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VIA EMAIL: pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K. Street, NW
Washington, DC 20006
E-mail:

Regarding: Comment On FINRA Regulatory Notice 26-06 – Modernizing FINRA Arbitration Rules, Guidance and Process

Dear Ms. Mitchell,

I am a securities attorney who regularly represents investors in FINRA arbitration proceedings involving misconduct by registered representatives, broker-dealers, and associated persons. I write to urge FINRA to reject proposals in Regulatory Notice 26-06 that would weaken the fairness, neutrality, transparency, and enforceability of the FINRA arbitration forum.

FINRA arbitration is not merely an alternative forum. For most investors, it is the forum imposed on them by pre-dispute arbitration clauses drafted by the securities industry. Because investors must use this forum, FINRA has a heightened obligation to ensure that the process is fair, neutral, and meaningful—in both form and substance.

Many proposals under consideration would move the forum in the wrong direction. They would make it harder for injured investors to bring claims, obtain evidence, reach a merits hearing, preserve meaningful remedies, and collect valid awards. Those changes would not modernize the forum. They would diminish it. They would also conflict with FINRA's statutory obligation to maintain rules designed to protect investors and the public interest.

Forum Selection / Customer Disputes (Requests for Comment A(i))

FINRA should reject any proposal that would allow member firms to divert customer disputes away from FINRA arbitration based on labels such as "complex," "large," "institutional,"

or "retail." Those labels are often unreliable, easily manipulated, and divorced from the realities of the broker-customer relationship.

A customer does not become sophisticated merely because a broker recommended a complex product. A retiree does not become an institutional investor merely because a firm advised the use of an LLC, trust, or other entity for estate planning, tax, asset-protection, or investment-access reasons. A claimant does not forfeit the protections of the FINRA forum merely because the misconduct involves a large loss or a complicated investment strategy. The need for fairness is greatest where the products, strategies, and disclosures are most complex.

Allowing firms to classify disputes in ways that determine the forum would create an obvious conflict of interest. The same industry participants whose conduct is challenged would have incentives to structure accounts, agreements, and products to push future disputes into forums with fewer investor protections. That is not reform. It is forum engineering.

The distinction between pre-dispute and post-dispute agreements is critical. Pre-dispute clauses are imposed before any claim exists, before the investor knows the facts, and before the investor has any meaningful bargaining power. Those clauses should not be used to deprive investors of FINRA's protections. Post-dispute agreements are different. Once a dispute exists and an investor is represented by counsel, parties can make informed procedural choices. FINRA should protect that distinction rather than blur it.

The core principle should be simple: if a customer has a claim against a FINRA member or an associated person of a member, and the claim arises from the business activities of the member or associated person, the customer should have access to FINRA arbitration. Weakening that principle would reduce investor protection and damage public confidence in the forum.

If FINRA considers changes to its forum rules, it should allow retail customers, after a dispute arises, to choose between FINRA arbitration and court. That change would enhance investor protection and better align FINRA's rules with its mission.

Eligibility and Motions to Dismiss (Requests for Comment B(i))

FINRA should not convert the eligibility rule into a strict statute of repose. Doing so would bar meritorious investor claims before the investor could reasonably discover the misconduct. That result would be fundamentally unfair and would reward concealment.

Many FINRA cases involve long-term investments, illiquid products, private placements, non-traded REITs, annuities, Ponzi schemes, or other strategies where the investor does not learn the truth for years. Firms and sponsors may report artificial values, delay write-downs, continue sending misleading account statements, or conceal supervisory failures. In those circumstances, the actionable "occurrence or event" is not necessarily the date of purchase. The claim may arise from later misrepresentations, ongoing concealment, continued unsuitable advice, false account values, or the delayed realization of loss.

A rigid repose rule would create perverse incentives. It would benefit firms that hide misconduct long enough and would ignore the continuing nature of many brokerage and advisory relationships. FINRA should not adopt a rule that makes concealment a defense.

FINRA should also resist expanding pre-hearing motions to dismiss. Arbitration is supposed to be an accessible merits-based forum, not a court-style pleading trap. Expanding early dismissal practice would increase cost, delay discovery, and give well-funded firms another procedural weapon against customers.

FINRA should instead clarify that arbitration pleadings need not satisfy technical court pleading standards and that meaningful discovery should occur before eligibility or dispositive motions are heard, except in extraordinary circumstances. Panels should decide such issues on a developed record, not on incomplete facts.

Arbitrator Qualifications, Classification, and Selection (Requests for Comment C & D)

FINRA arbitration replaces the courthouse and a jury. The arbitrator pool should therefore be broad, representative, and independent. It should not be narrowed into a more professionalized group of repeat participants who bear little resemblance to the investing public.

