

## Status Report on FINRA Dispute Resolution Task Force Recommendations

In December 2015, the FINRA Dispute Resolution Task Force (Task Force) issued its Final Report<sup>1</sup> relating to its review of FINRA's dispute resolution forum, which included 51 recommendations. This report discusses the status of FINRA's responses to these recommendations.

As of January 31, 2017, FINRA has discussed all of the Task Force recommendations with the National Arbitration and Mediation Committee (NAMC), FINRA's standing Board advisory committee. The NAMC is composed of investor and industry representatives, arbitrators and academics. In addition, in implementing the Task Force recommendations, FINRA consulted with various interested parties, including investor and industry counsel. FINRA has taken action on 35 of the 51 recommendations; 16 are pending. FINRA continues to evaluate ways to implement recommendations not yet addressed, and is considering additional steps to further enhance the forum's operations and transparency in response to the recommendations.

The following sets forth FINRA's progress to date.

### I. SEC Approved Rulemakings

The SEC has approved two proposals that address Task Force recommendations.

- **Task Force Recommendation Relating to Arbitrators:** In those instances where all non-public arbitrators are struck from the arbitrator selection process, a new list of ten public arbitrators should be generated for that seat. In that way, selection of the all public panel will be made from lists containing 30 potential arbitrators.<sup>2</sup>

FINRA staff agreed with the Task Force that it should provide parties with greater choice of public arbitrators in cases with all public panels. However, if FINRA staff waited until the parties collectively struck all the non-public arbitrators from the list before it provided the parties with additional names of public arbitrators, the panel selection process would likely take at least one additional month to complete. Also, FINRA staff was concerned about the additional time and expense the parties would incur in vetting an additional list of 10 public arbitrators. Therefore, in order to address the Task Force's recommendation without delaying the panel selection process, or unduly burdening the parties, FINRA proposed to amend FINRA Rule 12403 of the Code of Arbitration Procedure for Customer Disputes (Customer Code), to increase the number of public arbitrators on the list that FINRA sends parties during the arbitration panel selection process from 10 to 15 arbitrators in cases with three arbitrators. The SEC approved the proposed rule change on September 14, 2016.<sup>3</sup> The rule change became effective on January 3, 2017.<sup>4</sup>

- **Task Force Recommendation Relating to Motions to Dismiss:** Rule 12504(a) should be amended to include one additional category for which motions to dismiss may be made before the conclusion of the case in chief: situations where the dispute has been

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<sup>1</sup> See <http://www.finra.org/arbitration-and-mediation/finra-dispute-resolution-task-force>.

<sup>2</sup> See Final Report recommendations relating to Arbitrators (No. 6).

<sup>3</sup> See Securities Exchange Act Release No. 78836 (September 14, 2016), 81 FR 64564 (September 20, 2016) (Order Approving File No. SR-FINRA-2016-022).

<sup>4</sup> See *Regulatory Notice 16-44*.

previously concluded through adjudication or arbitration and memorialized in an order, judgment, award or decision.<sup>5</sup>

FINRA staff agreed with the Task Force and believes that the recommendation should also be applied to intra-industry disputes. Therefore, FINRA proposed to amend FINRA Rule 12504 of the Customer Code and FINRA Rule 13504 of the Code of Arbitration Procedure for Industry Disputes (Industry Code), to provide that arbitrators may act upon a motion to dismiss a party or claim prior to the conclusion of a party's case in chief if the arbitrators determine that the non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision. The SEC approved the proposed rule change on November 10, 2016.<sup>6</sup> The rule change became effective on January 23, 2017.<sup>7</sup>

## II. Board Approved Rulemakings

The Board approved four proposals that are in various stages in the rulemaking process.

- **Task Force Recommendation Relating to Expungement:** Review of procedures for notifying state regulators of expungement requests.

