

May 1, 2026

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006

Re: Comments on Regulatory Notice 26-06

Dear Ms. Mitchell:

Sigma Financial Corporation (“Sigma”) and Parkland Securities, LLC (“Parkland,” and together with Sigma, the “Companies,” “we,” “us,” or “our”) are registered broker-dealers and FINRA member firms located in Ann Arbor, Michigan.¹ The Companies value FINRA’s longstanding self-regulatory compact with member firms,² and we appreciate the opportunity to provide constructive feedback on the various issues raised for comment in Regulatory Notice 26-06. The requests for comments to which the Companies are responding are set forth below and follow the same labeling as in Regulatory Notice 26-06.

A. Forum Selection

Request for Comment A(i).2: Should customers be allowed to unilaterally choose, post dispute, between arbitration and litigation even if they signed a customer agreement with an alternative forum selection clause? Alternatively, should FINRA permit arbitration in its forum only where both parties agree to such arbitration post dispute? What fairness considerations should be part of evaluating this question?

Response: In terms of “fairness considerations,” the proper starting point is FINRA Rule 12200. Under that rule, and in the event of a dispute “between a customer and a member or associated person of a member,” the member *must* arbitrate under the Code if “requested by the customer.”

¹ The Companies’ CRD numbers are 14303 and 115368, respectively.

² This compact was articulated by one of FINRA’s former CEOs. See Richard G. Ketchum, Chief Regulatory Officer, NYSE, Keynote Speech at the Practising Law Institute, Nov. 11, 2004 (“if we do not accept the fact that the burden of self-regulation is collaborative with equal responsibility to the industry and those in this hall who advise them, as it is with the SROs, then we have already failed”).

In other words, absent a written pre-dispute arbitration agreement, the customer holds a one-sided litigation option, with the ability to unilaterally choose court or arbitration as the litigation forum for *both* parties in the manner they deem most advantageous. The member firm is *required* to arbitrate the dispute if the customer wishes to do so, even if the member firm prefers otherwise or is thereby disadvantaged. Fundamentally, there is no historical basis for granting customers such a sweeping and one-sided option to compel member firms to arbitrate disputes involuntarily.³

Fairness considerations dictate that member firms should have an equal say in such an important matter. To address the obvious fact that they do not, and to remedy this rather one-sided situation under FINRA Rule 12200, member firms routinely require customers to sign a pre-dispute arbitration agreement before doing business, as permitted by industry practice and in accordance with FINRA Rule 2268. Customers who do not wish to sign such an agreement need not do so and are free to take their business elsewhere.

There are two reasons why FINRA should not permit customers to unilaterally choose, post dispute, between arbitration and litigation even if they signed a customer agreement with an alternative forum selection clause. First, modifying the widespread use of pre-dispute agreements would likely usurp the SEC's proper place in the regulatory framework established by Congress. For example, if FINRA were to permit customers to disregard or avoid the arbitration requirements of their agreements and opt for civil litigation instead, this would be tantamount to nullifying the legal effect of such arbitration provisions across the entire broker-dealer industry.

Pursuant to Section 921 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), the SEC has authority to "prohibit" or "impose conditions or limitations on the use of" pre-dispute arbitration agreements, but FINRA does not.⁴ The fact that the SEC has not acted under Section 921 of the Dodd-Frank Act suggests that FINRA should not overstep and take action that Congress has reserved to the SEC alone. In short, the scenario proposed by FINRA would be problematic under the regime envisioned by Congress and expose FINRA to legal attack based on its circumvention of Section 921 as well as the major questions doctrine⁵ as a consequence of nullifying pre-dispute arbitration agreements across an entire industry.

Second, the Federal Arbitration Act ("FAA") reflects "a congressional declaration of a liberal federal policy favoring arbitration agreements."⁶ Therefore, any such action by FINRA would

³ See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631–32 (Apr. 2005) ("While arbitration has been used as a dispute resolution technique for thousands of years, in the past it has been agreed to knowingly and voluntarily, typically by two or more businesses. The involuntary imposition of arbitration . . . is a new and most controversial phenomenon.").

⁴ See 15 U.S.C. § 78o(o).

⁵ See, e.g., *Alliance for Fair Bd. Recruitment v. SEC*, 125 F.4th 159 (5th Cir. 2024) (vacating the SEC's order approving the Nasdaq Board Diversity Proposal based on the major questions doctrine and the SEC's substantial restructuring of a major sector of the economy).

⁶ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

be contrary to the stated intent of Congress, as repeatedly recognized by federal courts,⁷ which *favors* pre-dispute arbitration agreements. It would be strange indeed if FINRA, which is itself a creature of federal securities law, were to take an approach with respect to arbitration agreements that is so *contrary* to well-established federal law.

Request for Comment A(ii).1: Should FINRA amend its rules to no longer require disputes arising out of the business activities of members or associated persons to be arbitrated under the Industry Code? What fairness considerations should be part of evaluating this question?

Response: No, FINRA should continue to require disputes arising out of the business activities of members or associated persons to be arbitrated under the Industry Code. The current framework is already fair in that both members and associated persons are subject to FINRA jurisdiction, the latter for two years after registration ends.⁸ There is no inherent unfairness in requiring such parties to arbitrate under the Industry Code when they are already subject to FINRA jurisdiction.

Moreover, nonpublic arbitrators are permitted under the Industry Code, and other forums are much less likely to have the knowledge and expertise needed to decide such cases or to determine the threshold question of whether a dispute arises “out of the business activities” of the parties. Finally, as noted above, the FAA reflects a congressional declaration of a liberal federal policy favoring arbitration agreements, and therefore such a proposed rule amendment would be contrary to public policy as articulated by Congress, the very same legislative body that authorized the creation of FINRA.

