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March 11, 2025

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Via email to rule-comments@sec.gov

RE: File No. SR-FINRA-2024-022 (Proposed Rule Change to Amend the Codes of Arbitration Procedure to Make Clarifying, Technical and Procedural Changes to the Arbitrator List Selection Process) – Response to Comments

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority, Inc. ("FINRA") in response to comments received by the Securities and Exchange Commission ("SEC" or "Commission") regarding the above-referenced rule filing. The proposed rule change would amend the FINRA Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the FINRA Code of Arbitration Procedure for Industry Disputes ("Industry Code") (together, "Codes") to make changes to certain provisions relating to the arbitrator list selection process ("Proposal").[1]

The Commission published the Proposal for comment in the Federal Register on December 30, 2024, and received five comments in response.[2] PIABA, St. John's and

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[1] See Securities Exchange Act Release No. 101993 (December 19, 2024), 89 FR 106635 (December 30, 2024) (Notice of Filing of File No. SR-FINRA-2024-022).

[2] See Letter from Matthew J. Kearney, dated January 13, 2025 ("Kearney"); letter from Leslie M. Van Buskirk, President, North American Securities Administrators Association, Inc., to J. Matthew DeLesDernier, Deputy Secretary, SEC, dated January 21, 2025 ("NASAA"); letter from Michael Bixby, EVP/President-Elect, Public Investors Advocate Bar Association, to Jill M. Peterson, Assistant Secretary, SEC, dated January 21, 2025 ("PIABA"); letter from Alice L. Stewart, Associate Professor of Law, Legal Clinics, Rachael T. Shaw, Staff Attorney/Adjunct Professor Law, Noah Clark, Certified Student Attorney & George A. Balchunas,

Kearney expressed general support for the Proposal. NASAA expressed general support for the Proposal, but also suggested modifications. Pitt Law opposed aspects of the Proposal and suggested alternatives.

The following are FINRA's responses to the commenters' material concerns.

I. Proposed Amendments to the Procedures for Generating Public Lists

The Proposal would amend the Codes to provide that, in preparing the list of arbitrators from the FINRA public arbitrator roster ("Public List"), the list selection algorithm will provide two chances for selection to public arbitrators who are not chair-qualified, and will continue to provide one chance for selection to chair-qualified public arbitrators.[3] NASAA, PIABA, St. John's and Kearney expressed support for this aspect of the Proposal. NASAA stated that this aspect of the Proposal "would end an inequity in FINRA's current process for generating lists of prospective arbitrators to equilibrate the chances of selection across public arbitrators who are chairperson-eligible and those who are not." PIABA noted that "[i]ncreasing arbitrator roster depth and improving public arbitrator access to cases are worthwhile aims, especially if FINRA ensures that the arbitrators are quality arbitrators who are willing to provide public investors a fair shake." St. John's stated that this aspect of the Proposal would "expand the opportunities for service on FINRA arbitration panels and lead to improved decision-making."

In contrast, Pitt Law discouraged adoption of this aspect of the Proposal, noting that, "when given the choice, [its] clients typically prefer to choose chair-qualified public arbitrators over non-[chair-]qualified public arbitrators, because of the former's superior experience in broker-investor disputes and transparent public record of awards and/or legal practice." Pitt Law expressed its view that "it is normally arbitrators without experience in arbitration or a law degree who grant awards which could plausibly be vacated" and that "neither the Clinic nor its clients typically possess the resources to pursue an order vacating an arbitration award in court."

As stated in the Proposal, FINRA recognizes that parties may prefer chair-qualified

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Certified Student Attorney, Securities Arbitration Clinic at the University of Pittsburgh School of Law, to J. Matthew DeLesDernier, Deputy Secretary, SEC, dated January 21, 2025 ("Pitt Law"); and letter from Mary Ehlbeck, Legal Intern, Maxwell Pitagno, Legal Intern, Epaphras Yonas, Legal Intern, Elissa Germaine, Supervising Attorney & Christine Lazaro, Supervising Attorney, Securities Arbitration Clinic of St. John's University School of Law, to Vanessa Countryman, Secretary, SEC, dated January 21, 2025 ("St. John's").