The FINRA Board has approved proposed amendments to FINRA Rule 12805 of the Customer Code and FINRA Rule 13805 of the Industry Code, to provide, among other matters, that FINRA will notify the appropriate state securities regulators of all requests for expungement relief.<sup>8</sup>

- **Task Force Recommendation Relating to Case Management:** Amend FINRA Rules 12402 and 12403 to use the first answer due date as opposed to the last answer due date.

FINRA staff agreed with the Task Force that it should expedite sending lists of arbitrators to parties. However, using the first answer date to send the lists to parties and their counsel could affect a party's ability to participate in the arbitrator selection process. FINRA staff first learns the identity of a respondent's counsel when the answer is filed with FINRA. If there are multiple respondents, it is not likely that the staff would learn the identity of some respondents' counsel at the time of the first answer due date. If the staff does not know the identity of a respondent's counsel, it would send the lists to the respondent, who may not forward them to his or her counsel. In light of this concern, FINRA is proposing to amend FINRA Rules 12402 and 12403 of the Customer Code, and FINRA Rule 13403 of the Industry Code (Sending Lists to Parties) to provide that the Director of Arbitration will send the list or lists generated by the Neutral List Selection System 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. Parties often extend their opponents' time to answer. The proposal would expedite the process by allowing FINRA to send the lists

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<sup>5</sup> See Final Report recommendations relating to Motions to Dismiss (No. 1).

<sup>6</sup> See Securities Exchange Act Release No. 79285 (November 10, 2016), 81 FR 81213 (November 17, 2016) (Order Approving File No. SR-FINRA-2016-030).

<sup>7</sup> See *Regulatory Notice 17-02*.

<sup>8</sup> See Final Report recommendations relating to Expungement (No. 3).

immediately after the last answer due date. FINRA will file the proposal with the SEC for comment.<sup>9</sup>

- **Task Force Recommendation Relating to Arbitrators:** 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 list of public arbitrators.

FINRA is proposing to amend FINRA Rule 12100 of the Customer Code and FINRA Rule 13100 of the Industry Code (Definitions), to revise the non-public arbitrator definition. Specifically, the amendments would provide that a non-public arbitrator is a person who is otherwise qualified to serve as an arbitrator, and is disqualified from classification as a public arbitrator. FINRA will file the proposal with the SEC for comment.<sup>10</sup>

- **Task Force Recommendation Relating to Small Claims:** Development of an intermediate form of adjudication for small claims—more than the papers, but less than a full hearing—in which the claimant and respondent appear before an arbitrator and have the opportunity to explain their positions and respond to their adversary’s positions.<sup>11</sup>

FINRA staff agreed with the Task Force and believes that the recommendation should also be applied to intra-industry disputes. Therefore, FINRA is proposing to amend FINRA Rule 12800 of the Customer Code and FINRA Rule 13800 of the Industry Code to provide an additional hearing option for parties in arbitration with claims of \$50,000 or less, excluding interest and expenses. The new option, a Special Proceeding for Simplified Arbitration, would be a telephonic hearing with time limits and other conditions. FINRA will file the proposal with the SEC for comment.

### **III. FINRA Office of Dispute Resolution—Enhancements**

Many of the recommendations, particularly those involving forum transparency, arbitrator recruitment and training, and case administration processes, did not require rulemaking. FINRA staff took steps to implement these recommendations in 2016.

#### **A. Recommendations Relating to Arbitrators**

- **Task Force Recommendation:** Develop a procedure for advising arbitrators about a proposed rule change and how they can comment on it and notifying them of adoption of proposed rule changes.<sup>12</sup>

**Action Taken:** FINRA implemented procedures to advise arbitrators through notices in *The Neutral Corner* (FINRA’s arbitrator and mediator newsletter), monthly emails to arbitrators, the Dispute Resolution web page and an arbitrator subscription feed.

- **Task Force Recommendation:** The IPHC (Initial Prehearing Conference) script should emphasize that the parties have the right to ask appropriate questions at

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<sup>9</sup> See Final Report recommendations relating to Case Management (No. 3).

<sup>10</sup> See Final Report recommendations relating to Arbitrators (No. 14).

