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May 8, 2024

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

RE: FINRA’s Statement in Support of Proposed Rule Change to Amend the FINRA Codes of Arbitration Procedure and Code of Mediation Procedure to Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations (File No. SR-FINRA-2023-013)

Dear Ms. Countryman:

This statement in support is being submitted by the Financial Industry Regulatory Authority, Inc. (“FINRA”) in response to the Order Scheduling Filing of Statements on Review published by the Securities and Exchange Commission (“SEC” or “Commission”) on April 8, 2024.¹ The action by the Division of Trading and Markets (“Division”) under review concerns the approval, pursuant to delegated authority, of SR-FINRA-2023-013.² SR-FINRA-2023-013 is a FINRA rulemaking amending the Code of Arbitration Procedure for Customer Disputes, the Code of Arbitration Procedure for Industry Disputes, and the Code of Mediation Procedure (collectively, the “Codes”), to revise and restate the qualifications for representatives in arbitrations and mediations in the forum administered by FINRA Dispute Resolution Services (“DRS”).³

¹ See Securities Exchange Act Release No. 99915 (April 8, 2024), 89 FR 25676 (April 11, 2024) (“Scheduling Order”).

² See Securities Exchange Act Release No. 99335 (January 11, 2024), 89 FR 3481 (January 18, 2024) (Order Approving File No. SR-FINRA-2023-013) (“Approval Order”).

³ See Securities Exchange Act Release No. 98703 (October 6, 2023), 88 FR 71051 (October 13, 2023) (Notice of Filing of File No. SR-FINRA-2023-013) (“Proposing Release”). See also Regulatory Notice 17-34 (October 2017) (seeking responses to questions related to forum users’ experiences with compensated non-attorney representatives and whether it would be prudent to further restrict their representation of parties).

As the Division correctly found, the Commission should also find that SR-FINRA-2023-013 is consistent with the Securities Exchange Act of 1934 (“Exchange Act”) and the rules and regulations thereunder applicable to a national securities association, and accordingly, should be approved.⁴

I. BACKGROUND

A. Procedural History

On October 5, 2023, FINRA filed SR-FINRA-2023-013 with the Commission, pursuant to Section 19(b)(1) of the Exchange Act⁵ and Rule 19b-4 thereunder.⁶ On October 13, 2023, SR-FINRA-2023-013 was published for public comment in the Federal Register.⁷ The public comment period closed on November 3, 2023. All four commenters that submitted a comment letter expressed support for SR-FINRA-2023-013.⁸ On November 9, 2023, FINRA consented to an extension of time for the Commission to approve, disapprove, or institute proceedings to determine whether to approve or disapprove SR-FINRA-2023-013 to January 11, 2024.⁹ On January 8, 2024, FINRA responded to the comment letters received.¹⁰ On January 11, 2024, the Commission, acting through authority delegated to the Division,¹¹ approved SR-FINRA-2023-013.¹² On January 19, 2024, the Commission issued a stay of SR-FINRA-2023-013 and notified FINRA that the Commission planned to review the delegated action pursuant to Rule 431

⁴ See Approval Order supra note 2.

⁵ See 15 U.S.C. 78s(b)(1).

⁶ See 17 CFR 240.19b-4.

⁷ See Proposing Release supra note 3.

⁸ The comment letters are available at <https://www.sec.gov/comments/sr-finra-2023-013/srfinra2023013.htm>.

⁹ See Letter from Kristine Vo, Assistant General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, SEC, dated November 9, 2023.

¹⁰ See Letter from Kristine Vo, Assistant General Counsel, FINRA, to Vanessa Countryman, Secretary, SEC, dated January 8, 2024.

¹¹ See 17 CFR 200.30-3(a)(12).

¹² See Approval Order supra note 2.

of the Commission's Rules of Practice.¹³ On April 8, 2024, the Commission issued the Scheduling Order stating that on or before May 8, 2024, any party or other person may file a statement in support of, or in opposition to, the action made pursuant to delegated authority.¹⁴ Also on April 8, 2024, Commissioner Hester M. Peirce issued a statement on SR-FINRA-2023-013.¹⁵

B. Applicable Legal Standards

In deciding a review of the Division's approval of a self-regulatory organization's rule pursuant to delegated authority, the Commission "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part," the Approval Order.¹⁶ The Commission conducts a de novo review of the Division's approval.¹⁷ When the Commission considers a FINRA proposed rule change, it shall approve the rule when it is "consistent with the requirements" of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.¹⁸ Specifically, the Commission must find that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act which requires, among other things, that the rule is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of

¹³ See Letter from J. Matthew DeLesDernier, Deputy Secretary, SEC, to Kristine Vo, Assistant General Counsel, FINRA, dated January 19, 2024.

