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MAYNARDNEXSEN

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VIA E-MAIL AND FINRA WEBSITE

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

Re: FINRA Regulatory Notice 26-06; FINRA Requests Comment on Modernizing FINRA Arbitration Rules, Guidance and Processes

Dear Ms. Mitchell:

We submit this letter in response to FINRA Regulatory Notice 26-06, FINRA Requests Comment on Modernizing FINRA Arbitration Rules, Guidance and Processes. We appreciate FINRA opening these topics for public comment and are grateful for the opportunity to share our views.

Over more than 30 years, Maynard Nexsen has handled thousands of FINRA arbitrations on a wide range of customer and industry issues. We have appeared as counsel in 49 states and various U.S. territories. As a result, we are uniquely positioned to offer insights on this modernization initiative.

Our letter focuses on four categories from Regulatory Notice 26-06: (1) Eligibility and Motions to Dismiss; (2) Arbitrator Classification and Selection; (3) Discovery and Hearing Oversight/Efficiency; and (4) Form U5 Defamation Claims.

We also have added a fifth category for items not addressed specifically in the regulatory notice, but would facilitate fair and efficient proceedings, including a proposed rule for offers of judgment, revised procedures for severance in multi-claimant arbitrations, an enhancement to FINRA Rule 12203 and 13203 regarding denial of the FINRA forum, and a recommendation regarding emergency motions.

While we do not address in detail the additional topics from Notice 26-06, we do want to voice our support for the items previously addressed in SIFMA's July 11, 2025 letter, including the proposals (a) permitting agreements to allow for alternative forums and (b) establishing limits on punitive damages. Both items would promote fairness within the FINRA forum and should be adopted.

We would like to add one additional point on the punitive damage issue. The Arbitrator Guide states: "[T]he arbitrator keeps equity in view, whereas the judge looks only at the law, and the reason why arbitrators were appointed was that equity might prevail." Arbitrator Guide, pg. 7. While some panels have relied on this language to award punitive damages, this reliance is misplaced because punitive damages are solely a legal remedy, with a specific legal framework in court proceedings for awarding them and subjecting them to appellate review. Without adherence to that legal framework, which FINRA arbitration does not provide, the awarding of punitive damages is untenable. Moreover, unlike in court proceedings, FINRA, the SEC and other regulators already operate a comprehensive regulatory enforcement apparatus that can punish wrongdoers and change future behavior, making punitive damages in FINRA arbitration unnecessary.

Eligibility and Motions to Dismiss

Eligibility Motions under Rule 12206 and Rule 13206

The only consistent thing about the eligibility rule is how inconsistently it is applied. Panels seem to struggle with when a claim accrues under the rule, which often results in them deferring decisions on eligibility motions until the final hearing. By deferring these motions, panels defeat the purpose of permitting these motions to be made well in advance of the hearing and force parties to incur costs for claims that should not have been brought in FINRA in the first place.

FINRA should clarify that the eligibility rule functions as a statute of repose, which is not subject to tolling for any reason. The cause of action should accrue at the time of the allegedly wrongful conduct, not at the time the claimant discovers or should have discovered the injury. Any sort of discovery rule incentivizes claimants to ignore or purport to ignore the results of their investment decisions, and creates a risk of inconsistent application across different arbitration panels. It is also worth noting that six years is not an insignificant amount of time to give claimants to bring any legitimate claims. To the extent damages have not arisen within those six years, the chances that they actually are tethered to the allegedly wrongful conduct becomes quite remote. Moreover, the eligibility rule is solely about access to the FINRA forum; claimants who do not file within six years would still have the opportunity to pursue their claims in court, subject to applicable statues of limitations.

In the event FINRA does not revise the eligibility rule to clarify that it is a statute of repose, it should at least remove the language in the Arbitrator Guide allowing claimants to assert that an alleged continuing violation can preclude enforcement of the rule. Each individual instance of allegedly wrongful conduct should be viewed as a separate event or occurrence. For example, claimants should not be permitted to allege that a respondent improperly induced them to purchase a security more than ten years ago and then advised them to hold it during subsequent meetings, and therefore all claims relating to the security are eligible. Each hold recommendation should be viewed as a separate event or occurrence; those that occurred within six years are eligible and those that occurred outside of six years are not. FINRA rules require that each recommendation to buy, sell, or hold should be viewed on its own merits, and there is no basis for allowing a claimant to proceed with respect to a recommendation made outside the eligibility period, just because there were other, later recommendations made with respect to that same security that were within the

eligibility period. This improperly broad application of the continuing violation argument threatens to preclude any application of the rule at all, except in situations where the customer sold the security at issue more than six years before bringing the claim.

