactions itself or permit investors to waive the redaction of their own PCI.<sup>237</sup> The commenter explained that this alternative approach would prevent “dismissals either due to pro se filers’ inability to comply with the rule, or their abandoning their case because they don’t fully understand how to accomplish the redaction.”<sup>238</sup>

In response, FINRA stated that it would provide clear, plain English guidance on the steps pro se parties can take to protect PCI and on how to redact PCI from documents filed with DRS on both its website and the Portal.<sup>239</sup> But FINRA declined to permit pro se investors to waive the redaction of their own PCI because it would undermine this proposed rule change’s effort to “safeguard investors’ information and their financial resources.”<sup>240</sup> FINRA also declined to make the redactions itself, explaining that FINRA rules require the application of redactions before a document is ever filed with FINRA.<sup>241</sup> In sum, “FINRA believes the benefits of safeguarding customers’ identities and sensitive information balance the concerns relating to pro se

<sup>234</sup> See PIABA Letter at 3; Pace Letter at 2–3; St. John’s Letter at 2.

<sup>235</sup> See PIABA Letter at 3 (stating that FINRA should post the guidance on the “case’s docket/portal”); Pace Letter at 3 (stating that FINRA should post the guidance on the Portal in a “visible and accessible manner, at the point in time when customers are likely to be uploading documents that may contain PCI” to help “ensure that guidance on PCI redaction is sufficiently beginner- and user-friendly and is not overlooked by pro se parties”).

<sup>236</sup> See Pace Letter at 3.

<sup>237</sup> See St. John’s Letter at 2.

<sup>238</sup> *Id.*

<sup>239</sup> See FINRA April Letter at 5–6.

<sup>240</sup> *Id.* at 6 (noting that waiver “would defeat the purpose of the Proposal”).

<sup>241</sup> *Id.*; see also FINRA Rules 12300(d)(1)(A) and 13300(d)(1)(A) (stating that “if the Director receives a claim . . . with the full Social Security number, taxpayer identification number or financial account number, the Director will deem the filing deficient under Rule 12307 and will request that the party refile the document in compliance with this paragraph.”); see also FINRA April Letter at 6 n.20 (emphasizing that FINRA would treat any filed claim or document as deficient or improper if it contained certain PCI).

<sup>220</sup> See proposed Rules 12600(b), 13600(b); but see *supra* note 77.

<sup>221</sup> See proposed Rules 12800(c)(3)(B)(i), 13800(c)(3)(B)(i).

<sup>222</sup> See Notice at 2146.

<sup>223</sup> PIABA Letter at 3; Cornell Letter at 2–3; Pace Letter at 2; St. John’s Letter at 2; Pickard Letter at 4.

<sup>224</sup> Cornell Letter at 3; see Pace Letter at 2.

<sup>225</sup> St. John’s Letter at 2.

<sup>226</sup> See Notice at 2146 and n.29 (explaining that FINRA Rules 12300(d)(1)(C) and 13300(d)(1)(C) would be deleted); proposed Rules 12300(d)(1), 13300(d)(1).

<sup>227</sup> See Notice at 2146.

<sup>228</sup> See FINRA Rules 12300(d)(1)(A), 13300(d)(1)(A).

<sup>229</sup> See Notice at 2146.

<sup>230</sup> *Id.*; see PCI Guidance, *supra* note 83.

<sup>231</sup> See PIABA Letter at 3; Cornell Letter at 3; Pace Letter at 2; St. John’s Letter at 2; Pickard Letter at 5.

<sup>232</sup> See PIABA Letter at 3; Cornell Letter at 3; Pace Letter at 2–3; St. John’s Letter at 2.

<sup>233</sup> See Cornell Letter at 3.

parties' lack of experience with filing claims in the forum."<sup>242</sup>

The Commission believes that requiring customers to redact PCI from any document they submit to DRS should help prevent substantial harm to investors. Absent this proposed rule change, unredacted PCI filed in Simplified Arbitrations could be misused by third parties. The Commission acknowledges commenters' concern that pro se investors might struggle to comply with the new redaction requirements and believes FINRA's plan to publish plain-English guidance should aid pro se investors in complying with these obligations without diminishing FINRA's efforts to protect PCI. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### 5. Number of Hearing Sessions per Day