3 See proposed FINRA Rules 12403(a)(3) and 13403(b)(4). The procedures for generating the Public List would not otherwise be modified under the Proposal.

public arbitrators who have experience in the forum administered by FINRA Dispute Resolution Services ("DRS") and a record of previous arbitration award outcomes.[4] For this reason, under the Proposal, chair-qualified public arbitrators would still have a chance to appear on the list of chair-qualified public arbitrators provided to parties from FINRA's chairperson roster ("Chairperson List") and, if not selected for the Chairperson List, they would also have a chance to appear on the list of public arbitrators provided to parties from FINRA's public arbitrator roster ("Public List"). Moreover, the Proposal would not impose limitations on a party's ability to strike and rank non-chair-qualified or chair-qualified public arbitrators when they appear on the Public List. Furthermore, as noted in the Proposal, by increasing the opportunity for public arbitrators who are not chair-qualified to be selected by the parties to serve as panelists, this aspect of the Proposal may help FINRA increase the roster of chair-qualified public arbitrators to address parties' preferences.[5]

Pitt Law made two recommendations as alternatives to the proposed amendments to the procedures for generating public lists. First, to increase the number of chair-qualified public arbitrators on the Chairperson Roster, Pitt Law recommended that FINRA amend the Codes' provisions governing chairperson eligibility to "remove the requirement that arbitrators with a law degree must have served as an arbitrator through award on at least one arbitration administered by a self-regulatory organization in which hearings were held to be chair-qualified."[6] According to Pitt Law, "[a]rbitrators with law degrees are more knowledgeable and circumspect about securities law, arbitration procedure, and the rules of evidence than arbitrators without law degrees. Moreover, arbitrators with a law degree, though they may not have an extensive record of awards, typically have a record of legal practice, which can be as valuable for assessing their preferences and inclinations in the arbitrator selection process."

FINRA appreciates the commenter's suggestion. However, FINRA believes an arbitrator with a law degree but no experience serving as an arbitrator through award on at least one arbitration in which hearings were held, may not necessarily have sufficient experience to serve as a chairperson. The hearing requirement is necessary to help ensure that chairpersons possess sufficient experience to effectively fulfill their responsibilities.[7]

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4 See Proposal, supra note 1, 89 FR 106635, 106637.

5 See id.

6 See FINRA Rules 12400(c)(1) and 13400(c)(1). Arbitrators with a law degree are eligible for the chairperson roster if they have completed chairperson training provided by FINRA and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least one arbitration administered by a self-regulatory organization in which hearings were held. Id.

7 See Securities Exchange Act Release No. 78729 (August 30, 2016), 81 FR 61288, 61289 (September 6, 2016) (Notice of Filing of File No. SR-FINRA-2016-033) (stating that "[a]ttorney arbitrators have the skillset to efficiently manage hearings

For example, chairpersons may be required to perform special tasks, such as facilitating prehearing conferences, deciding discovery-related motions, and writing explained decisions, in addition to their general duties as an arbitrator.

Second, Pitt Law recommended that FINRA increase the honoraria for arbitrators, which Pitt Law believes "would likely have a greater impact in the aggregate on both increasing the roster of arbitrators and decreasing the amount of arbitrators who leave the roster than additional weight for non-chair-qualified public arbitrators in FINRA's list selection algorithm."

While FINRA recognizes that increasing arbitrator honoraria could help retain arbitrators, in the Proposal, FINRA's primary concern is addressing the current imbalance in arbitrator list selection, which results in public arbitrators who are not chair-qualified being less likely to be selected for a list than public arbitrators who are chair-qualified.[8] FINRA does not believe that increasing the honoraria for arbitrators would increase the opportunity for public arbitrators who are not chair-qualified to be selected for Public Lists. Public arbitrators who are not chair-qualified must first appear on a Public List so that they have a chance to be selected by the parties.[9] Once selected, such arbitrators would need to preside over an arbitration, in some cases with prehearings or hearings, before they may be paid an honoraria.[10] FINRA continues to believe that the proposed changes strike the appropriate balance between leveling the opportunities for selection and minimizing the disruption to arbitrator list selection and its associated costs.[11]