Pre-Hearing Motions to Dismiss under Rule 12504(a) and Rule 13504(a)

While we understand that FINRA arbitrations are designed to be more streamlined and less motion-heavy than state and federal court cases, FINRA rules should provide an avenue for early resolution of cases that clearly should not proceed in the forum. We agree with SIFMA's suggestion in its July 11, 2025 letter to permit respondents to file motions to dismiss prior to answering the claim. The Statement of Answer in FINRA typically requires an extensive discussion of the substantive merits of the case, which can be a costly and time-consuming process. There is no basis to require respondents to undertake that process for a claim that squarely falls within one of the designated categories for dismissal.

In instances of repeat filings of adjudicated claims (often by *pro se* litigants), FINRA administrators and/or the Director should be empowered to refuse to process the claims absent a showing by the repeat litigant as to why the claims have not already been disposed of and should proceed.[1] When it is obvious from the face of the duplicate Statement of Claim that the matter has already been litigated, the respondent should not have to bear the expense of dismissing the claim. By way of example, our firm is currently defending claims re-filed by a *pro se* litigant that were settled via mediation and dismissed less than six months ago. Our client is having to incur the legal expense and FINRA costs of answering the claim, filing a motion to dismiss, ranking arbitrators, setting a hearing on the motion to dismiss, and arguing the motion - before it can obtain relief. The entire impetus for settling the underlying claims (cost savings) has been defeated by the process.

We also support adding statutes of limitations as an additional ground on which parties are permitted to file a motion to dismiss. We have seen numerous instances of claims that are, on their face, barred under the applicable statute of limitations, yet there is no mechanism for addressing that defect prior to a final hearing. For example, there is a two-year statute of limitations for many common law employment claims. If an industry claimant left his employment more than two years prior to filing his claims, his claims are almost certainly expired. Even so, in those instances, a respondent still would be required to answer the statement of claim, choose a panel, complete discovery and appear at the final hearing, all based on a facially defective claim.[2] Unlike an eligibility-based motion, a motion to dismiss based on statute of limitations would be subject to tolling and other equitable doctrines as authorized by law. However, when the claims are clearly time-barred, it makes no sense to require the parties to wait until the close of claimant's case to

[1] This process would be similar to that employed by FINRA administrators to screen for statutory discrimination claims. The administrators do not allow these claims to proceed before FINRA absent a showing of a pre- or post-dispute agreement to arbitrate such claims before FINRA in satisfaction of Rule 13201.

[2] This would include instances in which a claimant has failed to timely pursue an administrative prerequisite such as an EEOC charge. There is no reason a clearly time-barred claim should proceed to final hearing, with parties having to incur substantial expense to defend a stale claim.

obtain relief from the panel. Rules 12504 and 13504, which provide for the recovery of fees in the event of a frivolous motion to dismiss, will deter the parties from pursuing these motions in bad faith or without a reasonable basis.

Arbitrator Classification and Selection

Changes to Public Arbitrator Definitions

Panel quality seems to be a growing problem in arbitrations. While some of those issues can be handled via additional training, there also is room to improve the public arbitrator pool by adjusting some of the rules that have forced many qualified individuals into the non-public category. To that end, we suggest two changes to the definitions of public arbitrators in Rule 12100(aa) and Rule 13100(x).

First, attorneys, accountants, and other professionals who are no longer associated with the financial services industry should not be excluded from the public arbitrator pool. While it might make sense to include a reasonable period of separation from industry work -- such as two calendar years (as in subpart 11) -- a lifetime ban on serving as a public arbitrator is excessive and unnecessarily narrows the pool of qualified public arbitrators.