<sup>11</sup> See Final Report recommendations relating to Small Claims (No. 1).

<sup>12</sup> See Final Report recommendations relating to Arbitrators (No. 20).

that time and that the arbitrators expect questions and will not take exception to them in any manner.<sup>13</sup>

**Action Taken:** FINRA staff agreed with the Task Force that parties have the right to ask appropriate questions to arbitrators and that the arbitrators should not take exception to requests for additional information. However, based on discussions with forum users, staff does not believe that the IPHC is the best setting for asking for additional disclosures. Therefore, instead of revising the IPHC script, FINRA published an article in the December 2016 issue of *The Neutral Corner* that emphasizes the importance of arbitrators' prompt and complete responses to requests for additional information (Volume 4—2016).

- **Task Force Recommendation:** Arbitrators' training materials and the initial appointment letter should address the possible conflicts that can arise from serving on multiple related cases and emphasize the importance of prompt disclosure.<sup>14</sup>
- **Task Force Recommendation:** Challenges for cause because of multiple appointments to related cases should be allowed so long as the challenge is made promptly upon the party learning about the multiple appointments.<sup>15</sup>

**Action Taken:** Concerning training and correspondence, FINRA revised the arbitrator appointment letter and arbitrator oath to emphasize disclosure of multiple appointments. FINRA published a question and answer on the topic in the December 2016 issue of *The Neutral Corner*. FINRA also addressed the topic in its arbitrator training modules (Basic Arbitrator Training, Chairperson Training, and Duty to Disclose Training).

Concerning challenges for cause, FINRA staff determined that it would continue to use a flexible approach rather than permit a challenge for cause in every case. This approach enables FINRA to efficiently appoint arbitrators in situations in which hundreds or thousands of cases are filed regarding the same product in a single hearing location.

- **Task Force Recommendation:** Arbitrators should be required to update their arbitrator disclosure report promptly to report material new information or a material change in their status, and to review, at least annually, their arbitrator disclosure report and either confirm its accuracy or update it to take account of new information.<sup>16</sup>
- **Task Force Recommendation:** The arbitrator disclosure report should add to the existing list of current cases assigned to the arbitrator the name of counsel and city of counsel's office.<sup>17</sup>
- **Task Force Recommendation:** Require potential arbitrators to disclose subject matter (case-specific) disclosures earlier in the arbitrator selection process.<sup>18</sup>

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<sup>13</sup> *Id.* (No. 13).

<sup>14</sup> *Id.* (No. 8).

<sup>15</sup> *Id.* (No. 7).

<sup>16</sup> *Id.* (No. 9).

<sup>17</sup> *Id.* (No. 10).

**Action Taken:** FINRA implemented several enhancements to procedures relating to arbitrator disclosures including issuing quarterly reminders to arbitrators to review and revise their disclosure reports, and requiring arbitrators to certify as to the accuracy of the information on their profiles. FINRA is working on technology changes to its arbitrator disclosure reports that are scheduled for completion in the second quarter of 2017. The disclosure report will include the last date that the arbitrator certified as to the accuracy of the report, and will provide contact information for counsel on each of the open cases on which FINRA appointed an arbitrator to serve. Finally, as discussed above, FINRA published an article on disclosure in the December 2016 issue of *The Neutral Corner* relating to the importance of arbitrator disclosures.

The Task Force also recommended that FINRA provide every arbitrator on the lists that FINRA sends to the parties during the panel selection process with party provided case summaries so that they could make their disclosures prior to being selected for the case. FINRA would then send the completed disclosure forms to the parties' counsel at the same time as the arbitrator lists. If the potential arbitrators failed to respond within five days, they would be removed from the selection lists for that case. The Task Force recommended that FINRA remove from the arbitrator roster those arbitrators who repeatedly failed to respond timely.