As stated above, arbitrators receive compensation for each hearing session in which they participate.<sup>243</sup> To calculate the number of hearing sessions per day, FINRA explained that DRS's current practice is to calculate the total number of hearing hours, subtract any time spent for lunch, and divide the remainder by four (as in four hours).<sup>244</sup> Consistent with this methodology, this proposed rule change would amend the definition of "hearing session" to indicate that, during a single day, "the next hearing session begins after four hours of hearing time has elapsed."<sup>245</sup>

One commenter supported this proposed rule change.<sup>246</sup> Another commenter offered no objection to this proposed rule change so long as it "would not cause the party to whom fees are assessed . . . to pay for 'session time' not actually spent in session."<sup>247</sup> More broadly, this commenter requested "greater clarity . . . as it is unclear . . . whether fees for two full sessions will be assessed after four hours and one minute of hearing time have elapsed."<sup>248</sup>

In response, FINRA stated that after four hours and one minute of hearing time have elapsed, it would pay arbitrators for two hearing sessions to ensure that they are compensated for their time and service to the DRS forum.<sup>249</sup> FINRA further stated that it would update its arbitrator guidance to

encourage arbitrators to be efficient in managing the time during hearings to minimize, whenever possible, the number of hearing sessions held.<sup>250</sup>

The Commission believes that aligning the Codes' definition of "hearing session" with FINRA's current practice for calculating the number of hearing sessions in a single day promotes transparency and clarity in the way DRS calculates the number of hearing sessions. As such, the proposed rule change should help parties to an arbitration better understand the fees charged in a proceeding and better plan the presentation of their claim. For these reasons the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### 6. Update Submission Agreement When Filing a Third-Party Claim

As stated above, the proposed rule change would expressly require a respondent filing an answer with a third-party claim to (1) execute a Submission Agreement that lists the name of the third-party and (2) file the updated Submission Agreement with the DRS Director.<sup>251</sup> FINRA stated that failing to file an updated Submission Agreement makes a third-party claim deficient under existing rules, and that the prevalence of this mistake currently causes time-consuming delays in arbitration.<sup>252</sup> The proposed rule change would help "avoid potential delay and slower case processing times" by emphasizing the parties' obligations under the rules.<sup>253</sup>

One commenter offered no objection to this proposed rule change.<sup>254</sup> Another commenter supported this proposed rule change, explaining that it has "no drawbacks" because it would "add clarification and prevent delays."<sup>255</sup>

The Commission believes that by addressing the apparent confusion that results in filing of deficient claims, this proposed rule change helps ensure more consistent compliance with forum rules and prevent unnecessary delays in case processing. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### 7. Amending Pleadings or Filing Third-Party Claims

As stated above, the proposed rule change would modify several procedures related to the filing of amended pleadings and third-party claims. First, the proposed rule change would expand the application of FINRA Rules 12309 and 13309 (Amending Pleadings) from just amended pleadings to both amended pleadings and third-party claims.<sup>256</sup> FINRA stated that these proposed rule changes would help address the current absence of express provisions governing the filing of third-party claims other than in a respondent's answer to a claim.<sup>257</sup> Second, the proposed rule change would make other changes to the Codes relating to amended pleadings, including specifying that: arbitrators are "appointed to" the panel, not placed "on" the panel;<sup>258</sup> an amended pleading or third-party claim that is included with a motion need not be a hard copy;<sup>259</sup> once the ranked arbitrator lists are due, no party may amend a pleading to add a party or file a third-party claim until a panel has been appointed and the panel grants a motion to amend a pleading or file the third-party claim;<sup>260</sup> service by first-class mail or overnight mail service is accomplished on the date of mailing; service by any other means is accomplished on the date of delivery;<sup>261</sup> the provisions in the Codes relating to responding to amended pleadings are separate from the current provisions relating to answering amended claims;<sup>262</sup> and before panel appointment, the DRS Director would be authorized to determine whether any party may file a response to an amended pleading.<sup>263</sup> Third, the proposed rule change would expressly permit a customer to file a third-party claim if a respondent becomes an inactive FINRA member or associated person.<sup>264</sup>

<sup>256</sup> See Notice at 2147; *see generally* proposed Rules 12309, 13309.

<sup>257</sup> Notice at 2147; *see* FINRA Rules 12303(b), 13303(b).

<sup>258</sup> Notice at 2147; *see* proposed Rules 12309(a), 13309(a).

<sup>259</sup> Notice at 2147; *see* proposed Rules 12309(b)(1), 13309(b) (deleting "a copy of").