Second, FINRA should amend the immediate family rule in subpart 11(A) to allow parents, stepparents, children, and stepchildren to serve as public arbitrators even if their immediate family members would be disqualified from serving on the public arbitrator roster. By way of example, the late father of one of the undersigned was a thoughtful, well-respected lawyer who did not handle financial services matters during his more than 50-year career. Yet when he retired and registered to serve as a FINRA arbitrator, he was required to be listed as a non-public arbitrator solely because of his grown child's work representing industry clients. While that fact certainly should be disclosed, it should not be a bar to appearing on public arbitrator lists. This overly restrictive rule improperly narrows the pool of qualified public arbitrators while placing arbitrators with no industry experience in the pool of non-public arbitrators.

No Collective Rank/Strikes for Claimants, Respondents

FINRA has asked whether all claimants should share one set of strikes and all respondents should share a separate set of strikes. We do not believe that approach would be workable in practice. Respondents can, at times, have varying interests and forcing them to share information on their arbitrator preferences and work together to agree on a consolidated strike list would be prejudicial.

Discovery and Hearing Oversight/Efficiency

Proposed Caps on Requests for Production and/or Mandatory Meet and Confer Conferences

We agree with the discovery recommendations from SIFMA in its July 11, 2025 letter. Indeed some of the problems SIFMA attempted to solve have only been exacerbated since its letter. For example, the growing adoption of AI has resulted in numerous instances where *pro se*

claimants use it to generate voluminous discovery demands, sometimes up to 100 requests for production (RFPs).

While the FINRA rules require that requests be "reasonable in number," they do not impose any numerical cap on RFPs. We recommend a cap on the number of RFPs that each party can serve, absent the permission of the panel. FINRA's National Arbitration and Mediation Committee and its Discovery Subcommittee are well-positioned to develop specific guidance on appropriate default limits and the factors arbitrators should consider when modifying them.

If FINRA chooses not to implement a broad-based cap, it should at least require that the parties discuss the issue prior to or at the initial pre-hearing conference and include a limit in the IPHC scheduling order. Such a discussion could be part of the larger pre-IPHC meet and confer requirement that SIFMA previously suggested.

Resource for resolving discovery disputes

Discovery disputes in securities arbitration have grown increasingly complex, driven in part by the proliferation of electronically stored information and the sensitive nature of privilege and confidentiality issues that often arise. Arbitrators would benefit from enhanced tools and processes to manage these disputes effectively, including clearer authority to control the scope and cost of discovery, as well as access to specialized expertise when confronting particularly challenging issues such as assertions of attorney-client privilege. We respectfully submit the following recommendations for FINRA's consideration, which we believe would meaningfully advance these objectives.

Cost-Shifting Authority

We recommend that FINRA amend its discovery rules to expressly authorize arbitrators to shift the cost of responding to discovery requests in appropriate circumstances. Discovery in securities arbitration can impose substantial burdens on responding parties, particularly when requests are broad in scope or seek voluminous electronically stored information. Granting arbitrators clear discretion to allocate some or all of the costs of compliance to the requesting party would encourage more judicious use of discovery tools, reduce unnecessary expense and delay, and promote fairness.

Proportionality Standard

We further recommend that FINRA incorporate a proportionality standard into its discovery rules, consistent with the approach embodied in the Federal Rules of Civil Procedure. Under such a standard, the scope of permissible discovery—including, for example, the number of custodians whose records are to be searched—would be measured against factors including the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, and the burden or expense of the proposed discovery in relation to its likely benefit. A proportionality requirement would provide arbitrators with a principled framework for evaluating discovery requests and resolving disputes, while ensuring that the discovery process remains commensurate with the nature and value of the claims at issue.

Special Masters Panel for Discovery Appeals

Finally, we recommend that FINRA establish a panel of special masters authorized to hear appeals of any discovery order implicating attorney-client privilege, confidentiality, or proportionality issues. This panel should consist of lawyers in private practice with substantial litigation experience, who would be randomly assigned to review challenged discovery rulings that implicate these sensitive areas. Privilege and confidentiality determinations require careful legal analysis and carry significant consequences if resolved incorrectly. Similarly, disputes over proportionality often involve nuanced judgment calls that benefit from the perspective of experienced litigators. A special masters panel would provide an efficient mechanism for obtaining expert review of these critical issues, enhance the quality and consistency of discovery rulings, and give parties greater confidence in the integrity of the arbitration process.