B. Eligibility and Motions to Dismiss

Request for Comment B(i).1: Should FINRA eliminate the eligibility rule and allow eligibility to be determined solely by applicable statutes of limitations? What would be the impacts on parties, if any, including on recordkeeping burdens and forum accessibility? What fairness considerations should be part of evaluating this question?

Response: No, preserving the eligibility rule as a statute of repose—and clarifying it to be a statute of repose and not something else—is preferable to eliminating the eligibility rule and replacing it with applicable statutes of limitations. This follows from the difference between the two kinds of statutes:

In the ordinary course, a statute of limitations creates a time limit for suing in a civil case, based on the date when the claim accrued. Measured by this standard, a claim accrues in a personal-injury or property-damage action when the injury occurred or was discovered. . . . A statute of repose, on the other hand, puts an

⁷ Because the SEC has not acted based on Section 921 of the Dodd-Frank Act, this statutory provision has not been tested in federal court in light of the FAA. Presumably, any action by the SEC under Section 921 to prohibit or limit the use of pre-dispute arbitration agreements would be deemed a carve-out from the FAA due to the later enactment of the Dodd-Frank Act. Regardless, FINRA has no authority to act under Section 921, and therefore FINRA’s actions must be evaluated solely in light of the FAA.

⁸ This is found in Article V, Section 4 of the FINRA By-Laws.

outer limit on the right to bring a civil action. That limit is measured not from the date on which a claim accrues but instead from the date of the last culpable act or omission of the defendant. A statute of repose bars any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury. The statute of repose limit is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered. The repose provision is therefore equivalent to “a cutoff,” in essence an absolute bar on a defendant’s temporal liability.

Although there is substantial overlap between the policies of a statute of limitations and a statute of repose, each has a distinct purpose and each is targeted at a different actor. Statutes of limitations require plaintiffs to pursue diligent prosecution of known claims. Statutes of limitations promote justice by preventing surprises through plaintiffs’ revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons. But the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant should be free from liability after a legislatively determined period of time.⁹

With this distinction in mind, we see that the latter considerations apply. That is, the NASD long ago made its own “legislative judgment” that member firms should be free from liability after six years because it would be unfair to force member firms to litigate stale claims after mandatory recordkeeping periods have expired. As the NASD explained:

A time limitation on matters eligible for arbitration has existed in the Code since it was first adopted in 1968. Originally set at two (2) years, the time limit had been extended to six years by the time the Rule was added to the original Uniform Code of Arbitration developed by the Securities Industry Conference on Arbitration (“SICA”) in 1978. Currently, [NASD] Rule 10304 [now FINRA Rule 12206] of the Code provides, “No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.”

The original purpose of the rule was to prevent aged claims from being litigated in arbitration. The six-year time limitation was consistent with the SEC’s books and records rule, SEC Rule 17a-4, which required certain significant broker/dealer records to be retained for no more than six years, and members may have believed that they would be disadvantaged if forced to arbitrate claims if records were not available. Moreover, the securities industry believed that the inherently equitable nature of arbitration posed a greater risk that arbitrators might not strictly apply legal defenses such as statutes of

⁹ *CTS Corp. v. Waldburger*, 573 U.S. 1, 7–9 (2014) (citations and quotation marks omitted).

limitation, thereby permitting a customer (investor) to recover in a case that would have been dismissed had it been brought in court.¹⁰

At this point, there is no sense in abandoning the eligibility rule in favor of using statutes of limitations. An NASD task force previously considered such an idea in 1996, and the NASD rightly rejected this proposal, a decision which need not be revisited.¹¹ Despite the passage of three decades, the original purpose for the eligibility rule remains valid.

Finally, operating with a statute of repose is preferable given that certain state courts have held that statutes of limitations do not apply in arbitration.¹² Relying on a simple six-year statute of repose spares all parties as well as arbitrators the burdensome task of sifting through state case law on statutes of limitations, providing them instead with a clear bright-line rule that is easily administrable and reflects a sensible regulatory policy as explained above.

Request for Comment B(i).2: Should FINRA amend the eligibility rule to expressly allow claims in FINRA’s arbitration forum that arise from transactions or wrongful events that occurred more than six years prior to the claim being filed if, for example, there are ongoing damages or concealment of the harm? What fairness considerations should be part of evaluating this question?

Response: No, this would be manifestly unfair to member firms given the policy rationale underlying the eligibility rule’s six-year limit. As one arbitration panel has explained:

FINRA Rule 12206 (the “Eligibility Rule”) bars the arbitration of claims arising more than six years prior to the filing of the Statement of Claim. **The Eligibility**

¹⁰ Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Eligibility of Claims for Arbitration, Exchange Act Release No. 39487, 1997 SEC LEXIS 2699, at *8–9 (Dec. 23, 1997) (emphasis added).

¹¹ “In January 1996, the NASD’s Arbitration Policy Task Force . . . recommended suspending the [eligibility] rule and replacing it with a procedure by which the arbitrators would have been required to apply applicable statutes of limitation. . . . The NASD’s Policy Task Force recommended suspending the eligibility rule for three years as a pilot and, ultimately, repealing it. In response, brokerage firms argued that repealing the rule either temporarily or permanently would eventually expose them to very old claims; they would be unable to predict or manage the risks of such claims. The NASD, as a result, concluded that repealing the rule would create more problems for both investors and member firms than were solved and that the original purpose for the rule remained valid. The NASD therefore determined not to adopt the Task Force recommendation[.]” 1 DAVID E. ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 5-10 (Matthew Bender 2025).

