FIRST ASSET FINANCIAL INC
Member SIPC ♦ FINRA
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April 30, 2026

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

Re: Regulatory Notice 26-06 – Request for Comment on Modernizing FINRA Arbitration Rules, Guidance and Processes

Dear Ms. Mitchell:

First Asset Financial Inc. (First Asset) appreciates FINRA's objective regarding modernizing FINRA's arbitration rules, guidance, and processes which allow us to comment on FINRA Regulatory Notice 26-06. With six plus years' service on FINRA's Small Firm Advisory Committee (this letter is my own and not a SFAC opinion), several years on a FINRA regional committee and experiencing my 50th year as an Associated Person, I ask serious consideration be given to my recommendations contained herein.

The arbitration forum was intended to operate within-and be informed by-the FINRA regulatory framework. That linkage has weakened. Too often, outcome reflect ad hoc equitable judgements untethered from FINRA rules and regulations, resulting in decisions that firms cannot reconcile with the standards they are required to follow in their day-to-day operations. This disconnect is unsustainable. A dispute resolution system that does not reliably apply the governing rules ceases to function as a credible extension of the regulatory regime.

The process has become more complex, expensive, and unpredictable, with decision-makers who may lack current industry experience and outcomes that can appear inconsistent or disproportionate. Many firms now view arbitration less as a neutral forum and more as an uneven risk, where results may hinge on perception or sympathy rather than clear legal or regulatory violations.

This shift has been driven in part by the influence of advocacy groups aligned with the plaintiffs' bar, whose financial incentives favor increased claims and larger awards. Their impact has pushed the system toward one that emphasizes leverage and settlement pressure, without sufficient safeguards to filter weak claims or ensure reasoned, reviewable decisions. As a result, firms can face significant exposure even absent any proven wrongdoing, reinforcing a system that no longer consistently serves its original, balanced purpose.

When functioning as originally intended, the arbitration process reduces time, expense and uncertainty normally associated with civil litigation while preserving customers rights and yet, allow legitimate customer grievances to be heard and resolved in a fair and equitable manner. With 71% of claims settled (claimant receives a settlement) prior to completion of an arbitration and 21% of claimants receive settlements from arbitrations, claimants have a 77% "win" rate (71% + 6% [.21 x .29]) overall. While the plaintiff's bar accentuates the 21% "win" rate for arbitrations a "low," they choose to disregard the 71% settlement rate.

I. Arbitration Procedures

A. Lack of Transparency in Awards

A common criticism among our member firms is the lack of transparency in arbitration awards. Arbitrators do not specify which rules or regulations were violated. This leaves parties unclear as to the rationale for awards, undermining confidence in the fairness of the process and the ability of firms to "correct course" for the rules that are violated.

B. Disproportionate Awards

High awards are sometimes seen as disproportionate, with some cases involving legal fees that firms consider inflated relative to the underlying dispute. Additionally, firms report being billed for entire reserved time blocks for hearings even when arbitrations are cut short for scheduling reasons (e.g., being charged for a full afternoon when only an hour is used).

C. Recommended Reforms

Mandatory Reasoned Awards: First Asset recommends that FINRA require arbitrators to state the specific rules or regulations found to have been violated. This should **not** be a fully "explained decisions" but (a) only identify the principal FINRA rules, SEC or laws that were applied to the decision and specifically what part of that rule, law or regulation was applied (this should assure that the panelist at least considered the appropriate applicable regulations!) and (b) provide itemized damage calculations, including how compensatory damages, interest, attorneys' fees, and costs were determined.

This could be achieved with something as simple as a form. FINRA should amend Rules 12904 and 13904 to specify minimum content requirements, especially for awards and any departures from the relief requested, while making clear that disclosures should be concise but not be highly legalistic. The form should also state that the reply includes specific rule violations, not just use Rule 2010 as the only basis.

Amend Rules 12904 / 13904 to require:

- Identification of specific FINRA rules (e.g., 2111, 3110**)** or legal standards applied
- Itemized damages methodology

This aligns arbitration with the SEC's emphasis on **procedural integrity over outcome engineering**.

Cap Fee Awards and Improve Cost Controls: FINRA should review and cap attorney fee awards to ensure they are proportional to the dispute. Additionally, FINRA should pro-rate billing for hearing sessions to actual time used, not blocks reserved.

II. Rebalance FINRA Filing Fees for Plaintiffs and Respondents

The cost of FINRA arbitration has escalated to the point that it can no longer be reliably described as an efficient alternative to litigation. Filing fees, arbitrator compensation and procedural complexity have collectively eroded one of the form's central advantages for both parties. FINRA's filing fee structure creates a significant cost imbalance between claimants and respondents. Firms pay a $5,000 filing fee for basic arbitration claims—ten times the $500 filing fee charged to customers and plaintiff attorneys. This 10-to-1 disparity is particularly burdensome for small and mid-sized firms and creates a misaligned incentive structure: plaintiffs face minimal financial consequence for filing even questionable or frivolous claims, while firms bear substantial initial costs simply by being named.

By comparison, major alternative arbitration organizations (AAA and JAMS) employ equal filing fees for all parties, recognizing that balanced fee structures discourage frivolous filings and encourage claimants to assess

claims more carefully before filing. Federal court upfront fees are much less than FINRA charges Member Firms. Even firms that complete arbitration with a full "win" for a respondent end up with higher FINRA and forum fees than the plaintiff. If the plaintiffs have enlisted use of a "contingent fee" attorney, this would be true of legal fees as well.

Recommended Reform: FINRA should consider adopting equal filing fees for claimants and respondents in all FINRA arbitration proceedings, or at minimum, increase the claimant filing fee to create a more balanced cost structure that discourages frivolous filings while remaining manageable for individual claimants. FINRA should also implement a fee-shifting mechanism under which claimants who file clearly ineligible, frivolous, or wholly baseless claims (as determined at the motion to dismiss stage or by the panel) bear the full filing fees and a portion of respondent's costs.

A more equitable fee structure would reduce the plaintiff bar's incentive to engage in "shotgun" naming of multiple respondents and would encourage more careful pre-filing assessment of claim viability. This reform complements the motion to dismiss enhancements recommended below and aligns FINRA's cost structure with leading alternative dispute resolution forums. The SEC has not endorsed cost frameworks favoring one party, instead emphasizing **proportionality and access.** Thus:

- Equalize filing fees or rebalance meaningfully
- Introduce **fee-shifting for frivolous claims**

A. Inadequate Procedures for Dismissing Meritless Claims

The SEC has consistently recognized **procedural efficiency** as a legitimate objective. FINRA's current approach—reflected in Regulatory Notice 12-11—discourages dispositive motions in favor of full hearings. While intended to preserve access, it produces:

- Cost inefficiency
- Settlement coercion
- Inclusion of clearly non-viable claims

By contrast, federal courts routinely apply Rule 12(b)(6) without impairing due process.

Firms advocate for adoption of a more comprehensive Motion to Dismiss (MTD) rule, similar to federal Rule 12(b)(6), to effectively filter out meritless claims and reduce costs. The absence of summary judgment procedures in FINRA arbitration means that even questionable claims can result in long, costly proceedings. Early in the process, arbitrators should bar claims against non-involved parties, claims exceeding a statute of limitations and claims obviously frivolous. This relieves a burden for smaller firms who must bear the full forum and legal costs from cases that should not have been admitted in the first place. FINRA's current cost structure establishes incentives for speculative and weak claims by making it inexpensive for a plaintiff to file but imposes significant costs on small/medium sized FINRA member firms to respond (10:1). The lack of summary dismissal by panels creates optics that the panel wishes to pursue such cases to obtain resultant fees from a full hearing.