Resource for Arbitrator Questions During the Hearing

Guidance to arbitrators regarding procedural or evidentiary issues that arise during the final hearing can be inconsistent, potentially inappropriate, and not always in alignment with FINRA Rules. Members of our firm have experience with arbitrators pausing arbitration hearings and having lengthy calls with FINRA regarding procedural questions, the scope of their authority, and other issues. Moreover, arbitrators have reported that the advice provided by FINRA has made them feel compelled to take certain action or rule in certain ways.

FINRA should have strict policies regarding when, how, and who may provide information to arbitrators with questions during the arbitration process. A FINRA case administrator or staff member should at no time influence the outcome of an arbitration directly or indirectly via the advice and guidance provided to arbitrators in the course of an arbitration (whether intentionally or unintentionally). A case administrator who has not been in the hearing may not understand the question fully or why the question is being asked, which could impact answers provided. Provision of inaccurate or incomplete information in response to an arbitrator question can have a direct impact on the arbitration and its result.

As such, we would suggest that FINRA provide a single point of contact or a discrete handful of contacts who would be permitted to answer arbitrator questions during the hearing. To ensure fairness and transparency, the parties should be informed of any such outreach and have an opportunity to address the questions that are raised.

Late Withdrawal of Arbitrators

We have experienced a growing number of late arbitrator withdrawals, either in the weeks leading up to a final hearing and, in some cases, *during* a final hearing. Most of these withdrawals have taken place with no explanation provided to the parties. In our experience, such withdrawals prejudice all parties' ability to present their cases. Replacing arbitrators at the last moment, whether by the short list process or other methods, means that at least one-third of the panel will have no experience with the case prior to appointment. We have also observed that the potential arbitrators who are available on short notice tend to be less experienced.

We believe that late withdrawals, particularly those without good cause, should carry some consequence. In addition to the potential removal or arbitrators from the roster permanently or for some significant period, we also recommend that if arbitrators who withdraw late or on multiple occasions are permitted to remain on the roster, future parties be notified of these withdrawals through entries on their disclosure reports. Moreover, we also recommend that FINRA case administrators adopt a practice of checking with panel members sixty (60) days prior to the final hearing to confirm their availability to minimize last-minute withdrawals arising from existing conflicts that otherwise might have remained unnoticed.

Arbitrator Removal for Misconduct

The integrity and effectiveness of FINRA's arbitration forum depend fundamentally on the quality and conduct of its arbitrators. While FINRA has established procedures for investigating and evaluating arbitrator misconduct and poor performance, the current framework does not adequately address conduct that occurs during the arbitration itself.

FINRA Rules 12407(b) and 13410(b) permit arbitrator removal after the first hearing session has begun only if the removal is based on information required to be disclosed under Rule 12405 or 13408 that was not previously known by the parties. Absent a violation of those rules, the only basis for removal of an arbitrator is under the general discretionary powers afforded to the Director under Rules 12408 and 13412. Thus, if any arbitrator engages in misconduct that is unrelated to a disclosure violation (i.e. showing up drunk to a hearing, using offensive language, exhibiting blatant bias in comments, sleeping through critical testimony, etc.), there is no specific vehicle for having that arbitrator removed during the hearing.

We would recommend broadening the grounds for removal during a hearing under Rules 12407(b) and 13410(b) to give the Director specific power to remove an arbitrator who engages in misconduct. Providing an avenue to address arbitrator misconduct in advance of a final award should also reduce the number of publicly-filed vacatur motions, which tend to erode public and industry confidence in the FINRA process.

Form U5 Defamation Claims

Arbitrator Qualifications for Defamation Cases

FINRA should require arbitrators considering Form U5 defamation monetary damage or expungement claims to have additional experience and qualifications. FINRA has already recognized that experience and qualification requirements are necessary for arbitrators who render decisions based on claims that involve certain substantive areas of the law such as sexual assault, permanent injunctive relief, and the expungement of customer information. *See Regulatory Notice 26-06* at 9 and fn. 60. Requiring experience and qualifications for arbitrators who decide defamation claims would be consistent with FINRA's requirements in other areas. In addition, such requirements would help to ensure that arbitration panels apply correct and consistent legal standards in reaching their decisions on defamation cases.

