



LAW OFFICES OF
ROBERT V. CORNISH, JR., P.C.

680 South Cache Street, Suite 100
Jackson, WY 83001
Office: (307) 264-0535
Fax: (571) 290-6052
rcornish@rcornishlaw.com

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VIA EMAIL ONLY TO PUBCOM@FINRA.ORG

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

Re: Comment on FINRA Regulatory Notice 26-06—Modernizing FINRA Arbitration Rules, Guidance, and Process

Dear Ms. Mitchell:

I am an attorney who frequently represents victims of investment fraud in FINRA arbitrations, including victims of misconduct by FINRA-registered representatives and broker-dealers. FINRA should remain faithful to its investor-protection mission and decline the bulk of the proposals in Regulatory Notice 26-06, many of which would shift the forum's balance toward broker-dealers at the expense of retail investors. Section 15A(b)(6) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3(b)(6), requires FINRA to maintain rules designed to protect investors and the public interest, and proposals that curtail investor remedies, fragment the forum, or restrict discovery are inconsistent with that mandate. The Notice itself frames questions about routing “complex” or “large-dollar” disputes outside FINRA and about curbing damages, discovery, and arbitrator selection, but investor advocates have credibly warned that such changes would advantage repeat-player industry respondents over one-shot retail claimants. Investor protection and meaningful disclosure must remain the central pillars of any modernization effort.

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

Any move to differentiate procedures or permit routing of customer disputes to alternative forums based on labels such as “complex,” “large,” “institutional,” or “retail” is both flawed and dangerous. FINRA should preserve a single, fair, efficient forum for broker-customer disputes to avoid confusion, duplicative process, and strategic gamesmanship. The Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), upholding arbitration of securities claims under the Federal Arbitration Act, rested on the adequacy of investor protections in the then-NASD forum; the Court emphasized that streamlined procedures do not compromise substantive rights, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). FINRA Rule 12200 enshrines a customer's option to require member firms to arbitrate in the FINRA forum; contractual routing to alternative fora would undercut the foundation on which *McMahon* relied. Categorizing disputes

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by complexity or investor type is often artificial and susceptible to firm-driven engineering, as retail customers are frequently advised to employ entities or to purchase complex products without a corresponding increase in sophistication.

Fragmentation would yield concrete harms for retail investors. Threshold “gatekeeping” cycles proliferate in alternative fora, where administrators often parse filing prerequisites, applicable rules, and consolidation before any merits arbitrator is appointed, delaying discovery and hearing scheduling for small-dollar individualized claims. FINRA’s simplified track exists precisely to move small cases with low filing fees, streamlined procedures, and paper or single-day hearing options, and the forum’s historical time-to-closure benchmarks anchor expectations for seniors and retail claimants seeking timely resolution. Steering claims away from this securities-specific, lower-friction pathway would impose unfamiliar fee structures and timelines while depriving customers of a purpose-built forum. Fragmentation also risks duplicative or inconsistent proceedings across broker-dealer and advisory affiliates or product channels, which is especially problematic given the growth of illiquid and opaque retail alternatives, episodic redemption “gates,” and valuation opacity that can defer the discovery of losses for years.

The distinction between pre-dispute and post-dispute variance is critical. Congress authorized the SEC in Exchange Act § 15(o), 15 U.S.C. § 78o(o), to prohibit or condition pre-dispute arbitration agreements where necessary to protect investors, reflecting a recognition that boilerplate pre-dispute clauses can be weaponized against customers. Post-dispute customization, by contrast, occurs when customers are likelier to be represented by counsel and able to make informed process choices. To align with FINRA’s investor-protection mandate, customers should retain the unilateral right to select FINRA arbitration or court post-dispute, and member-firm routing to hand-selected alternative fora should be rejected.

These conclusions are also supported by law review scholarship. Academics have documented how fragmentation and privatization of adjudication can exacerbate repeat-player advantages and diminish the perceived legitimacy of outcomes for individual claimants. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Arbitration*, 74 Wash. U. L.Q. 637, 653–60 (1996); Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors’ Perceptions of Fairness of Securities Arbitration*, 2008 J. Disp. Resol. 349, 365–72 (2008).