B. Recommended Reforms

First Asset recommends that FINRA adopt a more robust pre-hearing motion to dismiss rules aligned with federal Rule 12(b)(6) to better filter out frivolous claims and save resources. FINRA should permit respondents to file a targeted, threshold motion to dismiss based on eligibility (six-year rule) or non-association (wrong party) before filing a full answer, provided the motion includes clear documentary proof of the timeline or lack of involvement; only if the motion is denied would a full answer be required.

FINRA should also reinforce and expand the "wrong respondent" ground for dismissal by directing panels to promptly release firms and individuals who are not associated with the relevant accounts, securities, or conduct, rather than forcing clearly non-related parties to litigate through a full hearing to obtain dismissal.

III. Six-Year Eligibility Rule

A. Clarification of Statute of Repose

First Asset strongly recommends that FINRA clarify in rule text and arbitrator training that FINRA's six-year eligibility rule operates as a statute of repose for forum eligibility: any transaction or allegedly wrongful conduct that occurred more than six years before the filing of a FINRA arbitration claim is ineligible for arbitration, period!

B. Interaction with Statute of Limitations

It is critical to distinguish the six-year statute of repose (which governs forum eligibility) from the applicable statute of limitations for individual claims and causes of action. A case may satisfy the six-year repose requirement—because the alleged wrongful conduct and/or alleged wrongful transaction(s) occurred within six years of the filing of the claim with FINRA—yet still contain individual claims or causes of action that are time-barred under their respective statutes of limitations.

For example, a claimant's Statement of Claim may assert claims for securities fraud (state or federal) and/or breach of fiduciary duty. These claims typically have relatively shorter statutes of limitations—often two or three years—considerably shorter than the six-year repose period. Upon respondent's motion, the arbitration panel or sole arbitrator must dismiss any such claims that were not asserted in the FINRA case before the expiration of the respective statute of limitations applicable to that claim.

Of course, statute of limitations analysis can become complicated when a claimant asserts equitable tolling, fraudulent concealment, discovery of wrongdoing, or other doctrines that may extend or toll the statute of limitations—underscoring the fairness and urgent need for FINRA to clarify that the six-year eligibility rule operates as a statute of repose and not a statute of limitations.

C. Dual Requirement for FINRA Arbitration Eligibility

Satisfying the six-year statute of repose is the overarching, mandatory requirement for every case's FINRA arbitration eligibility. However, within each case that is eligible for FINRA arbitration, each individual claim or cause of action asserted by the claimant must independently satisfy the applicable statute of limitations for that particular claim. This dual-requirement framework is consistent with federal and state civil litigation practice and with First Asset 's broader advocacy for improved Motion to Dismiss requirements in FINRA arbitration, modeled on federal Rule 12(b)(6) motion practice.

D. Recommended Implementation

FINRA should require arbitrators to dismiss all claims, or portions of claims, based on events outside the six-year window and make clear that panels may not revive such claims on purely equitable grounds.

FINRA should emphasize that allowing claims beyond six years is inherently prejudicial because broker-dealers are generally not required to retain key records past six years. FINRA should require claimants who file clearly ineligible, time-barred claims to bear respondents' FINRA fees associated with those claims. Panelists should be taught that actions brought for securities purchase more than six years ago are barred from arbitration.

As an alternative, FINRA should allow parties to adopt the shorter of the six-year repose period or applicable state statutes of limitation in the claimant's home state.

Please review the attached Exhibit (used with permission) sent to FINRA attorneys Victoria Crane, Esq. and Todd Saltzman, Esq. on July 26, 2021 attached. This 23 page *Memorandum and Formal Request for FINRA Action Regarding FINRA's Arbitration Eligibility Rules* is authored by Kent Lund, Esq., of GVC Capital LLC and details the background, foundation and case citations for legal support of a statute of repose to be initiated by FINRA.

IV. BrokerCheck Data Integrity and Incorrect Respondent Naming

A. The BrokerCheck Data Problem

Once a Form U-5 is filed for a departing representative, FINRA's system prohibits any subsequent amendments to the employment section of the associated Form U-4. This creates a persistent inaccuracy in BrokerCheck: the system may show a representative as currently employed by a firm from which he or she has long since departed.

With limited resources, small firms often focus on filing an accurate Form U-5 when dismissing an Associated Person. The U-4 employment date is often overlooked by clerical level employees or even management filing the Form U-5. A high percentage of small firms fail to enter an employment termination date on Form U-4 prior to filing a Form U-5, making this a significant issue.

B. Real-World Consequences for Firms

This BrokerCheck inaccuracy creates a significant problem for former employers: plaintiff attorneys routinely name firms in arbitration claims based solely on outdated BrokerCheck employment records, even when the relevant conduct occurred after the representative's termination from the firm or when the claim involves only activities at the representative's new employer.

Plaintiff counsel often adopt a "throw mud at the wall and see what sticks" approach, naming every firm that appears in BrokerCheck records in hopes of extracting settlement payments. Firms have been named as respondents in arbitrations involving conduct that predates the representative's employment with the firm or that occurred entirely at different firms—situations that should be obvious as incorrect.

C. Fee and Defense Burden

Simply being named as a respondent triggers a mandatory $5,000 FINRA filing fee, which can be substantial for smaller firms. Firms must then incur additional legal fees to file motions seeking dismissal based on "wrong respondent" or lack of involvement—adding further cost and burden. Many firms settle with plaintiff counsel simply to avoid these mounting costs, even when their liability is meager or nonexistent.

V. Collateral Impact of Arbitration Filings

A. Form U4 Disclosure Requirements and Reputational Harm

Upon receiving a customer complaint, firms must disclose the complaint on Form U4, which can result in significant reputational damage. For registered representatives at broker-dealers, customer complaints and arbitration filings must be disclosed promptly on Form U4, which is publicly available through BrokerCheck.

Even if a claim is meritless or ultimately withdrawn, the disclosure itself can remain visible and damaging to the individual's reputation and career, as well as potentially limit future employment opportunities. Plaintiff attorneys know this dynamic well and may leverage it, since the existence of complaints alone can pressure both individuals and firms toward settlement to minimize reputational fallout. Moreover, every settlement triggers another reportable disclosure, compounding the burden.

B. Incentive to Settle Early

Plaintiff firms may use these disclosures to target individuals for additional actions. Firms are incentivized to settle early to avoid mounting defense costs, but settlements trigger additional disclosures.

D. Recommended Reforms

Revise Disclosure Rules: FINRA should reassess U4 reporting requirements to distinguish between pending allegations, settled claims, and actual liability findings. FINRA should permit confidential settlements where appropriate or allow certain records to be expunged from U4 disclosures after independent review via a low cost and brief process.

Limit Use of Arbitration Filings in Further Actions: FINRA should set up safeguards to prevent repetitive targeting of individuals based on initial arbitration disclosures alone.

D. Recommended Reforms

First Asset recommends that FINRA implement a technical solution that permits firms to correct employment dates and status in BrokerCheck records after a U-5 is filed or allow firms to file a corrected record that is visible alongside the original record.

In the absence of BrokerCheck data corrections, FINRA should strongly reinforce the "wrong respondent" dismissal ground and direct arbitration panels to promptly and thoroughly scrutinize whether named firms have any actual connection to the conduct, claims, or representative involved in the dispute.

FINRA should require plaintiff counsel to submit, at the time of claim filing, documentary evidence supporting the assertion that each named respondent had actual involvement with or responsibility for the conduct at issue—not mere appearance in BrokerCheck records.

FINRA should direct panels to consider and resolve "wrong respondent" motions at the pre-hearing stage, before firms incur significant defense costs, and to award respondents' FINRA fees and costs when a clearly unrelated firm is named.

