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**By Email Only to pubcom@finra.org**

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

***Re:*** ***Comment On FINRA Regulatory Notice 26-06 – Modernizing FINRA Arbitration Rules, Guidance and Process***

Dear Ms. Mitchell:

Since 1988 I have been representing investors in FINRA (formerly NASD) arbitrations against FINRA member broker-dealers ("BDs"). For the past 25 or so years I also have represented registered representatives ("RRs") in employment disputes against their employer BDs. My experience over these decades is that for many reasons investors and RRs have always had an uphill battle in securing justice from FINRA arbitration panels, including that their cases are arbitrated before jaded professional arbitrators whose livelihoods are dependent upon not rocking the boat and that the arbitration rules clearly favor BDs. Is it no wonder then that virtually every single one of the BDs on the planet forces their customers and employee RRs to give up their constitutional rights to trial by jury and instead requires their customers and employee RRs to sign agreements compelling FINRA arbitration of their disputes.

Thus, it is with much fear and sadness that I see that the BDs are now proposing yet additional rules to further put their customers and employee RRs behind the proverbial eight ball in FINRA arbitrations. Accordingly, for the reasons set forth below, I oppose most of the proposed changes.

**Preliminary Comment re Part I.E (The Federal Arbitration Act)**

Before addressing the proposed rule changes, I believe it is necessary to address what appears to be FINRA's fundamental misunderstanding of the law. In Part I.E it states as follows: "Overlaying FINRA's arbitration forum and rules is the FAA. This law establishes a liberal federal policy favoring arbitration agreements." FINRA appears to be implying by that statement that the law favors arbitration over litigation. But FINRA's statement and its implication are directly at odds with the recent pronouncement of the Supreme Court on the subject of arbitration.

Specifically, in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), the Supreme Court, in a unanimous opinion, stated as follows at pages 418-19 (boldfacing added):

> But the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Moses H. Cone*, 460 U.S. at 24, 103 S.Ct. 927. Our frequent use of that phrase connotes something different. **"Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."** *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (internal quotation marks omitted). Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Accordingly**,** a court must hold a party to its arbitration contract just as the court would to any other kind. **But a court may not devise novel rules to favor arbitration over litigation.** See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. **The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.** See *ibid.*; *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (C.A.D.C. 1987) ("The Supreme Court has made clear" that the FAA's policy "is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism").

As can be seen, the Supreme Court has made clear that there is no "liberal federal policy ***favoring*** arbitration agreements." Instead, the policy adopted by the FAA, as elucidated by the Supreme Court, is to be agnostic on the subject of arbitration, but instead merely to require that arbitration agreements be enforced to the same extent as are any other agreements.

## COMMENTS CONCERNING CUSTOMER DISPUTES

### Forum Selection/Customer Disputes (Requests for Comment A(i))

Proposals to differentiate procedural requirements or even allow FINRA member firms to select alternative arbitration forums to FINRA based on whether a claim is "complex" or "large" or the claimant is an "institutional" or "retail" investor are fundamentally flawed and dangerous. The distinction between these categories is often artificial and controlled by the FINRA member firm itself. Retail customers are frequently advised by their brokers to invest in the complex products or strategies at issue or to establish corporate entities or trusts to invest, ostensibly for estate planning or asset protection, or to access supposedly "elite" complex products. However, forming a single-member LLC does not alter the customer's actual sophistication or their reliance on the broker's advice. Crucially, customers are often unaware that this structural change may strip them of critical regulatory protections. Allowing rules to differentiate or to permit FINRA member firms to select alternative arbitration forums with fewer or no protections based on decisions made by the very FINRA member involved creates a perverse incentive for bad actors to exculpate themselves from misconduct. This would serve to lower the bar on investor protection.