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

Modernization should not expand prehearing dismissal avenues or hardwire statutes of limitations into the Codes in ways that immunize long-tailed misconduct. Investors in private placements, EB-5 investments, non-traded REITs, annuities, and other illiquid or opaque products often experience delayed realization of losses due to sponsor-controlled net asset values and redemption limits; rigid time bars risk extinguishing meritorious claims that surface only after multi-year holding periods. FINRA Rules 12206(a) and 13206(a) establish a six-year eligibility framework, and Rules 12409 and 13413 vest arbitrators with authority to interpret and apply it, a structure the SEC has recognized by noting that decisions under the six-year rule fall within the sole discretion of the panel. The Supreme Court similarly held in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85–86 (2002), that such eligibility questions are for

arbitrators, not courts. Introducing rigid statutory limitations into the Codes would engender confusion and conflict with this settled allocation of authority.

The current eligibility rule's focus on an "occurrence or event" within six years permits panels to account for ongoing fraud, continuing representations, and delayed harm—timing realities common in cases involving fabricated statements, masked valuations, or supervisory failures. Courts have recognized that determining the operative "occurrence or event" often requires a fact-intensive inquiry and, where appropriate, evidentiary hearings. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Masland*, 878 F. Supp. 710, 719–20 (M.D. Pa. 1995). Expanding repose defenses or facilitating early-dismissal motion practice would encourage tactical filings that stifle discovery and delay justice. FINRA's 2016 rulemaking reasonably limited prehearing motions to dismiss; modernization should reinforce that arbitration pleadings need not meet court-style particularity and that, absent narrow exceptions, discovery should precede dismissal rulings.

Scholars have cautioned that importing rigid civil-procedure doctrines into arbitral eligibility and motion practice can undermine arbitration's accessibility and fairness for consumers and investors. See Barbara Black & Jill I. Gross, *Making It Up as They Go Along: The Role of Law in Securities Arbitration*, 23 *Cardozo L. Rev.* 991, 1005–10 (2002). This scholarship supports maintaining a flexible, panel-centered approach to eligibility and limiting prehearing dismissal opportunities.

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

FINRA's new baseline requirements of a four-year college degree and five years of professional experience for arbitrators should be reversed or narrowed. These criteria arbitrarily disqualify large segments of the public and risk shrinking the pool of public arbitrators in ways that skew toward industry sensibilities and away from community-representative perspectives. Investor advocates, including PIABA, have criticized these screens as unnecessary and prone to tilt panels away from ordinary investor viewpoints; congressional testimony in 2026 echoed those concerns. Increasing minimum qualifications further would exacerbate repeat-arbitrator dynamics and diminish public confidence.

FINRA arbitration exists as a substitute for a civil jury trial. McMahon recognized that parties trade court procedures for arbitration's simplicity, informality, and expedition, and public confidence therefore depends on a pool that resembles a jury as much as practicable. Members of juries do not require subject-matter degrees, and becoming a part-time neutral should not be more onerous than meeting licensing standards for registered representatives. The pool should be broadened to include any community member who can complete arbitrator training and meet independence standards, and FINRA should retain robust disqualification criteria for "public arbitrators" to prevent "industry-lite" encroachment. These steps are consistent with Section 15A(b)(6)'s investor-protection mandate and with the SEC's application of that mandate when reviewing FINRA actions affecting arbitration.

Rule 12403(c)(1)(A), which permits parties to strike all non-public arbitrators on a three-arbitrator panel, should remain intact. This rule corrected a historic bias that once required an industry representative on every panel and materially advanced neutrality. The Second Circuit

has underscored that FINRA arbitration provisions must be interpreted to effectuate the parties' intent while preserving the forum's integrity, and that "customer" status and forum access turn on clear, objective relationships rather than elasticity that would invite manipulation. See *Citigroup Glob. Mkts., Inc. v. Abbar*, 761 F.3d 268, 274–77 (2d Cir. 2014). FINRA's 2025 changes, as described in Regulatory Notice 25-16, to better balance list generation for three-arbitrator panels, and even-handed replacement mechanics like a codified Short List Option, are constructive provided they reduce repeat-player advantages and improve transparency.

To promote parity when multiple separately represented parties appear on a side, FINRA should amend its rules to ensure that all claimants collectively and all respondents collectively have the same total number of strikes, applied even-handedly. Equalizing strikes reduces strategic imbalances tied to party fragmentation and enhances perceived fairness without advantaging either side.

Arbitrator Training (Requests for Comment E)

Targeted, ongoing procedural training will improve case management without compromising neutrality. Refresher courses on ethics, hearing structure, chair responsibilities, and practical sequencing of discovery can reduce unnecessary hearings, avoid late withdrawals, and keep cases moving, particularly for seniors or claimants with serious medical conditions. FINRA's March 30, 2026 acceleration rules demonstrate that calibrated deadlines can shorten time to award for qualifying claimants without prejudicing respondents. However, training should remain procedural. Substantive training that creates hierarchies of customer claims or that ventures into legal elements or product-specific instruction risks putting a thumb on the scale in adjudication. Substantive argument belongs to the advocates and expert witnesses, not to the forum's training materials.