¹⁴ See Scheduling Order supra note 1.

¹⁵ See Statement from Commissioner Hester M. Peirce, Filling the Gap: Comments on the Proposal to Amend FINRA's Code of Arbitration Procedure and Code of Mediation Procedure to Modify the Qualifications for Representatives in Arbitrations and Mediations (April 8, 2024) ("Comm'r Peirce Statement"), available at https://www.sec.gov/news/statement/peirce-finra-04082024?utm_medium=email&utm_source=govdelivery.

¹⁶ See SEC Rule of Practice 431(a), 17 CFR 201.431.

¹⁷ See, e.g., Securities Exchange Act Release No. 98003 (July 27, 2023), 88 FR 50205 (August 1, 2023) (Order Setting Aside Action by Delegated Authority and Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Requirements for Covered Agency Transactions Under FINRA Rule 4210 (Margin Requirements) as Approved Pursuant to SR-FINRA-2015-036) (exercising de novo review of a Division approval order issued pursuant to delegated authority).

¹⁸ See 15 U.S.C. 78o-3(b)(6). In approving a proposed rule change, the Commission also considers the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

trade, and, in general, to protect investors and the public interest.¹⁹ As the Division correctly found, the Commission should also find that SR-FINRA-2023-013 is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities association, and accordingly, should be approved.

II. DISCUSSION

Currently, the Codes permit parties to arbitrations and mediations in the DRS forum to represent themselves, to be represented by an attorney at law in good standing, or to be represented by a non-attorney representative (“NAR”).²⁰ Some NARs, often friends or relatives of a party, assist parties without compensation (“uncompensated NARs”). Other NARs receive compensation in connection with their representation of parties (“compensated NARs”).²¹ In addition, although not specifically provided for in the Codes, law students represent parties, typically pro bono, while practicing under the supervision of an attorney through securities arbitration clinics (“SACs”).²²

SR-FINRA-2023-013 would disallow compensated representatives who are not attorneys from representing parties in the DRS forum; codify that a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing

¹⁹ See id.

²⁰ See FINRA Rules 12208, 13208 and 14106.

²¹ Compensated NARs receive monetary or non-monetary compensation in connection with the representation of parties — including, for example, advance fees, consulting fees, payments in kind, referral fees or fees pursuant to a contingent fee arrangement. Compensated NARs often possess a background in the securities industry and primarily represent individuals in arbitration or mediation claims against broker-dealers and their associated persons. Less commonly, they may represent associated persons in expungement claims brought against broker-dealers. Compensated NARs often associate with companies that are in the business of bringing these claims and providing related services, such as evaluations of customer account activity.

²² SACs are affiliated with law schools and are typically staffed by second- or third-year law students. SACs provide pro bono legal representation to individual customers who seek to arbitrate or mediate claims under \$100,000 and who cannot find or afford an attorney to represent them. Generally, SACs require that potential clients not exceed specified household income and asset requirements. Currently, 10 SACs operate in the District of Columbia, Florida, Illinois, New Jersey, New York and Pennsylvania. For more information on SACs, see <https://www.finra.org/arbitration-mediation/about/find-attorney>.

under the supervision of an attorney may represent investors in the DRS forum; and expand the circumstances in which any person, including attorneys, would be prohibited from representing parties in the DRS forum.²³

A. Compensated NARs Engage in Misconduct Harming Investors

Compensated NARs represent customers in one percent of customer cases and only a few compensated NARs regularly operate in the DRS forum today.²⁴ Despite the infrequency of compensated NAR representation, FINRA has identified several allegations of improper conduct by compensated NARs in connection with their representation of parties in the DRS forum.²⁵ For example, the State of California brought a civil enforcement action against several compensated NARs for engaging in the unauthorized practice of law, in part in the DRS forum; falsely promising to help customers recover their past failed investments through, in part, arbitration in the DRS forum; and charging advance fees in violation of California law.²⁶ Another compensated NAR was criminally

²³ SR-FINRA-2023-013 would also make some clarifying non-substantive changes to the current provision that prevents delay of a proceeding while a challenge to the qualifications of a person to represent a party is resolved outside the DRS forum. See Proposing Release supra note 3, 88 FR 71051, 71055.

