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

Re: FINRA Regulatory Notice 26-06

Dear Ms. Mitchell:

I write in response to FINRA's Regulatory Notice 26-06, dated March 2, 2026 ("RN 26-06"), a request for comment on modernizing FINRA arbitration rules, guidance and processes. I am a law professor at the Elisabeth Haub School of Law at Pace University ("Pace Law") and my scholarship has focused on, among other topics, the fairness of FINRA securities arbitration.[1]

For more than twenty-five years, I have commented on many FINRA (and NASD) rule proposals, typically on behalf of the interests of investors of modest means with small dollar claims against broker-dealers. Some of my comments were submitted in my individual capacity; others in my capacity as a Director of the Fairbridge Investor Rights Clinic of John Jay Legal Services, Inc. at Pace Law, formerly known as the Securities Arbitration Clinic ("Pace Law Clinic").[2] While I no longer serve as Director of the Pace Law Clinic and have no formal role in its operation, I do agree with the comments made in its May 1, 2026 letter submitted to FINRA in response to RN 26-06 (Pace Law Clinic May 1 Letter). I specifically incorporate by reference those comments in the relevant sections below.

Because FINRA arbitration is mandatory for virtually all customers of broker-dealers, FINRA's arbitration forum retains its legitimacy ONLY if it offers those customers the opportunity to achieve substantively and procedurally fair outcomes via an arbitration proceeding that enhances disputants' access to justice. To do so, the process must include all the characteristics of a fair process: a neutral decision-maker, notice of a hearing, a full and fair

[1] A complete list of my publications is available at https://www.pace.edu/profile/jill-i-gross?law. The opinions expressed here belong solely to me and do not necessarily reflect the views of Pace University.
[2] I was Co-Director or Director of the Pace Law Clinic from 1999-2015.

opportunity to be heard in a low-cost, efficient manner, the option to assert any claim, remedy, or procedure that would be available in court, the option to be represented, and a published and explained binding award.[3]

RN 26-06 appears to be FINRA's attempt to seek approval from industry players to diminish some aspects of the arbitration process that further goals of investor protection. In this letter, I respond to those aspects of RN 26-06 that suggest to me that FINRA is considering reducing customers' access to justice and fairness in the FINRA arbitration forum.

A. Forum Selection – Customer Disputes

Any attempt by FINRA to limit retail customers' access to its arbitration forum for any type of claim that could arise out of the business of their accounts would harm investors. Labels such as "complex," "large," or "institutional" are not easily defined, are often manufactured by broker-dealers, and are easily manipulable to sweep in far more investors than intended. Furthermore, retail investors are routinely placed into complex products, private placements, and structures like LLCs or trusts at the recommendation of their adviser. That does not make those customers sophisticated and certainly does not justify barring them from access to FINRA arbitration. The fact that the cost of FINRA arbitration is subsidized by the industry contributes to its fairness. If customers had to pay filing and arbitrator fees that are typical in other non-securities forums, they would be hard-pressed to vindicate their claims and would lose access to justice.

While sophisticated parties should, by agreement, be able to opt out of FINRA arbitration after a dispute has arisen, broker-dealer firms should not be able to force customers to give up their access pre-dispute to the FINRA forum—which is regulated and monitored by the SEC to ensure investors are protected in a manner consistent with the federal securities laws—for any claims they can assert currently.

B. Eligibility and Motions to Dismiss

FINRA should amend its eligibility rule to expressly permit claims that arise from transactions or wrongful conduct that occurred more than six years prior to the claim being filed if the customer can establish a reason for delay currently recognized by the courts, such as ongoing damages or concealment of the harm. There is no basis to deprive customers of arguments they otherwise would have available to them if they were able to file a claim in court. In particular, it would be patently unfair if a broker concealed misconduct which then caused the customer to lose the ability to pursue recourse in FINRA arbitration—which has rules designed to make it fair for investors.

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I oppose changing the timing of when motions may be filed under current Rule 12504. I also oppose expanding the circumstances under which a Respondent may file a motion to dismiss under Rule 12504. The current rule adequately balances customer protection and fairness considerations.

[3] *See* Jill I. Gross, *Arbitration Archetypes for Achieving Justice*, 88 FORDHAM L. REV. 2319, 2326-27 (2020).