Because defamation findings would require an application of facts to law, the appropriate additional experience and qualifications for arbitrators who decide such cases could be: (1) a law

degree; (2) membership in the bar of any jurisdiction; and (3) five or more years of legal experience, of which at least three years must be in either:

i. Law practice;
ii. Law school teaching;
iii. The defense or prosecution of first amendment or defamation claims;
iv. Experience as a judge, arbitrator, or mediator; or
v. Experience as in-house counsel.

Require that Statements Be False

The standard of "defamatory in nature" for Form U5 expungement matters is neither appropriate nor clear. The standard is not codified in the Rules but instead is the result of a Neutral Corner 2010 article that has now been adopted as the standard by some panels. Unfortunately, many panels have interpreted "defamatory in nature" to simply require a finding that the information is negative or places claimant in a poor light. However, virtually all Form U5 disclosures meet this manufactured standard because disclosures by their nature are negative. [3]

As a result, member firms are in an untenable situation as they try to fulfill their regulatory disclosure obligations knowing that if they fully satisfy FINRA's requirements to provide truthful and sufficiently detailed information with regard to circumstances of a registered representative's departure, they will likely prompt a FINRA arbitration seeking expungement and possibly a monetary claim for defamation.

To eliminate this Catch-22, FINRA should articulate clear standards for U5 expungements. It should either eliminate and replace the "defamatory in nature" standard or clarify that this standard requires an express finding that the U5 disclosure is false, not simply negative or harmful. To create consistency and encourage member firms to fully meet their regulatory obligations, FINRA should consider requiring panels, as a prerequisite for expungement, to find:

- the challenged U5 disclosures are materially untrue;
- the information expunged or modified has no investor protection value; and
- the change to the Form U5 (expungement or modification) accurately reflects the circumstances of departure.[4]

Most critically, in order to enter an award recommending expungement or modification of employment termination information, arbitrators should be required to find that the statements on

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[3] Virtually every Form U5 disclosure contains negative information. If the standard applied is simply whether the disclosure places the subject in a negative light – this justifies the expungement of most disclosures and completely undermines the integrity of the CRD system. It also unfairly penalizes members that comply with their reporting obligations.

[4] FINRA panels often change accurate termination reasons to "voluntary" even when there is no record support that the registered representative left on his/her own accord. In other words, they substitute the termination explanation with something that is clearly false and inaccurate.

the Form U5 are materially false and defamatory. Finding that statements are defamatory in nature, without also finding that they are *actually false*, does not promote providing truthful and accurate disclosures. That lesser standard also leaves firms at risk of monetary awards based on claims of defamation even when the disclosures are true.

Proposed Immunity Standard

The investing public would be best served by FINRA and other regulators revisiting the question of providing members with further immunity against Form U5 defamation claims. In doing so, it would encourage more fulsome disclosures on Form U5, thereby allowing members to better provide "sufficient detail when responding to Form U5 questions such that a reasonable person may understand the circumstances that triggered the affirmative response" as required in Regulatory Notice 10-39. In turn, as noted in that Regulatory Notice, more fulsome disclosures would assist: 1) the investing public in making well educated decisions on whether to do business with a particular registered person; 2) regulators in better identifying and sanctioning individuals who commit rule violations and in making more informed registration and licensing decisions; and 3) member firms in making employment and/or registration decisions.

Currently, the patchwork of state defamation laws creates the potential for inconsistent outcomes for Form U5 disputes. While the majority of states provide only qualified immunity for Form U5 disclosures, New York, as just one example, provides absolute immunity. *See Rosenberg v. MetLife, Inc*., 866 N.E.2d 439 (N.Y. 2007). While New York's absolute immunity rule is not the standard we propose here, it shows that a jurisdiction with deep familiarity with the securities industry has determined that significant protection from liability connected to Form U5 filings advances legitimate regulatory interests. Our proposed qualified immunity standard is, by comparison, a more moderate position that balances those regulatory interests against the rights of associated persons who are the subject of genuinely defamatory disclosures.

Because most Form U5 defamation claims proceed to FINRA arbitration rather than court, arbitrators are required to evaluate whether a state-law privilege applies. Unfortunately, in many cases arbitrators focus simply on whether disclosures are entirely accurate or somewhat misleading or unclear, rather than applying the full elements of a defamation claim, which often require a privilege analysis. A national uniform standard would eliminate this inconsistency.