²⁴ See Proposing Release supra note 3, 88 FR 71051, 71057 (discussing the economic baseline for the proposed rule change).

²⁵ See Proposing Release supra note 3, 88 FR 71051, 71052 (discussing allegations of improper conduct by compensated NARs in connection with their representation of parties in the DRS forum).

²⁶ See Complaint for Injunctive Relief, Civil Penalties and Other Ancillary Relief, People v. Chambliss Corp., No. 18STCV05586 (Cal. Super. Ct. filed Nov. 19, 2018); see also People v. Chambliss Corp., No. 18STCV05586, 2020 Cal. Super. LEXIS 72668 (Cal. Super. Ct. Nov. 12, 2020) (order granting stipulated judgment against Defendant Casey C. Mielnik, a compensated NAR, for violations of false advertising, unfair competition law, and telephonic sellers law); Chambliss Corp., No. 18STCV05586 (Cal. Super. Ct. Nov. 24, 2020) (order regarding Defendant National Advisory Network, Inc. and granting default judgment against 11 defendants, nine compensated NARs and two nonlegal corporations, for false advertising, unfair competition law, telephonic sellers law, and unauthorized practice of law); Chambliss Corp., No. 18STCV05586 (Cal. Super. Ct. Nov. 24, 2020) (order regarding Defendants Jay R. Jeskie, Eric D. Harris, Elijah Schnell, Matthew J. Cano, John W. Martynech, Gordon A. Herman and granting default judgment against 11 defendants, nine compensated NARs and two nonlegal corporations, for false advertising, unfair competition law, and telephonic sellers

sentenced in New York for felony grand larceny, engaging in a scheme to defraud, and falsification of business records in connection with proceedings that the compensated NAR initiated in the DRS forum. A different compensated NAR misrepresented his identity in order to represent parties in DRS proceedings even though he was not qualified to do so.²⁷

In addition, forum users have asserted that compensated NARs cold call investors with aggressive sales tactics; pursue frivolous claims; misrepresent or willfully fail to disclose important facts relating to their background (e.g., that they are a disbarred attorney); achieve worse outcomes or awards for their clients or settle cases for lower amounts than attorneys; and work in coordination with persons who are suspended or barred from the securities industry.²⁸ Given the aforementioned civil enforcement action,

law); Chambliss Corp., No. 18STCV05586 (Cal. Super. Ct. Jan. 13, 2021) (order granting motion for summary adjudication against Defendant Amanda L. Langer, a compensated NAR, for violating unfair competition law, unauthorized practice of law, and telephonic sellers law); People v. Chambliss Corp., No. 18STCV05586, 2022 Cal. Super. LEXIS 86977 (Cal. Super. Ct. Sept. 29, 2022) (judgment against attorney Peter A. Bumerts for the unauthorized practice of law, false advertising, unfair competition law, and aiding and abetting the unauthorized practice of law).

²⁷ In contrast, FINRA has not identified any allegations of improper conduct by uncompensated NARs or law students. See Proposing Release supra note 3, 88 FR 71051, 71052.

²⁸ See Proposing Release supra note 3, 88 FR 71051, 71052 (discussing allegations of improper conduct by compensated NARs in connection with their representation of parties in the DRS forum). See also Letter from Marc S. Dobin, Dobin Law, to Marcia E. Asquith, Corporate Secretary, FINRA, dated November 3, 2017 (responding to Regulatory Notice 17-34 sharing concerns about compensated NARs including that “at least one” compensated NAR “was a disbarred attorney”); letter from Robin Traxler, Vice President, Regulatory Affairs and Associate General Counsel, Financial Services Institute (“FSI”), to Marcia E. Asquith, Corporate Secretary, FINRA, dated December 18, 2017 (responding to Regulatory Notice 17-34 suggesting restrictions on NARs and stating “FSI’s members have reported that disbarred attorneys...are acting as NARs”); letter from David E. Robbins, Partner, Kaufmann Gildin & Robbins LLP, to SEC, dated April 18, 2024 (responding to Scheduling Order stating “[t]he failings of NARs often lead to settlements for lower amounts than an experienced securities arbitration attorney could achieve...and to outright ‘malpractice’ in the pleadings and hearing stages [such as] poorly written Statements of Claim and not knowing how to effectively question witnesses on direct and cross-examinations”).

