

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

May 1, 2026

Re: Regulatory Notice 26-06 — Request for Comment on FINRA’s Arbitration Forum

Dear Ms. Mitchell:

I write in response to FINRA Regulatory Notice 26-06, which solicits comment on FINRA’s arbitration forum. I am on the law faculty at Chicago-Kent College of Law, where my scholarship extends to the law of self-regulatory organizations (SROs) and on dispute resolution in the securities industry. In law practice before academia, I specialized in the statutory mechanisms governing FINRA’s SRO status, including Section 19 of the Securities Exchange Act of 1934 (Exchange Act). The views expressed here are my own and do not represent the views of my employer or any entity.

As a scholar of broker-dealer regulation and of FINRA’s relationship with the SEC,¹ I welcome the opportunity to comment on Notice 26-06. Other comment letters are better positioned to address from experience the operational questions in Notice 26-06, so my comments’ purpose is narrower but, I hope, complimentary. This comment situates Notice 26-06 within the statutory framework that governs FINRA’s relationship with the Securities and Exchange Commission (SEC), and urges FINRA to use that framework as the lens through which it evaluates other responses it receives to Notice 26-06.

The main point is simple: for federal-law purposes, FINRA’s SRO status means it is not similarly situated to private commercial arbitration providers. As this letter explains, FINRA arbitration is an Exchange Act “service” offered by a “registered securities association,” so the rules and processes governing access to the FINRA arbitration forum are subject to two lines of SEC oversight in ways that private commercial arbitration is not. The first is review of rule filings under Exchange Act Section 19(b), and the second is adjudicatory review of prohibitions or limitations on access to that service under Section 19(d).²

The Federal Arbitration Act sharply limits judicial review of arbitral *outcomes*, but it does not limit—and was not meant to limit—Commission review of the SRO’s institutional design choices that determine who can use the forum and on what terms. That structural feature should inform every revision FINRA contemplates in this rulemaking. Reforms that increase efficiency

¹ See James Fallows Tierney, *Overseeing Private Rulemaking: Evidence from SEC Review of SRO Rules*, 27 U. PA. J. BUS. L. 589 (2025); James Fallows Tierney & Benjamin P. Edwards, *Stockbroker Secrets*, 26 U. PA. J. BUS. L. 793 (2024); James Fallows Tierney, *Reconsidering Securities Industry Bars*, 29 STAN. J.L. BUS. & FIN. 134 (2024).

² 15 U.S.C. § 78s(b), (d)

by reducing public accountability or investor protection in the design of the forum risk shifting decisional weight onto the one layer (the award) where federal review is essentially unavailable.

The remainder of this letter develops the framing in three parts. Part I briefly sets out the Section 19(b) and 19(d) architecture as it bears on the design of FINRA's arbitration forum. Part II explains why that architecture matters for the questions FINRA has put out for comment—and, in particular, why M.2, M.3, and M.4 are best read as questions about the SEC-reviewable layer of forum design rather than purely internal operational questions. Part III turns to M.6 (priorities) and offers a single recommendation: that FINRA, in any initial steps it takes following this Notice, expressly preserve the features of its arbitration forum that distinguish it from the unregulated alternative, and that it treat efficiency gains and investor-protection guarantees as joint constraints rather than as items to be traded against each other.

I. The Section 19 Framework as Applied to the Arbitration Forum

FINRA occupies a hybrid regulatory position. Many of its institutional activities are reviewable by the SEC under standards Congress prescribed in 1975. Two of those review pathways are pertinent here.

A. Section 19(b) — review of FINRA rule filings

Under Section 19(b)(1) of the Exchange Act, FINRA must file with the Commission any “proposed rule change,” and most such changes do not take effect until the Commission has approved them after notice and an opportunity for public comment. The Commission must approve a proposed rule change if it finds the change consistent with the requirements of the Exchange Act applicable to FINRA, including the Section 15A(b)(6) requirements that the association's rules be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . and, in general, to protect investors and the public interest.” The Code of Arbitration Procedure for Customer Disputes and the Code for Industry Disputes are FINRA rules in this sense; their content has been, and continues to be, the product of an iterative public process in which the Commission applies the statutory standard. Any rule changes that emerge from Notice 26-06 will travel the same route.

