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VIA ELECTRONIC MAIL

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Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, N.W.
Washington, D.C. 20006

Re: Regulatory Notice 26-06 — Request for Comment on FINRA's Arbitration Forum

Dear Mses. Laughlin, Crane, and Mitchell:

We write in response to Regulatory Notice 26-06 ("NTM 26-06") and greatly appreciate FINRA's engagement on how to strengthen its arbitration forum. A fair, efficient, and credible dispute resolution system is essential to the proper functioning of our capital markets, and FINRA's willingness to revisit its rules, guidance, and processes is both timely and necessary.

FINRA Dispute Resolution's mandate has always been to provide a fair and neutral forum where disputes can be resolved more efficiently and at less expense than in court, and by impartial arbitrators with greater relevant education, experience, and expertise than found in a typical jury. Unfortunately, as it currently operates, the forum has meaningfully diverged from that mandate. Today, both the perception and the reality are that forum lacks fairness and neutrality, and is particularly unsuited to handle larger and more complex disputes.

The heart of the problem is that the principles of equity that govern FINRA arbitration and the procedures that make FINRA arbitration efficient and effective for smaller disputes does not work for larger disputes involving more significant financial exposure and often more complex issues. FINRA already recognizes that all claims should not be adjudicated in the same manner, distinguishing claims below $50,000 from those above that threshold. Modernizing FINRA's practices requires now recognizing that firms facing claims involving high seven, eight and occasionally nine-figure exposures are entitled to protections that the informality and equitable underpinnings of FINRA's arbitration scheme do not provide.

While there are many ways one might address these issues, we believe making one simple change will greatly enhance FINRA's modernization effort. That change is to implement a rule providing, in substance, the following:

> "Notwithstanding anything in Rule 12200 to the contrary, whenever a customer files a claim against a member firm or a member firm and an associated person seeking arbitration under the Code that (i) claims $5 million or more in relief, the member firm may, at its election, require that the customer refile and pursue the claim in a court of competent jurisdiction or such other alternative forum as has been agreed between them in their customer agreement, or (ii) claims less than $5 million or an unspecified amount, then the authority of the FINRA panel to award relief, whether compensatory, statutory, recessionary, punitive or equitable, shall be limited to $5 million in the aggregate; provided, however, that if at any time the customer increases the amount being claimed to $5 million or more, whether by formal amendment or otherwise, the firm may at that time, at its election, require that the customer withdraw the claim and pursue it in a court of competent jurisdiction or such other alternative forum as has been agreed between them in their customer agreement. For purposes of this Rule, related claims that are combined pursuant to Rule 12314 shall be treated as a single claim for purposes of the amount being claimed and the limitation on the FINRA panel's authority to award relief."

Implementing just this one fix would go a long way toward restoring the industry's confidence in the integrity of the dispute resolution process because it is the outsized cases, and the untethered and excessive awards some of them have generated without any effective recourse, that has drawn the most focus and create the largest financial concern. Our proposal directly addresses this core concern by retaining access to FINRA arbitration as it is today while at the same time preserving the ability to require that the very large, complex disputes, including those disputes where a claimant seeks extraordinary non-compensatory or punitive relief, be adjudicated in a forum that is better equipped to handle them fairly, impartially and efficiently, including with standards and appellate review to protect against untethered and excessive awards. Even if firms were to exercise the option to move every single dispute involving a claim greater than $5 million out of FINRA arbitration, FINRA arbitration would still handle substantially more than 90 percent of retail investor disputes.

Industry participants have been actively discussing many other ways to enhance FINRA arbitration, including improvements to panel composition, panel selection, panel compensation and resolution standards and procedures. There should be continue to be dialogue and consideration of those changes because improving the efficiency, fairness and reliability of FINRA's arbitration forum for the overwhelming majority of the disputes it will continue to handle is a goal all participants should support. However, continued consideration about those improvements, what they should encompass, and how best to implement them will take time and should not delay the implementation of a rule change consistent with our proposal, which will have immediate and positive impact.