Moreover, a national uniform standard could be modeled on Section 507 of the Uniform Securities Act of 2002, which provides qualified immunity for statements made on registration forms unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity. This standard has been adopted by more than 20 states, including: (1) Alaska [ALASKA STAT. § 45.56.560]; (2) Georgia [GA. CODE ANN. § 10-5-56][5]; (3) Hawaii [HAW. REV. STAT. § 485A-507]; (4) Idaho [IDAHO CODE ANN. § 30-14-507]; (5) Indiana [IND. CODE ANN. § 23-19-5-7]; (6) Iowa [IOWA CODE § 502.507]; (7) Kansas [KAN. STAT. ANN. § 17-12a507]; (8) Maine [ME. REV. STAT. ANN. tit. 32, § 16507]; (9) Michigan [MICH. COMP. LAWS §

[5] Georgia's statute does not contain the "or should have known at the time that the statement was made" language.

451.2507]; (10) Minnesota [MINN. STAT. § 80A.74]; (11) Mississippi [MISS. CODE ANN. § 75-71-507]; (12) Missouri [MO. REV. STAT. § 409.5-507]; (13) New Hampshire [N.H. REV. STAT. ANN. § 421-B:5-507]; (14) New Mexico [N.M. STAT. ANN. § 5813C-507]; (15) Oklahoma [OKLA. STAT. tit. 71, § 1-507]; (16) South Carolina [S.C. CODE ANN. § 35-1-507]; (17) South Dakota [S.D. CODIFIED LAWS § 47-31B-507]; (18) the U.S. Virgin Islands [V.I. CODE ANN. tit. 9, § 657]; (19) Vermont [VT. STAT. ANN. tit. 9, § 5507]; (20) Wisconsin [WIS. STAT. § 551.507]; and (21) Wyoming [WYO. STAT. ANN. § 17-4-507].

Under such a standard, a member firm would not be liable for defamation unless the claimant proves that the firm knew or should have known at the time the statement was made, that it was false in a material respect, or that the firm acted in reckless disregard of the statement's truth or falsity. In applying this standard, good faith should be assessed in light of the firm's internal processes for gathering facts prior to filing – including the limited time for investigation – so that firms acting reasonably under the circumstances are not penalized for a lack of information that was unable to be ascertained by the 30-day deadline for filing.

FINRA's rulemaking authority under the Securities Exchange Act provides a further basis for such a standard. Indeed, the NASD previously proposed NASD Rule 1150 to codify qualified immunity for Form U5 disclosures (*see* NASD Notice to Members 97-77), recognizing that full disclosure of disciplinary information on Forms U4 and U5 is in the public interest and that it is appropriate to provide some degree of protection to members for statements made on required forms in order to encourage such full disclosure. Although proposed Rule 1150 was never adopted, FINRA could revive this proposal. It is also worth noting that former SEC Commissioner Isaac C. Hunt, Jr., similarly advocated for a uniform qualified immunity rule in a speech to the New York Stock Exchange Legal Advisory Committee. While Commissioner Hunt's statement is now thirty years old, the structural problem he identified – inconsistent state law outcomes for federally mandated disclosures – remains unresolved. FINRA Forward provides the perfect vehicle to address it.

Finally, any argument that further immunity would enable bad actors to file false Forms U5 with impunity is countered by the fact that the regulatory enforcement mechanism remains fully intact regardless of any change to the private arbitration remedy. Since defamation claims inherently involve the publication of misleading information, relevant FINRA conduct rules would support this further immunity since those rules specifically prohibit false filings. In particular, violations of FINRA Rule 1122 (prohibiting members and associated persons from filing or failing to correct misleading registration information) and FINRA Rule 2010 (which requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business), could result in an enforcement action with disciplinary sanctions for such misleading (defamatory) statements on Form U5. *See* FINRA's Sanction Guidelines at 55.

The regulatory enforcement mechanism is in many respects better suited than private arbitration to address bad actors who make false Form U5 filings, as FINRA can investigate those issues proactively across multiple filings, and impose sanctions (including fines and suspensions) where appropriate. Moreover, FINRA's enforcement mechanism is not dependent on an individual claimant having the resources and motivation to bring a private cause of action. By contrast, private arbitrations frequently focus on the accuracy of a single statement and produce

inconsistent outcomes across panels, which can result in penalties for accurate but unflattering disclosures.