¹² Courts which have held that statutes of limitations do not apply to arbitration proceedings include those in Arizona, Connecticut, Maine, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, and Washington. See *Broom v. Morgan Stanley DW, Inc.*, 236 P.3d 182, 187 (Wash. 2010); *Morgan v. Carillon Invs., Inc.*, 109 P.3d 82 (Ariz. 2005); *Carpenter v. Pomerantz*, 634 N.E.2d 587, 590 (Mass. App. Ct. 1994); *NCR Corp. v. CBS Liquor Control*, 874 F. Supp. 168 (S.D. Ohio 1993); *Nielsen v. Butterworth Hosp.*, 452 N.W.2d 848, 850 (Mich. Ct. App. 1990), *rev’d on other grounds*, 485 N.W.2d 666 (Mich. 1992); *Cameron v. Griffith*, 370 S.E.2d 704 (N.C. Ct. App. 1988); *Lewiston Firefighters Assoc. v. Lewiston*, 354 A.2d 154, 167 (Me. 1976); *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 218 N.W.2d 751, 755 (Minn. 1974); *Skidmore, Owings & Merrill v. Connecticut General Life Ins. Co.*, 197 A.2d 83 (Conn. Super. Ct. 1963).

Rule acts as a statute of repose and prohibits the instant claims from proceeding in FINRA arbitration—the purpose being to protect parties from litigating stale claims without adequate documentation and witness recollection. . . . According to the Eligibility Rule, “[n]o claim shall be eligible for submission to arbitration under the code where six years have elapsed from the occurrence or event giving rise to the claim.” FINRA Rule 12206(a). This provision “serves as an absolute bar to claims submitted for arbitration more than six years after the event which gave rise to the dispute.” *Paine Webber v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989). As an absolute bar, the Eligibility Rule does not depend on when Claimant supposedly became aware of his alleged claims, as “[t]he date of the occurrence or event does not under any circumstances depend on the date when the aggrieved investor first discovers that he or she has suffered a financial loss.” *Dean Witter Reynolds, Inc. v. McCoy*, 853 F. Supp. 1023, 1030–31 (E.D. Tenn. 1994).¹³

In other words, the six-year period of the eligibility rule tracks the maximum six-year recordkeeping requirements of Exchange Act Rules 17a-3 and 17a-4, thereby preventing member firms from having to unfairly litigate “stale claims without adequate documentation and witness recollection.” As one legal commentator explains, “Requiring a firm, and a broker, to defend a claim which arose beyond that six-year period . . . could prejudice a firm and broker because key records (e.g., monthly account statements, confirmations, opening account forms) may no longer be available.”¹⁴

Consequently, FINRA should not amend the eligibility rule beyond six years. Otherwise, member firms will be unfairly prejudiced by having to defend themselves without the benefit of records that have been purged because they were no longer required to be maintained.

Request for Comment B(i).3: Should FINRA amend the eligibility rule to expressly provide that the rule is a statute of repose, barring claims based on securities transactions or wrongful events that occurred more than six years before a claim is filed? How would this approach affect claims related to a continuing occurrence (e.g., allegations of ongoing fraud starting with the purchase of a stock 10 years ago but continuing to a date within six years of the date the arbitration claim was filed)? What fairness considerations should be part of evaluating this question?

Response: The Companies believe this question is misstated. The phrase “amend the eligibility rule” suggests that the eligibility rule is not already a statute of repose, when in fact arbitrators have long regarded it as such.¹⁵

¹³ *Cordero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, FINRA Case No. 17-00449, at 3 (Sept. 27, 2017) (emphasis added).

¹⁴ 1 ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 5-10.

¹⁵ See, e.g., *Birchwood Res., Inc. v. J.P. Morgan Sec., LLC*, FINRA Case No. 22-01207, at 3 (Nov. 11, 2024) (“Rule 12206 is a statute of repose and is not subject to equitable tolling.”); *Baker v. TD Ameritrade*, FINRA Case No. 23-00656, at 4 (Sept. 27, 2024) (“FINRA Rule 12206 sets forth a 6-year statute of repose which is calculated by the date on which the unsuitable investment(s) were initially sold/purchased.”); *Osamor v. First Command Brokerage Servs., Inc.*, FINRA Case No. 23-00663, at 2 (Oct. 17, 2023) (“FINRA Rule 12206 . . . is a

To the extent there remains confusion on this point, we encourage FINRA to amend the eligibility rule to clarify that it is indeed a statute of repose, as arbitrators have long recognized. Making this explicit would ensure continued proper treatment of the rule going forward and help prevent erroneous conclusions to the contrary.

It would not be unfair for FINRA to make such a clarifying amendment, as it would merely codify how the rule is already interpreted and applied by arbitrators. Moreover, arbitrators do not seem stymied about how to handle claims related to a continuing occurrence. For example:

FINRA rule 12206(a) the so-called “Six Year Rule” is familiar: “No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.” The Rule is a statute of repose. That means a cause of action is absolutely barred as of a specified time after a precipitating event or occurrence, even if the cause of action has not accrued because it has not been discovered. Rule 12206(c) makes this clear: “The rule does not extend applicable statutes of limitations...” Thus, erroneous statements to the contrary in some case law notwithstanding, statutes of limitation concepts like tolling and discovery are antithetical to a statute of repose. The FINRA’s guidance that “arbitrators may find that there is a continuing occurrence or event giving rise to the dispute” in place of the precipitating event—usually purchase of the investment—is designed to assist the Panel to achieve certainty, not automatically expand the time to bring a claim. This is so because while the time period in Rule 12206 is generous, and exceeds time periods in most statutes of limitation, the Rule is inherently restrictive, not expansive.¹⁶

In short, it seems the guidance and training that FINRA has provided with respect to continuing occurrences has been well understood and applied by arbitrators *when viewing the rule as a statute of repose*. Thus, there is no need to further evaluate how the approach that FINRA is considering will “affect claims related to a continuing occurrence,” as the pieces are already in place and appear to be working well.