<sup>260</sup> Notice at 2147; *see* proposed Rules 12309(c)(1), 13309(c)(1).

<sup>261</sup> Notice at 2147; *see* proposed Rules 12309(a)(3), 13309(a)(3).

<sup>262</sup> Notice at 2147; *see* proposed Rules 12309(d), 13309(d); FINRA Rules 12310, 13310.

<sup>263</sup> Notice at 2147; *see* proposed Rules 12309(d), 13309(d); FINRA Rules 12310, 13310.

<sup>264</sup> Proposed Rules 12309(b)(2), 12309(c)(2).

<sup>242</sup> See FINRA April Letter at 7.

<sup>243</sup> See Notice at 2146 (citing FINRA Rules 12214, 13214).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*; *see* proposed Rules 12100(p), 13100(p).

<sup>246</sup> See Cornell Letter at 3.

<sup>247</sup> See Pickard Letter at 5.

<sup>248</sup> *Id.* at 5.

<sup>249</sup> See FINRA August Letter at 5.

<sup>250</sup> *Id.*

<sup>251</sup> See proposed Rules 12303(b), 13303(b).

<sup>252</sup> See Notice at 2146.

<sup>253</sup> *Id.* at 2146–47 (explaining that the proposed rule change aims "[t]o clarify to parties the requirements related to third party claims and Submission Agreements").

<sup>254</sup> See Pickard Letter at 5.

<sup>255</sup> See Cornell Letter at 3.

Two commenters supported these proposed rule changes,<sup>265</sup> and a third offered no objection.<sup>266</sup>

The Commission believes that by addressing procedural and other ambiguities in the relevant rules, these proposed rule changes should enhance the transparency of the forum's procedures and promote their consistent and efficient application. For this these reasons, the Commission finds that the proposed rule changes are reasonably designed to protect investors and the public interest.

#### 8. Combining Claims

As stated above, the proposed rule change would address which panel among those in multiple cases involving separate but related claims would decide a motion to combine such claims into a single arbitration or reconsider the DRS Director's previous decision on a motion to combine such claims.<sup>267</sup> Specifically, the original proposed rule change would have set forth rules governing two scenarios: (1) if a panel has been appointed to the lowest numbered case, the panel in that case would have the above-referenced authority; and (2) 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 would have the above-referenced authority.<sup>268</sup> FINRA stated that this original proposed rule change would have codified current practice.<sup>269</sup>

One commenter offered no objection to this proposed rule change.<sup>270</sup> A second commenter stated that as originally proposed, the proposed rule change would promote clarity and efficiency by codifying current practice.<sup>271</sup> However, this commenter noted that this original proposed rule change had an apparent gap—it did not address “what happens if a panel has only been appointed to cases numbered in the middle (*i.e.*, neither the lowest nor the highest) if more than two combinable claims are involved.”<sup>272</sup>

In its response, FINRA amended the proposed rule change to address this commenter's concerns. FINRA

explained that the original proposed rule change addressed the two most common situations in which a motion to combine claims is filed.<sup>273</sup> But to provide greater clarity, FINRA amended this proposed rule change to provide that “[i]f a panel has been appointed to one or more cases [involving separate but related claims], the panel appointed to the lowest-numbered case with a panel” has the authority to: (1) combine separate but related claims into one arbitration; and (2) reconsider the DRS Director's decision on such a motion to combine claims.<sup>274</sup>

The Commission believes that by addressing ambiguities in the Codes and codifying existing practice, the proposed rule change enhances the transparency of the forum's procedures and promotes their consistent application in all arbitration cases. In addition, this proposed rule change should enhance the efficiency of the arbitration process by reducing the number of arbitrations hearing separate but related claims. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### 9. Motions in Arbitration

As stated above, the proposed rule change would amend FINRA's rules governing parties' motions in arbitration. First, the proposed rule change would require the DRS Director to send all motions, responses, and replies to the panel after the last reply date expires, unless the arbitrator panel directs otherwise.<sup>275</sup> If the DRS Director receives any submissions on the motion after the last reply date has elapsed, this proposed rule change would require the DRS Director to forward the submissions to the panel upon receipt, and the panel would determine whether to accept them.<sup>276</sup> FINRA stated that this proposed rule change would codify an existing practice, bringing transparency and consistency to arbitration.<sup>277</sup>