I. Neutrality, Fairness and Accountability Must Be the Governing Principles

By way of context, we begin with a paramount principle: *FINRA Dispute Resolution must function as a neutral adjudicative forum for all parties.* In soliciting comment on the various issues and potential changes to its arbitration rules, FINRA NTM 26-06 refers multiple times to "customer protection" considerations and asks how they should factor into the analysis. It is important to remember that while customer protection is and should remain a central objective of FINRA, dispute resolution should not be confused with FINRA's regulatory, examination and enforcement functions. Dispute resolution is not a regulatory function—it is an adjudicative one. By contrast, punishment is a regulatory function. In providing a forum to resolve disputes, and in modernizing the processes governing that forum and its applicability, FINRA should strive for a result that is impartial and fair to all parties—customers and member firms alike. Rules and procedures that structurally favor one party to a dispute over the other are incompatible with the role of a neutral dispute resolution forum.

Legitimacy as an adjudicative body exists when it serves as a truly neutral arbiter that commands the confidence of all participants—not when one side's preferred outcomes are baked into the forum's governing philosophy. The right place for customer protection objectives is in FINRA's regulatory, examination, and enforcement programs, not in the architecture, administration, and application of its dispute resolution rules.

Concern about structural bias is not theoretical but is inscribed currently in FINRA's own Arbitrator's Guide, which opens with a quote from Aristotle that instructs every FINRA arbitrator to "keep[] equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail." (Arbitrator's Guide at 7 (Mar. 2026 ed.)). Placing that passage on the very first page of the Guide (before any discussion of rules, procedures, or standards) is a deliberate philosophical statement that FINRA arbitrators are not expected to govern their decision-making by applying the law. They are expected to "do equity," an entirely subjective and unknowable standard that answers to no court, no code, and no principle that can be reliably predicted or reviewed.

Instructing panelists to "do equity"—*i.e.*, to reach what they personally regard as a fair result, unconstrained by legal precedent, evidentiary rules, or any standard that can be objectively verified or meaningfully reviewed—creates an inherent structural bias. While that bias (though inappropriate) may be tolerable for routine disputes of modest size, it reflects a philosophy that renders the FINRA forum unsuitable to fairly, efficiently and reliably resolve high-value and complex disputes where legal principles are paramount, or to impose punishment based on individual standards of fairness that are effectively unreviewable.

In addition to telling arbitrators they need not follow the law,[1] the Guide further operationalizes that unbounded discretion and arbitrariness. The Guide vests arbitrators with essentially unchecked authority to order or refuse the production of any documents, expand or contract the Discovery Guide's presumptive lists, and resolve disputes on the basis of "the totality of the circumstances", which is an open-ended standard that provides an arbitrator with essentially unfettered discretion to do whatever he or she wants. (Guide at 41). FINRA rules also strictly limit dispositive motions that would permit early termination of legally deficient claims. (*See* FINRA Rule 12504). And more importantly, FINRA arbitrators are expressly told they are "not required to follow state or federal rules of evidence," and that the governing standard for admissibility is simply "fairness", which is a wholly subjective criterion. (*See* Guide at 59; FINRA Rule 12604(a)). This means that any FINRA arbitrator may admit or exclude any evidence based on nothing more than a personal judgment call. There is no hearsay rule, no authentication requirement, no foundation requirement, no relevance guardrails, and no basis on which a party can reliably predict in advance what evidence will be considered or be confident it will be limited to evidence that is legally relevant.

Accordingly, in any FINRA arbitration, claims that would never survive to trial in court are permitted to proceed through discovery to expensive evidentiary hearings where arbitrators are permitted to consider evidence without regard to any evidentiary rules, to decide the dispute based on the arbitrators' own standards of "equity" and to impose potentially unbounded financial relief in their essentially unreviewable discretion. In a small customer dispute, that flexibility may be tolerable and to some degree even warranted. In a case where tens or hundreds of millions of dollars are at stake, it is indefensible and dangerous. In practical terms what this means is that member firms must weigh the cost and risk of proceeding to a hearing before an often lay panel[2] in a forum with limited procedural guardrails and no effective appellate protection against the cost of settling claims on terms that may not reflect the merits. This dynamic distorts the dispute resolution process and imposes systemic costs on the industry, investors and the markets.

II. Member Firms Should be Allowed to Move Large Claims Out of FINRA's Arbitration Forum Because it is Not Appropriate for High-Value Disputes.

While arbitration is intended to be efficient and flexible, those characteristics become increasingly problematic as the size and complexity of disputes grow. Not surprisingly, recent years have seen an increase in the number of arbitration awards involving excessive compensatory and punitive damages that bear no reasonable relationship to the claimant's actual net investment losses or the alleged wrongdoing—awards that are effectively unreviewable.