B. Section 19(d) — review of prohibitions or limitations of access to FINRA services

Section 19(d)(1) provides that when an SRO “prohibits or limits any person in respect to access to services offered by such organization,” it must promptly file notice with the Commission, and Section 19(d)(2) gives the aggrieved person a right to apply to the Commission for review. The Commission has read the “access to services” category to cover SRO actions denying or limiting “fundamentally important services offered by the SRO”—services “central to the function of the SRO.”³ On review, the Commission applies the standards of Section 19(f): it dismisses the proceeding if it finds that the specific grounds for the SRO's action exist in fact,

³ *Morgan Stanley & Co.*, Exchange Act Release No. 39459, 1997 WL 802072, at *3 (Dec. 17, 1997).

that the action was in accordance with the SRO’s own rules, and that those rules were applied in a manner consistent with the purposes of the Exchange Act.⁴ If the action fails any of those tests, the Commission sets it aside.

Two features of this Section 19(d) regime deserve emphasis for present purposes. First, the Commission’s adjudicatory review jurisdiction is triggered by the *SRO action*—by what FINRA does when it administers its forum—not by the merits of any underlying dispute. The Federal Arbitration Act and longstanding SEC practice place the *award itself*, and the conduct of the arbitral hearing, beyond the reach of Section 19(d) review.⁵ But the institutional decisions surrounding the hearing—who gets to the hearing, on what terms, against whom—are a different matter, and the line between them is itself a question of FINRA’s institutional design.

Second, any decision point that possibly prohibits or limits a member or third party’s access to the arbitration forum is potentially subject to Section 19(d) review for whether FINRA acted consistent with its rules in doing so. The takeaway is that every such decision point must be backed up by a textual basis in FINRA’s ruleset; when a rule’s substance is not fairly discernible from that of an earlier, properly filed rule, the SEC is likely to conclude that the rule was required to have been filed under Section 19(b).⁶ The SEC has held in the analogous fee context that an SRO action denying access cannot be sustained under Section 19(f) if the rule on which the action rests was itself required to be filed under Section 19(b) but was not.⁷ The principle that 19(d) review is not available to validate, post hoc, restrictions that should have travelled the 19(b) route is directly relevant to FINRA arbitration: it cautions against allowing significant access-affecting positions to develop through informal guidance rather than filed rules.⁸ The two pathways thus interlock: 19(b) governs what FINRA *says* its rules are; 19(d) governs whether the rules-as-applied withstand statutory scrutiny when someone is denied a service.

The arbitration forum is plainly a service FINRA offers, and for the very large category of disputes in which it serves as the mandatory forum under FINRA Rules 12200 and 13200, it is the only forum available. As the Commission explained in *Consolidated Arbitration Applications*, “given FINRA’s chosen structure and the scope of services it offers to members and third parties,” its “service of providing arbitration ... is ‘fundamentally important’ and central to its

⁴ 15 U.S.C. § 78s(f).

⁵ *John Boone Kincaid*, Exchange Act Release No. 87384, 2019 WL 5445514, at *4 (Oct. 22, 2019) (explaining that the SEC lacks jurisdiction to review an arbitrator’s decision); *Thomas Christophe Prentice*, Exchange Act Release No. 96769, 2023 WL 1255084 (explaining that a claimant accesses—and so can’t review as a denial of access to—FINRA’s arbitration service when the claimant “receiv[ed] an arbitration award on the merits”); *accord Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (FAA grounds for vacatur are exclusive).

⁶ *Consolidated Arbitration Applications*, Exchange Act Release No. 97248, 2023 WL 2805323, at *7 (Apr. 4, 2023) (“A rule need not explicitly address each of its intended applications, particularly when it deliberately states a broad principle.”).

⁷ *Bloomberg L.P.*, Exchange Act Release No. 49076, 2004 WL 65766, at *5 (Jan. 14, 2004) (setting aside NYSE access denial where the underlying restrictions on data dissemination “constitute[d] Exchange rules that were required to be filed and approved pursuant to Exchange Act Section 19(b)” but had not been so filed).

