

April 29, 2026

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

**Submitted VIA FINRA portal**

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

Dear Ms. Mitchell,

PKS is appreciative of the opportunity to respond to the Request for Comment outlined in Regulatory Notice 26-06, published March 2, 2026. Although we support FINRA arbitration for resolution of most disputes, we believe that the current FINRA Arbitration Codes are in need of clarification and, in some cases revision, and we submit the following comments for your consideration.

Relevant to our position that FINRA arbitration inures to the benefit of the industry generally, and the investing public specifically, and before beginning, we take issue with commenters that maintain that the arbitration process favors the industry to the detriment of public customers. This is epitomized by the recent comment by an industry bar association stating that, although the “industry already prevails in over 70% of the final arbitration proceedings, FINRA appears to be more interested in granting the industry’s wish lists for industry protection to make the FINRA arbitration forum even more unfair for investors.”<sup>1</sup>

This and similar comments are not supported by the data. FINRA’s most recent published statistics <sup>2</sup> state the following:

---

<sup>1</sup> AdvisorHub, [Lawmakers Question FINRA’s Authority as Investor Group Warns of Arbitration Changes](https://www.advisorhub.com/lawmakers-question-finras-authority-as-investor-group-warns-of-arbitration-changes/), March 6, 2026; <https://www.advisorhub.com/lawmakers-question-finras-authority-as-investor-group-warns-of-arbitration-changes/>.

<sup>2</sup> As cited in FINRA Regulatory Notice 26-06, P. 6.

- In 2025 there were 10,393 arbitration cases closed for Public Customers; 8776 were resolved.
- 13% (1,393) were closed by award and 71% (7,385) were settled prior to hearing; the other 16% were dropped.<sup>3</sup>
- Of the 1,391 cases that went to hearing, 734 closed by award, where the customers were awarded damages in 43% (313) of the cases.

To summarize, of the 8,776 resolved cases,<sup>4</sup> Claimants agreed to settlement or received an award in 95.2% of the cases; only in 421 (4.8%) cases were the claimants denied restitution of any kind. That hardly seems biased toward the industry.

Based on these metrics, any assertion that FINRA arbitration favors Member Firms over public customers has no merit. The fact that the vast majority of asserted arbitration claims are settled, at an amount agreeable to the Claimants, supports this. It is an established fact that Member Firms routinely will settle any case where the Firm identifies significant arbitral risk. Settlement provides appropriate and agreed-upon resolution for clients, avoids uncertainty for all parties, and avoids legal and forum costs. Member Firms typically only go to hearing when they have a very strong case, and in those cases the claimants still win approximately 43% of the time.

Numbers don't lie. No credible claim can be made to suggest that the arbitration process unfairly favors the industry when public customers receive either an award or a satisfactory settlement 95.2% of the time.

**Our specific Comments are listed in the Sections below:**

**Punitive damages:**

Punitive damages are intended to punish a party for its conduct or deter a party (and others) from wrongfully acting in the future. Punitive damages are currently permitted in FINRA arbitration in accordance with the US Supreme Court decision in *Mastrobuono v Shearson Lehman Hutton, Inc.*<sup>5</sup> Although *Mastrobuono* interpreted NASD (now FINRA) rules and guidance to permit the imposition of punitive damages by arbitrators, it is noteworthy that the Court's decision in *Mastrobuono* does not require punitive damages to be permitted under the FINRA Arbitration codes.<sup>6</sup>

---

<sup>3</sup> No reason cited.

<sup>4</sup> Differs from 10,393 cases closed as some were simply dropped.

<sup>5</sup> 514 U.S. 52 (1995).

<sup>6</sup> *Mastrobuono* held that the Federal Arbitration Act ("FAA") ensures that private arbitration agreements are enforced "according to their terms," and that the FAA preempts *Garrity* where the agreement to arbitrate permits punitive damages. The Court noted that FINRA rules placed no limit on the relief that could be awarded and FINRA arbitrator guidance permitting punitive damages and that the private arbitration

Prior to Mastrobuono, the NASD had noted concerns regarding punitive damages in arbitration. In November of 1992, the NASD established the Subcommittee on Punitive Damages of the NASD Legal Advisory Board, which issued its Report (the "Report") for comment on July 1, 1994.<sup>7</sup> At that time, the Board of Governors stated it "believes the report, which is thoughtful and well researched, provides a useful framework for discussing this controversial area."<sup>8</sup>

"Section III(D) of the Report noted numerous issues arising out of punitive arbitration awards, citing, among the most prominent, the reasoning set forth in the New York case, *Garrity v. Lyle Stuart, Inc.*,<sup>9</sup> barring punitive damages in New York State because punitive damages are 'a sanction reserved to the State,' and of such import that the State courts are the only forum authorized to award them. Allowing punitive damages as a private remedy (through private arbitration) "would violate strong public policy."