Discovery (Requests for Comment F)

The Discovery Guide must be updated to reflect the realities of 2026 and to curb boilerplate objections that impede access to core records. Broker-dealers too often invoke the Gramm–Leach–Bliley Act as a catch-all to resist production of exception reports, compensation data, or communications, despite regulators' clear expectations that business communications are books and records that must be preserved and produced. Arbitrators should enforce the Guide, treat improper objections to presumptively discoverable categories as sanctionable, and require production of complete compliance manuals, regulatory-investigation documents (including FINRA Rule 8210 materials and SEC Wells notices), and all relevant communications, including texts and emails, regarding the products and strategies at issue. Recent SEC and FINRA enforcement confirms widespread use of unmonitored or "off-channel" communications for business, and those communications must be preserved and produced; failures have resulted in significant penalties and case-specific sanctions tied to unproduced texts revealed only at deposition. Arbitrators should internalize these recordkeeping expectations under Exchange Act Rule 17a-4 and FINRA Rule 4511 when assessing privacy and burden objections.

Modernization should also require non-evidentiary disclosure of applicable insurance coverage. Federal courts require disclosure of insurance agreements under Federal Rule of Civil Procedure 26(a)(1)(A)(iv), and most states impose a similar obligation, facilitating realistic settlement discussions and efficient case planning. Requiring disclosure of policy declarations, full policies, and any declination letters in arbitration will aid efficient resolution and reduce post-award enforcement disputes, without prejudicing respondents. Industry experience and academic commentary indicate that targeted insurance mandates and disclosures do not reduce access to advice markets.

Law review scholarship supports stronger discovery norms and transparency to counter informational asymmetries endemic to securities disputes. See Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Perceptions of Fairness of Securities Arbitration*, 2008 J. Disp. Resol. 349, 365–72 (2008).

Hearing Oversight and Efficiency (Requests for Comment G)

FINRA should not create a centralized interpretive “help desk” for arbitrators, which could blur lines between administration and adjudication and invite overreliance on staff for legal questions. FINRA's past conduct in eliminating staff counsel was in recognition of this precise perception by both sides of the aisle. Stricter case management, if one-sidedly invoked by repeat players, risks ossifying a forum whose flexibility has served retail investors well. Instead, FINRA should improve the clarity of existing resources, enhance procedural and evidentiary training, and focus on enforcing existing timelines and rules. Where parties or panels are at risk of missing benchmarks such as the Initial Prehearing Conference or the final hearing, administrative staff should proactively check in and offer logistical assistance without encroaching on panel independence. Technology upgrades—including a mobile app for counsel, improved billing integrations, clearer DR Portal dockets with PACER-like filtering, and standardized motion-type selections—would improve usability and timeliness for all participants.

Punitive Damages (Requests for Comment H)

FINRA should preserve arbitrators' authority to award punitive damages where governing law permits and should reject any forum-specific limits. The Supreme Court has held that arbitration agreements authorizing punitive damages are enforceable according to their terms, and generic choice-of-law provisions do not constitute unequivocal exclusions. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59–64 (1995); see also *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001). Empirically, punitive awards are rare in this forum, and any process changes must be data-driven, not anecdote-driven. Boilerplate pre-dispute waivers of punitive damages would create a Hobson's choice for investors and attempt by private contract what state law cannot accomplish under the FAA's preemptive force; Exchange Act § 15(o) further underscores the SEC's authority to check abusive pre-dispute provisions where necessary to protect investors.

FINRA should not impose bifurcation mandates, special qualifications, or punitive-specific appeals. State law already governs punitive standards; adding arbitration-only hurdles would chill the already rare punitive awards, increase costs and delays, and unfairly target outcomes disfavored by industry respondents. The FAA's limited vacatur regime, 9 U.S.C.

§§ 10–11, ensures available remedies for corruption, fraud, or arbitrator misconduct while preserving the finality central to arbitration’s simplicity, informality, and expedition.

Law review commentary cautions that expanding private arbitration’s carve-outs and appellate layers can erode democratic legitimacy and entrench repeat-player advantages; those warnings counsel against punitive-specific limits or appeals in FINRA arbitration. See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371, 383–90 (2016).