Furthermore, FINRA should consider the critical distinction between pre-dispute and post-dispute variances. Pre-dispute variances inevitably lead to boilerplate contracts dictated by firms that favor the firm's interests, as customers lack the leverage or knowledge to negotiate these terms. Conversely, allowing parties to manage the administration of their case post-dispute, when the customer is likely represented by counsel familiar with the process, poses less risk to the customer and allows for necessary customization. Allowing customers to unilaterally choose between arbitration and litigation post-dispute aligns with FINRA's obligation to protect investors. Allowing certain claims into industry hand-selected alternative arbitration forums would clearly not increase fairness for the customer; it would merely shift the venue to one where the power imbalance is even more pronounced. The current system, where customers can access FINRA arbitration regardless of the claim's nature, provides a necessary baseline of protection that would be eroded by such exclusions.

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

The current practice of allowing eligibility motions to dismiss potentially forces investors back into court years after filing, restarting their litigation from scratch and creating significant inefficiency. This is particularly problematic for long-term, illiquid products like private placements, alternative investments like non-traded REITs, and annuities, where the true value of the investment may not be revealed for years due to sponsors' ability to set and artificially mask Net Asset Values (NAV). In these cases, the "event" triggering the claim may be the realization of a massive loss years after the initial purchase, a nuance that rigid time bars might fail to capture. Furthermore, many states do not apply statutes of limitations to arbitration, viewing them as equitable proceedings. FINRA's rules already empower arbitrators to interpret and apply the Code, and introducing statutory limitations would create confusion and inconsistency. Interpreted correctly, the current eligibility rule, which focuses on the "occurrence or event" within six years, is flexible enough to account for ongoing fraud, continuing representation, and the delayed discovery of harm inherent in complex financial products.

The eligibility rule should not be amended to create a strict statute of repose. Such a rule would incentivize negligent supervision and reward bad actors who conceal fraud for extended periods. Many claims involve ongoing misconduct, such as long-tailed Ponzi schemes or continuous fraudulent account statements, where the harm is not discovered until years later. The current rule recognizes that investors interact with advisors continuously and may not be aware of harm due to the advisor's deception or the firm's failure to supervise. Tying the eligibility period strictly to the date of a securities transaction also ignores the reality that the claim often arises from subsequent fraudulent acts, such as the creation of fake statements or values to hide losses or other misrepresentations. The flexibility of the current rule allows arbitrators to analyze specific fact patterns, whereas a rigid statute of repose would potentially bar valid claims and undermine investor protection.

Providing the industry with additional methods to dismiss cases would only increase abusive motion practice and prevent customers from having their cases heard on the merits. FINRA's own guidance discourages pre-hearing dismissals. Instead of adding more hurdles, FINRA should clarify that pleading standards in arbitration do not require court-style detail and

should require discovery to be completed before motions to dismiss can be filed. This would ensure panels have a complete record to evaluate eligibility claims, preventing firms from using early motions to stifle discovery and delay justice. I do not support expanded changes to the timing or circumstances for prehearing motions to dismiss. The current framework, which discourages such motions prior to the conclusion of a party's case-in-chief, is essential for fairness to the investing public. Allowing earlier or broader dismissal powers would further tilt the playing field in favor of member firms.

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

I oppose FINRA's recent changes requiring a four-year college degree and five years of professional experience for arbitrators. These requirements arbitrarily disqualify a vast segment of the population – adults without a bachelor's degree. Further increasing minimum qualification requirements would artificially shrink the pool and increase reliance on repeat arbitrators. This move potentially creates an industry-tilted panel that is less representative of the investing public. FINRA arbitration exists as a substitute for the right to a jury trial. Therefore, the arbitrator pool should resemble a jury pool as closely as possible. Members of juries do not require specific subject matter expertise, nor do many judges. The new rules make becoming a part-time arbitrator more difficult than becoming a Series 7 licensed financial advisor, which requires no degree. The pool should be broadened to include anyone who completes the training, ensuring a true jury of peers.

FINRA is required to have rules that are "designed . . . in general, to protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6). I oppose amendments to the definition of "public arbitrator" that dilute the independence criteria. The current disqualification criteria, such as the 20% professional time threshold and cooling-off periods, are essential guardrails. Individuals who spend a significant portion of their careers representing industry interests may develop a "defense-side" worldview. Expanding the roster to include "Industry-Lite" arbitrators would erode the legitimacy of the forum. The pool already skews toward an older, professional demographic. FINRA should focus on recruiting truly neutral professionals rather than lowering standards.