Seemingly based on the *Garrity* case, the Report made a number of recommendations, including instituting a right to appeal punitive damages, instituting caps on punitive damages and requiring that the NASD establish a system for referring arbitration cases to an enforcement body as an alternative to awarding punitive damages. Subsequent to the issuance of the Report, the Board approved an NAC recommendation to amend Section 5 of the Code of Arbitration Procedure so as to reinforce arbitrators' inherent authority to initiate disciplinary referrals."<sup>10</sup>

The Report noted that, "the Securities Exchange Act of 1934 (the "Act"), the principal federal statute relied upon in most securities litigation, expressly prohibits the award of punitive damages."<sup>11</sup> Footnote 12 of the Report reiterates this fact and quotes the Act as follows: "Section 28(a) of the 1934 Act expressly states that "no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of."<sup>12</sup>

"Law reform advocates, in a potpourri of recent law journal articles,<sup>13</sup> as well as business defendants in a troika of Supreme Court cases commencing in 1989, have observed that 'punitive

---

agreement between the parties was ambiguous and thus insufficient to evidence intent to preclude punitive damages.

<sup>7</sup> Notice to Members 94-54. <https://www.finra.org/rules-guidance/notices/94-54>.

<sup>8</sup> Notice to Members 94-54.

<sup>9</sup> 40 N.Y.2d 354, 356 (1976).

<sup>10</sup> FINRA Notice to Members 94-54.

<sup>11</sup> The Report, Section B. The Murky Law of Punitive Damages in Securities Arbitration.

<sup>12</sup> Subcommittee on Punitive Damages to the NASD Legal Advisory Board, 1994. Also see The Securities Exchange Act, Section 28. See also, 5D Arnold S. Jacobs, *Litigation and Practice Under Rule 10b-5*, Â§ 260.03[e] (2d ed. 1986); *Green v. Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (rejecting argument that punitives were available for an implied cause of action under Rule 10b-5).

<sup>13</sup> See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (1990); Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 of Punitive Damages, 40 Ala. L. Rev. 705 (1989); see also, John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269 (1983).

damages punish defendants without employing the procedural safeguards of criminal law, thereby blurring the distinction between public and private law,' and that 'punitive damages raise due process concerns because the awards are irrational and unpredictable.' " 14 15

One year after the Subcommittee's Report, the U.S. Supreme court issued the Mastrobuono ruling. Arguably, it was immaterial to the Court's ruling at the time, or unknown to the Court, that the Subcommittee had proffered alternative methodologies to replace punitive damages.

Notably, there is no specific reference to punitive damages within FINRA's Code of Arbitration. However, FINRA rules have been found to permit punitive damages in FINRA arbitration.<sup>16</sup> FINRA guidance allows arbitrators to impose punitive damages "17. Both the Code and this guidance require amendment. Consistent with the reasoning of the New York Court of Appeals in both Garity and the Report, PKS submits that the imposition of punishment is not properly a function of private dispute resolution and belongs in the courts or within FINRA's disciplinary schematic, as discussed below.

If the goal of punitive damages is deterrence and/or punishment, FINRA has in-place the mechanisms to impose fines, order disgorgement, and enforce sanctions through its disciplinary hearings process. We submit that most arbitration panels, as currently composed, lack the requisite training and/or qualifications to determine the appropriateness of punitive damages and are likely to be swayed by claimants' arguments that might distort facts and circumstances to achieve unjust enrichment.