D. Arbitrator Classification and Selection

Request for Comment D.1: Should FINRA amend the definition of “public arbitrator” provided in Rules 12100(aa) and 13100(x) to modify or remove any of the criteria that disqualify an arbitrator from service as a public arbitrator to expand the public roster? If so, which criteria and why?

Response: Yes, the “Permanent Disqualifications Based on a Person’s Own Activities” section of FINRA Rule 12100(aa) should be revised to eliminate lifetime bans for individuals

statute of repose which does not provide for ‘tolling’ until later discovery of a claimed occurrence or event.”); *Cordero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, FINRA Case No. 17-00449, at 3 (Sept. 27, 2017) (“The Eligibility Rule acts as a statute of repose”).

¹⁶ *Patricia Mary Taylor Trust v. Kestra Inv. Servs., LLC*, FINRA Case No. 21-02458, at 3 (Feb. 2, 2022).

who have worked in the industry. This lifetime ban serves no useful purpose and can lead to bizarre results.

For example, consider a summer intern who worked for three months at a broker-dealer and thereafter decided to pursue other interests following graduation. Afterward, this individual attended law school, passed the bar exam, and joined a law firm focusing on environmental law (or some other field unrelated to the financial services industry). Decades later, now a successful environmental law partner, this individual decides to apply as a FINRA arbitrator. For no sensible reason, this individual cannot qualify as a “public arbitrator” due to a three-month internship that has been long forgotten. Such a lifetime ban for such little involvement in the industry serves no useful purpose, and yet it is the outcome required by FINRA Rule 12100(aa). It borders on the absurd to think that such an individual would be biased or lack neutrality after such a brief period of time working in the industry so long ago. At some point—and plausibly not long at that—loyalty to the industry fades away altogether.

A better approach would be to disqualify as “public arbitrators” only those individuals who either have worked a certain number of years in the industry (e.g., five years) or who recently have worked in the industry (e.g., in the past five years). Otherwise, FINRA is needlessly turning away potential arbitrators who can represent the “public” fairly and in a manner that is not prejudiced against customers.

L. Form U5 Defamation Claims

Request for Comment L.1: How should the regulatory need for the reporting of complete and accurate information to CRD be balanced with concerns from members regarding adverse arbitration awards based on required reporting and associated persons’ expectation for recourse if they believe the reported information is untrue or misleading?

Response: FINRA can balance the regulatory need for reporting and members’ concerns by providing member firms with qualified immunity, as originally proposed decades ago with NASD Rule 1150.¹⁷ This is discussed below in further detail in response to requests for comment L.2 and L.6.

Request for Comment L.2: Should FINRA amend its rules to require that before making an award of monetary damages for Form U5 defamation claims, arbitrators should be required to find that the alleged defamatory statement is a false statement of fact and was made in bad faith and with malice in fact? Is this the appropriate standard for damages claims based on allegations of defamation? Are there other standards FINRA should consider?

Response: The appropriate standard that FINRA should consider is the standard articulated in Section 507 of the Uniform Securities Act of 2002:

A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser

¹⁷ See SR-NASD-1998-018.

representative for defamation relating to a statement that is contained in a record required by the administrator, or designee of the administrator, the Securities and Exchange Commission, or a self-regulatory organization, ***unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.***¹⁸

This standard of qualified immunity was seen by the drafters at the National Conference of Commissioners on Uniform State Laws as striking the right balance:

Section 507 is a new qualified immunity provision to protect a broker-dealer or investment adviser from defamation claims based on information filed with the SEC, a state administrator, or self-regulatory organization “unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.” This Section, which is ***consistent with most litigated cases to date and is a response to concerns that defamation lawsuits have deterred broker-dealers and investment advisers from full and complete disclosure of problems with departing employees.*** The Drafting Committee was also sensitive to the concern that such immunity could allow broker-dealers and investment advisers to unfairly characterize employees to protect their “book” of clients. Because of this concern the Drafting Committee rejected proposals for an absolute immunity.¹⁹

This strikes a fair and proper balance. The *qualified* immunity addresses concerns from members regarding adverse arbitration awards based on required reporting. Furthermore, the fact that this immunity is not *absolute* takes into account associated persons' expectations for recourse if they believe the reported information is untrue or misleading.

Request for Comment L.6: Should FINRA and other regulators revisit the question of providing members with further immunity against Form U5 defamation claims? If FINRA and other regulators were to revisit such a proposal, what would a national, uniform standard look like and why? What regulatory authority would support such a standard?

Response: The Companies believe this question is misstated. The phrase “further immunity” suggests that member firms have *some* immunity against Form U5 defamation claims, when in fact they presently have *none*.

For context, *defamation* is “an attack on the reputation of another through the unprivileged utterance or publication of false statements that proximately result in injury to that person. A communication is considered defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or

¹⁸ UNIFORM SECURITIES ACT OF 2002 § 507 (emphasis added).