Additional Recommendations

Offer of Judgment Rule

We believe that all parties would benefit if FINRA adopted an offer of judgment rule that is modeled on Rule 68 of the Federal Rules of Civil Procedure, but adapted to the specific demands of FINRA's arbitration forum. The current FINRA rules lack any mechanism to incentivize parties to engage seriously with reasonable settlement offers. As it stands, a claimant who rejects a fair settlement offer faces no consequence if the final award proves less favorable than the rejected offer. On the other hand, the respondent who made the fair settlement offer is required to proceed to a full hearing with its associated costs. This is inconsistent with the core purpose of arbitration. An offer of judgment rule corrects this imbalance by imposing a measured cost consequence on a party who rejects a reasonable offer and then fails to obtain a better result, thereby promoting realistic case valuation, encouraging earlier resolution of meritorious claims, and conserving FINRA's resources for disputes that genuinely require a hearing on the merits.

This is not a novel concept, and FINRA does not need to search far for precedent. Rule 68 of the Federal Rules of Civil Procedure has provided an offer of judgment mechanism in federal court for decades, and analogous provisions exist in state courts across the country. Moreover, the NASD's Legal Advisory Board recommended adoption of a similar mechanism for FINRA's predecessor in 1994. *See* NASD Notice to Members 94-54. While that proposal was never enacted, the current initiative provides an excellent opportunity to address this longstanding issue.

Below is language for FINRA to consider as a proposed rule:

Proposed Offer of Judgment Rule

To promote the efficient and fair resolution of disputes, any party to an arbitration proceeding before FINRA may make a written offer of judgment pursuant to the procedures set forth in this Rule. A party who rejects an offer of judgment and fails to obtain an award more favorable than the rejected offer shall be subject to the cost-shifting consequence described herein.

> (a) At any time more than 30 days before the first scheduled hearing session on the merits, any party (the "Offeror") may serve a written offer of judgment on any opposing party (the "Offeree") specifying: (1) the total monetary amount offered in full and final resolution of all claims and counterclaims between those parties; and (2) an acceptance deadline of no fewer than 14 days from service.
>
> (b) If the Offeree does not accept within the acceptance period and the final award is not more favorable to the Offeree than the unaccepted offer, the Offeree shall pay the Offeror's costs incurred after the date of the offer, including FINRA forum fees and, to the extent not prohibited by applicable law, reasonable attorneys' fees.

> (c) The final award for purposes of subsection (b) includes all monetary relief awarded, including compensatory damages, interest, and punitive damages.
>
> (d) An offer of judgment and the fact of its rejection shall be kept confidential from the panel until after the award on the merits. Disclosure to the panel is a per se violation subject to sanctions under Rule 12212/Rule 13212.

We also believe that an offer of judgment rule is appropriate for the Customer and Industry Codes, with certain enhanced investor protection modifications for the former. Specifically, for the Customer Code, we recommend that any offer served on a retail customer should include a plain-language disclosure of the rule's mechanics and consequences and that the panel should retain discretion to reduce or waive cost-shifting upon a showing of financial hardship, consistent with FINRA's existing fee waiver framework.

Severance for Multi-Claimant Arbitrations

Multi-claimant FINRA arbitrations present significant case management challenges that may prejudice both claimants and respondents. Under FINRA Rules 12312 and 13312, multiple claimants may join claims in a single proceeding if they contain common questions of law or fact and either assert rights to relief jointly and severally or arise out of the same transaction or series of transactions. While this standard—paralleling Federal Rule of Civil Procedure 20—promotes efficiency when claims genuinely share common issues, it can also result in unwieldy proceedings where claimants' individual circumstances differ substantially.

The current procedural framework does not permit severance until after all responsive pleadings have been served. Under Rule 12312(b) and 13312(b), the Director may sever claims before panel appointment, or the panel may do so afterward, but in practice the Director generally defers to the panel. By the time severance is addressed, respondents have already been required to answer all joined claims, the panel selection process has proceeded (requiring generation of arbitrator lists, party ranking, and appointments), and substantial resources have been expended on joint proceedings. If severance then occurs, these steps must be duplicated for each new arbitration—creating inefficiencies that the earlier identification of improper joinder could have avoided.