As discussed above, FINRA agrees that arbitrators should make disclosures as early as possible in the proceeding and promptly when new issues arise. However, FINRA will not implement the Task Force recommendation relating to early case specific disclosures. The recommendation would require 35 potential arbitrators (all the arbitrators on the lists) to fill out the comprehensive Arbitrator Disclosure Checklist. The process of arbitrator disclosure is time-consuming for the arbitrators, and requiring every potential arbitrator to complete the checklist process would be burdensome for arbitrators and could deter future service to the forum. It would likely slow the administration of the case and its ultimate outcome substantially.

FINRA has taken several steps to enhance arbitrator disclosure (outlined above) and will continue to emphasize the importance of disclosure going forward.

- **Task Force Recommendation:** Compulsory training requirements should be considered for arbitrators with a record of poor evaluations, as well as inexperienced arbitrators and arbitrators who have not been recently selected for panels and who do not arbitrate regularly.<sup>19</sup>

**Action Taken:** FINRA staff agreed with the Task Force that in certain instances FINRA should require an arbitrator to take additional training. Therefore, FINRA updated its staff procedures relating to counseling arbitrators and requiring additional training.

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<sup>18</sup> *Id.* (No.11).

<sup>19</sup> *Id.* (No.16).

- **Task Force Recommendation:** Increased training for chairpersons.

**Action Taken:** FINRA staff agreed with the Task Force that increased training for chairpersons would be helpful. Therefore, staff developed a roster of experienced chairpersons for new chairpersons to use as a resource and implemented a mentoring program for new chairpersons. FINRA posted a Neutral Workshop on chair issues in November 2016.<sup>20</sup>

- **Task Force Recommendation:** Continue efforts to develop effective strategies to recruit aggressively applicants for the arbitrator pool, with a view to increasing both the depth and the diversity of the pool, and to monitor the results.

**Action Taken:** FINRA implemented procedures to recruit additional arbitrators including, but not limited to, hiring additional staff for arbitrator recruitment, retaining a consultant for recruitment advice, expanding the use of social media and direct marketing.<sup>21</sup> In 2016, FINRA recruited 945 new arbitrators to the roster, well above our goal of 750. FINRA's latest arbitrator demographic survey, which was conducted by an external consulting firm, showed that we had particular success in adding women and African-Americans to the roster. In 2016, 33 percent of the arbitrators added in the last year were women and 14 percent were African-American. This represents an important improvement from the 2015 survey results which showed that 26 percent of the arbitrators added were women and 4 percent were African-American.<sup>22</sup>

- **Task Force Recommendation:** Continue review and monitoring of the arbitrator qualification process to ensure that the goals of processing an application within 120 days and training arbitrators within 120 days of approval are achieved.

**Action Taken:** FINRA established performance criteria to ensure that FINRA reviews arbitrator applications promptly and that newly approved arbitrators receive timely training. FINRA implemented procedures to regularly monitor performance of these measures.<sup>23</sup> In 2016, the average turnaround time for an arbitrator application was 69 days and the average turnaround time for an approved arbitrator to be trained was 85 days.

- **Task Force Recommendation:** Continue review of FINRA's website, as well as its recruitment materials, to ensure that they convey a message of inclusiveness and do not discourage from applying qualified and diverse individuals with a variety of educational backgrounds and work experiences.

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<sup>20</sup> See Fall 2016 Neutral Workshop—Best Practice Tips for Chairpersons.

<sup>21</sup> See Final Report recommendations relating to Arbitrators (No. 3).

<sup>22</sup> FINRA uses an independent consulting firm to conduct annual demographic surveys of arbitrators and mediators to evaluate the success of its effort to recruit diverse neutrals for the forum. For the period between October 2015 and October 2016, 33 percent of neutrals joining the roster who responded to the survey identified themselves as women and 14 percent identified themselves as African-American. The response rate for the survey was 64 percent. For the period between October 2014 and October 2015, 26 percent of neutrals joining the roster who responded to the survey identified themselves as women and 4 percent identified themselves as African-American. The response rate for the survey was 72 percent. Neutral responses for both surveys were completely voluntary, confidential and anonymous.