¹⁹ *Id.* Prefatory Note (emphasis added).

dealing with him, or if it tends to expose him to public hatred, contempt or ridicule.”²⁰ Furthermore, even an *incomplete statement* can be sufficient for defamation liability.²¹

A key element of any defamation claim is *publication*. This presents member firms with a dilemma when terminating a registered representative for cause, or what one legal commentator described as a “Modern-Day Hobson’s Choice.”²² On the one hand, FINRA rules require members to fully report the reasons for such a termination, and also to generally inform customers of the representative’s departure.²³ If a member fails to fully report the reasons for termination, it can face civil and even criminal penalties.²⁴ Moreover, a member can be liable to future customers for failing to provide accurate language on Form U5.²⁵

On the other hand, members have an incentive to “whitewash” a Form U5 disclosure as much as possible in order to avoid the risk of a defamation lawsuit from the representative who was terminated. The result is potentially less transparency for the investing public regarding the reason for a representative’s termination (e.g., on BrokerCheck reports), an outcome that is contrary to FINRA’s mission of protecting investors and safeguarding market integrity.

The result is a no-win situation for member firms which are caught between the proverbial rock of disclosure and the hard place of defamation liability. Even if full disclosure is made, the risk of a potential defamation claim—even if frivolous—looms large and has a very real chilling effect.

This is not mere speculation. Even though many states provide a qualified immunity privilege for potentially defamatory statements made to quasi-governmental bodies such as FINRA,²⁶

²⁰ 3 DAVID E. ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 15-8 (Matthew Bender 2025) (quotation marks and citation omitted).

²¹ *James Patrick Robertson v. Raymond James Fin. Servs., Inc.*, FINRA Case No. 12-01755, at 6 (Jan. 30, 2014) (“True but incomplete statements can fulfill the falsity requirement for defamation”).

²² 3 ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 15-8.

²³ See FINRA Regulatory Notice 19-10 (Apr. 5, 2019).

²⁴ NASD Notice to Members 88-67 (Sept. 1, 1988) (“The NASD would also point out that members and their associated persons may be subject to administrative, civil, and even criminal penalties for failing to provide complete and accurate information on Forms U-4 and U-5.”).

²⁵ See *Twiss v. Kury*, 25 F.3d 1551 (11th Cir. 1994).

²⁶ Qualified immunity is provided for such disclosure in Section 507 of the Uniform Securities Act of 2002. Among the jurisdictions that have adopted the Uniform Securities Act of 2002, in full or in part, at least 21 of them have included the Section 507 qualified immunity provision: (1) Alaska [ALASKA STAT. § 45.56.560]; (2) Georgia [GA. CODE ANN. § 10-5-56]; (3) Hawaii [HAW. REV. STAT. § 485A-507]; (4) Idaho [IDAHO CODE ANN. § 30-14-507]; (5) Indiana [IND. CODE ANN. § 23-19-5-7]; (6) Iowa [IOWA CODE § 502.507]; (7) Kansas [KAN. STAT. ANN. § 17-12a507]; (8) Maine [ME. REV. STAT. ANN. tit. 32, § 16507]; (9) Michigan [MICH. COMP. LAWS § 451.2507]; (10) Minnesota [MINN. STAT. § 80A.74]; (11) Mississippi [MISS. CODE ANN. § 75-71-507]; (12) Missouri [MO. REV. STAT. § 409.5-507]; (13) New Hampshire [N.H. REV. STAT. ANN. § 421-B:5-507]; (14) New Mexico [N.M. STAT. ANN. § 58-13C-507]; (15) Oklahoma [OKLA. STAT. tit. 71, § 1-507]; (16) South Carolina [S.C. CODE ANN. § 35-1-507]; (17)

such qualified privilege carries less weight in FINRA arbitration which is an equitable forum²⁷ where legal precedent can be disregarded²⁸:

Whether state law affords firms absolute, qualified, or no immunity, at the end of the day, most U5 defamation claims are compelled to proceed to arbitration, not court, and FINRA arbitrators often do not evaluate whether a privilege applies until all evidence has been entered. Further, FINRA arbitrators often focus their awards on simply whether the Form U5 disclosures are inaccurate or false, and not whether the claimant can satisfy each element of a defamation claim. Brokers have been successful in receiving substantial arbitration awards in their defamation claims against major brokerage firms.²⁹

At one time, the NASD sympathized with member firms on this issue and endorsed granting qualified immunity for Form U4 and Form U5 disclosures:

In recent years, registered persons have brought a number of defamation claims for allegedly untrue or misleading statements made on Form U-5. The claims are primarily brought in arbitration . . . [and] because of the personal and financial interests at issue, the members' potential exposure to liability as a result of such claims may be substantial.

At common law, courts have generally found that employers are entitled to a qualified privilege for statements made about former employees to prospective employers. This qualified privilege has been codified in many state statutes. . . .

South Dakota [S.D. CODIFIED LAWS § 47-31B-507]; (18) the U.S. Virgin Islands [V.I. CODE ANN. tit. 9, § 657]; (19) Vermont [VA. STAT. ANN. tit. 9, § 5507]; (20) Wisconsin [WIS. STAT. § 551.507]; and (21) Wyoming [WYO. STAT. ANN. § 17-4-507].

This appears consistent with legal conclusions that Form U5 is not entitled to absolute immunity, but only qualified immunity, because it is not part of a judicial proceeding. See *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996) (“the arbitration panel’s failure to afford the statements on the Form U-5 an absolute privilege was not in manifest disregard of Tennessee law”). In contrast, New York law provides for an absolute privilege. See *Rosenberg v. Metlife, Inc.*, 866 N.E.2d 439, 445 (N.Y. 2007) (“Statements made by an employer on a NASD employee termination notice are subject to an absolute privilege in a suit for defamation.”).

²⁷ FINRA Dispute Resolution Services Arbitrator’s Guide, at 9 (Mar. 2026) (“Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.”), available at <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

²⁸ SEC Office of Investor Education and Advocacy, *Broker-Dealer/Customer Arbitration: Investor Bulletin* (June 14, 2022) (“Arbitrators are not required to follow state or federal rules of evidence and are not bound by legal precedent.”), available at <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/broker-dealercustomer-arbitration-investor-bulletin>.