The recent punitive damages award against Stiefel, Nicolaus & Co. highlights the point.<sup>18</sup> Claimants sought "at-least \$5 Million Dollars" in damages. According to Stiefel's Federal Court Motion to Vacate, the net out of pocket loss was \$16.3MM. However, the arbitration panel awarded the claimants compensatory damages of \$26.5MM, punitive damages of \$79.5MM and attorney fees of 25% of punitive and compensatory damages, for a total of \$132MM. An examination of the available facts renders it evident that the award in general is problematic.<sup>19</sup> Without addressing other issues in the case, we submit that the \$79.5MM punitive damages award was excessive and would prove existential to almost all FINRA Member firms, forcing them into net-capital violations and subsequent closure. An arbitration panel should not be

---

<sup>14</sup> The Report. Pepp. L. Rev. 907 (1990); Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269 (1993); Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform – State Legislatures Can and Should Meet the Challenge Issued by The Supreme Court of The United States in Haslip, 42 Am. U. L. Rev. 1365 (1993); Victor E. Schwartz & Liberty Magadan, Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy, 28 Am. Bus. L. J. 485 (1990); David G. Owen, The Moral Foundations

<sup>15</sup> Foreword. Symposium On Civil Justice Reform, 42 Am. U. L. Rev. 1245, at 1250 (1993).

<sup>16</sup> Mastrobuono, Id.

<sup>17</sup> FINRA Dispute Resolution Arbitrators Guide, 2026, P. 70.

<https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

<sup>18</sup> Janetti et al vs Stifel, Nicolaus & Co., Inc.; [https://www.finra.org/sites/default/files/aa0\\_documents/23-01342.pdf](https://www.finra.org/sites/default/files/aa0_documents/23-01342.pdf).

<sup>19</sup> See Respondents Motion to Vacate Arbitration Award, Case No. 1:25-cv-21176-DPG, US District Court, SD Florida, [https://www.finra.org/sites/default/files/aa0\\_documents/23-01342%283%29.pdf](https://www.finra.org/sites/default/files/aa0_documents/23-01342%283%29.pdf).

granted the authority to punish a firm, regardless of the panel's viewpoint on the issues giving rise to the arbitration. Those decisions belong to the Courts or possibly in the FINRA Disciplinary Process, which also allows for appeals to the National Adjudicatory Council and the Securities and Exchange Commission, ensuring that violations of securities laws and FINRA rules are addressed appropriately, while maintaining the integrity of the securities industry and protecting investors.

The fact that the Federal District Court upheld the punitive damages award against Steifel highlights the fact that courts are reluctant to overturn arbitration awards. In his decision, the Federal judge noted the substantial deference that courts give to arbitrators and the very narrow grounds that Courts have to intercede under federal law.<sup>20</sup>

The fact that the courts are reluctant to overrule arbitration-awarded punitive damages so egregiously disproportionate (read: \$132MM on a \$16.5MM NOP) to the harm is a clear sign that something needs to change.

"It is impossible to vacate even an obviously unreasonable arbitration award."<sup>21</sup> Currently, no effective mechanism or guidelines exist that can prevent arbitration panels from unconscionable decisions that would never hold up in a court of law. It is FINRA that must act to restrict abuses of arbitrators' power. As regards the arbitration process itself, it is axiomatic that consent by both parties (read: member firm and claimant) are vital to the agreement to arbitrate.

Fundamental to any arbitration agreement is that consent must be "freely given." Member Firms have no choice in the matter; FINRA rules mandate arbitration and a Firm must be a FINRA Member to transact business.<sup>22</sup> It can certainly be argued that Firms do not have freedom-of-choice when Member Firms must submit to dispute resolution forums where arbitrators are empowered to award punitive damages at their unchecked discretion. This lack of true consent to imposition of punitive damages raises due process concerns, as noted in the Report.

In light of the Supreme Court decisions in Haslip and TXQ, and their progeny in federal and state courts, an award of punitive damages in securities arbitration triggers application of the due process guarantees of the United States Constitution. These guarantees are costly and difficult to administer, and their application is reason enough to severely limit punitive damages in this forum. The Fourteenth Amendment applies when the state deprives "any person of life, liberty, or property, without due process of law ..." Thus, in order for due process protections to apply, there must be so-called state action. State action must go beyond mere acquiescence of private action in a state or federal statute; there

---

<sup>20</sup> Jannetti v Stifel, Nicolaus & Co., Inc., (SD Florida); <https://docs.justia.com/cases/federal/district-courts/florida/flsdce/1:2025cv21176/685685/61/>.

<sup>21</sup> SIFMA Letter to Robert Colby, EVP, and Chief Legal Officer at FINRA, July 11, 2025.

<sup>22</sup> See quote in below paragraph from the Report.

must be "something more" than that. The award of punitive damages in arbitration is state action that meets the "something more" test for at least two reasons: imposing punitive damages is a public function, and the government compels membership in an SRO.