VI. Arbitrator Confidence and Competence

A. Industry Knowledge Deficits

We and our fellow FINRA members have raised substantial concerns regarding arbitrators' lack of adequate industry knowledge, proper training and orientation. This knowledge gap frequently leads to substantial penalties imposed without sufficient economic analysis or understanding of industry practices, FINRA rules, products, and supervisory structures. Even arbitrators with prior industry experience may possess outdated knowledge, limiting their relevance to modern securities matters. The elimination of mandatory industry arbitrators was implemented via:

- SR–FINRA–2007–021 (Release No. 34-56119)
- SR–FINRA–2008–010 (Release No. 34-57456)

These changes were based on **perception of bias—not empirical findings of unfair outcomes**

B. Unpredictable Outcomes

Members report concerns over "wildcard" or "lottery" outcomes in arbitration proceedings. Results can vary widely depending on the arbitrator assigned, creating uncertainty and inconsistency in the application of industry

standards and regulations. The absence of any appeals process exacerbates this concern, leaving parties with unexpectedly large, arbitrary, or questionable awards with no meaningful recourse. The removal of industry arbitrators has created a **technical competency gap**, particularly in cases involving:

- Suitability (Rule 2111)
- Reg BI
- Supervisory systems (Rule 3110)

C. Recommended Reforms

Broaden Arbitrator Qualification Standards: First Asset recommends that FINRA recruit arbitrators with substantial and current financial industry experience for inclusion on panels. FINRA should implement ongoing training and peer benchmarking to ensure arbitrators maintain up-to-date knowledge of industry practices, products, and regulations. Enhancing arbitrator training specific to FINRA rules and regulatory framework and/or providing access to neutral technical resources to assist panels in understanding applicable regulatory standards should be instituted. Enhance arbitrator training tied to:

- FINRA rules
- Regulatory frameworks
- Product complexity

The SEC's rulemaking history does **not support exclusion of subject-matter expertise**—only mitigation of perceived bias.

Mandatory Industry Arbitrator Participation: FINRA should require that at least one arbitrator with industry experience participate in all arbitrations, eliminating the claimant's ability to choose an all-public panel. Claimants should no longer be allowed to select all-public panels lacking practical familiarity with how firms operate, how supervisory structures function, and how FINRA rules apply in real-world settings. The current structure has become confusing, expensive, and increasingly driven by decision-makers who often lack current industry experience, resulting in unpredictable outcomes, disproportionate fee awards, and mounting procedural burdens. Instead of being viewed as a neutral, efficient forum, arbitration is now too often seen by firms as a one-way risk—more akin to a lottery, where panels at times appear to award recovery based on sympathy or perceived 'deep pockets' rather than a demonstrated violation of any rule or law—with little of the procedural balance and basic safeguards that exist in federal court.

Restore Mixed Panel Structure: FINRA's shift from a default one-industry/two-public panel to allowing claimants to choose all-public panels has contributed to panels' lack of familiarity with FINRA rules, products, and supervisory structures, and to greater reliance on perceived "equity" rather than applicable rules and law. First Asset recommends that FINRA restore a mandatory panel composition of at least one industry arbitrator and two public arbitrators in all customer cases, eliminating the claimant's unilateral option to select an all-public panel.

Clarify Arbitrators' Duty To Apply Facts And Law: FINRA should revise the arbitrator oath, Arbitrator's Guide, and training materials to state expressly that each arbitrator must: (a) ascertain fairly all relevant facts of the dispute; and (b) ascertain and apply fairly to those facts all applicable FINRA arbitration rules, specific FINRA rules, and all applicable federal and state laws, rules, and regulations.

Arbitrators should not be permitted to disregard applicable facts or law, operate in a vacuum untethered to the record and governing rules, or simply do what they consider "equitable" without grounding the award in the Code and applicable law. FINRA should address the messaging in the Arbitrator's Guide, including the Domke/Aristotle quotation that suggests arbitrators should allow "equity" to prevail over the written law, and rebalance the Guide so that disciplined fact-finding and application of FINRA rules and law are given at least equal emphasis to conflicts-of-interest and neutrality topics. If arbitration is to remain credible, decisions must be anchored in the rules that firms are required to follow. Anything less creates a disconnect between regulation and adjudication.

Appeals Mechanism: FINRA should consider implementing a streamlined, limited-scope appeals process for awards above a dollar threshold or with alleged procedural errors. Under the current framework, even obviously flawed or disproportionate awards are effectively final, leaving parties without a practical avenue to correct serious errors of law, misapplications of rules, or material procedural irregularities. A limited appeal right would assist in preventing most problematic awards from becoming permanent, promote more disciplined decision-making at the panel level and provide a necessary check where panels appear to have disregarded FINRA regulations, governing law or made an award recovery based on a customer loss of an inherently risky investment. A limited appeals process would:

- Improve decision discipline
- Align outcomes with governing rules

VII. Allow Court Access

A. Reconsideration of Court Access

While litigation could be more costly for both parties, it might reduce the number of frivolous claims brought against firms due to the time and expense of having to bring a claim to court. Retail customer arbitrations, though less common, tend to raise unique issues around procedural inconsistency and unpredictability of results.

B. Allow Cases to Go to Court

Where **no arbitration agreement exists**, mandatory arbitration lacks contractual foundation. Firms should not be compelled into FINRA arbitration at a customer's request when no arbitration clause exists in the customer agreement. While firms must be FINRA members to operate, that requirement should not override the absence of a contractual agreement to arbitrate.

Arbitration is not inherently mandatory under federal law—it applies when agreed upon by contract. FINRA's rule effectively imposing arbitration at the customer's discretion, even without such an agreement, is therefore unwarranted. Firms that choose not to include arbitration clauses should retain the ability to resolve disputes in court with customers. The current structure denies that option.

C. Recommended Reform

FINRA's rules should be revised to allow firms to decline arbitration when no contractual obligation to arbitrate exists. Permit firms to decline arbitration absent agreement.

VIII. Conclusion

First Asset encourages improvement, reform or restructuring in all the preceding areas, but focusing on:

-Return to the requirement that an industry member must serve on every three person arbitration panel

-Strict adherence to a six year statute of repose for the eligibility for submission of a case

-Rebalancing the FINRA arbitration filing fees between customers and member firms to a more equitable basis

-Reform the "motion to dismiss" to alleviate unjust inclusion and fees paid by uninvolved participants by adopting a Rule 12(b)(6)-style standard and allowing pre-answer motions

-Correct the U-4 to allow a change of employment date after the filing of a Form U-5

-If no arbitration clause is present in a customer agreement, allow disputes to go to court, not to FINRA arbitration at the customer's selection

-Introduce a limited appeals process with a streamlined appellate review for large awards or cases involving clear procedural error

-Reform arbitrator selection, education and orientation to promote adherence to decisions based on FINRA regulations (by which we all attempt to conform to) or other rules or laws, not based on "equity" or perceived "deep pockets."

FINRA's arbitration forum remains central to the securities industry, but it is under increasing strain from structural weaknesses that have gone insufficiently addressed. Modernization must be more then procedural refinement—it must correct jurisdictional gaps, restore decision-making competency, control costs, and improve transparency.

Adopting the reforms outlined in this letter will materially improve fairness, consistency, and efficiency, and will better align FINRA arbitration with the expectations of a modern dispute resolution system. We appreciated the opportunity to comment and would welcome further engagement on these matters.

Respectfully,

Robert L. Hamman

Robert L. Hamman
President

Attachment: Exhibit-- *Memorandum and Formal Request for FINRA Action Regarding FINRA's Arbitration Eligibility Rules* is authored by Kent Lund, Esq.,

GVC Capital

Memorandum and Formal Request for FINRA Action Regarding FINRA's Arbitration Eligibility Rules

To: Todd Saltzman, Esq. and Victoria Crane, Esq., Financial Industry Regulatory Authority

From: Kent Lund, Esq., Interim CEO, GVC Capital LLC

Date: July 26, 2021

SENT VIA EMAIL:

Dear Todd and Tory:

Thank you for communicating previously (emails and telephone/video calls) with me about these important matters.