²⁹ Gary Lieberman, “Form U5 Defamation Claims on the Rise at FINRA: Be Prepared!”, *littler.com*, Mar. 25, 2021, available at <https://www.littler.com/news-analysis/asap/form-u5-defamation-claims-rise-finra-be-prepared>. See also 3 ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 15-8 (noting that arbitrators should be “encouraged to apply” the specific legal standards for defamation claims).

The potential liability for statements made on Forms U-5 has created a disincentive for member firms to provide full disclosure. Members have also questioned the fairness of exposure to potentially significant liability for disclosures they are required by the NASD to make. . . . [F]ull disclosure of disciplinary problems on Forms U-4 and U-5 is in the public interest. Accordingly, NASD Regulation believes it is appropriate to provide some degree of protection for members for statements made on required forms in order to encourage full disclosure. Inadequate disclosure has the potential to compromise the integrity of the Central Registration Depository, and hinders regulatory enforcement action by the NASD and other regulators. . . . The proposed Rule is designed to strike a balance between the interests of the member firms, the employees, and the public by providing qualified immunity for statements made in good faith by member firms on certain required forms, and by providing employees with an opportunity to seek changes to disclosures contained in Forms U-5 prior to their filing.³⁰

Unfortunately, FINRA’s sympathy has seemingly waned, and proposed NASD Rule 1150 never came to be.³¹ As a result, member firms have continued to be at the mercy of arbitration panels willing to grant enormous defamation awards in connection with Form U5 disclosures.³² Moreover, recent FINRA arbitration statistics show no signs of such cases slowing down:

FINRA Arbitration Cases Involving Libel or Slander on Form U5³³					
Time Period	2026 Cases Served	2025	2024	2023	2022
Through March	21	14	31	28	18
Year-End	-	82	90	104	84

Member firms are forced to walk an increasingly challenging disclosure tightrope of publicly disclosing sensitive information with reputational consequences but without the benefit of

³⁰ NASD Notice to Members 97-77, at 661–62 (Nov. 1997) (proposing NASD Rule 1150 under SR-NASD-1998-018).

³¹ Proposed NASD Rule 1150 was withdrawn after being published in Exchange Act Release No. 39892 (Apr. 21, 1998) and was never acted upon by the SEC. See UNIFORM SECURITIES ACT OF 2002 § 507 cmt. 2 (“In 1998, the National Association of Securities Dealers proposed qualified immunity for statements made in Forms U-4 and U-5 to address this problem. This proposal was reprinted in Securities Exchange Act Release 39,892 . . . [but] was not acted on by the Securities and Exchange Commission.”).

³² See, e.g., *Dustin B. Lockett v. J.P. Morgan Sec., LLC*, FINRA Case No. 19-03075 (Feb. 4, 2022) (awarding the Claimant \$1.4 million in compensatory damages, with no discussion of qualified immunity, while leaving unchanged the Reason for Termination in Section 3 of the Claimant’s Form U5); *James L. Springer v. UBS Fin. Servs.*, FINRA Case No. 15-00100 (Oct. 26, 2017) (awarding the Claimant \$3 million in compensatory damages for defamation, with no discussion of qualified immunity, while also denying the Claimant’s request for expungement of the Reason for Termination in Section 3 of the claimant’s Form U5 and Question 7F(1)).

³³ See FINRA Dispute Resolution Services Statistics, available at <https://www.finra.org/arbitration-mediation/dispute-resolution-services-statistics>.

even qualified immunity in the event a terminated representative chooses to file a Statement of Claim alleging defamation. Such a difficult situation leaves no one better off—the public, terminated representatives, member firms, or FINRA.

Our suggestion is straightforward: Enshrine in the Code of Arbitration Procedure the same qualified immunity that is already available in many states throughout the nation. Doing so would protect the public interest and ensure full and fair disclosure, as the NASD recognized decades ago in proposing NASD Rule 1150.³⁴

Consequently, FINRA and other regulators should revisit the question of providing members with immunity against Form U5 defamation claims. In doing so, FINRA and other regulators can naturally draw inspiration from Section 507 of the Uniform Securities Act of 2002, which grants qualified immunity for such disclosures. Among the jurisdictions that have adopted the Uniform Securities Act of 2002, in full or in part, at least 21 of them have included the Section 507 qualified immunity provision.³⁵

FINRA presumably already possesses the regulatory authority it needs to promulgate such a standard, otherwise FINRA (then NASD) could not have done so back in 1998 when NASD Rule 1150 was proposed.³⁶ However, if FINRA requires explicit regulatory authority for such a standard, it need look no further than Section 507 of the Uniform Securities Act of 2002 which has been adopted in many jurisdictions.³⁷

M. General Requests for Comment

Request for Comment M.3: What ambiguities in FINRA rules related to arbitration should FINRA address? Are there any other modifications to FINRA rules related to arbitration that should be considered to clarify their application?

Response: Yes, FINRA should clarify the proper interaction between FINRA Rule 2080(b)(1), FINRA Rule 13805(c)(9)(A), and Question 14I(3) of Form U4. Specifically, based on the significant number of straight-in expungement requests granted since 2016 and the reasoning provided by arbitrators in awarding such relief, FINRA should clarify whether a member firm can refrain from reporting a consumer complaint under Question 14I(3) if the member firm reasonably determines, in good faith, that the complaint meets one or more of the criteria listed in FINRA Rules 2080(b)(1) and 13805(c)(9)(A).