Moreover, Congress intended that self-regulatory organizations, in another context, provide due process protections. In Section 15A of the Securities Exchange Act of 1934, Congress set forth elaborate procedural protections, to be provided by the SRO, for persons who are denied membership in the SRO and for members who are disciplined by it. Although disciplinary proceedings brought by an SRO are a different context than arbitration, the analogy makes it clear that Congress did not intend the SRO's to be immune from providing due process guarantees *[footnotes omitted]*.<sup>23</sup>

The analysis of the Subcommittee, as clearly stated in the Report and judged by the Board of Governors as "thoughtful and well researched," cannot be ignored. Arbitration exists to resolve disputes,<sup>24</sup> not to punish one side or the other. The imposition of punitive damages must comply due process of requirements and therefore should be reserved to the regulators and the courts, as a matter of Public Policy.

Based on the foregoing, we respectfully request that FINRA amend the customer and industry arbitration codes to prohibit the imposition of punitive damages awards.

#### **Eligibility and Motions to Dismiss:**

FINRA Rules 12206 and 13206 ("the Eligibility Rule") provide that a claim "...is not eligible for submission to arbitration where six years have elapsed from the occurrence or event giving rise to the claim." These are presumably black-letter Rules.

However, the Eligibility Rule is broken, largely as a result of the U.S. Supreme Court ruling permitting "arbitrators ...to interpret and determine the applicability" of all code provisions.<sup>25</sup>

Arbitration panels have used discretion, for example, to extend liability beyond six years after the purchase of the securities or products at issue, under such theories as, "a claim does not begin to accrue until a customer suffers damages."<sup>26</sup> In many cases aged beyond six years, panels have adopted a claimant assertion that that a "hold" recommendation is implicitly in-place, resetting the eligibility timeline, contrary to FINRA Rule 2111 defining "the phrase 'investment strategy' ... [to] include, among other things, **an explicit (emphasis added)** recommendation to

---

<sup>23</sup> The Report. Section II.A.1.

<sup>24</sup> As a point of fact, FINRA manages arbitrations through its "Dispute Resolution Services" department.

<sup>25</sup> *Howsan v Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

<sup>26</sup> Notice 26-06 P. 14 pp1.

hold a security or securities.”<sup>27</sup> Panels have also used alleged “hold” recommendations to extend eligibility in cases involving illiquid securities, where a hold recommendation, if actually made, would be meaningless given that no market existed for the securities.

The solution is clear. Rule 12206 should be amended to make it clear that the Eligibility Rule is a statute of repose. The rule should clearly state that any claims related to investments made over six years from the date of the filing of the claim are ineligible. Rule 13206 should be similarly amended.

The creation of a clear eligibility rule does not restrict other options for litigants for whom a clear tolling rationale exists. Litigants who are ineligible for arbitration continue to have the courts to redress grievances in situations where tolling of applicable statutes of limitation are appropriate.<sup>28</sup>

### **Arbitrator Panels:**

Parties are entitled to competent arbitrators. PKS believes that the Code should be amended to encourage competent persons to become arbitrators, and to promote a more judicial process.

The first measure that should be considered is arbitrator compensation. PKS submits that arbitrators currently are underpaid, at \$300 per hearing session/day. On an annual basis, this computes to a base compensation of \$84,000 per year. In contrast, under its Consumer Arbitration rules, arbitrators for the American Arbitration Association are paid \$300.00 per hour and are paid by the business unless otherwise agreed.<sup>29</sup> PKS submits that the inadequacy of the FINRA arbitrator pay scale has led to a degradation of the arbitrator pool generally. PKS believes that FINRA members will be willing to pay more for competent arbitrators, and urges FINRA to increase compensation for arbitrators, for conferences, motions, deliberation time, and hearing days, even if forum cost shifting from investors to firms is involved in this process.

As an ancillary matter, PKS asserts that due process principles require that arbitrations should generally be held in person before the arbitration panel. During the covid pandemic, remote hearings became commonplace through necessity. While this was reasonable during the pandemic, it should not become the norm. While PKS has no objection to the remote testimony of non-party witnesses, PKS submits that an arbitration panel should not be permitted to impose remote arbitration in the absence of the consent of all parties.

Finally, PKS asserts that non-public arbitrators should be eligible for three-person arbitration panels and should not be subject to unilateral exclusion by investor parties.

