

FINRA DISPUTE RESOLUTION TASK FORCE

INTERIM SUMMARY OF KEY ISSUES

June 2015

The FINRA Arbitration Task Force met on May 14-15, 2015 and reviewed the reports and recommendations made to date by the ten subcommittees set up to study the issues identified in the Task Force Issues Outline posted on the FINRA website. The Task Force is issuing this Interim Summary of Key Issues at this time so that it can alert users of the forum, arbitrators, mediators, and the general public to its current thinking on the key issues before it. It hopes, in this way, to generate additional input on these, and any other, issues related to the FINRA arbitration forum.

The Task Force emphasizes that it took no formal votes on any issue. What is set forth below represents what appears to be the group's consensus at this time. The Task Force did not sign off on any topic and did not foreclose further discussion of any matter, including additional topics. Individual members of the Task Force may reconsider their views on any particular issue; accordingly, even the positions currently supported by consensus may change, and the recommendations contained in the Task Force's final report (scheduled for release at the end of 2015) may be different from those suggested here.

The Task Force reached consensus that it would likely make recommendations on a number of issues. Significant issues include:

- I. *Class action waivers.*
 - a. Class action waivers should not be allowed in broker-dealers' PDAAAs, and the FINRA policy set forth in *Schwab* is strongly endorsed.
- II. *Arbitrators: selection and disclosure.*
 - a. Develop a rationale and procedure for *voir dire* of panel members and provide examples of appropriate questions.
 - b. Propose modifications to the list selection process in light of the all-public panel option.
 - c. Monitor the application of the recently adopted definitions of public and non-public arbitrators in light of concerns that individuals with substantial process and subject matter expertise are stricken from the lists.
 - d. Strengthen disclosure requirements to highlight potential conflicts when arbitrators are assigned to multiple cases with the same witnesses, experts, documents, etc.
- III. *Arbitrators: Training.*
 - a. All arbitrators should be encouraged to complete continuing education programs on a periodic basis. In addition, compulsory training requirements should be considered for inexperienced arbitrators, arbitrators who have not been recently selected for panels, and arbitrators with a record of poor evaluations. The Task

Force recommends that NAMC engage an outside consultant to study and potentially design the specific type of coursework to be offered.

- b. Arbitrators should receive additional training on drafting the summary description of the award, including the development of templates or examples of descriptions. See also 7.c below.

IV. *Arbitrators: Recruitment.*

- a. FINRA should aggressively recruit applicants for the arbitrator pool, with a view to increasing both the depth and the diversity of the pool. In addition, it should review the arbitrator registration process and consider modifications to streamline the process.

V. *Motions to Dismiss.*

- a. Expand the grounds for Motions to Dismiss Prior to Conclusion of Case in Chief to include situations where the dispute was previously adjudicated by an order, judgment, award or decision.

VI. *Discovery Guide.*

- a. Add insurance policies for firms and associated persons to respondents' list of discoverable documents.

VII. *Explained Decisions.*

- a. The FINRA rule should be amended to require explained decisions unless either party notifies FINRA, prior to the IPHC, that it does not want an explained decision.
- b. The current brief, fact-based format of the explanation should be retained, but with the addition of some summary explanation of the reasons behind any damage calculation.
- c. Before any plan to expand the use of explained decisions is implemented, FINRA must develop and administer a training program on how to write explained decisions; chairs must complete the training promptly after they are notified that an explained decision is expected in an assigned case.

VIII. *Large Cases.*

- a. FINRA should seriously consider the adoption of a mandatory set of procedures for large claims, i.e., matters where the actual damages sought are at least \$20 million, exclusive of consequential or punitive damages and attorneys' fees. The rules would, in general, give parties flexibility to set up alternative procedures to the FINRA rules, including an alternative method of selecting arbitrators. Limited use of depositions would be expressly authorized.

IX. *Small Cases.*

- a. Develop an intermediate form of adjudication for small claims in which the claimant and the respondent appear before an arbitrator and have the opportunity to explain their positions and respond to their adversary's positions. Parties would be able to appear in whatever manner they prefer: in person, by phone, or by video conference. Arbitrators would be specially qualified and trained for this role. How these sessions would be conducted is a matter for further discussion.

X. *Mediation.*

- a. Automatic mediation process for all cases filed in arbitration, subject to an opt-out by either party.
- b. Development of a formal, mandatory continuing education and mentoring program for new mediators.
- c. Development of a continuing education program for all mediators.
- d. FINRA should develop opportunities for beginning mediators to gain experience and training.
- e. FINRA should compile data, on a voluntary basis, of the race and gender of mediators and should undertake aggressive efforts to recruit, train and encourage the use of more diverse mediators.

XI. *Transparency.*

- a. FINRA should adopt a policy of promoting, to the maximum extent possible, transparency about its dispute resolution forum. FINRA should use its good judgment in evaluating what data and information can be released to the public, even if it requires some expense to redact or remove personal or confidential information prior to release. For example, FINRA might consider the release of arbitrators' evaluations with redaction of identifying information because it could shed light on the performance of panels.
- b. We specifically recommend that FINRA reinstate its prior practice of disclosing on its website the names of NAMC members.

XII. *Expungement.*

- a. The Task Force has been made aware that FINRA and NASAA are in discussions with respect to the expungement process. It was the consensus that it should allow time for FINRA and NASAA to complete their discussions on the feasibility of a new regulatory approach and process. The Task Force will give further consideration to the creation of a Special Arbitration Panel consisting of specially trained arbitrators to decide requests for expungement.

XIII. *DR Portal.*

- a. The Task Force supports efforts to improve the functionality of the DR Portal.

The Task Force reached consensus that, at least at this time, it did not expect that it would make any recommendations on some topics. They include:

I. *The All-Public Panel Option.*

- a. The Task Force does not anticipate making a recommendation to change the existing right of claimants to select an all-public panel.

The Task Force decided that, on certain issues, it was not ready to state even a tentative position and it would continue to review and discuss those topics. They include:

- I. *Forum Access.*
 - a. Whether broker-dealers may continue to require customers to sign PDAA's under the current system; whether customers should have the choice, post-dispute, to choose between arbitration or litigation; whether broker-dealers should be required to offer at least some customers a brokerage contract that does not include a PDAA; whether broker-dealers should be required to include non-SRO forums as an option in PDAA's.
- II. *Arbitrator Disclosure Requirements.*
 - a. Comprehensive arbitrator disclosure requirements (both general and case-specific) are necessary for the users of the forum and the public to have confidence in the fairness and impartiality of the system, yet they should not be unduly burdensome and discourage qualified individuals from serving as FINRA arbitrators.
- III. *Arbitrator Recruitment.*
 - a. The Task Force agrees that a deep and diverse pool of arbitrators is important to the operation of the forum, yet expressed different views about the most important characteristics of the appropriate arbitrator. Simply put, should the arbitrator more closely resemble a juror or a judge? Is the solution to develop a pool with enough variety of arbitrators so that the parties can select the type of arbitrator they want for a particular case?
- IV. *Arbitrator Compensation.*
 - a. The Task Force received many comments from arbitrators expressing dissatisfaction with arbitrator compensation, but recognizes that the comments may not take account of FINRA's recent increases.
- V. *Unpaid Awards.*
 - a. The Task Force explored options to address the problem of unpaid awards, including the hiring of a consultant to review the feasibility of setting up and funding an insurance fund or insurance policy to assist customers with unpaid awards.