Based on our discussion regarding possible next steps with FINRA, I submit respectfully for your and your FINRA colleagues' consideration this Memorandum and Formal Request for Action by FINRA. Please let me know if and how I should do anything further to initiate and/or progress with FINRA these important matters.

I. Brief Introduction and Background:

Without going into details about the particular situation impacting GVC that brought these matters to my attention, as we discussed together, I was (and remain) astounded to learn that there is no clear and definitive FINRA written guidance and instructions about the meaning and required application of the FINRA arbitration eligibility rules (FINRA Rules 12206 and 13206).

I dug in and attempted to research these matters. I learned *inter alia* that there is a long and complicated history regarding these FINRA arbitration eligibility rules.

And I concluded that there is an urgent need for FINRA to address head on these important matters.

This Memorandum is long and covers much ground in my attempt to analyze these issues. However, I do not purport to be an "expert" about these issues. As we discussed, I would be pleased to receive and review any relevant references and/or data that I missed in my research and/or failed to consider properly. I would be pleased to discuss these matters with you and your FINRA colleagues.

Notwithstanding the above, however, the good news is that, in my view, **there is a simple and straightforward fix that FINRA can adopt and implement easily**. This simple and straightforward fix is based on and supported fully by applicable law, history, equity and common sense.

II. The Simple and Straightforward Fix and Formal Request for FINRA Action to Adopt and Implement this Fix:

Based on my reading and researching, thinking and agonizing, and repeated editing of this Memorandum, **I had an epiphany of the simple and straightforward fix that, in my view, solves these serious problems**.

Cutting to the proverbial chase, that fix is the following: (1) FINRA pronounces formally and in writing that its six-year arbitration eligibility rules (FINRA Rules 12206 and 13206) in legal effect act as statutes of repose; and (2) the six-year eligibility clock in these two rules runs from date of the allegedly wrongful securities transaction(s).

Even more simply put, FINRA pronounces a Bright Line Rule: "Investments older than six years are barred from FINRA securities arbitration."

Although not directly on point, perhaps the most persuasive legal and equitable explanation and rationale supporting this fix is the Supreme Court's analysis in *Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042 (2017). In that case, the Supreme Court held that the three-year time limit in the second sentence of Section 13 of the Securities Act of 1933, which specifies time limits for commencing actions to enforce any liability created under Section 11 of the Securities Act of 1933, is a statute of repose (not a statute of limitations) that runs from the effective date of an allegedly deficient registration statement and as

such is **not subject to equitable tolling**. I commend that case for your thoughtful consideration.

Arbitration is a matter of contract, and FINRA has full authority to specify the particular cases that are eligible for its arbitration forum.

With all due respect, the status quo regarding FINRA's arbitration eligibility rules is a disaster. At present and as has been the case for many years, FINRA's *liaise faire* inattention to FINRA Rule 12206 results in inconsistent and arbitrary application. The status quo is grievously unfair to FINRA members and associated persons.

For purposes of its arbitration forum, the time is now for FINRA to impose a clear temporal limit on any potential liability claimed to result from any allegedly wrongful securities transaction(s).

III. Discussion:

As noted above, there is a long and complicated history regarding these FINRA arbitration eligibility rules. I attempted to include in this Memorandum in these regards what I believe to be the most important references and other considerations.

Many thanks to Todd for sending me various FINRA references about FINRA's arbitration eligibility rules. I carefully reviewed and considered all of those references.

Please advise me if I missed something (in the references that Todd sent or otherwise), but **I submit respectfully that FINRA's existing references and other materials do not address, explain and specify substantively the critical principles relating to FINRA Arbitration eligibility and how they must be applied in each FINRA arbitration case**. Therefore, **I submit respectfully that FINRA must issue clear written guidance and clarification about FINRA Rules 12206 and 13206**. For convenience, this Memorandum focuses on FINRA Rule 12206, but its analysis applies equally to FINRA Rule 13206.

You both know better than I, but FINRA written guidance and clarification about FINRA Rule 12206 can take a variety of forms. In previous emails that I sent to

either or both of you, I tried to explain in detail what I believe is needed. Subject to your views, I think that the "best" form of FINRA written guidance and clarification about FINRA Rule 12206 would be a FINRA Regulatory Notice.

A. Overarching Concerns:

With due respect to all concerned, because FINRA has dropped the ball in the rule itself and in its various written materials or references regarding the rule, FINRA arbitration panels (and sole arbitrators) lack definitive guidance and instructions about how properly to consider and apply the rule in each FINRA arbitration case. The result is a chaotic free for all.

Moreover, from what I can tell FINRA case administrators are not helping this situation (probably because they too are in the dark). Instead, FINRA case administrators need to be proactive and helpful to the FINRA arbitration panels (and sole arbitrators) in making sure that the eligibility rule is applied properly and consistently in each case. Of course, FINRA case administrators cannot and should not decide and/or unduly influence these issues (such decisions are for the FINRA arbitration panels (and sole arbitrators)), but FINRA must instruct its case administrators that FINRA arbitration panels (and sole arbitrators) cannot operate in a vacuum and do whatever they want.

I have no objection to the FINRA arbitration panels (and sole arbitrators) resolving "any questions regarding the eligibility of a claim under this rule." FINRA Rule 12206(a). **But they/he/she cannot do so in a vacuum and without applying mandatory FINRA arbitration eligibility principles and requirements.** FINRA Arbitration is not a free for all in which the FINRA arbitration panels (and sole arbitrators) do whatever they think is "right" or "equitable" regarding eligibility (and/or anything else).

As you know, in years past there was extensive court litigation about who/what authority determines arbitrability. Eventually, it was established that the arbitrators (not the courts) determine arbitration eligibility. This litigation had the unintended negative (in my view) consequence of ceasing additional reported court decisions analyzing the principal issues discussed in this Memorandum. Even so, older reported court decisions, some of which are cited in this

Memorandum, contain persuasive and powerful detailed analyses that remain highly persuasive if not dispositive.

B. Additional Discussion and/or Needed Clarification:

Recognizing that much more could be said or written (now or later), I submit respectfully that FINRA must, e.g., confirm in writing the following substantive principles:

- FINRA Rule 12206 establishes, in effect, a mandatory jurisdictional threshold that must be applied and satisfied in each and every FINRA arbitration case.
    - This is clear *inter alia* from FINRA Rule 12206(a)'s express language which states in relevant part: "No claim shall be eligible for submission to arbitration under the Code where six years have lapsed from the occurrence or event giving rise to the claim."
    - The six-year eligibility rule in FINRA Rule 12206 is **mandatory**, not discretionary.
- FINRA Rule 12206(b) states in relevant part: "Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court."
    - Exactly Right: if a Claimant cannot meet the six-year eligibility requirements for FINRA arbitration, he/she/it must go to court.
- The FINRA website (finra.org) contains a section entitled "What Cases are Eligible" and states in relevant part that "Arbitration cases are eligible to be heard in FINRA's forum if the following criteria are met" for disputes with investors, including (emphasis added):
    - "The claim is filed within 6 years from the time the events giving rise to the dispute occurred."
    - This is consistent with a statute of repose.