---

<sup>27</sup> FINRA Rule 2111, see .03 Recommended Strategies.

<sup>28</sup> As currently provided in FINRA Rule 12206(b).

<sup>29</sup> [https://www.adr.org/media/3uofn4lu/consumer\\_rules\\_and\\_mediation\\_procedures\\_feeschedule.pdf](https://www.adr.org/media/3uofn4lu/consumer_rules_and_mediation_procedures_feeschedule.pdf).

“FINRA maintains three rosters of arbitrators: public arbitrators, non-public arbitrators and arbitrators who are eligible to serve as chairperson of a panel. *In general, a non-public arbitrator is a person who is otherwise qualified to serve as an arbitrator and is disqualified from services as a public arbitrator due to their current or previous association with the financial industry” (Emphasis added).*<sup>30</sup>

It has been suggested that “FINRA believes that this disqualification of non-public arbitrators and other changes to the definitions of public and non-public arbitrators... address both investor and industry concerns about perceived bias and arbitrator neutrality.”<sup>31</sup> PKS applauds any effort to maintain neutrality and confidence in the arbitration system. These actions, however, have had the opposite effect, in that they effectively bar industry professionals as serving as arbitration panelists.

Public arbitrators and chair-eligible panelists alike often lack comprehensive knowledge of the broker-dealer industry and the services and products provided by FINRA Member firms.<sup>32</sup> It is submitted that arbitration panel deliberations could benefit from at least one member having a comprehensive understanding of these matters. FINRA understands this and, on paper, allows for former industry professionals to sit on arbitration panels, albeit as “non-public” arbitrators.

There is a serious problem with the arbitrator selection process, however, in that the process is illusory, effectively allowing any party to eliminate every non-public arbitrator.<sup>33</sup>

Highlighting this problem:

- FINRA lists 10 public arbitrators from the Chairperson List; four of whom may be struck from consideration by each party.
- FINRA lists 15 arbitrators from the Public List, six of whom may be struck from consideration by each party.
- FINRA lists 10 arbitrators from the Non-Public List, **all of whom may be struck from consideration by either party (Emphasis added).**

“By striking all the arbitrators from the non-public list, any party may ensure that the panel will have three public arbitrators.”<sup>34</sup> PKS is unsure why such assurance is needed, as at least two of the panelists, including the Chairperson, will be public, and only two panelists are needed for a

---

<sup>30</sup> FINRA Regulatory Notice 26-06 P. 17 pp 5.

<sup>31</sup> See [Proskauer >> Corporate Defense and Disputes](https://www.corporatedefensedisputes.com/2015/03/sec-approval-of-new-finra-public-arbitrator-rule-imposes-new-limits-on-the-pool-of-potential-public-arbitrators/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+CorporateDefenseAndDisputes+%28Corporate+Defense+and+Disputes%29), March 16, 2015.

[https://www.corporatedefensedisputes.com/2015/03/sec-approval-of-new-finra-public-arbitrator-rule-imposes-new-limits-on-the-pool-of-potential-public-arbitrators/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+CorporateDefenseAndDisputes+%28Corporate+Defense+and+Disputes%29](https://www.corporatedefensedisputes.com/2015/03/sec-approval-of-new-finra-public-arbitrator-rule-imposes-new-limits-on-the-pool-of-potential-public-arbitrators/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+CorporateDefenseAndDisputes+%28Corporate+Defense+and+Disputes%29).

<sup>32</sup> See “Forum Selection (above) and Notice to Members 94-54.

<sup>33</sup> For three person panels.

<sup>34</sup> FINRA Regulatory Notice 26-06 P. 18 pp3.

majority. That said, such assurance also ensures that the other party is denied the ability to have a non-public arbitrator on the panel; this is patently unfair.

It should be self-evident that claimants' attorneys wish to pick less sophisticated panelists, who would be less likely to understand legal norms and industry practices and more likely to be influenced by emotion and empathy. We have personal knowledge of non-public arbitrators that have never been selected; it is logical to assume that one party (most likely claimants) has struck all non-public panelists.

The designation of current and former industry professionals as "non-public" arbitrators, as highlighted in Proskauer, to address both investor and industry concerns about perceived bias and arbitrator neutrality, suggests that FINRA lacks confidence in the integrity of its licensed registered persons. Any such lack of faith is unwarranted. That said, allowing one party to strike all industry professionals from a panel definitely creates the perception, from an industry perspective, that the process favors claimants over the rights of Member Firms.