⁸ *See Tierney & Edwards*, *supra* note 1, at 840 n.217 (2024); *ABN AMRO Clearing Chicago LLC*, Exchange Act Release No. 34,83849, 2018 WL 3869452, at *2 (Aug. 2018) (“Unless an exception applies, an SRO cannot invoke a procedure in a disciplinary proceeding against a member or associated person that is premised upon an unfiled and unapproved rule.”).

function as an SRO.”⁹ To the extent FINRA offers arbitration for a particular kind of claim (as in the expungement context in *Consolidated Arbitration Applications*), FINRA institutional decisions that gatekeep member or third-party access to arbitration for claims *of that sort* are potentially limitations on the provision of that “service” that are reviewable by the SEC.¹⁰ Decisions that determine whether and how a person can use that forum—eligibility determinations, forum-access rulings, threshold determinations about claim or party qualification, and analogous administrative actions—are at least candidates for treatment as access-to-services determinations within the meaning of Section 19(d).

II. Why the Section 19 Frame Matters for M.2, M.3, and M.4

Notice 26-06 frames its substantive questions in the vocabulary of transparency, impartiality, and efficiency. Those are good values, and FINRA is right to ask whether its arbitration rules and processes serve them. But FINRA’s questions cannot be answered well at a purely operational level, because the arbitration forum is not a purely operational matter. The Section 19 architecture means that every revision FINRA contemplates falls into one of three categories, and the categories carry different implications for how FINRA should proceed.

Many of the items implicated by M.2 and M.3—the eligibility rule, the discovery guide insofar as it has been incorporated by rule, the arbitrator classification rules, the codes’ provisions on motion practice—are FINRA rules that have been filed with and approved by the Commission, or that operate as gloss on filed rules. Call these “category A.” Revisions to these items are certainly proposed rule changes under Section 19(b)(1) and will require public comment and Commission approval against Section 15A(b)(6), including its investor-protection prong.

FINRA’s question in M.3 about ambiguities is, in this light, partly a question about which of its existing positions are doing real work as filed rules and which are operating as informal guidance that could either be elevated to filed-rule status (with the procedural protections that entails) or relaxed. The choice between those two paths is itself substantive: filed-rule status produces predictability and federal review; informal-guidance status produces flexibility but reduces accountability. M.3 is, in part, a question about which of those values FINRA wishes to prioritize and in which contexts.

Other items implicated by M.2 and M.4—case-administration practices, eligibility and forum-jurisdiction determinations, fee-waiver and indigency processes, hearing-location decisions, scheduling protocols that effectively foreclose claimants of limited means—sit in a more interesting position. Let’s call these “category B” actions. They are administrative in form but can amount to limitations on access to a fundamentally important SRO service.¹¹ The Section

⁹ *Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 WL 4569083, at *2 (Aug. 6, 2020).

¹⁰ Cf. *Jonathan Edward Graham*, Exchange Act Release No. 89237, 2020 WL 3820988 (July 7, 2020) (finding no jurisdiction “where the SRO has not prohibited or limited the applicant’s access to a service that it offers, or where the applicant seeks review of a purported denial of access to services that the SRO does not offer”).

¹¹ Cf. KNIVES OUT (2019) (Daniel Craig as Benoit Blanc: “Makes no damn sense. Compels me though!”).

19(d) framing invites two questions FINRA should put to itself for each candidate revision in category B. First, would the revision change the conditions under which a person can obtain the service of FINRA arbitration? If so, will FINRA’s practice after the revision involve the application of a stated rule, or will it be a discretionary determination? Second, is the revision’s effect on access calibrated to a permissible purpose under the Exchange Act, or does it reduce access for reasons (cost containment, administrative convenience) that would not survive Section 19(f) review if challenged? Asking those questions *ex ante*—at the design stage—is both better policy and better risk management than waiting to answer them in adjudicated 19(d) proceedings.