- In each FINRA arbitration case, the arbitration panel (or sole arbitrator) must determine *sua sponte* or at any party's request based on the filings, documents, briefs and arguments that the allegedly wrongful "occurrence or event giving rise to the claim" took place within six years from the date that the Statement of Claim was filed with FINRA.
    - If so, the case is eligible under FINRA Rule 12206 and may proceed.
        - At the same time, in each eligible FINRA arbitration case the Respondent(s) still may argue that any specific cause of action/claim for relief asserted by the Claimant(s) is barred by the applicable statute of limitation for such specific cause of action/claim for relief.
            - If it is established at any time in any eligible FINRA arbitration case that the applicable statute of limitation for such specific cause of action/claim for relief bars any specific cause of action/claim for relief, the arbitration panel (or sole arbitrator) must dismiss it.
    - If not, the case is NOT eligible under FINRA Rule 12206 and the arbitration panel (or sole arbitrator) must dismiss the entire case. Period, end of story.
    - The date of "occurrence or event giving rise to the claim" starts the six-year clock and the FINRA arbitration eligibility analysis is that of a **statute of repose**.
        - As such, there is no consideration or application of any discovery rule, equitable tolling considerations and/or fraudulent concealment considerations.
- FINRA Rule 12206(b)(5) states: "If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation."
    - Existing FINRA guidance makes clear that the "written explanation" need not be overly detailed, lengthy and/or legalistic.

- In contrast, FINRA Rule 12206 does not state expressly that the panel must issue a "written explanation" if it denies a motion to dismiss under FINRA Rule 12206.

    - Given the mandatory jurisdictional nature of FINRA Rule 12206 and its application as a statute of repose, this drafting omission is wrong and needs to be changed also to require the panel to issue a "written explanation" if it denies a motion to dismiss under FINRA Rule 12206.

- The critical questions in each eligibility case are: (1) what is "the occurrence or event giving rise to the claim"; and (2) on what date did it take place?

    - FINRA must specify that "the occurrence or event giving rise to the claim" is the allegedly wrongful securities transaction.

    - FINRA must state expressly that the six-year clock starts on the date of the allegedly wrongful securities transaction.

        - Typically, this will be the date on which a security was purchased or sold (i.e., the date the investment was made).

        - If that date is more than six years before the Statement of Claim was filed, the case must be dismissed.

        - Simply put: **Investments older than six years are barred from FINRA securities arbitration.**

C. Legal Support for the Fix Proposed in this Memorandum:

Numerous courts and FINRA arbitrators repeatedly analyzed these issues thoroughly and correctly, including for example in the reported court decisions and published FINRA Arbitration Awards cited and discussed below.

These authorities and references light and show the way.

- **Reported Case Law**

See, e.g., Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 512-13 (7th Cir. 1992) (court held that the then-NASD six-year rule "is an eligibility requirement [an

absolute bar] and not a statute of limitations and thus cannot be [equitably] tolled [where fraudulent concealment is present]"); *Chubb Sec. Corp. v. Manning*, 224 Mich.App. 702, 569 N.W.2d 886, 887 (Mich. App. 1997) (*per curiam*) (emphasis added) (court held that the six-year eligibility period in former § 15 of the NASD code is not subject to equitable tolling based on a claim of fraudulent concealment; court held also that **the six-year time period began to run** "**at the time the investment purchases were made**, rather than, as argued by the defendant [customer], when defendant decided that the purchases were no longer in her best interest"; citing other case law, court held further that the "date of the occurrence or event does not under any circumstances depend on the date when the aggrieved investor first discovered that he or she has suffered a financial loss."); *Ohio Co. v. Nemecek*, 98 F.3d 234, 237 (6th Cir. 1996) (emphasis added) (court held that the six-year eligibility period under then-NYSE arbitration rules "**is a substantive temporal limitation on the parties' agreement to contract and as such is not subject to equitable tolling**" because of alleged fraudulent concealment).

The following considerations, rationale and holding in *Chubb Sec. Corp.* (569 N.W.2d at 888) (emphasis added) especially are applicable and dispositive:

> **The purpose of the six-year period** in former [NASD] § 15 **was to prevent the submission of stale disputes to arbitration**. [citation omitted]. **Allowing investors to wait until they suffer a financial loss and then to file a stale claim for arbitration more than six years after the date the investment was made would circumvent the purpose of § 15**. [citation omitted]. Furthermore, **if the limited partnership investments were too speculative and not in the best interests of defendant [investor], then the investments were not suitable on the dates that the investments were purchased**. [citation omitted].

The six-year rule is an eligibility requirement rather than a procedural statute of limitations and, as such, claims are not subject to equitable tolling. *Solomon Smith Barney, Inc. v. Harvey et al.*, 260 F.3d 1302, 1307-08 (11th Cir. 2001) (citing cases), vacated in 537 U.S. 1085 (2002) "for further consideration in light of *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002).[1]

1. In essence, *Howsam* held that an NASD arbitrator should interpret and apply the NASD's six-year eligibility rule to the underlying controversy, not a court. 537 U.S. at 82-83, 85.

In *Prudential Securities, Inc. v. Mills*, 944 F.Supp. 625 (W.D. Tenn. 1996), the court interpreted an American Stock Exchange ("**ASE**") Arbitration Rule that is substantively the same as FINRA Rule 12206.[2] The court stated that this ASE rule is "essentially identical" to NYSE and NASD arbitration rules that were interpreted in other federal court decisions cited and relied upon by the court. *See* n. 4. Citing extensive legal authority, the court held that each such six-year arbitration rule "is a substantive bar to arbitrating actions because it operates as an eligibility requirement." *Id.* at 628 (emphasis added). The court stated that the "**weight of authority holds that the date of accrual is the date of investment**." *Id.* at 630 (emphasis added). The court stated also that "**a fraudulent concealment claim does not stay or remove the six-year bar, and does not change the nature of [the six-year rule] from an eligibility requirement to a statute of limitations**." *Id.* at 631. Accordingly, the court held that "**the six-year bar is calculated from the date of investment" and accordingly all investments older than six years "are barred from [securities] arbitration**." *Id.* (emphasis added). The court granted Prudential's Motion for Preliminary Injunctive Relief as to arbitration before the ASE and specifically enforced the six-year eligibility rule as specified in the opinion. *Id.*

The Bright Line Rule for FINRA to specify is: Investments older than six years are barred from securities arbitration.

Accord Lindell v. Waddell & Reed, 962 F.Supp. 103, 106-07 (W.D. Mich. 1997) (emphasis added) (citing favorably *Mills* and similar cases establishing that: the six-year eligibility rule is construed "strictly without recourse to equitable tolling"; and the date of the "occurrence or event" giving rise to the claims is the date the investments were made). The court held: "**The [alleged] wrong done here was done at the time of the sale of the investments and the time of sale is the relevant benchmark for determining the expiration of the [six-year] arbitration eligibility period**." *Id.* at 107 (emphasis added). The court stated further (*Id.* at 107) (emphasis added):

> Likewise, the plaintiffs in this lawsuit cannot subject the Section 15 [six-year] arbitration provision to an *ad nauseam* series of extensions to

2. ASE Rule 605(a) stated: "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." *Id.* at 627.

account for their continual assessment of the success of their investments. **The wrong done here was done at the time of the sale of the investments and the time of sale is the relevant benchmark for determining the expiration of the arbitration eligibility period**. Since the last sale of securities occurred in January 1988--more than six years before the filing of the claim in December 1994--the decision of the arbitrators was made outside of their designated authority. Therefore, defendant is entitled to the entry of an order vacating the arbitration award.

The court entered an order vacating a NASD arbitration award because the arbitrators' decision "was made outside of their designated authority" since the last sale of securities occurred more than six years before the filing of the arbitration claim. *Id.*

See also Dean Witter Reynolds, Inc. v. McCoy, 1995 U.S. App. LEXIS 37080, *5 (6th Cir. Nov. 27, 1995) (unpublished) (upholding the dismissal of ineligible arbitration claims under the predecessor rule to FINRA Rule 12206, saying "there is no merit in the Investors' allegations that their injury did not occur until the investments turned sour. Adopting the Investors' interpretation would clearly undermine the intention of ... (the) six-year time limit on the arbitrability of claims, and would enable the Investors to control the running of the time limit while they reaped the benefits of the investments about which they would later complain."). The District Court decision reviewed by the Sixth Circuit is *Dean Witter Reynolds, Inc. v. McCoy*, 853 F.Supp. 1023 (E.D.Tenn. 1994).