FINRA Rules 12407 and 13410 provide, in relevant part, that "the Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. **The interest or bias must be definite and capable of reasonable demonstration, rather than remote or speculative**"<sup>35</sup> (Emphasis added).

Allowing a party to strike all industry professionals from a three-person arbitration panel assumes that all current and former industry professionals lack impartiality and/or are otherwise biased. However, as in this matter, where there is no showing of "definite and reasonable demonstration" of bias or indirect interest in the outcome, such process flies in the face of black-letter Rules 12407 and 13410.

Personally, I would have no problem ruling against another firm or Registered Representative if I believe that a client was wronged. Again, I consider "bad actors" as a stain on our profession and believe they should be accountable to both clients and the regulators. I believe that my feelings are shared by the overwhelming majority of industry professionals.

Courts generally apply a high bar for vacatur of arbitration awards on bias grounds, requiring a "reasonable impression" of impartiality or "evident bias."<sup>36</sup> No reasonable impression of bias or impartiality can exist for industry professionals as a group.

One commenter noted that, by excluding industry-associated persons, the 2015 rule change and other similar changes would "limit the number of public arbitrators. FINRA's rationale for limiting the definition of public arbitrator is concern about the perception that an arbitrator's

---

<sup>35</sup> FINRA Rule 12407(a)(1); see also Rule 13410(a).

<sup>36</sup> *Schmitz v Zilveti*, 20 F.3d 1043; *Allied Industrial Materials Corp v Ovalar Makine Ticaret Ve Sanayi, AS*, 492 F.3d 132.

prior affiliation with the financial industry could affect that arbitrator's neutrality.”<sup>37</sup> This redefinition of industry professionals to eliminate allegations of “industry bias,” has been extreme by allowing claimants to strike all non-public arbitrators from the list and proceed with an all-public panel. It is noteworthy that potential arbitrators must disclose their accounts held at FINRA Member firms, and most arbitrators list several such relationships. There seems to be no consideration of whether-or-not these individuals might have bias against the industry, such as having lost money on an investment, that would be prejudicial; numerous arbitration rulings have been overturned in the courts because of arbitrator bias.<sup>38</sup> While a party does have the right to strike potential public arbitrators for bias, the number of strikes permitted by FINRA is limited to forty percent of choices. In contrast, a party has no limit for strikes of non-public arbitrators, notwithstanding the absence of any indication of bias other than the “remote and speculative” assumption that their current-or-former profession renders them biased against claimants.

The effective elimination of industry arbitrators has damaged the arbitration process by, among other things, running the risk that panels will be susceptible to distortion or misrepresentation of the nature of the products at issue. Allowing the involvement of former industry professionals that are capable of informed assessment of these matters would assist panels in reaching well-reasoned decisions.

We have seen arguments proffered that industry panelists are not necessary because expert witnesses can explain complicated issues to public arbitrators. Such a position ignores the fact that expert witnesses are typically “guns for hire” for both claimants and respondents. They are paid by one side or the other to advocate a position, and it is common for experts to disagree on fundamental points, leaving the panel to judge the correct position. We submit that offering expert testimony actually increases the need for at-least one panelist to be industry qualified to assist the panel in its internal deliberations.

In an ancillary matter, arguments have been proffered that a Respondent should not have the right to strike a panelist that had previously ruled on an adverse judgement against the Respondent. In Congressional committee hearings, some commentators criticized FINRA for granting requests by brokerage firms to remove arbitrators who previously ruled against them, claiming that this practice constituted “...a drastic change to the equality of the arbitrator ranking process and allows brokerage firms to remove arbitrators from the pool in a given case without having to use one of their pre-emptory strikes available for each case.”<sup>39</sup>

---

<sup>37</sup> [SEC Approved FINRA Public Arbitrator Rule | Burr & Forman LLP](https://www.burr.com/securities-litigation/sec-approved-finra-public-arbitrator-rule#_ftn1), 2015. [https://www.burr.com/securities-litigation/sec-approved-finra-public-arbitrator-rule#\\_ftn1](https://www.burr.com/securities-litigation/sec-approved-finra-public-arbitrator-rule#_ftn1).