I oppose heightened qualification requirements that unnecessarily exclude capable members of the public, including adults without four-year college degrees. A college degree is not a proxy for fairness, judgment, common sense, or independence. Jurors are not required to have degrees. Judges do not need subject-matter expertise before taking the bench. Yet the proposal before FINRA risks making it more difficult to serve as a part-time arbitrator than to enter the securities industry itself.

FINRA also should not dilute the definition of "public arbitrator." Independence is essential. Existing restrictions and cooling-off periods are safeguards, not technicalities. Individuals with substantial industry-aligned experience may bring assumptions that favor industry respondents, even unintentionally. FINRA should not create "public" arbitrators who are public in name only.

Rule 12403(c)(1)(A), which allows parties to strike all non-public arbitrators, should remain unchanged. That rule was an important investor-protection reform. Requiring or pressuring investors to accept industry-affiliated arbitrators would undermine neutrality and revive concerns that FINRA arbitration is structurally tilted toward the industry that funds and uses it most often.

FINRA should, however, amend its strike rules so that claimants collectively and respondents collectively receive equal numbers of strikes. One side should not gain a tactical advantage merely because of the number of separately represented parties.

Arbitrator Training (Requests for Comment E)

I support additional training that helps arbitrators administer cases fairly, efficiently, and consistently. Refresher training on ethics, conflicts, hearing management, discovery enforcement, motion practice, chairperson responsibilities, and rule changes would benefit the forum.

But FINRA must draw a firm line between procedural training and substantive instruction. Arbitrators should not be trained in a way that suggests certain claims are more worthy, certain legal theories are disfavored, or certain products should be viewed through an industry-approved lens.

Every investor claim deserves equal dignity, whether the case involves a modest retirement account or a large portfolio. The size of the account does not determine the seriousness of the misconduct. Nor should FINRA create training materials that implicitly rank customer claims by perceived complexity, dollar amount, or product type.

Substantive law and product-specific disputes should be addressed through party advocacy, evidence, and expert testimony. FINRA should not place its thumb on the scale by instructing arbitrators on disputed legal or investment issues outside the adversarial process.

Discovery (Requests for Comment F)

Discovery is one of the most significant fairness issues in FINRA arbitration. Investors typically begin cases with far less information than broker-dealers, which possess the key evidence—emails, text messages, supervisory records, commission data, exception reports, compliance materials, due diligence files, and internal communications. Without meaningful discovery, investors cannot prove what occurred.

The Discovery Guide should be strengthened, not narrowed. While it improved discovery at the time of its adoption, it no longer reflects current realities. Broker-dealers now rely on technologies that allow them to electronically store, organize, search, retrieve, and produce large volumes of documents with relative ease. Discovery today is nearly entirely electronic.

Despite this, firms routinely withhold plainly discoverable materials while relying on boilerplate objections—such as claims of undue burden, overbreadth, irrelevance, privacy, or unfounded assertions of privilege—often without any meaningful justification.

FINRA should make clear that presumptively discoverable documents must be produced absent meritorious, specific objections, and that boilerplate objections are unacceptable. Arbitrators should be trained and encouraged to enforce the Discovery Guide rigorously and to issue meaningful sanctions for repeated or egregious failures to comply.

FINRA should update the Guide to also expressly require the production of:

- "all communications the Claimant(s) sent or received, including emails and text messages";
- complete written supervisory procedure manuals;
- complete Regulation Best Interest manuals;

- regulatory inquiry materials;
- FINRA Rule 8210 requests;
- relevant SEC Wells notices;
- product due diligence files;
- all relevant internal communications; and
- all communications concerning the customer, products, strategies, accounts, and representatives at issue.

These materials are often critical to establishing what the firm knew, when it knew it, and whether it acted reasonably.

In addition, FINRA should require production of insurance information, including policy declarations, full policies, and any reservation of rights or declination letters. Such disclosures are routine in litigation and are essential for evaluating settlement and collectability. Their absence in arbitration is unjustified and contributes to inefficiency and unpaid awards.

FINRA should also address structural sources of delay. Confidentiality disputes frequently stall discovery. Arbitrators should be required to resolve confidentiality agreements at the outset of each case. Firms should also be required to identify relevant supervisors early so that discovery can proceed in a targeted and efficient manner.

FINRA should not create a new discovery referee bureaucracy. Doing so would increase costs and delays without addressing the core issue. The problem is not a lack of rules—it is the failure to enforce existing ones. Panels already have the authority to manage discovery effectively; FINRA should ensure that they use it.

Hearing Oversight and Efficiency (Requests for Comment G)

FINRA should not create a centralized contact point that provides interpretive guidance to arbitrators during cases. That proposal risks blurring the line between forum administration and adjudication. Arbitrators must decide disputes based on the parties' submissions, the evidence, and the governing law. FINRA staff should not become an off-the-record source of interpretive direction.

The better approach is to strengthen procedural training and enforce existing timelines. Many delays in FINRA arbitration result from discovery noncompliance and reluctance to impose sanctions. New layers of case-management rules will not solve that problem. Enforcement will.