Should FINRA adopt the Proposal, Pitt Law suggested that "the problem which the amendments seek to resolve . . . will be resolved within a finite amount of time." Thus, Pitt Law recommended that FINRA "set a date" for this provision of the Proposal to "expire," by either "predict[ing] when the desirable proportion changes would likely be achieved" or "conduct[ing] an annual review of its arbitrator roster . . . ."[12]

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and the experience to decide motions, among other matters. Their service as an arbitrator through award on one arbitration provides them with valuable experience regarding the arbitration forum.").

8 See Proposal, supra note 1, 89 FR 106635, 106636.

9 See FINRA Rules 12403(a) and 13403(b).

10 For example, under the Codes, FINRA will provide a $300 honorarium to each arbitrator for each hearing session in which they participate. See FINRA Rules 12214(a)(1) and 13214(a)(1).

11 See Proposal, supra note 1 at 106643.

12 PIABA also recommended that FINRA "monitor the impact of these proposed

As stated in the Proposal, FINRA will monitor the impact of the Proposal if approved by the Commission and continue to consider if additional changes are warranted.[13]

II. Proposed Amendments to Increase the Transparency of the Arbitrator List Selection Process

The Proposal also would codify certain practices that DRS has developed to efficiently administer arbitrator list selection. NASAA expressed general support for these provisions of the Proposal and suggested modifications.[14]

Among other things, the Proposal would align the Codes to DRS's current practice of allowing parties to anonymously request additional information about an arbitrator at any stage of the proceeding, and prohibit the Director or any party from disclosing to the arbitrator the request for additional information, unless an opposing party objects to the request for additional information within a specified timeframe.[15] The Proposal would also align the Codes with current guidance provided by DRS to provide that a party may not inform a panel or arbitrator of another party's request to remove an arbitrator for cause,[16] and that disclosure to the arbitrator or panel of an opposing party's request to remove an arbitrator for cause would permit the party that requested removal of the arbitrator to file a written motion with the Director for removal of the arbitrator within a specified

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changes to avoid any potential disengagement or withdrawal from existing chair-qualified arbitrators who may receive fewer appointments." PIABA added that "[i]mproving access to case selection for public arbitrators should not result in the unintended consequence of reducing the pool of chair-qualified arbitrators."

13 See Proposal, supra note 1, 89 FR 106635, 106643.

14 PIABA also expressed support for these provisions of the Proposal and recommended that FINRA "monitor these proposed amendments to ensure that the proposed amendments offer the efficiency and transparency anticipated." As a matter of course, FINRA monitors the efficiency and transparency of its rules and will continue to do so.

15 See proposed FINRA Rules 12402(c)(2), 12403(b)(2), and 13403(c)(2). Under the Codes, the term "Director" means the Director of DRS. Unless the Codes provide that the Director may not delegate a specific function, the term includes FINRA staff to whom the Director has delegated authority. See FINRA Rules 12100(m), 12103, 13100(m), and 13103.

16 See proposed FINRA Rules 12407(e)(1) and 13410(e)(1).

timeframe.[17]

NASAA expressed support for these two provisions of the Proposal and recommended that FINRA expressly state that "[a]ny violation of [these provisions] by a party or party's representative at any point in an arbitration proceeding shall constitute a failure to comply with discovery provisions" within the meaning of paragraph (a) of FINRA Rules 12511 or 13511 (the "Discovery Sanctions Rules"). In doing so, NASAA suggested that "FINRA would (i) make clear that these are serious breaches of the [Codes] and (ii) give arbitrators an appropriate lens through which to view and redress such breaches (i.e., to treat them as akin to willful or negligent discovery violations)."