<sup>23</sup> See Final Report recommendations relating to Arbitrators (No. 4).

**Action Taken:** FINRA revised the recruitment materials on the website to ensure that they convey a message of inclusiveness. The materials now target a broader range of industries from which FINRA welcomes arbitrator applicants.<sup>24</sup> FINRA posted a recruitment video on its website emphasizing this message.<sup>25</sup>

- **Task Force Recommendation:** All arbitrators should be encouraged to complete continuing education programs on a periodic basis.

**Action Taken:** FINRA uses *The Neutral Corner*, monthly emails to neutrals and the FINRA website to remind arbitrators of training opportunities available at FINRA, including FINRA's free arbitrator training modules and accompanying written training materials, and reduced rates for FINRA regulatory/compliance training courses. FINRA also makes arbitrators aware of upcoming programs on securities arbitration and mediation provided by bar associations through these vehicles. FINRA staff worked with the American Bar Association and the Practising Law Institute to provide free training or training at a reduced cost to arbitrators.<sup>26</sup>

## **B. Recommendations Relating to Case Management Procedures**

- **Task Force Recommendation:** Review of procedures to encourage expeditious scheduling of hearings.

**Action Taken:** FINRA implemented procedures to increase the efficiency of administering Simplified Arbitration cases including, among other things, sending the arbitrator's oath and the pleadings to the arbitrator earlier in the process, and using management reports to track and speed up the resolution of motions.<sup>27</sup> Simplified case turnaround time in 2016 decreased 15 percent from 2015.<sup>28</sup> FINRA is now applying the new procedures to all cases.

- **Task Force Recommendation:** Revise the IPHC script to make clear that the parties may agree to modify hearing procedures, including the use of any type of technology, in the interest of efficiency and cost-effectiveness, subject to the arbitrators' discretion for good cause.

**Action Taken:** FINRA revised its IPHC script to state that the parties are encouraged to use technology to facilitate hearings. The script also provides that parties may agree to modify hearing procedures by using technology that promotes efficiency and cost-effectiveness (e.g., videoconferencing and electronic exhibits), subject to the arbitrators' approval.<sup>29</sup> FINRA published an arbitrator tip on this topic in the September 2016 issue of *The Neutral Corner* (Volume 3—2016).

- **Task Force Recommendation:** Adding language to the IPHC script to strongly discourage the practice of phantom retention of experts.

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<sup>24</sup> *Id.* (No. 5).

<sup>25</sup> See <https://vimeo.com/188349814>.

<sup>26</sup> See Final Report recommendations relating to Arbitrators (No. 15).

<sup>27</sup> See Final Report recommendations relating to Case Management – Procedural Issues (No. 1).

<sup>28</sup> See <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>.

<sup>29</sup> See Final Report recommendations relating to Case Management – Procedural Issues (No. 7).

**Action Taken:** FINRA revised its IPHC script and form letters to state that a party should only identify the name of an expert witness that the party has actually retained.<sup>30</sup> FINRA also included an article in *The Neutral Corner* on the topic of identifying expert witnesses.<sup>31</sup>

- **Task Force Recommendation:** With respect to expedited hearings for senior and seriously ill parties, implement procedures to insure that once the expedited process is selected, the goals of achieving an expedited process and hearing are achieved.

**Action Taken:** FINRA implemented procedures to increase the efficiency of administering expedited cases concerning senior and seriously ill parties. Among other things, FINRA: (1) reduced the time staff takes to send arbitrator lists to the parties after the answer is due; (2) reduced the time that arbitrators have to accept such cases; (3) updated management tracking reports to note expedited cases; and (4) sends a checklist to parties asking them to stipulate to a number of steps that will reduce the time it takes FINRA to administer a case (e.g., agreeing to reduce the number of days to return arbitrator rankings to FINRA).<sup>32</sup> FINRA also published an article in *The Neutral Corner* on the topic of expedited cases for senior and seriously ill parties.<sup>33</sup> FINRA also updated information on this topic in its arbitrator training modules (Basic Arbitrator Training, and Chairperson Training).

