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VIA E-MAIL ATTACHMENT
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Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006

Re: **Comment Letter on Regulatory Notice 26-06 / FINRA Eligibility Rule**

Dear Ms. Mitchell:

Please consider this comment letter related to FINRA's March 2, 2026 publication of Regulatory Notice 26-06 ("Arbitration: FINRA Requests Comments on Modernizing FINRA Arbitration Rules, Guidance, and Processes") (hereinafter, "RN 26-06"). Having served as counsel for at least a handful of customers in some very large securities arbitration matters over the past 10 years (where compensatory damages in some instances reached into the tens of millions of dollars), I have devoted many hours of research to and analysis of FINRA Rule 12206 (the Six-Year Rule of Eligibility). Accordingly, I write specifically with regards to those portions of RN 26-06 at pages 11-14 wherein the focus is "FINRA's Eligibility Rule."

RN 26-06 divides the discussion of Rule 12206 into three sections: (1) the History of the Eligibility Rule; (2) FINRA's Eligibility Rule; and (3) View on Eligibility Rule. I will refer to those as the "Content Section." In my opinion, the Content Section fairly addresses 12206 from different, often diametrically opposed, perspectives. It is especially important that the United States Supreme Court's decision in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002) be included in any assessment of the Eligibility Rule. I was comforted to see that FINRA included brief, but meaningful, recognition to the importance of *Howsam* in this discussion (p. 12 of RN 26-06).

Following that section, FINRA poses three questions, which I will summarize as:

1. Should FINRA eliminate the Eligibility Rule (and defer strictly to applicable Statutes of Limitation)?

2. Should FINRA amend the Eligibility Rule to expressly allow claims in FINRA's arbitration forum to a period of more than six years?

3. Should FINRA transform the Eligibility Rule into a statute of repose.

To begin, I note that from an overall—but, yet, critically important—perspective, FINRA repeats the phrase "investor protection" or "customer protection" 16 times in the 39-page content section of RN 26-06 (prior to 31 pages of footnotes that follow). This is not surprising. Beyond the confines of RN 26-06, FINRA reiterates this claim often and in many places, most notably on the homepage of its website (www.finra.org) ("FINRA pursues its mission of promoting investor protection . . . in many ways.")

Eliminating the Eligibility Rule would be antithetical to FINRA's mantra of investor protection. And it is not difficult to imagine why. Eliminating the Eligibility Rule, and, thus, the tolling aspect that courts have been recognizing with increasing favor over the past 15 years (discussed below) here in the Ninth Circuit, would be tantamount to licensing and/or incentivizing continuing fraud. For example, if a nefarious financial advisor understands that he or she can avoid being held responsible for a fraud committed during the sale of a high-risk mutual fund on May 1, 2026 so long as they can continuously convince their client that nothing went array at the point of sale through April 30, 2032 (six years in duration), he or she will focus their efforts on precisely that: Continuing fraud. A "mission of promoting investor protection," on the one hand, and incentivizing a financial advisor to focus their attention on continuing to fool their own client following a fraud-infused solicitation, on the other hand, are polar opposites. FINRA should not chill investor protection, and force itself to find a new mantra, by eliminating the Eligibility Rule.

Second, a court no less than the *Howsam* Supreme Court "**eviscerated**" the premise that the eligibility rule was a substantive limit on the agreement to arbitrate, not a statute of limitation that is subject to equitable tolling. This was the key term used by a district court in the Ninth Circuit in the case of *Mid-Ohio Securities v. Estate of Burns*, 790 F. Supp. 2d 1263, 1271 (Dist. Nev. 2011). The *Mid-Ohio Securities* court added that *Howsam*'s evisceration found that "the eligibility time limit was not a question of arbitrability, but a gateway procedural matter for the arbitrator. Thus, the

entire line of cases suggest Rule 12206 is not subject to tolling is **undermined**." (Bold added.) *Mid-Ohio Securities* dealt with an underlying FINRA arbitration award and Rule 12206.

Having been a financial advisor for two of Wall Street's then-largest firms (Merrill Lynch and PaineWebber) beginning in 1986 for a total of about 10 years, I have seen firsthand how some brokers distract clients from detecting they were misled regarding the risks of an investment or strategy by telling (in fact, often repeating, as needed, for years that) the client should "**stay the course**" when the investment's poor performance is suggesting that there was more risk involved than originally disclosed.