In addition, NASAA suggested that allowing arbitrators to apply the Discovery Sanctions Rules to sanction such disclosures, rather than FINRA Rules 12212 and 13212 (the "General Sanctions Rules"), "would provide arbitrators with appropriate context for crafting equitable remedies for such violations on a case-by-case basis." NASAA also suggested that allowing a party to request removal of an arbitrator following the disclosure of the party's challenge to remove the arbitrator is a "narrow and severe" remedy. NASAA recommended that a panel should be permitted to sanction the disclosing party, which would "give aggrieved parties greater flexibility when responding to an opponent's violation of these provisions." Alternatively, NASAA suggested that FINRA amend the Proposal to "at least reference" the General Sanctions Rules and "provide guidance on how seriously FINRA expects arbitrators to treat the new nondisclosure duties FINRA is creating."

As NASAA acknowledges, the Codes already provide a remedy for a party's failure to comply with a provision in the Codes. The General Sanctions Rules provide a panel with broad discretion in addressing a party's failure to comply with any provision of the Codes, or any order of the panel or single arbitrator authorized to act on behalf of the panel.[18] For example, unless prohibited by law, sanctions may include, but are not limited to: "assessing monetary penalties payable to one or more parties; precluding a party from presenting evidence; making an adverse inference against a party; assessing postponement and/or forum fees; and assessing attorneys' fees, costs, and expenses."[19] The panel also

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17 See proposed FINRA Rules 12407(e)(2) and 13410(e)(2). Assuming that the motion is filed in a timely manner, and absent extraordinary circumstances, the Proposal provides that the Director will grant the motion for removal of the arbitrator. Id. If, however, the party does not make a timely motion for removal of the arbitrator, the Proposal provides that the party would forfeit the opportunity to request removal of the arbitrator because of the disclosure. Id.

18 See FINRA Rules 12212 and 13212; see also FINRA Dispute Resolution Services Arbitrator's Guide, at p. 60, https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

19 See FINRA Rules 12212(a) and 13212(a); see also FINRA Dispute Resolution

may initiate a disciplinary referral at the conclusion of an arbitration, or dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.[20] Thus, FINRA believes that arbitrators would not require any further authority to impose sanctions for disclosure of a party's request for additional information about an arbitrator or disclosure of a party's request to remove an arbitrator for cause, and that it would be unnecessary for the Proposal to expressly reference the General Sanctions Rules.

In addition, FINRA believes it would be inappropriate to apply the Discovery Sanctions Rules because such rules are only applicable when a panel determines to sanction parties in connection with a failure to comply with the discovery provisions of the Codes or frivolously objecting to the production of requested documents or information.[21] Neither the disclosure of a party's request for additional information about an arbitrator nor the disclosure of a party's request to remove an arbitrator for cause relate to discovery. Moreover, FINRA believes that allowing a party to file a motion to remove an arbitrator is the most appropriate remedy to address the potential harm caused by an opposing party's disclosure of a request to remove the arbitrator for cause. However, the Proposal does not require a party to file a motion to request removal of the arbitrator following an opposing party's disclosure. Thus, a party may determine to proceed with the arbitrator, despite the disclosure. In addition, as noted above, the General Sanctions Rules would permit a panel to sanction the opposing party for disclosing such a request. For these reasons, FINRA declines to amend the Proposal as suggested.

III. Conclusion

FINRA believes that the foregoing responds to the suggestions raised by the commenters on the Proposal. If you have any questions, please contact me at (202) 728-8829, or email Bria.Adams@finra.org.

Services Arbitrator's Guide, at p. 60, https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

[20] See FINRA Rules 12212(b) and (c) and 13212(b) and (c); see also FINRA Dispute Resolution Services Arbitrator's Guide, at p. 60, https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

[21] See FINRA Rules 12511(a) and 13511(a). In addition, paragraph (b) of FINRA Rules 12511 and 13511 provide that a panel may dismiss a claim, defense or proceeding with prejudice in accordance with FINRA Rules 12212(c) and 13212(c), respectively, for intentional and material failure to comply with a discovery order of the panel if prior warnings or sanctions have proven ineffective.

Best regards,

/s/ Bria Adams

Bria Adams
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