- **Task Force Recommendation:** Take steps to emphasize to arbitrators the need to avoid late recusals and the perceived problem of double-booking.
- **Task Force Recommendation:** Develop a formal disciplinary process to deal with arbitrators who engage in last-minute recusals without good cause.

**Action Taken:** FINRA published an article in *The Neutral Corner* on avoiding late arbitrator recusals.<sup>34</sup> FINRA programmed enhancements to its case management system that allow staff to track late recusals and created an arbitrator-specific report that managers can generate from the system to monitor the issue. Staff implemented new procedures to carefully review arbitrators who appear on the tracking reports.<sup>35</sup>

- **Task Force Recommendation:** Develop a feature on the party portal which allows a party to view all costs on an on-going basis.

**Action Taken:** FINRA staff is programming system changes to the Dispute Resolution Party Portal that will allow parties to view costs accrued in a case on an on-going basis. In the interim, if a party has questions about fees accrued, FINRA staff sends the party a fee summary.<sup>36</sup>

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<sup>30</sup> *Id.* (No. 9).

<sup>31</sup> See [http://www.finra.org/sites/default/files/The\\_Neutral\\_Corner\\_Volume\\_2\\_2016.pdf](http://www.finra.org/sites/default/files/The_Neutral_Corner_Volume_2_2016.pdf).

<sup>32</sup> See Final Report recommendations relating to Case Management – Procedural Issues (No. 2).

<sup>33</sup> See [http://www.finra.org/sites/default/files/The\\_Neutral\\_Corner\\_Volume\\_2\\_2016.pdf](http://www.finra.org/sites/default/files/The_Neutral_Corner_Volume_2_2016.pdf).

<sup>34</sup> See Final Report recommendations relating to Case Management – Procedural Issues (No. 4).

See [http://www.finra.org/sites/default/files/The\\_Neutral\\_Corner\\_Volume\\_1\\_2016\\_0.pdf](http://www.finra.org/sites/default/files/The_Neutral_Corner_Volume_1_2016_0.pdf).

<sup>35</sup> See Final Report recommendations relating to Case Management – Procedural Issues (No. 5).

<sup>36</sup> *Id.* (No. 8).

### **C. Recommendations Relating to Explained Decisions**

- **Task Force Recommendation:** The FINRA rule should be amended to require explained decisions unless any party notifies FINRA, prior to the IPHC, that it does not want an explained decision.<sup>37</sup>
- **Task Force Recommendation:** 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.<sup>38</sup>
- **Task Force Recommendation:** 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. Chairpersons must complete the training promptly after they are notified that an explained decision is expected in an assigned case.<sup>39</sup>

**Action Taken:** The Task Force believed that expanding the use of explained decisions could increase transparency in the system and that increased confidence in the fairness of the system would likely flow from increased transparency. However, forum users (including investor and industry counsel) expressed reservations about making explained decisions the default award type at the forum including, among other things, that: (1) they put the finality of arbitration awards at risk of motions to vacate based on the explanations; (2) an opt-out provision would be problematic because parties that inadvertently fail to opt-out would receive an explained decision they do not want; (3) arbitrators might agree that they want to award damages to a party but not agree on the basis for the damages; (4) the requirement to write an explained decision would put added strain on arbitrators and might be a deterrent to service; and (5) drafting explained decisions could delay the issuance of awards.

In order to remove a potential obstacle to parties requesting an explained decision when they want one, FINRA now waives the \$400 fee for an explained decision. FINRA implemented the waiver on January 3, 2017. FINRA will monitor the number of parties agreeing to explained decisions after January 3, 2017 to determine if the fee waiver makes an impact. FINRA will also continue to evaluate the feasibility of making explained decisions the default award type at the forum.