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[1] Although the Guide explicitly tells arbitrators that they are not required to follow the law (Guide at 65), FINRA purports to moderate that principle by cautioning arbitrators not to manifestly disregard the law. But that advice is completely ineffective because most courts will not vacate an award for manifest disregard of the law and those that entertain the doctrine apply it so narrowly that it provides no recourse, and FINRA itself has no provision for supervisory review. Consequently, each panel is, in effect, a law unto itself.

[2] The qualifications of and process for selecting arbitrators is another issue that requires review and improvement. Meaningful improvement in arbitrator qualifications and selection will take time and should not delay the change we are proposing.

FINRA's current rule set contains no meaningful principle of proportionality for claims above the simplified arbitration threshold of $50,000. Whether a customer is seeking $100,000 or $100 million in damages, the same rules apply—the same limited discovery, the same restrictions on dispositive motions, the same evidentiary standards (or lack thereof), the same freedom not to apply the law, and the same narrow avenues for review. This one-size-fits-all approach is wholly unsuitable for high-value disputes.

High-value disputes are as a general matter fundamentally different. They typically involve more complex legal and factual issues, extensive document discovery, lengthy evidentiary hearings, substantial expert testimony, and more significant regulatory, reputational, and financial consequences for all parties. These are precisely the disputes in which the absence of formalized procedures and defined decision-making standards, coupled with the absence of meaningful appellate review, are most consequential, and where the risk of a runaway, legally indefensible award is greatest. The forum's procedural informality, which may be an asset in small cases, becomes a profound liability and limiting factor in large ones. And although disputes of this magnitude are the vast minority, they are the ones that lead to untenable and well publicized results, they are the ones that force member firms to settle even when they believe the claim lacks merit or is overstated because of the risk of an unwarranted, outsized result without any recourse, and they are the ones that fuel the perception that the FINRA dispute resolution system as a whole is broken.

FINRA Rule 12200 currently requires member firms to arbitrate in FINRA's forum whenever a customer requests, even if the parties have expressly agreed in advance to resolve disputes elsewhere. This requirement is another example of tilting the adjudicatory process in favor of the customer, and is difficult to justify because FINRA does not have a principled objection to parties agreeing to resolve disputes in a non-FINRA forum. In fact, FINRA expressly permits parties to agree to alternative forums *after* a dispute has arisen. There is simply no good reason why FINRA allows parties to choose an alternate forum after a dispute has arisen but not before. FINRA already excludes certain categories of disputes from mandatory arbitration, including class actions, shareholder derivative actions, and disputes involving the insurance business activities of member firms—all rules that should remain unchanged. These categorical exclusions recognize that FINRA arbitration is not the appropriate forum for all disputes, which is a principle that should apply with equal or greater force to the highest-value customer claims.[3]

[3] Additionally, Rule 12203 separately empowers the Director of Arbitration to decline jurisdiction over matters the Director determines are "inappropriate" for FINRA arbitration. High-dollar claims which exceed a specified threshold are, for the structural reasons described above, simply inappropriate for FINRA's forum. FINRA should codify this principle in a rule amendment rather than leaving it to the ad hoc discretion of its Directors.

Our proposal is a standalone change that provides a simple fix to this problem, which will go a long way toward restoring industry confidence in the fairness of the system. The claimant is the master of his or her own claim. If the claimant chooses to assert a claim of sufficient size and complexity, exposing a firm to potentially material liability, even potentially punitive liability, the firm should not be bound to a FINRA forum and should have the right to require the customer to resolve the claim in court or another forum, as the customer and the firm have agreed in their customer agreement. Fairness dictates that with large exposures, the firm should have the right to a forum with an even playing field—not one guided fundamentally by individual arbitrators' personal notions of equity with the ability to disregard the law when they choose to do so. In these large cases, more formal procedures are warranted. Firms should have some measure of protection for review of decisions that are not grounded in the applicable law or that impose punitive measures that do not accord with the Constitution or other recognized legal standards. And all parties should benefit by decisionmakers having judicial or subject matter expertise.