The case law discussed above remains persuasive and legally binding law. *E.g., Andrade v. Ewanouski*, 962 N.E.2d 245, 81 Mass.App.Ct. 1117 (2012), n. 6 (emphasis added), in which the court put it clearly and simply: "In accordance with FINRA Code of Arbitration rule 12206(a), the panel was precluded from evaluating claims beyond six years, which in this case were [investment] activities prior to June 1, 2001."

- **Reported FINRA Arbitration Awards**

Although FINRA Arbitration Awards are not directly precedential, they are highly persuasive especially if they cite and apply thoughtfully well-reasoned and supported case law.

FINRA "Rule 12206(a) is a statute of repose, not a statute of limitation." *Miller v. Morgan Keegan & Co.*, FINRA Arbitration Case No. 13-02211 (Award dated and signed April 23, 2014), page 2 (emphasis added). After six years have passed from the occurrence or event giving rise to the claims asserted in the FINRA arbitration case, "**the [FINRA Arbitration] Panel is divested of jurisdiction over claims not submitted within the six years allowed, without regard to either time limitations on particular cause of actions or claims, or to principles of discovery, latency, and tolling**." *Id.* (emphasis added). The *Miller* Arbitration Award cites extensive case law in support of these clear legal principles and determinations. *Id.* at 2-3.

Numerous other FINRA Arbitration Awards, **including several recent** FINRA Arbitration Awards, align fully with the case law and the 2014 *Miller* FINRA Arbitration Award cited and discussed above. The *Miller* FINRA Arbitration Award is a powerful and persuasive reference with which to start this section.

In *Miller*, the FINRA Arbitrator determined and held that "**the bulk of authority holds that the eligibility period** [specified in FINRA Rule 12206] **begins to run on the date of purchase for fraud, suitability, breach of contract, and breach of fiduciary claims**." (emphasis added). The arbitrator reasoned that where, "at bottom, the securities are alleged to be unsuitable...", "the 'occurrence or event' [in FINRA Rule 12206] appears to be the date of purchase of the two allegedly unsuitable securities." *Id.* at pages 2-3 (emphasis added). Because all of the claims "emanated from the sale of the" securities, "[n]othing else needed to happen (e.g., a later failure to change the recommendation, decline in value, etc.) to ensure that 'the Claimant's clams [sic, meant "claims"] were 'plausible' as of the date she purchased them."

The March 22, 2018, Award issued in *Boylen-Pieja v. Belesis and Levine*, FINRA Arbitration Case No. 17-00752 also is well reasoned and persuasive. Noting for example that all investments in Claimant's account were made more than six years before the FINRA arbitration case was filed, the Arbitrator wrote on page 3 of the Award (emphasis added):

> **Many courts have held that Rule 12206 is a substantive eligibility requirement rather than a statute of limitations procedural rule and it is not subject to equitable tolling on the grounds of fraudulent concealment**. Furthermore, **courts have held that Rule 12206 cannot be interpreted as**

permitting investors to wait for years until they suffer a financial loss and then file a stale claim for arbitration more than 6 years after the investments were made, challenging the investments suitability.

I find the Claimant's claims are not timely filed and thus are not eligible for submission to arbitration pursuant to FINRA Rule 12206. FINRA exercises no jurisdiction over Claimant's claims. Respondent Belesis's Motion to Dismiss is granted.

In *Mooney et al. v. Canella et al.*, FINRA Arbitration Case No. 16-00746, the Arbitration Panel granted Canella's Motion to dismiss pursuant to FINRA Rule 12206(a) because the arbitration case was filed more than six years from the sales of the securities regarding which the Claimants complained. Award dated June 5, 2020, pgs. 11 and 14.

Accord Western v. VSR Financial Services, Inc., et al., FINRA Arbitration Case No. 16-01180, Award dated January 2, 2018. For example, *see* page 3 (all claims against the D.H. Hill Respondents were dismissed pursuant to FINRA Rule 12206 because all investments were purchased more than six years before, and more than six years before individual Respondent Geraci left his association with D.H. Hill, the Claimant filed a Statement of Claim with FINRA) and page 4 (all claims against VSR and Geraci were dismissed pursuant to FINRA Rule 12206 because all claims arose more than six years before Claimant filed a Statement of Claim with FINRA).

Accord Deitsch v. Questar Capital Corporation and Gammon, FINRA Arbitration Case No. 15-03358, Award dated November 16, 2016 (case dismissed because the date of sale of the securities was in January 2007 and the Statement of Claim was filed on or about December 11, 2015; that case also involved a situation where in May 2007 the individual Respondent registered representative left the broker dealer Questar).

Accord Grohovsky et al. v. Next Financial Group and Sagepoint Financial, Inc., FINRA Arbitration Case No. 15-01909, Award dated March 17, 2016 (holding that the Claimant's claims against the Respondent, including those based on purchases of allegedly unsuitable securities, occurred "well outside the six-year time limit in Rule 12206"; panel held that "the events or occurrences giving rise to the claim

were the dates of purchase"; thus the Respondents' Motions to Dismiss were granted and the claims were dismissed pursuant to FINRA Rule 12206).

Accord Seitz, Trustee of the Seitz 2000 Descendants Trust, FINRA Arbitration Case No. 19-01405, Award dated May 28, 2020 (dismissing the case pursuant to FINRA Rule 12206 because the relevant events giving rise to the claims "occurred well over six years prior to the fling of the Statement of Claim", and Claimant's "knowledge of the issues complained of" started "more than ten years prior to the filing of the Statement of Claim").

In *Wilcynski, Individually and as Trustee of the Wilcynski Living Trust v. Aegis Capital Corp. and Capital Securities Management, Inc.,* FINRA Arbitration Case No. 17-01664, Award dated July 17, 2018, the Arbitration Panel dismissed the case pursuant to FINRA Rule 12206, noting for example that Claimants were on notice of account activity from account statements and tax statements (Form 1099) received by the Claimants before and after their broker moved from Aegis to Capital. *Id.* at 4. The FINRA Arbitration Panel concluded that the "Claimants were on notice of account balances and activity for their account at Aegis over a period of years before the May 2009 transfer of the account balance to Capital, and had the opportunity to inquire, and if appropriate, to file a claim against Aegis within 6 years of the events." This well-reasoned Award particularly is persuasive.

Please *see also Martinez, Trustee of the George H. and Marion P. Jones Trust v. First Financial Equity Corporation et al.*, FINRA Arbitration Case No. 10-03673. In that case, the claimant asserted a variety of causes of action: (1) Arizona statutory securities law violations; (2) breach of fiduciary duty; (3) breach of duty of attorney-in-fact; (4) conversion; (5) negligent misrepresentation; (6) suitability; (7) negligence; and (8) failure to supervise. Award dated June 17, 2011, page 2.

The FINRA Arbitration Panel in *Martinez* clearly set forth the proper analysis and application of FINRA Rule 12206. In Paragraph 5 on page 3 of the Award, the Panel stated: "Under Rule 12206, all claims that arise out of events occurring [six years before the Arbitration case was filed with FINRA] ... are ineligible and are barred from being heard in a FINRA arbitration proceeding." Based on its review of the pleadings and documents submitted, the Panel "determined that **the last purchase or sale transaction in the two accounts held by Marion Jones and the Trust at FFEC [the broker dealer] occurred more than six years before filing the Statement of Claim**." *Id.* at Paragraph 11, page 4 (emphasis added).