### **D. Recommendations Relating to Frivolous Motions to Vacate**

- **Task Force Recommendation:** Continue to monitor this area and, in particular, be alert to motions to vacate explained decisions.<sup>40</sup>

**Action Taken:** FINRA staff implemented a procedure for reviewing motions to vacate and possible referral to FINRA's Enforcement Department for further review.

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<sup>37</sup> See Final Report recommendations relating to Explained Awards (No. 1).

<sup>38</sup> *Id.* (No. 2).

<sup>39</sup> *Id.* (No. 3).

<sup>40</sup> See Final Report recommendations relating to Frivolous Motions to Vacate (No. 1).

## **E. Recommendations Relating to Transparency**

- **Task Force Recommendation:** FINRA should adopt a policy of promoting, to the maximum extent possible, transparency about its dispute resolution forum.

**Action Taken:** FINRA expanded the statistics updated monthly on the FINRA website and updated charts to display case filing volume for the 15 most often cited controversy and security types over a five-year period. The information is further distinguished between customer cases and intra-industry cases. FINRA added a map that provides the number of cases and arbitrators (by type) in each arbitration hearing location.<sup>41</sup>

- **Task Force Recommendation:** FINRA should reinstate its prior practice of disclosing on its website the names of NAMC members.

**Action Taken:** FINRA published the names and affiliations of the members of the NAMC on FINRA's website.<sup>42</sup>

## **F. Recommendation Relating to Mediation**

- **Task Force Recommendation:** FINRA should maintain aggressive efforts to recruit, train and encourage the use of more diverse mediators.

**Action Taken:** FINRA eliminated the annual fee that mediators remit to remain eligible to serve as FINRA mediators in order to assist in recruiting and retaining a diverse roster of mediators.<sup>43</sup>

## **IV. Recommendations That FINRA Will Not Implement**

After substantial deliberation, and consultation with the NAMC, FINRA has determined not to implement the recommendations described below.

- **Task Force Recommendation:** Section IV of the arbitrator disclosure checklist should be revised to state "registered investment adviser."<sup>44</sup>

FINRA staff sends its Arbitrator Disclosure Checklist to the arbitrators as part of the Oath of Arbitrator for each of an arbitrator's cases. It reminds arbitrators to consider all possible disclosures, and requires a complete explanation of any possible conflict to the parties in a particular case. One question asks whether the arbitrator is, or was ever, associated with, including employed by or registered through, an investment adviser. The Task Force believed that the term "investment adviser" required clarification because it is a term that is often used in a non-technical sense. It recommended that FINRA change the phrase "investment adviser" to "registered investment adviser."

FINRA does not agree with the recommendation because the Customer and Industry Codes refer to "investment adviser," which is a broader term than "registered investment adviser."<sup>45</sup>

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<sup>41</sup> See Final Report recommendations relating to Transparency (No. 1).

<sup>42</sup> *Id.* (No. 2), and see <http://www.finra.org/arbitration-and-mediation/national-arbitration-and-mediation-committee-namc>.

<sup>43</sup> See Final Report recommendations relating to Mediation (No. 6).

<sup>44</sup> See Final Report recommendations relating to Arbitrators (No. 12).

The arbitrator definitions reference the term specifically, and FINRA staff uses the definitions to determine whether to classify a new arbitrator as public or non-public. FINRA believes that the Arbitrator Disclosure Checklist should be consistent with the arbitrator definitions.

- **Task Force Recommendation:** Biennial increases in arbitrator compensation tied to the Consumer Price Index (CPI).<sup>46</sup>

Since honoraria increases are generally supported by fees to forum users, FINRA does not believe that honoraria increases should be automatic. FINRA will evaluate the arbitrator honoraria every two to three years going forward.

### **Next Steps**

FINRA staff will continue working on recommendations related to new staff procedures, technology enhancements and rulemaking, and provide periodic updates on its progress going forward.

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<sup>45</sup> See FINRA Rules 12100 and 13100 (Definitions).

<sup>46</sup> See Final Report recommendations relating to Arbitrators (No. 2).