A residual “category C” of questions raised by Notice 26-06—internal training materials, scheduling software, IT modernization, the format of pre-hearing conferences—does not implicate the Section 19 framework in any direct way and can be addressed as ordinary administrative improvement. I have no quarrel with FINRA pursuing efficiency in that residual category; indeed, efficiency gains there are unambiguously good, because they free resources for the substantive work of running a fair forum.

The point of this comment letter’s reminder about Section 19 is not to slow FINRA down. It is to ensure that, when FINRA receives comments urging it to streamline its arbitration process, it asks what category each suggested streamlining belongs to. Suggestions that nominally promote “efficiency” but in fact narrow access to a fundamentally important SRO service belong to category B above, and they should be evaluated against the investor-protection standard the Exchange Act imposes—not against a generic efficiency metric borrowed from private commercial arbitration.

III. M.6 (Priorities): Preserve What Distinguishes FINRA Arbitration from the Alternative

Question M.6 asks where FINRA should focus its initial efforts. I offer one priority, framed as a constraint rather than as an affirmative project: in any initial steps following Notice 26-06, FINRA should preserve the features of its forum that distinguish it from the unregulated alternative, and should treat preservation of those features as a precondition rather than a competing consideration.

The relevant comparator is arbitration in the registered investment adviser (RIA) industry, which my co-authors and I have described as the wild west relative to FINRA’s forum.¹² RIA arbitration, conducted under contract clauses pointing to a heterogeneous set of private providers, lacks several features that FINRA’s system has built up over decades and that exist precisely because FINRA is an SRO operating under Exchange Act constraints: a mandatory, non-waivable forum for customer disputes; publicly available awards; a public-arbitrator pool with disclosed classification rules; meaningful discovery obligations; an eligibility rule with a clear and uniform statute of limitations; constraints on motion-to-dismiss practice that preserve

¹² See Adam Gana, James Fallows Tierney, and Zahra Hodjat, *Arbitration of Investment Adviser Disputes is Unfair: Why RIA Arbitration Fails Investors*, 76 CASE W. RES. L. REV. — (forthcoming 2026), available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5146785.

claimants' right to be heard on the merits; and oversight by a regulator answerable, in turn, to the Commission. Each of those features is, in significant part, the product of the Section 19(b) rule-filing process and the iterative engagement between FINRA and the Commission that the process produces.

It would be a serious mistake to take away from responses to Notice 26-06 that FINRA arbitration should be reformed to be brought in closer alignment with the unregulated alternative on efficiency grounds. The features listed above are not inefficiencies in the system—they are the system. Some of them can no doubt be administered more efficiently, and FINRA should pursue those administrative gains. But the features themselves should be treated as fixed points around which efficiency gains are pursued, not as variables to be optimized away. Concretely, that suggests the following ordering for FINRA's initial steps.

First, FINRA should prioritize improvements that *expand* the investor-protective features of the forum where they are weakest—most notably, discovery against industry parties in disputes involving documents held by affiliates, transparency around case-administration data, and the timeliness of awards. These are areas where efficiency and investor protection point in the same direction, and where FINRA's rule-filing posture before the Commission is straightforwardly favorable.

Second, FINRA should be cautious about revisions whose primary effect is to reduce claimant access to the forum or to compress claimants' procedural opportunities—particularly for pro se and small-dollar claimants, whose ability to use the forum is the most sensitive to administrative-design choices and the most likely, if curtailed, to raise Section 19(d) "access to services" concerns under the *Morgan Stanley* standard.

Third, FINRA should resist the temptation to recharacterize as "efficiency" reforms what are, in substance, reductions in the public-interest dimension of the forum. The Section 19(b) standard is not an efficiency standard; it is a standard about whether FINRA's rules are designed to protect investors and the public interest, statutory concepts that encompass but are not coterminous with Kaldor-Hicks efficiency. Reforms that cannot be defended in the Exchange Act's investor-protection and public-interest terms should not be filed with the SEC.

I appreciate FINRA's openness to comment on these institutional-design questions and would welcome the opportunity to discuss any of the points above.

Respectfully submitted,



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