Even though the time elapsed from last sales in the two applicable accounts to the filing of the Statement of Claim were, respectively, six years and 18 days and six years and one day (see paragraph 12 and the chart therein on pages 4 and 5, respectively), the Panel unanimously determined that the Claimants' claims were not eligible for FINRA arbitration and dismissed them pursuant to FINRA Rule 12206. *See* page 5.

D. The Need to Revise and/or Update Existing FINRA References and Guidance:

- FINRA must clarify and correct at least the following existing FINRA references:

  - On page 5 of FINRA Regulatory Notice 09-07 (January 2009), FINRA stated (emphasis added):

    > A panel **may grant** a motion to dismiss on eligibility grounds at any stage of the proceeding, including a prehearing motion, under Rules 12206(b)(7) and 13206(b)(7) if the claim is not eligible for submission to arbitration because six years have elapsed from the occurrence or event giving rise to the claim. Parties seeking this exception **should provide** arbitrators with valid documents that **indicate** when the occurrence or event took place.

  - The word "may" in the above language is flat wrong. The word "may" must be changed to "must".

  - The word "should" in the above language also is flat wrong. The word "should" must be changed to "must".

  - The word "indicate" in the above language also is flat wrong. The word "indicate" must be changed to "establish".

    - In summary this paragraph must be revised by FINRA to read as follows (emphasis added):

      > A panel **must grant** a motion to dismiss on eligibility grounds at any stage of the proceeding, including a

prehearing motion, under Rules 12206(b)(7) and 13206(b)(7) if the claim is not eligible for submission to arbitration because six years have elapsed from the occurrence or event giving rise to the claim. Parties seeking this exception **must provide** arbitrators with valid documents that **establish** when the occurrence or event took place.

- Page 47 of the FINRA Arbitrator's Guide states (emphasis added):

> The panel determines whether a claim meets the six-year eligibility requirement by reviewing the submissions, pleadings and arguments of the parties. When appropriate, the panel may give the parties a reasonable opportunity to conduct discovery. As with any discovery request, arbitrators have discretion to grant, deny or modify the request. If the arbitrators have additional questions about the eligibility of the claim, they should ask the parties to brief the issue. The arbitrators may find that there is a continuing occurrence or event giving rise to the dispute. For example, although a customer purchased stock 10 years ago, there are allegations of ongoing fraud starting with the purchase, but continuing to a date within six years of the date the claim was filed.

  - **Because FINRA Rule 12206 acts as a statute of repose, FINRA must delete the underlined language in yellow highlighting above.**

    - Allegation of "ongoing fraud" does not save the case from dismissal.

Again, the Bright Line Rule is clear: Investments older than six years are barred from FINRA securities arbitration.

- Page 9 of the FINRA Arbitrator's Guide states in a separate blue box (emphasis added):

- ***"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."***
  —
- **Domke on Aristotle**

This is all well and good as a general philosophical principle and a platitude, but on its face it is misleading and can be misused. This notion is **NOT** a license for the FINRA arbitration panels (and sole arbitrators) to ignore and/or fail to apply all relevant and applicable FINRA rules and all relevant and applicable law.

Ideally, this quotation needs to be deleted from FINRA Arbitrator's Guide.

- Of course, doing equity is not inconsistent with following and applying all applicable FINRA Rules and all applicable laws, rules and regulations.
  - Indeed, it is more equitable for arbitrators to make decisions and render arbitration awards by following and applying all applicable FINRA Rules and all applicable laws, rules and regulations.
- **It is inequitable for FINRA arbitrators to make decisions in a vacuum and without finding, applying and taking into careful consideration the applicable facts, laws, rules and regulations**.

- The FINRA website (finra.org) contains a section entitled "Motion to Dismiss and Eligibility Rules FAQ" and states in relevant part under Eligibility (emphasis added):

> A panel **may grant** a motion to dismiss on eligibility grounds at any stage of the proceeding under Rules 12206(b)(7) and 13206(b)(7), including a prehearing motion, if the claim is not eligible for submission to arbitration because six years have elapsed from the occurrence or event giving rise to the claim. Parties seeking this exception should provide arbitrators with valid documents that indicate when the occurrence or event took place.

- Like the comment above, the word "may" must be changed to "must".

- The Neutral Corner (Volume 1 – 2009) (citing and discussing Regulatory Notice 09-07), states the following on page 4 (emphasis added):

> c. The claim is not eligible for submission to arbitration because six years have elapsed from the occurrence or event giving rise to the claim. Parties seeking this exception **should provide** arbitrators with valid documents that indicate when the occurrence or event took place.

  - Like the comment above, the word "should" must be changed to "must".

- As noted, to give full meaning and effect to FINRA Rule 12206, FINRA must state that FINRA Rule 12206 acts as a **statue of repose** rather than a statute of limitation.

  - Instructive and persuasive is *Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042 (2017) (holding that the three-year time limit in the second sentence of Section 13 of the Securities Act of 1933, which specifies time limits for actions to enforce any liability created under Section 11 of the Securities Act of 1933, is a statute of repose not subject to equitable tolling).

    - The Supreme Court explained the difference between statutes of limitation and statutes of repose. It stated that "statutes of repose begin to run on 'the date of the last culpable act or omission of the defendant.'" *Id.* at 2049. The "rule of repose protects the defendant from an interminable threat of liability." *Id.* at 2050. "The purpose of a statute of repose is to create 'an absolute bar on a defendant's temporal liability.'" *Id.* Given the purpose of a statute of repose, "the provision is in general not subject to tolling." *Id.* The Supreme Court "repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling." *Id.* at 2051. The "object of a statute of repose, to give complete peace to defendants,

supersedes the application of a tolling rule based in equity." *Id.* at 2052.

- "Tolling may be of great value to allow injured persons to recover for injuries that, through no fault of their own, they did not discover because the injury or the perpetrator was not evident until the limitations period otherwise would have expired." *Id.* at 2055. But "the purpose of a statute of repose, on the other hand, is to allow more certainty and reliability." *Id.* "These ends, too, are a necessity in a marketplace where stability and reliance are essential components of valuation and **expectation for financial actors**." *Id.* (emphasis added).
- The Supreme Court held that "**the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity**." *Id.* at 2052 (emphasis added).

E. The NASD's 1994 Rule Proposal

As noted in our previous communications and as we discussed, in 1994 FINRA's predecessor NASD proposed a rule in a manner that is consistent with and supports the specific fix requested in this Memorandum. The 1994 NASD rule proposal is not exactly on point, but its key principles are instructive and persuasive regarding all of these issues and concerns regarding FINRA Rule 12206.

The 1994 Federal Register Notice addressed a NASD Rule proposal concerning the then existing NASD six-year eligibility rule for NASD arbitration. The proposed rule was not adopted, but the 1994 Federal Register Notice supports the manner in which FINRA can and should adopt the specific fix requested in this Memorandum.

Please *see* Release No. 34-34442; File No. SR-NASD-93-51 (July 26, 1994) ("Self-Regulatory Organizations; Notice of Filing of Amended Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Eligibility of Disputes for Arbitration"), 59 Fed. Reg. 39,373, 39,374-39,375, 39,378 (August 2, 1994) (and citations therein; page 39,375 states *inter alia* that **the arbitration "forum is entitled to control" issues related to eligibility for arbitration in such forum and that there is a "distinction between issues related to eligibility, which**

the forum is entitled to control, and statutes of limitations, which are governed by applicable law.; page 39,378 states inter alia that, "**Arbitration is a creature of contract, ... and it is for the parties, through the choice of forum, to determine the terms of the contract**.") (emphasis added).

Had that NASD rule proposal been adopted, arbitration eligibility determinations would have been made by the FINRA Arbitration Director "**solely on an objective determination of whether the claim has stated that the occurrence or event giving rise to the claim took place within six (6) years**." *Id.* at 39,375 (emphasis added). "[A]ny arbitration forum has the inherent right to limit access to its forum in order to preserve and direct resources to the disposition of cases in the manner it deems most efficient." *Id.* at 39,377 (emphasis added). At that time, NASD's Department of Arbitration determined the eligibility of a claim for NASD arbitration "as a matter of the sufficiency of the allegations in [on the face of] a statement of claim." *Id.* (emphasis added).