Second, the proposed rule change would add cross-references to rules governing motions to separate or combine claims or arbitrations. In particular, the proposed rule change would clarify: (1) that the DRS Director may decide a motion to separate claims

or arbitrations prior to panel appointment, but the panel assumes that authority upon its appointment;<sup>278</sup> and (2) which panel among multiple cases may combine separate but related claims into one arbitration or reconsider the DRS Director's decision to combine claims upon motion of a party (as discussed above).<sup>279</sup>

Third, the proposed rule change would clarify if a motion to amend a pleading is made after panel appointment, the amended pleading that should be included with the motion does not need to be a hard copy.<sup>280</sup>

One commenter supported these proposed rule changes, characterizing them as “clear benefit[s] for both claimants and respondents” that do not alter current procedures.<sup>281</sup>

The Commission believes that by identifying and reducing ambiguity, the proposed rule change makes the arbitration process more transparent and promotes uniformity across arbitration cases. For these reasons, the Commission finds that the proposed clarifications are reasonably designed to protect investors and the public interest.

#### 10. Witness Lists Shall Not Be Combined With Document Lists

As stated above, the Codes require that at least 20 days before the first scheduled hearing, all parties must: (1) provide all other parties—but not the DRS Director or arbitrators—with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced;<sup>282</sup> and (2) provide each other party—as well as the DRS Director—with the names and business affiliations of all witnesses they intend to present at the hearing.<sup>283</sup> Separately, FINRA stated that in addition to producing copies of documents and other materials they intend to use at the hearing, parties often produce and file with the DRS

<sup>278</sup> Proposed Rules 12503(e)(3), 13503(e)(3) (adding cross-references to Rules 12312, 12313, 13312, and 13313, as applicable, which identify the circumstances in which the DRS Director or a panel may separate claims or arbitrations).

<sup>279</sup> Proposed Rules 12503(e)(4), 13503(e)(4) (adding cross-reference to proposed Rules 12314 or 13314, as applicable, which articulates who has authority to decide motions to combine claims). The addition of the proposed text to Rules 12503(e) and 13503(e) requires the renumbering of certain paragraphs in that subsection. *See* Notice at 2148 n.63.

<sup>280</sup> *See* proposed Rules 12503(a)(4), 13503(a)(4).

<sup>281</sup> *See* Cornell Letter at 4. Another commenter offered no objection. *See* Pickard Letter at 5.

<sup>282</sup> *See* FINRA Rules 12514(a), 13514(a) (stating that “[t]he parties should not file the documents with the [DRS] Director or the arbitrators before the hearing.”).

<sup>283</sup> FINRA Rules 12514(b), 13514(b).

<sup>265</sup> PIABA Letter at 3; Cornell Letter at 3–4 (stating that this proposed rule change would codify respondents' current ability to file third-party claims, create the same procedures for filing third-party claims as those for amending a complaint, and promote simplicity and fairness in the process).

<sup>266</sup> Pickard Letter at 5.

<sup>267</sup> *See* proposed Rules 12314(b), 13314(b); *see also* Amendment No. 1 at 4.

<sup>268</sup> *See* Notice at 2147.

<sup>269</sup> *See id.*

<sup>270</sup> Pickard Letter at 5.

<sup>271</sup> Cornell Letter at 4.

<sup>272</sup> *Id.*

<sup>273</sup> FINRA April Letter at 7–8.

<sup>274</sup> Proposed Rules 12314(b)(1), 13314(b)(1); FINRA April Letter at 7–8; *see also* Amendment No. 1 at 4.

<sup>275</sup> Proposed Rules 12503(d), 13503(d).

<sup>276</sup> *Id.*

<sup>277</sup> *See* Notice at 2148 (stating that “[i]n practice, DRS sends all motions and all responses to the panel after the last reply date has elapsed, unless otherwise directed by the panel.”).