Rule 12403(c)(1)(A), which allows parties to strike all non-public arbitrators, should not be amended. This rule was a landmark victory for investor protection, addressing the systemic bias of the Rules previously requiring an industry representative on every arbitration panel. Reverting this rule would undermine the neutrality of arbitration panels and contravene FINRA's goal of investor protection.

FINRA should amend its rules to allow all claimants collectively and all respondents collectively to share the same number of strikes. This ensures that one side does not have an unfair advantage due to the number of separately represented parties. As long as the rule applies equally to both sides, it promotes impartiality.

**Arbitrator Training (Requests for Comment E)**

I support additional procedural training, such as refresher courses on ethics, hearing structure, and the role of the chairperson. Continuing education on FINRA rule changes and

training to prevent late withdrawals would also be beneficial. However, this arbitrator training must remain focused on *procedure*, not substance. I oppose training that creates a hierarchy of customer claims, implying some are more important than others. All cases, whether involving a small retirement nest egg or a large trading account, deserve equal respect and dignity. Any additional training should focus on managing complex multi-party disputes or extensive document production, not on substantive legal distinctions or investment products. Such Training on elements of laws or complex investment products undermines FINRA's neutrality and risks putting a "thumb on the scale" regarding legal interpretations. Substantive issues should be left to argument by the parties' advocates and testimony of expert witnesses.

**Discovery (Requests for Comment F)**

The Discovery Guide is currently slanted in favor of respondents and must be amended to reflect the reality of the 2026 securities industry. While the Guide was a step forward from "adjudication by ambush," it is now outdated. Broker-dealers routinely abuse the process with boilerplate objections, particularly regarding exception reports and commission runs, often citing the Gramm-Leach-Bliley Act incorrectly. FINRA must enforce the Guide more strictly, clarifying that objections to presumptively discoverable items are sanctionable misconduct. The Guide should be updated to mandate the production of entire compliance manuals, regulatory investigation documents (including FINRA 8210 requests and SEC Wells notices), and all communications including texts and emails relevant to the dispute and the products and strategy at issue which are frequently internal firm documents key to a fair process and search for the truth.

I oppose creating a new "discovery referee" or additional layer of bureaucracy. FINRA already has a robust code of arbitration procedure with eight rules dedicated to discovery. The problem is not a lack of rules but a lack of enforcement. FINRA should focus on training arbitrators to enforce existing rules, discourage boilerplate objections to the Discovery Guide, and sanctioning repeat violators rather than creating new administrative roles that could introduce industry bias.

FINRA must resist imposing further limitations on discovery. Access to potentially relevant information is a right, not a mere desire. Broker-dealers are required by SEC rules to maintain records in a readily available format, and cost objections should require evidence of an actual unreasonable burden.

The Discovery Guide must be amended to require the production of insurance coverage information upon request. In all federal courts and nearly all states, liability insurance disclosure is mandatory. The lack of this disclosure in FINRA arbitration is fundamentally unfair, as it prevents investors from assessing the collectability of an award and planning their strategy. The proposed amendment should require the production of policy declarations, the full policy, and any declination letters.

**Hearing Oversight and Efficiency (Requests for Comment G)**

FINRA should not create a central contact point to provide interpretive guidance. Such a resource risks arbitrators relying on FINRA staff for legal interpretations, blurring the line between

administration and adjudication. Instead, FINRA should improve the clarity of existing resources and enhance training on procedural and evidentiary issues.

No new case management requirements are needed. The priority should be enforcing existing timelines and rules. Firms frequently fail to comply with discovery obligations, and arbitrators are often reluctant to impose meaningful sanctions. Strengthening enforcement mechanisms is more effective than creating new deadlines. If procedural benchmarks (like the scheduling of an Initial Prehearing Conference or final hearing) are not met, FINRA staff should automatically check in with the parties and panel to offer administrative assistance. This removes the pressure on parties to request help and ensures timely resolution without compromising arbitrator independence.