FINRA staff can appropriately monitor administrative milestones without influencing adjudicative decisions. For example, if an initial prehearing conference, discovery schedule, or final hearing date is not timely established, FINRA staff should automatically contact the panel and parties to determine whether administrative assistance is needed. That would promote efficiency without compromising decisional independence.

FINRA should also modernize the DR Portal. The portal should provide clearer docket views, better filing categories, improved filtering, prompt billing integration, and mobile access for counsel. These practical improvements would do more for efficiency than additional procedural hurdles aimed at claimants.

Punitive Damages (Requests for Comment H)

FINRA must preserve arbitrators' authority to award punitive damages. Punitive damages are rare, but they serve an essential function in cases involving egregious misconduct. They punish wrongdoing, deter future misconduct, and reinforce the principle that the securities industry cannot profit from abusive conduct while treating compensatory damages as merely a cost of doing business.

The industry's effort to restrict punitive damages appears to be driven by dissatisfaction with a small handful of awards. That is not a principled basis for rulemaking. If arbitrators hear the evidence and conclude that punitive damages are warranted, FINRA should not shield firms from that consequence.

Pre-dispute waivers of punitive damages should be prohibited. Such waivers would be imposed in customer agreements before any dispute exists and before any investor could understand what rights were being surrendered. They would force investors to give up a critical remedy as the price of opening or maintaining an account. That is not consent.

FINRA also should reject caps, bifurcation requirements, special qualifications, mandatory explained decisions, or special appellate procedures for punitive damages. Existing state and federal law already provide standards and safeguards. The Federal Arbitration Act and applicable state law already provide mechanisms to challenge awards in cases of corruption, fraud, evident partiality, or other serious misconduct.

It is illogical to say that arbitrators are competent to dismiss an investor's entire case, award damages, assess credibility, resolve complex factual disputes, and enter final awards, but somehow are not competent to award punitive damages when the evidence warrants them. FINRA should not adopt special rules that single out punitive damages for industry-protective treatment.

Arbitration Awards Online (Requests for Comment J)

The Arbitration Awards Online database is essential to transparency. It allows investors, counsel, regulators, academics, and the public to evaluate outcomes, identify patterns of misconduct, assess arbitrator histories, and understand how the forum operates.

FINRA should not permit awards to be removed or redacted in a way that obscures material information. Public awards help counteract the information imbalance between repeat-player firms and retail customers. Removing awards would create an incomplete and misleading public record.

Rather than restrict access, FINRA should improve the database. Awards should be converted into structured, searchable data, with better full-text search, outcome analytics, arbitrator history tools, BrokerCheck links, and links to related court proceedings. Transparency strengthens the forum. Concealment weakens it.

Unpaid Awards (Requests for Comment K)

The continued existence of unpaid arbitration awards is a clear failure of the FINRA arbitration system. An investor who proves misconduct, obtains an award, and still cannot collect has not received justice. FINRA grants broker-dealers the registrations they need to operate, yet does not require them to maintain insurance or other meaningful financial safeguards. At the same time, some broker-dealers structure themselves in ways that allow them to easily evade liability for arbitration awards. In light of that reality, a mandatory forum that produces unenforceable awards cannot credibly claim to provide meaningful investor protection.

This problem is structural, not anecdotal. FINRA should adopt a national investor recovery fund funded by member firms. The industry that requires investors to use this forum should bear responsibility for ensuring that valid awards are paid.

FINRA should also consider insurance requirements, support legislative reforms preventing wrongdoers from discharging unpaid awards in bankruptcy, and strengthen disclosure requirements concerning unpaid awards. Investors should not discover collectability problems only after they have spent time and resources on a lengthy arbitration.

The moral hazard objection is unpersuasive. Fraudsters do not commit misconduct because an investor compensation mechanism exists. Any recovery fund can preserve rights of reimbursement, subrogation, and enforcement against wrongdoers. The real moral hazard is allowing firms and associated persons with no insurance or financial requirements to impose arbitration on investors while leaving valid awards unpaid.

Conclusion

FINRA should approach Regulatory Notice 26-06 from first principles. The securities industry already drafts the customer agreements. It already possesses most of the documents. It already appears in the forum repeatedly. It already has superior information, resources, and institutional familiarity. FINRA should not adopt rule changes that further increase those advantages.

Modernization should mean a fairer, more transparent, more enforceable forum. It should not mean fewer investor protections, more dismissal mechanisms, narrower discovery, reduced transparency, weaker remedies, or unpaid awards.

FINRA's obligation is to protect investors and the public interest. That obligation should guide every decision made in response to Regulatory Notice 26-06. FINRA should reject proposals

that would tilt the forum toward the industry and should instead strengthen the safeguards necessary to ensure that investors receive a fair hearing, meaningful access to evidence, neutral decision-makers, transparent outcomes, and collectible awards.

Respectfully submitted,

/s/ Adam J. Marquardt

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