<sup>38</sup> See *FCM Investments LLC v. Grove Pham, LLC*, <https://caselaw.findlaw.com/court/ca-court-of-appeal/115300544.html>. See also *Bassam Simah Chelico v. T.J. Gearys*; [https://storage.courtlistener.com/pdf/2026/01/14/chelico\\_v.\\_tjb\\_gearys\\_ca27.pdf](https://storage.courtlistener.com/pdf/2026/01/14/chelico_v._tjb_gearys_ca27.pdf). see also *Monster Energy v. City Beverages*, 940 F.3d 1130, cert. den. 141 S. Ct. 164.

<sup>39</sup> AdvisorHub, [Lawmakers Question FINRA's Authority as Investor Group Warns of Arbitration Changes](#), March 6, 2026, *Id.*

PKS disagrees with these comments. An arbitration panelist who had previously ruled against a member firm would, of necessity, formed prior (likely negative) opinions regarding the firm. This is the very definition of bias. If the situation were reversed, it strains credibility to believe that a claimant's counsel would be comfortable with a panelist who had previously ruled in favor of the specific brokerage firm involved in the client's arbitration. Further, there are hundreds of available arbitrators that can be chosen with no previous knowledge of either party, thus ensuring an unbiased judgement.

Staff states, "although previous legal experience is not required to serve as an arbitrator, FINRA has focused on recruiting more attorneys to serve as arbitrators."<sup>40</sup> While PKS is in favor of adding more attorneys to sit on panels, we submit that an industry professional, with comprehensive training and experience in the products, advice and services at-issue, is equally qualified to assess and judge the merits of an industry dispute.

To summarize our position, if FINRA is to continue to designate industry professionals as non-public arbitrators, no party should be allowed to strike *every single one of the available choices*. Allowed strikes of industry arbitrators should be in the exact same proportions to the allowed strikes for Chairpersons and Public Arbitrators, that being forty percent. We submit that fairness is best served where all Panels consist of two Public Arbitrators (attorneys if possible and at least one as the Chair) together with one non-public arbitrator.

#### **Explained decisions in Awards:**

We believe that Parties have a right to understand adverse awards by arbitration panels. Joint requests should not be necessary; any party should be able to request an explained decision. The Report provides a rationale in the context of punitive damages.

The NAC has recommended that all awards of punitive damages articulate the legal standard applied in determining to award such damages, as well as the facts that the arbitrators found to constitute a basis for the award. The NAC believes that requiring such articulation will, among other things, alert members of the securities industry to the types of conduct that can lead to punitive damages and thereby deter similar conduct in the future. Thus, the views of the NAC are generally consistent with those set forth in Section III(A) of the Report.<sup>41</sup>

Notwithstanding our noted objections to punitive damages awards in FINRA arbitrations, we believe this logic is equally applicable to awards in general. Explained awards would better assist FINRA in understanding the effectiveness of their training and selection process and provide internal accountability for cases where arbitrators exceed their powers.

---

<sup>40</sup> Notice 26-06 P. 16 pp 4.

<sup>41</sup> The Report, under heading "NAC Action."

Member Firms would benefit from such explanations, as these would likely provide a roadmap to avoid pitfalls going-forward, as well as provide a better understanding of the consequences of problematic behavior.

Fundamental fairness dictates that no party should lose a case, with the resultant costs and emotions associated with such a decision, without understanding why.

### **Complex Cases:**

While there is no accepted definition of the term “complex” when referring to the construction of an investment portfolio or product, it is clear that many large cases involve complicated issues requiring arbitrators to have a high degree of sophistication. Permitting an opt-out in these cases makes sense, and PKS believes that FINRA should define what constitutes a “complex” case and allow for alternate forums.

Due process concerns increase with the size and complexity of any case. For example, in FINRA arbitration, parties are limited in pre-hearing discovery. While this works in smaller cases, FINRA discovery mechanisms are insufficient for the protection of the rights of parties in large cases. Additionally, the lack of meaningful appellate review is not acceptable in complex cases, where the impact is much greater than in other cases. Disputes involving complex cases require certain expertise to assess. FINRA arbitration panels are often not qualified to manage complex cases. However, Federal judges are skilled in the management of complex commercial cases.

PKS recommends that FINRA’s definition of a complex case includes:

First, any case where damages are alleged of Five Million Dollars or more. It is highly likely that such a claim would arise from an overall portfolio much larger than the damages claim. These clients are more risk-tolerant and are suitable for products that would not be appropriate for smaller investors, and overall portfolio construction for such clients requires advanced understanding of the ultra high-net worth marketplace.