³⁴ If FINRA is still unwilling to offer member firms qualified immunity, we suggest that the reasons for termination provided on Form U5 not be made available through BrokerCheck or to anyone except FINRA staff and other regulators, as this will help prevent the “publication” from occurring that is necessary for defamation.

³⁵ *Supra* note 26.

³⁶ See, e.g., *Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Qualified Immunity in Arbitration Proceedings for Statements Made on Forms U-4 and U-5*, Exchange Act Release No. 39892, 63 Fed. Reg. 23321 (Apr. 28, 1998).

³⁷ *Supra* note 26.

In short, with more than 4,700 straight-in expungement requests granted over the past decade, what are member firms to make of it all? From both a policy and a regulatory reporting standpoint, why are too many “false positives”³⁸ being reported on Form U4, and what can member firms do about it? For the reasons explained below, the answers to these questions need significant clarification.

Form U4

Under Question 14I(3), a member firm is required to update a registered representative’s Form U4 if the representative has, within the past 24 months, been the subject of an investment-related, consumer-initiated, written complaint, not otherwise reported under Question 14I(2), which either:

- Alleges that the representative was involved in one or more sales practice violations and contains a claim for compensatory damages of \$5,000 or more;³⁹ or
- Alleges that the representative was involved in forgery, theft, misappropriation, or conversion of funds or securities.

Importantly, neither the Instructions to Form U4⁴⁰ nor the Form U4 and U5 Interpretive Questions and Answers⁴¹ permit the member firm to evaluate the merits of the complaint. In other words, the complaint *must* be reported if the consumer’s allegations meet the criteria of Question 14I(3), even if such allegations are doubtful, implausible, defamatory,⁴² false, clearly erroneous, or factually impossible. There is simply nothing in Form U4 or related FINRA guidance that invites or permits member firms (or their principals) to act as gatekeepers and reasonably evaluate the credibility and accuracy of the allegations in order to exclude those complaints which clearly lack merit, even though courts have recognized

³⁸ Under FINRA Rule 13805(c)(9)(A)(i), expungement can only occur in one of three scenarios: (a) the claim, allegation, or information is factually impossible or clearly erroneous; (b) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (c) the claim, allegation, or information is false.

These are purely factual criteria, not the sort of subjective matters on which reasonable minds might readily disagree. The fact that such impossible, erroneous, or false claims have been reported and then expunged—making them “false positives”—over *4,700 times* indicates that something is quite wrong with the current disclosure regime.

³⁹ If no damage amount is alleged, the complaint must be reported unless the firm has made a good faith determination that the damages from the alleged conduct would be less than \$5,000.

⁴⁰ <https://www.finra.org/sites/default/files/AppSupportDoc/p015111.pdf>.

⁴¹ <https://www.finra.org/sites/default/files/Interpretive-Guidance-final-03.05.15.pdf>.

⁴² Claimants in straight-in expungement cases regularly assert that false allegations are defamatory because they can be seen by members of the public on BrokerCheck reports.

FINRA's duty to ensure that Central Registration Depository records contain only meaningful and useful information.⁴³

FINRA Rules 2080(b)(1) and 13805(c)(9)(A)

Member firms or associated persons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief must ordinarily name FINRA as an additional party and serve FINRA with all appropriate documents. Under FINRA Rule 2080(b)(1)(A)–(C), FINRA may waive this obligation if it determines that the expungement relief is based on affirmative judicial or arbitral findings that:

- The claim, allegation, or information is factually impossible or clearly erroneous;
- The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or
- The claim, allegation, or information is false.

For a case heard under the Code of Arbitration Procedure for Industry Disputes, FINRA Rule 13805(c)(9)(A) requires the panel to use these same three criteria when determining whether to issue an award containing expungement relief.

FINRA Expungement Cases

In response to a surge in registered representative expungement cases filed against member firms separately from a customer arbitration (i.e., straight-in requests), FINRA revised Rules 12800 and 12805 of the Code of Arbitration Procedure for Customer Disputes and Rule 13805 of the Code of Arbitration Procedure for Industry Disputes relating to the expungement of customer dispute information from the Central Registration Depository. These changes took effect on October 16, 2023, and are discussed in *Regulatory Notice 23-12*. The related FAQs⁴⁴ do not discuss Form U4 in any detail.

The reform effort seems to have been successful in decreasing the case load, although the high rate of expungement has not seen a similar decline. For example, during the period 2016–2021, expungement requests were granted 84% of the time, with 4,500 out of 5,365 straight-in expungement requests receiving an award that issued relief.⁴⁵ In contrast, during the period 2024–2025, expungement requests were granted 67% of the time, with 212 out of 316 straight-in expungement requests receiving an award that issued relief.⁴⁶ Thus, while the

⁴³ See, e.g., *In re Johnson (Summit)*, 22 Misc. 3d 631, 633 (N.Y. Sup. Ct. 2008) (“The effectiveness of the centralized national CRD system depends on its containing complete accurate information”) (citing NASD Notice to Members 99-09).

⁴⁴ <https://www.finra.org/rules-guidance/guidance/faqs/expungement-and-finra-rules-faqs>.

⁴⁵ FINRA, *Discussion Paper—Expungement of Customer Dispute Information*, at 7 (Apr. 2022), available at https://www.finra.org/sites/default/files/2022-04/Expungement_Discussion_Paper.pdf.

⁴⁶ FINRA, *Expungement of Customer Dispute Information* (Jan. 2026), available at <https://www.finra.org/rules-guidance/key-topics/expungement-of-dispute-information>.

case load has markedly declined, registered representatives are still granted expungement far more often than not.