C. Arbitrator Qualifications

While generally I oppose amendments to FINRA arbitrator qualifications that would limit customers' access to a diverse and competent pool, I support enhancing customers' access to an arbitrator pool with both substantive and process expertise. Therefore, I agree with the recommendation in the Pace Law Clinic May 1 Letter that FINRA should adopt enhanced requirements for Chairperson qualifications so that at least one panelist has subject matter expertise.

D. Arbitrator Classification and Selection

I believe the rules governing ranking and striking lists of eligible arbitrators should not be amended.

E. Arbitrator Training

I adopt and incorporate by reference the comments and recommendations on Arbitrator Training made in the Pace Law Clinic May 1 Letter.

F. Discovery

I adopt and incorporate by reference the comments and recommendations on Discovery made in the Pace Law Clinic May 1 Letter.

G. Hearing Oversight and Efficiency

G.1. – Yes, FINRA should establish a central contact point or support system to assist arbitrators with procedural questions during proceedings, but NOT to assist with evidentiary questions. Additional support could assist arbitrators to apply FINRA arbitration rules and protocols, but should not cross the line into usurping the arbitrators' authority to decide the merits of any dispute, which includes evidentiary rulings. In submitting to FINRA arbitration, the parties agreed to have an arbitrator decide their dispute; they did not agree to have the arbitral institution as a whole decide the dispute.

G.2. – FINRA should not implement more stringent case management requirements. The current requirements strike the proper balance between efficiency and the parties' ability to present their case.

G.3 – FINRA should not increase its direct oversight of arbitrators and arbitration proceedings to identify and address case management and other issues in real time. This change would lead to a high risk of the arbitral institution overstepping its authority and exercising powers not granted to them by the parties when they agreed to have an arbitrator resolve their dispute.

G.4. – I oppose any attempt to replace any aspect of the process with an Artificial Intelligence agent or decision-maker, as some other arbitral institutions have. While technology

generally can help increase the efficiency of arbitration, an AI arbitrator or bot should not participate in any way in hearing or resolving the merits of a dispute. Customers are entitled to having a human being hear and decide the merits.

H. Punitive Damages

I adopt and incorporate by reference the comments and recommendations regarding punitive damages made in the Pace Law Clinic May 1 Letter. I agree that FINRA should not limit the availability of punitive damages in its forum. I strongly oppose any effort to strip arbitrators' powers to award any remedy that would be available to customers under applicable law if they brought their claims in court. I also believe this would take away parties' legal rights, violate the law, and prevent customers from vindicating their statutory rights.

I. Explained Decisions in Awards

Twenty years ago, I co-authored a comment letter and a law journal article (with Professor Barbara Black) on the pros and cons of explained awards in FINRA arbitration.[4] In that article, we recognized that frequent forum users were divided on the desirability of explained decisions: while they increase transparency and arbitrator accountability, and possibly could lead to greater consistency and enhance the quality of arbitrator decision-making, they cost more, decrease the likelihood that equity will play a role in the award, impose legalistic-type analysis on arbitrators who are not necessarily lawyers, and risk leading to more appeals. Nevertheless, we argued that any attempt to enhance the transparency of the decision-making process by requiring arbitrators to explain awards would be beneficial to investors.

Soon after, FINRA adopted its Explained Award rule for both Customer and Industry arbitrations, Rules 12904(g) and 13904(g), respectively. Those rules require arbitrators to issue an Explained Decision—"a fact-based award stating the general reason(s) for the arbitrators' decision," but only if all parties jointly request one.

FINRA statistics show that very few customers have been able to take advantage of Rule 12904(g). Anecdotally, while customers want an Explained Decision, often the industry parties do not consent to one. Thus, I suggest that the rule should remain in place with one amendment. In order to provide an opportunity to customers to obtain a brief, explained award from the decision-makers, I support requiring arbitrators to issue an Explained Award, as currently defined by FINRA, if the customer requests one. Consent from all parties should not be needed; if a customer wants the arbitrator to issue an Explained Decision, the industry party should not be able to block the request by refusing consent. This will enhance customers' perception of fairness of the FINRA arbitration process.

[4] *See* Jill I. Gross and Barbara Black, *The Explained Award of Damocles: Protection or Peril in Securities Arbitration*, 34 SEC. REG. L. J. 17 (2006). Courts have long held that "arbitrators need not disclose the rationale for their award." *E.g.,* Fahnestock & Co. v. Waltman, 935 F.2d 512, 516 (2d Cir. 1991).