Director a single document listing such documents and other materials.<sup>284</sup> FINRA explained that even though FINRA Rules 12514(a) and 13514(a) indicate that “parties should not file the documents with the [DRS] Director or arbitrators before the hearing,” the Codes do not currently include language regarding the sharing of document lists that parties may choose to create before the hearing.<sup>285</sup> As such, parties who choose to create document lists, often file such lists with the DRS Director, along with the witness list.<sup>286</sup> When parties file combined lists, FINRA stated that it endeavors to remove any potentially prejudicial or inadmissible materials (typically found in a party’s list of documents) from the combined lists before forwarding the witness lists to the arbitrators.<sup>287</sup> To better protect against the risk of inadvertent disclosure of prejudicial or inadmissible materials, the proposed rule change would expressly provide that if a party creates a list of documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced, it may serve the list on all other parties, but shall not combine the list with the witness list filed with the DRS Director pursuant to Rule 12514(b) or 13514(b), as applicable.<sup>288</sup>

One commenter offered “no strong objection,” but observed that FINRA arbitrators prefer identifying admissible documents and materials prior to the hearing to avoid mid-hearing delays.<sup>289</sup> A second commenter supported this proposed rule change, emphasizing that it would reduce work for the DRS Director and minimize unintentional disclosures of confidential information to arbitrators without imposing a significant burden on the parties.<sup>290</sup>

The Commission believes the proposed rule change would reduce the risk of unintentional disclosure of prejudicial information to arbitrators without imposing a new obligation upon the parties. By more clearly setting forth the requirements of parties in arbitration, the proposed rule change would enhance the fairness of the arbitration process by helping to limit the exposure of prejudicial or

inadmissible materials to the panel. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### 11. Hearing Records

##### a. Allocation to Parties of Responsibilities for Hearing Records

The Codes require the DRS Director to “make a tape, digital, or other recording of every hearing.”<sup>291</sup> The official record of an arbitration hearing is the DRS Director’s tape, digital, or other recording of every arbitration hearing;<sup>292</sup> however, if a party chooses to make a stenographic record of a hearing, a panel may decide in advance of the hearing that the stenographic record will be the official record of the hearing.<sup>293</sup> If the DRS Director’s recording is the official record, the panel “may order the parties to provide a transcription of the recording” and “copies of the transcription must be provided to each arbitrator, served on each party, and filed with the Director.”<sup>294</sup> If a party’s stenographic record is the official record, “a copy must be provided to each arbitrator, served on each other party, and filed with the Director.”<sup>295</sup> Further, “[t]he cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties should bear all or part of the costs.”<sup>296</sup> But the Codes do not specify which party must provide to each arbitrator, serve on each other party, and file with the DRS Director a copy of the official record.<sup>297</sup> The proposed rule change would assign that responsibility to the party or parties: (1) ordered to provide a transcription of the DRS Director’s recording; or (2) electing to make a stenographic record.<sup>298</sup>

One commenter offered no objection.<sup>299</sup> A second commenter opposed this proposed rule change as drafted.<sup>300</sup> Specifically, the commenter opposed the appropriateness of requiring a claimant with limited financial means to produce a transcription of a hearing record.<sup>301</sup> Noting the “high costs” associated with

the provision of a transcription of a hearing record, the commenter recommended 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.”<sup>302</sup>

In response, FINRA declined to amend this proposed rule change.<sup>303</sup> FINRA explained that in cases where the DRS Director’s recording is the official record, a panel usually orders a transcript of the recording only upon a motion of a party, and that because the digital recording made by the DRS Director continues to be the official record of a hearing, these motions are rare.<sup>304</sup> When such a motion is made, the parties may litigate the motion by addressing, among other things, whether a transcript should be ordered at all or which party should bear the burden of generating the transcript.<sup>305</sup> In that process, a party could raise—and an arbitration panel would be well-positioned to consider—objections based on financial grounds.<sup>306</sup> For that reason, FINRA also declined “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.”<sup>307</sup> FINRA indicated, however, “that guidance on the process for ordering a transcript from a party may be helpful to the parties in preparing their case,” so it stated that it would provide such guidance on its website if the Commission approves this proposed rule change.<sup>308</sup>

The Commission believes it is reasonable that FINRA has determined to rest the obligation of providing, serving, and filing a transcription or stenographic record on the party responsible for creating that record (in the case of a transcription) or on the party that elected to make the record (in the case of a stenographic record). Clearly identifying the party responsible for providing, serving, and filing a transcription or stenographic record should help clarify the obligations of the parties. Additionally, the panel should be well positioned to consider any cost-

<sup>284</sup> Notice at 2148.

<sup>285</sup> *Id.*; see FINRA Rules 12514(a), 13514(a).

<sup>286</sup> See Notice at 2148; see also FINRA Rules 12514(a), 13514(a).

<sup>287</sup> See Notice at 2148.

<sup>288</sup> Proposed Rule 12514(a), 13514(a); see Notice at 2148.