Arbitration Awards Online (AAO) (Requests for Comment J)

The AAO database is indispensable for parties, counsel, researchers, regulators, and the public. FINRA should not redact or remove awards from AAO except in the narrowest circumstances consistent with public records values, and modernization should instead enhance searchability, completeness, and structured data. The expungement process has long been criticized for high approval rates and low opposition; however, FINRA’s 2023 reforms have produced measurable progress, including sharp reductions in “straight-in” expungement requests and lower approval rates in monitored cohorts compared to historically elevated levels. SEC guidance has recognized the need to align expungement with Section 15A(b)(6) and apply strict criteria and eligibility limits.

Greater transparency is an investor-protection asset. FINRA should convert awards to structured data, integrate outcome analytics, link awards to court actions and BrokerCheck profiles, and improve full-text search within AAO. These steps will help identify patterns of misconduct, inform arbitrator-selection decisions, and reduce information asymmetry between repeat-player firms and retail claimants.

Unpaid Awards (Requests for Comment K)

Unpaid customer awards remain a persistent structural failure. As of 2024, approximately one in four investor awards went unpaid, with roughly thirty-seven cents of every dollar uncollected, and about \$80 million reportedly uncollected between 2020 and 2024. PIABA’s March 5, 2026 congressional testimony highlighted these shortfalls, and the SEC has repeatedly acknowledged the severity of the problem when approving rule changes designed to protect investors facing respondents unlikely to pay and to incentivize behavior changes by outlier-risk members. FINRA and the SEC have also canvassed approaches such as a national investor recovery pool, rule-based capital, insurance or bonding solutions, and SIPC-related changes.

As a threshold, FINRA should have the ability to claim escheated funds of defunct broker-dealers and individual registrants to satisfy unpaid arbitration awards. Thousands of dollars sit stagnant in state treasuries, and some states (namely California, Texas and Florida) do not permit creditors with arbitration awards to claim these funds even with a court judgment in hand. This can and should be addressed in Form BD and Form U4 disclosures by expressly stating that FINRA or other regulators may claim such money on behalf of aggrieved investors.

But the single most effective solution would be a FINRA-administered national recovery pool funded by member firms, complemented by targeted insurance and bonding requirements and enhanced disclosures concerning coverage. FINRA's recent rebates of \$50 million in 2025 and \$100 million in March 2026 to member firms underscore the feasibility of funding mechanisms and have drawn criticism amid persistent unpaid awards. Interim measures within FINRA's remit—mandatory insurance disclosures, strengthened bonding for restricted or outlier-risk firms, and tighter supervision of control persons—would meaningfully reduce the incidence of hollow awards while broader structural reforms are pursued with the SEC and Congress. Moral-hazard arguments against insurance or a recovery pool are unpersuasive, as intentional misconduct is typically excluded from coverage and recovery pools can subrogate against recidivists and other bad actors.

Conclusion

Modernization should double down on fairness, accessibility, and transparency for retail investors, consistent with Section 15A(b)(6) of the Exchange Act and the forum's core investor-protection aims. FINRA should decline proposals that fragment forum selection or erect new time-bar or dispositive-motion hurdles, particularly where long-tailed, illiquid, or opaque products often conceal losses for years. FINRA should reverse or narrow the new degree-and-experience eligibility filters for arbitrators, preserve robust public-arbitrator criteria, and continue to refine list generation and replacement mechanics to minimize repeat-player advantages.

Discovery practices should reflect real-world recordkeeping obligations by embedding Exchange Act Rule 17a-4 and FINRA Rule 4511 expectations in discovery rulings, curbing overbroad privacy objections, and requiring timely disclosure of applicable insurance coverage in line with Federal Rule of Civil Procedure 26(a)(1)(A)(iv). FINRA should preserve governing-law standards for punitive damages without forum-specific curbs while enhancing transparency through explained decisions where appropriate. AAO should remain comprehensive and be further enhanced with structured data, analytics, and linkages to external dockets and BrokerCheck, while FINRA's 2023 expungement reforms should be retained and refined as early data warrant.

Finally, FINRA should prioritize measures that reduce unpaid awards and improve actual investor recovery, recognizing well-documented shortfalls and the optics of member rebates amid sustained non-payment. I appreciate FINRA's engagement and stand ready to provide data and case studies from active matters to assist staff and the Board. The forum's credibility rests on accessibility, efficiency, and perceived fairness for retail investors, and the recommendations above are designed to strengthen that foundation in service of FINRA's investor-protection mission.

Respectfully submitted,



Robert V. Cornish, Jr.