The importance of the amendment we are proposing is illustrated by the issue of punitive damages, as several recent awards with which you are undoubtedly familiar make clear. Courts have long held that punitive damages awards are subject to due process, and awards that are grossly excessive relative to the compensatory damages awarded, or that bear no rational relationship to the state's interest in punishment and deterrence, violate due process. But punitive awards in FINRA arbitrations have none of those protections and currently operate without any meaningful constraint. FINRA's Guide instructs arbitrators that they "may consider punitive damages as a remedy if a respondent has engaged in serious misconduct that meets the standards for such an award"—but then provides no definition of what "serious misconduct" means and no specification of what "standards" apply. (Guide at 70). Though the Guide requires that arbitrators "clearly specify" what portion of any award is punitive and "include in the award the basis for awarding punitive damages" it does not require that the stated basis bear any relationship to the applicable legal standard, nor does it provide any mechanism for a court to review whether that basis was legally sufficient or whether the amount of any award was excessive. (*See id.*) In short, panels may award punitive damages in any amount, based on any standard they choose to apply (or not apply), without any requirement of a sufficiently reasoned explanation, and without any meaningful supervision or appellate oversight.

There are compelling reasons to eliminate the ability of FINRA arbitrators to award punitive damages at all given these problems, as some industry commentors are suggesting. However, our approach is different and designed to avoid the criticism that would come from such a ban, particularly since punitive damages are awarded infrequently and it is the truly large exposures that create the risk of potentially material, unhinged results.[4] Claimants remain free to claim whatever relief they want, including punitive damages, but if their claim in the aggregate equals or exceeds $5 million, they do not have an unfettered right to a FINRA forum unless the member firm also chooses to allow the claim to be adjudicated through FINRA arbitration. For claims below that threshold, the efficiencies of arbitration are significant and our expectation is that the current absence of meaningful standards and controls FINRA arbitrators' authority to award punitive damages will be addressed through better education and the imposition of more rigorous standards.

As noted above, our proposal would impact a very small percentage of filed claims. The $5 million threshold we have suggested would capture the category of large, complex disputes that present the most significant procedural and due process concerns, while leaving the vast majority of customer arbitrations unaffected. FINRA rules already permit jury trial waivers and preclude class arbitration, and there would be no need to make any changes. Customers with very large claims and member firms would have access to the procedural protections that courts or other forums provide while the bulk of traditional customer claims would continue to be resolved through FINRA's forum. Indeed, FINRA's own data shows that of the 2,931 awards entered between January 2016 and June 2025, only 25 awards—less than one percent—exceeded $5 million. And of the 21,521 cases that had been filed since 2011 and closed in FINRA's system during that same period (whether by award, settlement, withdrawal or otherwise), only 1506—or less than seven percent—even claimed monetary damages in excess of $1 million. (NTM 26-06 at 9). In short, well over 90 percent of all customer cases (the vast majority of which are the traditional retail, smaller-claim disputes that FINRA's forum was designed to serve) would be entirely unaffected by this reform. The typical retail investor's access to FINRA arbitration would be fully preserved without change.

As reflected in the wording of the rule we are proposing, the $5 million threshold must also apply on an aggregate basis across all claims arising from claimants related by family or common ownership and involving a common course of conduct or common respondent, regardless of how many individuals or entities are named as claimants in a single Statement of Claim. In practical terms, those claims are one. Claims brought by such related parties as separate arbitrations should be subject to mandatory consolidation to prevent disaggregation of a claim across multiple separately filed arbitrations—each individually less than $5 million but far exceeding it in the aggregate. The Director should be required, not merely permitted, to combine related claims when aggregate recovery across related claimants would otherwise exceed the threshold.

[4] Punitive damages are an infrequent occurrence but their impact in large cases, including the threat that they might be awarded without any standards or protection, can be outsized and material. Of approximately 47,835 awards rendered in FINRA's arbitration forum over nearly four decades, only 3 percent (approximately 1,324) included any award of punitive damages. (NTM 26-06 at 28).

Summary

FINRA's effort to modernize its arbitration forum is both necessary and overdue. Our proposal to allow member firms to elect out of FINRA arbitration when faced with large claims is carefully calibrated to address the structural deficiencies that have most seriously undermined the forum's credibility, leaving FINRA arbitration's central role intact but providing the right to a forum better suited to handle larger claims in the small number of instances claims of that magnitude are filed. We appreciate FINRA's engagement with these issues and would welcome the opportunity to discuss these recommendations in more detail.

Sincerely,