<sup>289</sup> Pickard Letter at 6 (indicating that arbitrators “prefer identifying admissible documents and materials prior to the hearing to avoid mid-hearing delays, and may use exhibit lists before and during the hearing for ease of reference.”).

<sup>290</sup> Cornell Letter at 4.

<sup>291</sup> Current FINRA Rules 12606(a)(1), 13606(a)(1).

<sup>292</sup> FINRA Rules 12606(a)(3), 13606(a)(3).

<sup>293</sup> FINRA Rules 12606(b)(1), 13606(b)(1).

<sup>294</sup> FINRA Rules 12606(a)(2), 13606(a)(2).

<sup>295</sup> FINRA Rules 12606(b)(2), 13606(b)(2).

<sup>296</sup> *Id.*

<sup>297</sup> Notice at 2148.

<sup>298</sup> Proposed Rules 12606(a)(2), 13606(a)(2), 12606(b)(2), 13606(b)(2).

<sup>299</sup> Pickard Letter at 6.

<sup>300</sup> Cornell Letter at 5.

<sup>301</sup> See *id.*

<sup>302</sup> *Id.*

<sup>303</sup> FINRA April Letter at 9 n.28 and accompanying text.

<sup>304</sup> *Id.*

<sup>305</sup> See *id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

related issues raised by the parties. For these reasons, this proposed rule change is reasonably designed to protect investors and the public interest.

#### b. Record of Executive Sessions

As noted above, the Codes require the DRS Director to “make a tape, digital, or other recording of every hearing.”<sup>309</sup> Although the Codes do not specifically state that executive sessions will not be recorded, as a matter of practice, executive sessions are not recorded because they are not part of the official record of the hearing.<sup>310</sup> Rather, executive sessions are “discussions among arbitrators” outside the presence of the parties, the parties’ representatives, witnesses, and stenographers.<sup>311</sup> The proposed rule change would codify this practice by providing that the DRS Director will not make an official recording of any executive sessions, *i.e.*, discussions among arbitrators outside the presence of the parties, witnesses, and stenographers.<sup>312</sup> FINRA stated that this proposed rule change would promote “transparency and consistency” by codifying an existing practice.<sup>313</sup>

One commenter addressed this proposed rule change, offering no objection.<sup>314</sup>

The Commission believes that maintaining the confidentiality of executive session deliberations encourages candid discourse about a case among arbitrators. Specifically, the expectation of a private deliberation that is not recorded, in which each arbitrator can speak candidly, provides an opportunity to sharpen their assessments of a case and helps promote sound decision-making. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### 12. Dismissal of Proceedings for Insufficient Service

As stated above, the Codes require parties, other than those proceeding pro se, to serve all pleadings and other documents through the Portal.<sup>315</sup> If a party who is served fails to submit an answer, DRS reviews the service history with the panel and asks the panel to decide whether service was complete and sufficient before the case may proceed to hearing.<sup>316</sup> Although the

Codes do not address what action the panel should take if it determines that service was insufficient, current practice permits a panel to dismiss a claim or arbitration without prejudice (*i.e.*, a party can refile their claim in the future) if it finds insufficient service.<sup>317</sup> To promote “transparency and consistency,” the proposed rule change would expressly permit a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service upon a respondent.<sup>318</sup>

One commenter supported this proposed rule change, agreeing that it codifies current practice and “ensures that errors and misunderstandings are minimized.”<sup>319</sup> A second commenter offered no objection.<sup>320</sup>

The Commission believes that permitting a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service of a pleading or other document reasonably balances a respondent’s need for appropriate notice with a party’s ability to refile a claim without prejudice so the case can move forward. The Commission also believes that the proposed rule change would promote transparency about FINRA’s arbitration process and help ensure consistent procedures across arbitration cases. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### 13. Dismissal of Claims Requires Issuance of an Award

As stated above, an award is a document stating the final disposition of a case.<sup>321</sup> The Codes require FINRA to publish awards, which it does on its website.<sup>322</sup> Currently, although the Codes permit a panel to grant a motion to dismiss a party’s entire case after the conclusion of that party’s case-in-chief,<sup>323</sup> the Codes do not specifically address whether such a dismissal requires the issuance, and publication, of an award.<sup>324</sup> FINRA stated that as the dismissal of all a claimant’s claims disposes of a case, it is current practice to require the issuance, and publication, of an award for such dismissals.<sup>325</sup> The proposed rule change would codify this practice by requiring a panel granting a motion to dismiss all claims to issue a