We recommend amending Rules 12312 and 13312 to establish: (1) the authority of the Director to order severance before responsive pleadings are served, and (2) a presumption of severance when a statement of claim exceeds a specified claimant threshold. Under this framework, when filings exceed the threshold (which could be set at five, ten, or fifteen claimants depending on policy considerations), the Director would presumptively sever the claims into separate arbitrations unless claimants demonstrate that joinder requirements are satisfied and combined processing is appropriate given the circumstances.

The threshold-based presumption provides predictability for all parties, reduces the discretionary nature of severance decisions, and establishes an administrable standard for early Director intervention. By addressing joinder issues before responsive pleadings, the amendment

would prevent the waste of resources currently expended on combined proceedings that are later severed.

The proposal preserves flexibility by permitting the Director to decline severance upon a showing that joinder is appropriate, ensuring that truly common claims may proceed together when efficiency warrants. At the same time, the presumption reflects the practical reality that large multi-claimant arbitrations often present case management challenges—including high document volumes, coordination difficulties, and masked differences among individual claimants' circumstances—that outweigh the efficiencies of combined processing. Claimants also benefit because their individual claims receive more focused attention in appropriately sized proceedings; respondents benefit by avoiding the burden of answering potentially sprawling multi-claimant complaints before joinder propriety is assessed; and the forum benefits through more efficient administration of its caseload.

Denial of the FINRA Forum Where Applicable Judicial Precedent Exists

FINRA Rules 12203 and 13203 allow the Director to decline use of the FINRA forum under certain conditions, but neither rule specifically incorporates situations where courts have determined that identical or similar claims are not arbitrable. For example, we are aware of multiple instances where a party asserts a claim in FINRA based solely on financial products issued or managed by a company related to a FINRA-member firm, but the party is not actually a customer of the FINRA-member firm. Of course, without a customer relationship or arbitration agreement, there is no basis for FINRA arbitration, and courts routinely have held so. The Director should have the express authority to review applicable judicial precedents and, upon a motion by a respondent, have the authority to deny the FINRA forum where appropriate

Emergency Motions

FINRA Rules 12503 and 13503 provide that motions generally must be filed by the 20-day exchange deadline. While the standard briefing scheduled of ten days for responses and five days for replies is appropriate for the vast majority of motions, the current framework can create problems for motions that arise on or near the 20-day. Moreover, there is no provision in the rules for shortening the response and reply deadlines for motions that require urgent attention. Such motions are usually handled on an *ad hoc* basis, and the lack of standardization for this process can lead to inconsistent results, or an unfair burden on a party that could cause prejudice.

We propose amending FINRA Rules 12503 and 13503 to include a provision for filing emergency motions. While the last day that a party may file a motion, emergency or otherwise, will remain at the 20-day, emergency motions will be subject to an abbreviated briefing schedule. Rather than the standard 10 days to respond, the non-moving party would have five days. Replies would be due within three days, rather than the current five. Additionally, while a hearing is not mandatory for other motions filed under FINRA Rule, an emergency motion will presumptively have a hearing set as soon as practicable after the completion of briefing, unless the parties jointly agree that it is not necessary.

We also propose placing certain guardrails on the filing of emergency motions to prevent abuse. Similar to the process for a temporary restraining order outlined in Federal Rule of Civil Procedure 65, a party seeking an emergency motion must submit alongside the motion an affidavit

explaining "that immediate and irreparable injury, loss, or damage will result to the movant" if the standard motion schedule is followed. Additionally, to deter abuse, the hearing fee for an emergency motion will be twice the standard hearing fee for the arbitrators.

This proposal allows the parties and FINRA to deal with emergency situations on a more standardized basis, but the addition of an affidavit of need and increased hearing fees will hopefully prevent over-utilization of the emergency process. It will also lead to fewer administrative hurdles for both parties, as well as lessen the burden on FINRA case administrators for motions that are filed close to the final hearing. Last, it will allow a party with an immediate and urgent need to obtain relief sooner than the two weeks currently provided for motion practice.

If you have any questions concerning the above, please do not hesitate to contact us.

Very truly yours,

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