Eleven years after *Mid-Ohio Securities* was decided in favor of equitably tolling Rule 12206 in appropriate circumstances (depending on the facts), another district court in the Ninth Circuit—this one in Arizona—revisited this same question. See ***Karla Kretsch v. Newman***, 2022 U.S. Dist. LEXIS 160203, which also dealt with a prior FINRA award. Here, Ms. Kretsch prevailed against her former financial advisor (Mr. Newman) and his broker-dealer (GVC Capital, LLC), the two respondents. The primary allegations during the pendency of the FINRA arbitration proceeding were, as they so often are with 12206 motions and facts, that the financial advisor and his brokerage firm had **(1)** fraudulently advised Ms. Kretsch (the investor) to "stay the course" – when more honest advice would have provided detail into the inappropriateness of the investments that had been selected previously by GVC, and **(2)** "**provided false assurances to [her] to conceal their wrongdoing with the intended strategy to ultimately run the clock out on her.**" (Emphasis added.)

The *Kretsch* court noted that "all eight purchases" at issue "fell outside the six-year window" since the ***last*** purchase was seven years and three months prior to the filing of the Statement of Claim. Each respondent—Mr. Newman and the firm—brought its own separate 12206 motion to dismiss.

During the FINRA arbitration, GVC was represented by a partner at the expensive and accomplished law firm Bryan Cave; his bio on the Bryan Cave website boasts that he "is an experienced trial attorney" with a "40-year practice" and a specialty that includes securities law. Apparently, GVC's position was supported by some of the best arguments money could buy.

Oral argument was heard on each of the two 12206 motions (on different days), and each motion was denied on the *same day* of the full panel motion hearing. Thereafter, GVC settled, but Newman chose to go to hearing before the arbitrators.

Upon the conclusion of the hearing, an award was made in favor of Ms. Kretsch and her Kretsch Family Trust. Newman filed a petition to vacate arbitration award in federal district court.

In a well-reasoned written opinion, Judge Lanza upheld the panel's denial of the 12206 motion to dismiss, as well as the award in favor of Ms. Kretsch, by holding:

> Kretsch responds that the Panel did not exceed its powers with respect to the six-year eligibility rule because it was empowered, under *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002), to resolve any questions about the eligibility of a claim; . . . and because the Panel correctly determined under ***Mid-Ohio Securities v. Estate of Burns,*** 790 F. Supp. 2d 1263 (D. Nev. 2011), that the six-year eligibility rule did not begin to run at the date of purchase, **but rather was "tolled by Newman's ongoing fraud and false assurances**."
> (Bold added.)

If FINRA wishes to maintain its credibility with the investing public, and legitimately continue to claim that its mission is to protect the investing public, it should not allow any scenario when the GVCs of the world, or their adept defense firms are allowed to prevail by "running out the clock" on often-times highly unsophisticated investors who only learn they have been defrauded years after the fraud was originally perpetrated.

Last, by eviscerating "the entire line of cases [that] suggest Rule 12206 is not subject to tolling," *Mid-Ohio Securities* and its progeny (which also includes *Oshidary v. Purpura-Andriola,* 2012 U.S. Dist. LEXIS 81367 (N.D. Cal. 2012) (the court upheld a decision by a FINRA arbitration panel in a case that had involved Smith Barney Citigroup after a challenge based on the FINRA Eligibility Rule)), *Howsam* reduced to rubble the following cases:

Pre-Howsam cases that were "Eviscerated" and "Undermined" by the United States Supreme Court decision in Howsam v. Dean Witter Reynolds.

Case Name (and cite)	Jurisdiction and Year Decided	Status After United States Supreme Court's Howsam Decision and in Ninth Circuit after Mid-Ohio Securities, Oshidary, and Kretsch
PaineWebber v. Hartmann, 921 F.2d 507, 513-14 (3d Cir. 1990).	New York, 1990	"EVISCERTATED" and "UNDERMINED"