Importantly, the NASD made clear that its arbitration eligibility rule is **not** subject to "equitable tolling", "fraudulent concealment" and/or a "discovery rule" that may apply in respect of a federal or state law statute of limitations for any particular cause of action or claim asserted in an eligible Statement of Claim.

See 59 Fed. Reg. at 39,375, n. 2 (emphasis added) ("**The proposed rule change will not permit an otherwise ineligible claim to become eligible through the allegation of fraudulent concealment and equitable tolling.**"). *See also id.* at page 39,376.

"The NASD notes, and assumes that claimants and respondents are aware, that bad faith allegations of fraud, or other facts, designed to establish or defeat eligibility of a claim, would be counterproductive." *See* 59 Fed. Reg. at 39,375, n. 3. Such bad faith allegations and the nature of the allegations and conduct "may affect the arbitrators' determination of credibility issues in the case, or of the nature and amount of the remedies and relief awarded." *Id.* Any such bad faith allegations by FINRA member or associated person "may result in a referral of the matter for disciplinary investigation and action as conduct inconsistent with just and equitable principles of trade...." *Id.*

See also id. at 39,376 (where the NASD discussed the relationship/distinction of arbitration eligibility versus statutes of limitation). "**The Director's determination that a claim is eligible for arbitration has no effect on whether a relevant statute of limitations operates as a defense to a claim**." *Id.* (emphasis added).

The 1994 Release also supports the principle that in each and every Order that denies a Motion to Dismiss based on Rule 12206(a), the FINRA arbitrators/arbitration panels must specify as part of an explained Order "the occurrence or event giving rise to the claim" that took occurred less than six years from the filing of the Statement of Claim.

See 59 Fed. Reg. at 39,376 ("Proposed Subsection 15(f) requires the Director's determination [of eligibility] to be in writing and set forth the occurrence or event that is the basis for the eligibility determination.").

FINRA should expressly mandate under current FINRA Rule 12206 that the arbitrator's or arbitrators' determination must set forth in writing the occurrence or event that is the basis for the eligibility determination.

F. Additional Definitive Written Guidance by FINRA is Needed

Respectfully, FINRA must issue and/or include in additional definitive written guidance and/or amended rules regarding FINRA arbitration generally and FINRA Rule 12206 specifically as follows:

- **Specify Expressly in the FINRA Oath of Arbitrators**
    - **Each Arbitrator is obligated to: (1) ascertain fairly all relevant facts of the dispute; and (2) ascertain and apply fairly to the relevant facts of the dispute all applicable FINRA Arbitration Rules and all applicable laws, rules and regulations.**
- Explained Written Decisions Must be Mandatory in All FINRA Arbitration Cases and: (1) Require Citation to applicable Legal Authorities; and (2) Include Damage Calculations (as Applicable)
    - FINRA Rule 12904(g) should be revised accordingly.

- Also, FINRA Rule 12904(f) must be revised to read: "The award must contain a rationale underlying the award." (emphasis added; i.e., delete "may" and replace it with "must"))

- An Explained Written Decision need not be overly long, detailed and/or "legalistic": it need only be reasonable to cover the bases adequately and clearly.

FINRA must make clear that FINRA arbitrators and arbitration panels cannot take actions, make determinations and/or issue awards that they think are "equitable" apart from/that are not based the relevant facts, the applicable FINRA Arbitration Rules and the applicable laws, rules and regulations.

"Manifest disregard of the law" is one basis on which an arbitration award may be vacated by a reviewing court. *E.g.*, "FINRA Dispute Resolution Services Arbitrator's Guide" (November 2020 Edition), pg. 83.

GVC submits respectfully that FINRA rules and the Arbitrator's Oath must provide expressly that FINRA Arbitrators are prohibited from manifestly disregarding the applicable law.

G. A Relevant Hypothetical (based on a real-life situation) and its Mandatory Processing/Handling:

Assume that a customer files a FINRA Arbitration case against his/her/its broker dealer and individual registered representative alleging in the Statement of Claim that a securities transaction (a securities purchase) that was effected more than nine (9) years ago was fraudulent or unsuitable (i.e., the securities transaction occurred more than nine (9) years before the Statement of Claim was filed).

The FINRA arbitration panel (or sole arbitrator) **must** be advised and counseled by FINRA (in written guidance, arbitrator training and/or by the assigned FINRA case administrator(s) to review and determine *sua sponte* eligibility under FINRA Rule 12206. Of course, eligibility also may be raised by a Respondent in a Motion to Dismiss.

Because FINRA Rule 12206 acts as a statute of repose, and because the securities transaction occurred more than nine (9) years before the Statement of Claim was filed, the case must be dismissed.

No "discovery rule" or "equitable tolling" or "fraudulent concealment" principles apply. The case is not saved even if the Claimant alleges that there was some sort of "continuing fraud" that took place after the securities transaction occurred nine (9) years ago.

As the NASD stated clearly in 1994: "The NASD has not applied tolling to eligibility issues historically, and does not plan to apply tolling under the proposed rule." 59 Fed. Reg. at 39,378 (citing prior to that statement case law holding that because time limits in an eligibility rule are contractual, they do not operate like a statute of limitations and therefore generally they are not subject to tolling). The NASD stated also that "application of the eligibility rule without tolling will not deprive investors of their right to recourse." *Id.* "An ineligible claimant will retain his [sic] right to seek relief in the courts to the same extent as it existed prior to filing the claim in arbitration." *Id.*

Of course, it would have been even better if FINRA had stated in 1994:
Investments older than six years are barred from FINRA securities arbitration.

H. Broker Dealer Books and Records Requirements

With only limited exceptions (e.g., for certain business entity documents that must be maintained for the life of the entity), broker dealers are not required by SEC and/or FINRA rules to keep and maintain books and records for more than six years.

See SEC Rule 17a-3 (17 C.F.R. § 240.17a-3), SEC Rule 17a-4 (17 C.F.R. § 240.17a-4) and FINRA Rule 4511. FINRA Rule 4511(b) states (emphasis added): "Members shall preserve for a period of at least six years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules." *See also* FINRA Rule 4512.01 ("Customer Account Information Retention Periods") which requires customer account records to be preserved "for at least six years." FINRA Rule 4512.04 ("Maintain and Preserve") states that the "term 'preserve' is used to reflect customer account information that is no longer current or in use."

It is wholly unfair and inequitable to subject FINRA member broker dealers to claims of alleged misconduct older than six years from the date of the allegedly wrongful occurrence or event giving rise to the claim (i.e., the date of the allegedly wrongful securities transaction)!!

How can a FINRA member or associated person reasonably defend itself/himself/herself if documents relating to the allegedly wrongful transaction(s) are not available because the mandatory retention period has passed? Of course, firms and individuals voluntarily or inadvertently may retain certain documents beyond SEC and FINRA mandated retention periods, but that possibility is less likely as time passes.

IV. **Conclusion and Request for FINRA Action:**

I request respectfully that you initiate and process to conclusion within FINRA the specific course of action (i.e., the "fix") specified in this Memorandum (Section II and elsewhere).

As you know, I am a current member of the FINRA West Region Committee. If it would be helpful in any way, I would be happy to present these matters to the Committee and seek all of its members' comments and positions regarding them (e.g., support, opposition).

I request respectfully your **expeditious** consideration and attention to these critically important matters.

Please let me know how and when this process will proceed, and I will be happy to work with you and your colleagues in these regards.

Respectfully Submitted this 26th day of July 2021:

Kent J. Lund

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