“decision” containing the elements of a written award and make the decision “publicly available as an award.”<sup>326</sup>

One commenter supported this proposed rule change.<sup>327</sup> A second commenter objected to the proposed rule change, stating that the publication of an award dismissing all of a claimant’s claims would negatively impact the respondent’s reputation.<sup>328</sup> Specifically, because all arbitration awards are published in a “permanent, unredacted database,” they “reiterate the details of the customer complaint information about each broker, regardless of the complaint’s merit.”<sup>329</sup> Similarly, because a motion to dismiss will be granted after claimant’s case-in-chief and before respondents present their own case, the award “will not reflect any defense by [r]espondent[.]”<sup>330</sup> The commenter concluded that “[i]f a customer complaint has so little merit that it is disposed of through a Motion to Dismiss . . . , there is no regulatory purpose in ensuring that the member firm and/or registered representatives implicated by the complaint continue to have their reputations tainted by the allegations.”<sup>331</sup>

In response, FINRA acknowledged that the award may not reflect any defense raised by respondents.<sup>332</sup> However, FINRA stated that the Codes permit arbitrators to include a rationale underlying the award to provide

<sup>326</sup> *Id.*; see proposed Rule 12504(b), 13504(b); FINRA Rules 12904(e), 13904(e) (describing elements of an award).

<sup>327</sup> Cornell Letter at 5.

<sup>328</sup> Pickard at 6–7. Another commenter asserted that the proposed rule change would improperly amend the meaning of “final award” to include a panel’s dismissal of some, but not all, of a claimant’s claims. See letter from Anonymous to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Sep. 5, 2023). The Commission believes that this comment misinterprets the proposed rule change. In the Notice, FINRA stated that currently a panel renders a written award if it grants a motion to dismiss all of a claimant’s claims at the conclusion of the case in chief. See Notice at 2149. The proposed rule change would codify this practice. See proposed Rules 12504(b); 13504(b). FINRA further stated that if a panel grants a motion to dismiss some but not all of the claimant’s claims, the hearing would proceed as to the remaining claims and at the conclusion of the hearing, the panel would issue an award that disposes of each claim. See Notice at 2149 n.84 (citing FINRA Dispute Resolution Services Arbitrator’s Guide, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>). The proposed rule change is not modifying this practice.

<sup>329</sup> *Id.* at 6.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* This commenter also asked FINRA to develop a mechanism to remove information from or redact records in its public arbitration award database. *Id.* at 7–8. As FINRA has not proposed rules related to the redaction or removal of information from that database, this comment is outside the scope of this proposed rule change.

<sup>332</sup> See FINRA August Letter at 7.

<sup>317</sup> *Id.* at 2148–49.

<sup>318</sup> Proposed Rules 12700(c), 13700(c); see Notice at 2148–49.

<sup>319</sup> Cornell Letter at 5.

<sup>320</sup> Pickard Letter at 6.

<sup>321</sup> See *supra* notes 158–159 and accompanying text.

<sup>322</sup> See *supra* note 160.

<sup>323</sup> See FINRA Rules 12504(b), 13504(b).

<sup>324</sup> Notice at 2149.

<sup>325</sup> *Id.*

<sup>309</sup> Current FINRA Rules 12606(a)(1), 13606(a)(1).

<sup>310</sup> Notice at 2148.

<sup>311</sup> See *id.*

<sup>312</sup> Proposed Rules 12606(a)(1), 13606(a)(1).

<sup>313</sup> *Id.*

<sup>314</sup> See Pickard Letter at 6.

<sup>315</sup> FINRA Rules 12300, 13300; see *supra* note 39.

<sup>316</sup> Notice at 2148.



relevant context.<sup>333</sup> In addition, FINRA stated that after a panel dismisses a case at the conclusion of the case-in-chief, the firm must file an amended Uniform Application for Securities Industry Registration or Transfer (“Form U4”) for the associated person to report the final disposition of the case as dismissed.<sup>334</sup> FINRA stated that along with the final disposition, an associated person can provide a brief summary or add context on Form U4 regarding the circumstances leading to the customer arbitration, as well as the current status or final disposition.<sup>335</sup> This updated information is subsequently disclosed on the associated person’s BrokerCheck report, which is publicly available to investors.<sup>336</sup>