The SEC has established Rules for designating a class of investors, specifically Qualified Purchasers, that employs net worth to assess both client sophistication and suitability.

The designation of Qualified Purchaser (QP) is a significantly higher threshold, defined under Section 2(a)(51) of the Investment Company Act of 1940. This status is necessary to invest in private funds that rely on the Section 3(c)(7) exemption. The QP definition focuses on the total value of “investments owned,” a narrower metric than the net worth calculation used for Accredited Investor status. For an individual, the standard for Qualified Purchaser status is \$5 million or more in investments. This threshold applies to the individual alone or jointly with a spouse, excluding the value of a primary residence

and any property used in a business. “Investments” includes securities, real estate held for investment purposes, and cash equivalents held for investment.<sup>42</sup>

When drafting these Rules, the SEC clearly recognized that higher net-worth clients<sup>43</sup> had the sophistication and risk-tolerance to assess and participate in more complicated and risky investments. PKS submits that its recommended threshold of \$5MM to seek alternate forums for dispute resolution is reliant on the SEC’s own analysis and published Rule that is enforced by FINRA.

Second, certain products are too complicated for the average Public Arbitrator to understand. Modern Portfolio Theory and use of non-correlated asset classes, for example, are high-level concepts requiring a high level of sophistication. The use of commodities, structured notes, hedging strategies involving futures and options, DSTs, tax-advantaged oil and gas investments, REITS and endowment modeling, to name just a few, should be eligible for consideration as a “complex” case.

Finally, we propose that cases involving institutional investors, as defined in Rule 2210(a)(4), should be excluded from mandatory FINRA arbitration.

**Definition of Customer:**

Although not a subject of the Request for Comment in Notice 26-06, we submit that FINRA should redefine its definition of “Customer” for purposes of standing to file an arbitration claim against a FINRA member.

FINRA Rule 12200 requires “Parties” to arbitrate disputes that are “requested by a customer” where “the dispute is between a customer and a member or associated person of a member” and the dispute arises in connection with the business activities of the member and the associated person...”

FINRA Rule 12100(k) defines a “customer” in the negative, stating that “[a] customer shall not include a broker or dealer.”

As a result of this vague language, Member Firms have too often been forced to arbitrate claims from members of the public that had no accounts with the Firm, or the Firm did not provide execution or advice on the matter<sup>44</sup> and further did not receive compensation in connection with the matter.

PKS submits that, as arbitration is contractual in nature, the contract language should be clear. PKS further submits that a non-customer of a member firm should be ineligible to arbitrate against arbitration against that Firm, notwithstanding that such prospective claimant may be a customer of

---

<sup>42</sup> 15 U.S.C. § 80a-2(a)(51). FINRA enforces this Rule.

<sup>43</sup> The Rule actually only requires an “investable net worth” of \$5MM; PKS’ recommendation is \$5MM in damages, a “narrower metric calculation” than Accredited Investors, as stated above.

<sup>44</sup> Whether the matter involved a trade order or advisory services.

an associated person of the firm regarding an unrelated activity. To accomplish this objective, PKS believes that FINRA should amend Rule 12100(k) to, (1) provide for separate definitions of customer for firms and associated persons; (2) with respect to member firms, harmonize the definition of customer with that which already exists in FINRA Rule 4530, as "...any person, other than a broker or dealer, with whom the member has engaged, or has sought to engage, in securities activities;" and, (3) prohibit arbitration claims against member firms that are not related to transactions through the firm.

**Confidentiality:**

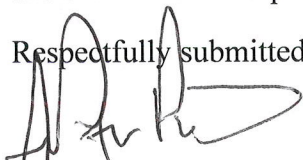
All arbitration panelists and parties, including their counsel, should be subject to stringent non-disclosure agreements. In particular, law firms that represent either claimants or respondents to a claim should not be able to share information that they have acquired during an arbitration with others.

**Closing:**

As stated above, PKS appreciates the opportunity to proffer suggestions that we believe would modernize FINRA arbitration. PKS believes that FINRA arbitration forums exist to address inappropriate behavior and actions that, in our opinion, damage the business climate and reputations of firms that legitimately act in the best interests of their clients.

Our comments are intended to reflect our sincere desire to achieve a process that not only protects the rights of public investors but provides a fair process for investors, Member Firms, and their associated persons.

Respectfully submitted,



J. Peter Purcell  
CEO