J. Arbitration Awards Online ("AAO")

Lawyers, customers and scholars all use AAO to help assess the effectiveness of the FINRA forum for particular kinds of claims, to spot trends in FINRA arbitration outcomes, and to learn about how arbitrators conduct cases. Any effort to reduce the availability of awards or to redact information contained within the award would inhibit these (and other) valid uses of AAO. As stated above, forum transparency is important for the legitimacy of the forum. Taking steps to reduce the forum's transparency will only lead to further distrust of FINRA.

K. Unpaid Awards

The problem of unpaid awards plagues the FINRA arbitration system and erodes the public's perception of the forum's legitimacy. In particular, FINRA's decision to return more than $150 million in surplus monies to member firms over the past few years rather than using that surplus to partially compensate customers who have obtained arbitration awards against insolvent or defunct member firms is a travesty of justice.

L. U5 Defamation Claims

No comment. This topic does not relate to customers' access to justice or investor rights.

M. General Request for Comment

1. FINRA should ban compensated NARs from its forum

I note that RN 26-06 does not mention FINRA's pending proposal to amend its rules regarding non-attorney representatives ("NARs"). Nevertheless, I urge FINRA to pursue SEC approval of its proposed amendment to its Codes of Arbitration Procedure to revise and restate the qualifications for representatives in arbitrations and mediations.[5] Specifically, I support FINRA's proposal to (1) ban compensated NARs from appearing on behalf of parties in FINRA DR, with limited exceptions for students in law school clinics; and (2) clarify existing rules as to "the circumstances in which any person, including attorneys, would be prohibited from representing parties in the DRS forum."[6]

2. FINRA Should Conduct Further Empirical Research

Twenty years ago, Professor Barbara Black and I conducted an empirical study of FINRA arbitration participants' views of various aspects of the process. That research, conducted through surveys of forum users, yielded important findings that were helpful to FINRA DRS' future direction and legitimacy. In particular, our findings regarding investors' perceptions of the

[5] *See* FINRA, Notice of Filing of a Proposed Rule Change to Amend the FINRA Codes of Arbitration Procedure and Code of Mediation Procedure To Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations, SEC Release No. 34-98703; SR-FINRA- 2023-013, 88 Fed. Reg. 71,051 (Oct. 6, 2023).

[6] *Id.* As of today's date, the proposal still awaits SEC final approval. For additional procedural developments with the proposal, see Jill Gross, *Follow-up to SEC's Stay of Rule Change Barring NARs in FINRA Arbitration*, Indisputably Blog, June 12, 2024, http://indisputably.org/2024/06/follow-up-to-secs-stay-of-rule-change-barring-nars-in-finra-arbitration/.

fairness of FINRA arbitration led to numerous rule changes to address some possible sources of these negative perceptions.[7] It is time for FINRA to conduct another survey of its users to assess whether any of the rule changes have helped, and whether customers now perceive the FINRA forum as more fair.

Finally, I urge FINRA to constitute a Task Force to study results from any new empirical research, to review all the comment letters received in response to RN 26-06, and thoughtfully and methodically debate future rule changes.

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For many years, I have argued in my scholarship that FINRA runs a fair arbitration forum.[8] I also have participated in the rule-making process by submitting comment letters on various rule proposals that impact retail customers in the arbitration process, or the substantive duties that brokers have to their customers. FINRA, and the SEC through its oversight, has been receptive to public comments, and has amended or adjusted rule proposals in response to certain public comments. I have been proud that a few of my suggestions or comments have made their way into FINRA arbitration rule changes, even if only for a minor revision.

In stark contrast, RN 26-06 suggests that FINRA wants to reduce the fairness of its forum, and strip investors of rights. That step would reverse decades of progress FINRA has made in improving the fairness of its forum, and in establishing FINRA as an arbitration forum offering an arbitration archetype that provides access to justice for customers of broker-dealers.

Please consider the comments in this letter and the many other comment letters you receive and do what you have done for many years: accept public feedback to improve the fairness and accessibility of your forum, not to reduce fairness.

Respectfully yours,

Jill Gross

Jill I. Gross

[7] *See* Jill I. Gross and Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349 (2008).

[8] *See, e.g.,* Jill I. Gross, *Arbitration Archetypes for Achieving Justice,* 88 FORDHAM L. REV. 2319, 2335-36 (2020) (arguing that FINRA arbitration is an arbitration archetype because it enhances access to justice); Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1194 (2010) (concluding FINRA arbitration is a fair process).