Regulatory Ambiguity

Despite the drop-off in expungement cases, the granting of *thousands* of expungement requests and the rationales provided in such expungement awards together have generated confusion and ambiguity about whether *all* consumer complaints really should (or need to) be reported under Question 14I(3). The following case is offered as an example of this important point.

In one expungement case⁴⁷ that is illustrative of many, the Claimant was formerly associated with a particular member firm as a registered representative from 2005 to 2015. In August 2010, one of the Claimant's customers submitted a letter of complaint alleging that an illiquid REIT he had purchased at the Claimant's recommendation was unsuitable, that he had no investment experience, that the Claimant promised the REIT would increase in value, and that the Claimant did not mention the investment's risks or that distributions could fluctuate. Accordingly, the member firm disclosed this customer's complaint on the Claimant's Form U4, even though the customer's allegations were without merit based on the suitability information obtained from the customer as well as the written disclosures provided to the customer.

Years later, in May 2023, the Claimant sued his former member firm as well as his current member firm to seek expungement for this complaint and two other similar items in accordance with FINRA Rules 2080, 13800, and 13805. Ultimately, the sole public arbitrator granted the Claimant's requests for expungement and offered the following rationale:

Pursuant to Rule 13805 of the Code, the Arbitrator has made the following affirmative finding of fact: The claim, allegation, or information is false. . . .

Occurrence Number 1526524

The allegation is false. The claim was denied by the firm. The customer only complained when the market did poorly. Prior to that market decline, the client received the benefits and objectives from the investments as intended.

Occurrence Number 1645256

The allegation is false. The customers received full documents and explanations, as Claimant submitted and testified. Exhibits were submitted regarding the same, showing the customers' acceptance of the risks, illiquidity, and investment return uncertainty. The firm denied the complaint. . . .

Occurrence Numbers 2154364, 1645256, and 1526524

Claimant produced several documents relating to the investments recommended to all Customers. All Customers acknowledged risks, illiquidity, and potential investment volatility in writing on more than one document. The respective client objectives were met with the products Claimant recommended at the time made, and based on Claimant's own due diligence. His firm(s)

⁴⁷ *James S. Lineweaver v. Triad Advisors LLC*, FINRA Arbitration Case No. 23-01321 (June 7, 2024).

supported the recommendations and allowed the purchases to take place with each customer. All three customer complaints came without prior notice or knowledge of dissatisfaction. All complaints came after market decline and after substantial time had passed from acquisition to complaint.⁴⁸

The purpose of this illustration is to call attention to the arbitrator's rationale in granting expungement relief, because it says something important about the purpose of Form U4 disclosures and the public policy behind them.

To summarize this case, a customer had alleged in a written complaint that he was not made aware of the risks of an illiquid investment, an allegation serious enough to warrant disclosure under Question 14I(3) of Form U4 notwithstanding the fact that the complaint was known to be false based on the disclosure documents provided to the customer. In other words, disclosure documents that clearly disproved the customer's allegations were insufficient to avoid disclosing the complaint on Form U4. Conversely, however, these same disclosure documents were later found to be sufficient to have the same allegations *removed* from the Claimant's Form U4 based on FINRA Rule 13805.

This case is representative of a broader trend and by no means an outlier. As noted above, public policy favors including only meaningful information in Central Registration Depository records. In the case of the Claimant from this example, the proper outcome—expungement of a false allegation—was ultimately reached, but only after a long, expensive, and unnecessarily circuitous process of litigation. It would have been far more efficient if the member firm could have kept the complaint off the Claimant's Form U4 given that the complaint was demonstrably false. Moreover, the arbitrator's rationale for granting expungement seems to strongly suggest, as a matter of both reason and sound policy, that the member firm should have been permitted to do so (i.e., not disclose the false complaint) in the first place.

In conclusion, it would be helpful for FINRA to clarify whether the criteria in FINRA Rules 2080(b)(1) and 13805(c)(9)(A) can (or should) be read into Question 14I(3) of Form U4 so as to eliminate at the outset the need to disclose complaints that would otherwise qualify for expungement if taken to a straight-in proceeding. As a solution, we suggest permitting a member firm's principals to act as gatekeepers and not disclose those complaints which they reasonably find to be false, factually impossible, or clearly erroneous, as long as they adequately document and preserve their determination in writing so it can be reviewed by FINRA examiners⁴⁹ and maintained in accordance with Exchange Act Rules 17a-3 and 17a-4. Moreover, this could be accomplished without the need for a formal rule filing, such as by updating the Form U4 and U5 Interpretive Questions and Answers⁵⁰ to clarify as much.

⁴⁸ *Id.*

⁴⁹ FINRA and the SEC permit this same approach in other contexts. See, e.g., 17 C.F.R. § 248.30(c)(1)(iii) (“The written documentation of any investigation and determination made regarding whether notification is required pursuant to [Rule 30(a)(4) of Reg. S-P]”); FINRA Rule 2040.01 (“In addition, a member must maintain books and records that reflect the member's determination.”).

⁵⁰ <https://www.finra.org/sites/default/files/Interpretive-Guidance-final-03.05.15.pdf>.

Conclusion

The Companies sincerely appreciate the opportunity to comment on these important matters and add their voice to the policy discussion. Thank you for considering our feedback and inviting us to play a role in helping FINRA further evolve its rules and guidance to reflect modern business practices and markets, promote efficiency, and eliminate unnecessary regulatory burdens.

Sincerely,

Randolph F. Pistor

Randolph F. Pistor, JD, CFA
Chief Legal Officer
Sigma Financial Corp.
Parkland Securities, LLC

300 Parkland Plaza
Ann Arbor, MI 48103

rpistor@axtella.com
(734) 663-1611