The Commission believes that this proposed rule change should promote transparency about FINRA’s arbitration process and help ensure consistent treatment of awards. Specifically, the proposed rule change equally requires all arbitration awards, including awards granting a motion to dismiss all claims, to be published. These published awards should provide current and future parties to an arbitration with data that could help inform the administration of their cases. The Commission acknowledges the commenter’s concern that a published award granting a motion to dismiss all claims may not reflect any defense raised by respondents. However, these concerns should be ameliorated by the fact that the Codes permit arbitrators to include a rationale underlying the award, providing relevant context to the dismissal of the claim such as the circumstances under which the claim was dismissed. In addition, an associated person may provide context on Form U4 regarding the circumstances leading to the customer arbitration, as

well as the claim’s current status or final disposition. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

#### IV. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.<sup>337</sup>

*It is therefore ordered* pursuant to Section 19(b)(2) of the Exchange Act<sup>338</sup> that the proposed rule change (SR–FINRA–2022–033), as amended by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>339</sup>

**Sherry R. Haywood,**  
*Assistant Secretary.*

[FR Doc. 2023–19729 Filed 9–12–23; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98321; File No. SR–NASDAQ–2022–079]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Amend Rules 4702(b)(14) and (b)(15) Concerning Dynamic M–ELO Holding Period

September 7, 2023.

#### I. Introduction

On December 21, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> a proposed rule change to replace the static holding period requirements for Midpoint Extended Life Orders and Midpoint Extended Life Orders Plus Continuous Book with

dynamic holding periods. The proposed rule change was published for comment in the **Federal Register** on January 10, 2023.<sup>3</sup> On February 22, 2023, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> On March 9, 2023, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed. On April 7, 2023, the Commission provided notice of filing of Amendment No. 1 and instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.<sup>6</sup> On July 6, 2023, pursuant to Section 19(b)(2) of the Act,<sup>7</sup> the Commission designated a longer period on proceedings to determine whether to approve or disapprove the proposed rule change.<sup>8</sup> On July 18, 2023, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and superseded the proposed rule change as amended by Amendment No. 1. The Commission received comments on the proposed rule change.<sup>9</sup> The Commission is publishing this Notice and Order to solicit comment on Amendment No. 2 in Sections II and III below, which sections are being published verbatim as filed by the Exchange, and to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

#### II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rules 4702(b)(14) and (b)(15) of the Exchange’s Rulebook to replace the static holding period requirements for Midpoint Extended Life Orders and Midpoint Extended Life Orders Plus Continuous Book with dynamic holding periods. This Amendment No. 2

<sup>3</sup> See Securities Exchange Act Release No. 92844 (January 4, 2023), 88 FR 1438.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 96963, 88 FR 12710 (February 28, 2023).

<sup>6</sup> See Securities Exchange Act Release No. 97263, 88 FR 22498 (April 13, 2023).

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> See Securities Exchange Act Release No. 97844, 88 FR 44423 (July 12, 2023).

<sup>9</sup> All comments received by the Commission on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2022-079/srnasdaq2022079.htm>.

<sup>337</sup> 15 U.S.C. 78o–3(b)(6).

<sup>338</sup> 15 U.S.C. 78s(b)(2).

<sup>339</sup> 17 CFR 200.30–3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>333</sup> See *id.*; see also FINRA Rules 12904(f) and 13904(f).

<sup>334</sup> See FINRA August Letter at 7 (citing FINRA By-Laws, Article V, Sections 2(c), 3(a) and 3(b)).

<sup>335</sup> See *id.* at 7 n.30.

<sup>336</sup> FINRA Rule 8312 (FINRA BrokerCheck Disclosure) governs the information FINRA releases to the public through its BrokerCheck system. Information available to investors through BrokerCheck includes, among other things, information reported on the most recently filed “Registration Forms” (with limited exceptions) for both member firms and registered individuals, and summary information about certain arbitration awards against the firm involving a securities or commodities dispute with a public customer; see also FINRA Rule 8312(b)(2)(A) (using the term “Registration Forms” to refer collectively to Form U4, the Uniform Termination Notice for Securities Industry Registration (Form U5), the Uniform Disciplinary Action Reporting Form (Form U6), the Uniform Application for Broker-Dealer Registration (Form BD), and the Uniform Request for Broker-Dealer Withdrawal (Form BDW)). The BrokerCheck website is available at [brokercheck.finra.org](http://brokercheck.finra.org).