FINRA should develop a mobile app for counsel, improve billing integration to issue invoices promptly, and update the DR Portal to display docket information more clearly (similar to PACER) including filtering portal filings. The portal should also include specific filing types for common motions.

**Punitive Damages (Requests for Comment H)**

The current framework allowing arbitrators to award punitive damages must be maintained. Punitive damages are awarded in less than 1% of cases and serve the critical functions of punishment and deterrence. The industry's push to limit them is a reaction to a few high-profile cases in which the arbitrators clearly found justification for punitive damages based on outrageous conduct by the industry. Stripping arbitrators of the power to award punitive damages would shield serious misconduct from consequences and directly counter FINRA's investor protection mandate.

FINRA should not permit pre-dispute agreements that limit or preclude punitive damages. Such provisions would create a *Hobson's choice* for investors, forcing them to forfeit a critical remedy. This would create a perverse incentive for firms to engage in egregious misconduct, knowing they cannot be held accountable for punitive damages.

No caps on punitive damages should be imposed. State and federal laws already provide adequate safeguards and standards for awarding punitive damages. Creating separate FINRA standards would be redundant and unnecessary. I oppose additional procedural hurdles regarding punitive damages, such as bifurcated hearings or mandatory explained decisions. These would discourage arbitrators from awarding these rarely imposed damages and increase costs and delay resolution without adding meaningful protection, as state laws already impose standards for awarding punitive damages. Further, it is absurd to suggest that arbitrators are qualified to entirely dismiss a Claimant's case or even award damages against the Claimant in favor of the brokerage firm but the same arbitrator cannot be qualified to issue an award of punitive damages against the brokerage firm. No special qualifications are needed for issuing punitive damages awards.

I also strongly oppose an appeal process specifically for punitive damages. The Federal Arbitration Act and state laws already provide remedies for vacating awards due to corruption, fraud, or arbitrator misconduct. Creating a special appeals process for punitive damage awards would undermine the finality of arbitration and unfairly target outcomes unfavorable to firms.

**Arbitration Awards Online (AAO) (Request for Comment J)**

The AAO database is a critical resource for parties, attorneys, researchers, regulators, and the public. It allows investors to research arbitrator track records, identify patterns of misconduct, and level the information asymmetry between repeat-player firms and one-shot investors.

FINRA should not amend its rules to permit the removal or redaction of awards from AAO. Transparency is essential for investor protection and regulatory oversight. The expungement process is flawed, with high approval rates and low opposition, and removing awards from AAO would create a "memory hole" that hides patterns of misconduct. Entire awards should remain public.

FINRA should enhance AAO by converting awards into structured, searchable data, integrating outcome analytics, linking awards to court actions and BrokerCheck profiles, and improving full-text search capabilities.

**Unpaid Awards (Request for Comment K)**

FINRA has failed to make substantive progress on the serious unpaid arbitration award problem for decades now. As of 2024, approximately 25% of investor awards remain unpaid, with roughly 37 cents on the dollar uncollected. These figures reflect a persistent structural deficiency rather than an isolated issue. The most effective solution would be a national investor recovery pool administered by FINRA, funded by member firms, which is clearly feasible since FINRA has separately refunded $50 million and $100 million to the industry in the last ten months alone. Insurance mandates have been shown in states like Oregon to not reduce access to advisory services and should also be considered. FINRA should also pursue legislative changes to prevent bankruptcy discharge of unpaid awards and strengthen disclosure requirements.

The moral hazard argument against insurance or a recovery pool is unfounded. Bad actors are not incentivized to commit fraud by the existence of a safety net, as intentional misconduct is typically excluded from coverage and the pool would retain the right to pursue the bad actor. The unpaid award problem must be addressed regardless of the forum or the title of the financial professional.

**COMMENTS CONCERNING INDUSTRY DISPUTES**

**Form U5 Defamation Claims (Request for Comment L)**

I strongly oppose any of the proposed changes concerning Form U5 defamation claims brought by RRs against their former employer BDs. There can be no doubt that BDs have a built-in economic interest in falsely accusing outgoing RRs of misconduct on the Form U5s that the BDs file with FINRA. Specifically, false Form U5s filed by BDs virtually insure that the outgoing RRs will find it very difficult, if not impossible, to get hired and registered by new BDs, thus insuring that the BDs who filed the false Form U5s will be able to retain the lion’s shares of the outgoing RRs’ books of business.