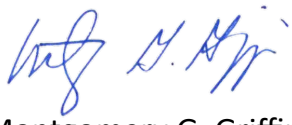
PaineWebber v. Farnam, 870 F.2d 1286, 1292 (7th Cir. 1989).	Illinois, 1989	"EVISCERTATED" and "UNDERMINED"
PaineWebber, Inc. v. Hofman, 984 F.2d 1372, 1379 (3rd Cir. 1993).	Pennsylvania, 1993	"EVISCERTATED" and "UNDERMINED"
Reed v. Mutual Serv. Corp. 106 Cal. App. 4th 1359, 1368 (2003).	California, 2003	This post-Howsam case upheld the Arbitrators' power to decide whether and how "events" are arbitrated
Merrill Lynch, Pierce, Fenner & Smith v. Jana, 835 F. Supp 406 D.C. (N.D. Ill. 1993).	Illinois, 1993	"EVISCERTATED" and "UNDERMINED"
Merrill Lynch, Pierce, Fenner & Smith v. Cohen, 62 F.3d 381, 385 11th Cir. 1995).	Florida, 1995	"EVISCERTATED" and "UNDERMINED"
Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 512 (7th Cir. 1992).	Illinois, 1992	"EVISCERTATED" and "UNDERMINED"
Smith Barney, Harris Upham & Co. v. St. Pierre, U.S. Dist. LEXIS 18649 (N.D. Ill. 1994).	Illinois, 1994	"EVISCERTATED" and "UNDERMINED"
PaineWebber Inc. v. Allen, 888 F. Supp. 53, 55 (E.D. Va. 1993).	Virgina, 1993	"EVISCERTATED" and "UNDERMINED"
Merrill Lynch, Pierce, Fenner & Smith Inc. v. Barchman, 916 F. Supp. 845 (N.D. Ill. 1996).	Illinois, 1996	"EVISCERTATED" and "UNDERMINED"
Geneva Securities, Inc. v. Johnson, 138 F.3d 688, 689, 692 (7th Cir. 1998).	Illinois, 1998	"EVISCERTATED" and "UNDERMINED"
Lindell v. Waddell & Reed, Inc., 962 F. Supp. 103, 107 (W.D. Mich. 1997).	Michigan, 1997	"EVISCERTATED" and "UNDERMINED"
Prudential Securities v. Kucinski, 947 F. Supp. 462, 466 (M.D. Fla. 1996).	Florida, 1996	"EVISCERTATED" and "UNDERMINED"
Mut. Service Corp. v. Spaulding, 871 F. Supp. 324 (N.D. Ill. 1994).	Illinois, 1994	"EVISCERTATED" and "UNDERMINED"
Dean Witter Reynolds v. McCoy, 853 F. Supp.1023, 1026-27 (E.D. Tenn. 1994)	Tennessee, 1994	"EVISCERTATED" and "UNDERMINED"
Prudential Secs. Inc. v. La Plant, 829 F. Supp. 1239, 1243 (D. Kan. 1993).	Kansas, 1993	"EVISCERTATED" and "UNDERMINED"
Griffin v. Goldman Sachs, & Co. v. 2008 U.S. Dist. LEXIS 74371, *5-6, (S.D.N.Y. 2008)	New York, 2008	This post-Howsam case affirms the FINRA Panel's determination of the date of accrual of the claims
Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1307 (11th Cir. 2001)	Florida, 2001	"EVISCERTATED" and "UNDERMINED"
Prudential Sec., Inc. v. Yingling, 226 F.3d 668, 672 (6th Cir. 2000)	Ohio, 2000	"EVISCERTATED" and "UNDERMINED"

Ohio Co. v. Nemecek, 98 F 3d 234, 237 (6th Cir. 1996).	Michigan, 1996	"EVISCERTATED" and "UNDERMINED"
J.E. Liss & Co. v. Levin, 201 F.3d 848, 851 (7th Cir. 2000)	Wisconsin, 2000	"EVISCERTATED" and "UNDERMINED"

Almost unthinkably, and certainly at times (depending on the jurisdiction) unethically, these eviscerated cases are still nonetheless cited in FINRA matters by defense counsel who seeks to bamboozle a Panel. And I have seen it first-hand. It is hard to imagine how unhinged this abuse would become if FINRA eliminated the Eligibility Rule—and, thus, instead of "modernizing" this rule, it took it back to the pre-*Howsam* stone ages.

FINRA has a duty to the investing public, one it assumes at all times and boasts of regularly. If it wishes to continue to be taken seriously, it should not join forces with those who argue that somehow *Howsam* does not apply, or worse those who simply pretend that it does not exist. Most importantly, FINRA should neither eliminate the Eligibility Rule nor transform it to an anemic statute of repose. After all, the "modern" trend with 12206 and eligibility in the pivotal Ninth Circuit, where I practice law, is to recognize equitable tolling and to add time to the clock rather than letting broker-dealers and their lawyers "run out the clock."

Very truly yours,



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