FINRA should never be in the business of creating rules to protect its member BDs from valid claims. Rather, whether Form U5 defamation claims can be brought and whether respondent BDs can assert an absolute or a qualified privilege in defense of those claims are matters that should be decided in accordance with the vast body of federal and state statutory and decisional law on those subjects. Accordingly, I oppose any of the suggested proposals.

**General Request for Comments (Request for Comment M)**

Under current FINRA rules, RRs who fail to pay awards in industry disputes are subject to having their FINRA licenses suspended unless they file for bankruptcy or prove hardship. These awards typically arise in promissory note cases. But there is absolutely no rational basis for suspending RRs who fail to pay these industry awards. Certainly, it is not a moral issue, as bankrupt RRs and dead broke RRs are exempted from the suspension rule, and RRs who fail to pay civil judgments are not subject to suspension for that failure. FINRA should not be acting as a collection agency for its member BDs. Moreover, by having the suspension specter hanging over the heads of RRs, they oftentimes are forced to forego valid defenses and counterclaims against those BDs claiming against them and will settle their disputes in order to avoid suspension. Again, FINRA should not be putting its thumb on the scale in favor of its member BDs.

In order to be licensed, RRs must sign Form U4s, in which they are forced to agree that all industry disputes must be arbitrated in FINRA (see paragraph 15A.5). Why? It should be left up to the agreement of the parties in industry disputes to provide the forum for the resolution of those disputes, i.e., in court or in any number of arbitration forums. Simply put, it is none of FINRA's business what forum is selected by the parties, and FINRA should not be dictating the forum in which those industry disputes must be resolved. Accordingly, that language in the Form U4 should be eliminated.

**COMMENTS CONCERNING BOTH CUSTOMER AND INDUSTRY DISPUTES**

**General Request for Comment (Request for Comment M)**

In my view, both the customer and industry arbitration codes need a complete overhaul to clarify ambiguities and to make the arbitration process fairer. But there are certain provisions that demand immediate attention.

Rules 12403 and 13404 provide that each separately represented party gets a full complement of strikes. That means that in cases where there are multiple respondents that are separately represented (e.g., an unscrupulous RR rips off a customer at Firm A, then moves himself and the customer to Firm B, where he continues his improper activities), the respondents will be able to control the arbitrator selection process. There is not a court in the land where such shenanigans are permitted in connection with jury selection. Instead, each side will be given the same number of peremptory challenges, i.e., the plaintiff(s) on the one hand and all defendants on the other hand will in total be given the same number of peremptory challenges. See, *e.g.*, 28 U.S.C. section 1870; California *Code of Civil Procedure* section 231(c). This gross inequity must be corrected immediately.

Rules 12400 and 13400 provide for separate chairperson rosters. That category should be eliminated. Having separate chairperson rosters does nothing other than to guarantee that a class of jaded professional arbitrators with dozens or awards each who have seen everything and are less likely to rock the boat by issuing significant awards in favor of customers and RRs will be heading panels. Moreover, in a typical Los Angeles case now, the parties are presented with chair list and a public list consisting of persons having almost no arbitration experience. The result oftentimes is a panel that is bullied into submission by the chair. Finally, contrary to FINRA's ostensible belief, one does not have any particular expertise to be a chair. To the contrary, it seems the only real qualifications that are needed are having common sense, the ability to read aloud to the parties the FINRA pre-printed hearing script, and the ability to operate the recording equipment. Accordingly, the separate chair rosters should be eliminated.

**CONCLUSION**

I encourage FINRA to ensure that any changes to their rules would prioritize the strengthening of investor protection and integrity of the markets. FINRA should not make changes to placate its board or industry members as the expense of its mandated goal of investor protection. The core principles of fairness, transparency, and acting in the customer's best interest must remain intact and be upheld.

Very truly yours,

*Leonard Steiner*

Leonard Steiner