criminal sentencing, and various assertions from forum users, it is clear reputational concerns are not sufficient to produce good representation by compensated NARs.²⁹

B. Compensated NARs Engage in the Unauthorized Practice of Law Harming Investors

FINRA also is concerned that parties may be harmed due to the lack of recourse when compensated NARs are found to be engaged in the unauthorized practice of law pursuant to the law of the relevant U.S. jurisdiction. Parties may benefit from increased certainty, at the outset of the proceeding, as to whether a party's representative is permitted to represent a party in the DRS forum. For example, the laws that govern the representation of parties differ from state to state, and it may be unclear whether compensated NARs can represent parties in the DRS forum or are engaged in the unauthorized practice of law. FINRA is not aware of any U.S. jurisdiction that explicitly allows parties to be represented by compensated NARs in the DRS forum by statute or rule. Only a few U.S. jurisdictions' unauthorized practice of law or professional conduct committees have specifically addressed compensated NAR representation of parties in arbitration or mediation in the DRS forum, and those that have done so concluded that their representation in the DRS forum constitutes the unauthorized practice of law.³⁰ Thus,

²⁹ See generally Comm'r Peirce Statement supra note 15 (asking if “reputational concerns [would] be sufficient to produce good representation by compensated non-lawyer representatives”).

³⁰ Unauthorized practice of law or professional conduct committees in Florida, Illinois and Ohio have concluded that compensated NAR representation of parties in securities arbitration constitutes the unauthorized practice of law. See Fla. Bar Re Advisory Op. on Nonlawyer Representation in Sec. Arbitration, 696 So. 2d 1178, 1180 (Fla. 1997) (concluding that compensated non-attorney representation of customers in securities arbitration constitutes the unauthorized practice of law and enjoining non-attorneys from representing customers for compensation in securities arbitration proceedings); Ill. State Bar Ass'n Standing Comm'n on Prof'l Conduct, Advisory Op. 13-03, at 7 (2013), <https://www.isba.org/sites/default/files/ethicsopinions/13-03.pdf> (stating that non-attorney representation in a FINRA arbitration generally constitutes the unauthorized practice of law and suggesting that FINRA arbitrators notify FINRA and the Illinois Attorney Registration and Disciplinary Committee if a non-attorney represents a party in FINRA arbitration); *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348, 350 (Ohio 2004) (finding that the representation of parties in securities arbitration and mediation by non-attorneys constitutes the unauthorized practice of law); see also Sara Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?* 48 U.C. DAVIS L. REV. 921, 948-958 (2015) (noting that unauthorized practice of

FINRA believes it is useful for clarity to claimants and respondents to adopt a rule that prohibits compensated NARs from representing parties in the DRS forum.³¹

By disallowing compensated NAR representation of parties in the DRS forum, parties would not incur the costs associated with retaining a compensated NAR who is later determined to be engaging in the unauthorized practice of law. In these instances, compensated NARs may be enjoined³² from continuing their representation of parties during pending arbitrations, and parties may incur the costs to seek and retain new representation. Arbitrators may also issue awards dismissing claims, or finding against parties, if they determine that a compensated NAR's representation of the party constitutes the unauthorized practice of law in the jurisdiction.³³ As a neutral administrator of the

law or professional conduct committees in Florida, Illinois and Ohio have concluded that compensated NAR representation of parties in securities arbitration constitutes the unauthorized practice of law). In addition, two committees of the Illinois State Bar Association sent three comment letters to Regulatory Notice 17-34 in support of prohibiting compensated NARs and argued that their representation of parties in the DRS forum constituted the unauthorized practice of law.

³¹ See generally Comm'r Peirce Statement supra note 15 (asking if “FINRA need[s] to step in to prohibit conduct that is already under scrutiny in some states”).

³² See, e.g., Empire Asset Mgmt. Co. v. Sherer, 19-555-CB (Mich. 5th Cir. Ct. Feb. 7, 2020); see also Disciplinary Counsel v. Alexicole, Inc., 822 N.E.2d 348, 350 (Ohio 2004) (finding that the representation of parties in securities arbitration by non-attorneys constituted the unauthorized practice of law).

³³ See, e.g., Simon v. Aegis Cap. Corp., FINRA Disp. Resol. Case No. 15-02865 (2016) (Parker, Arb.) (finding that customer claimant was not entitled to an award and was responsible for the DRS forum fees, either because the claimant's submissions were invalidated by the compensated NAR's unauthorized practice of law, or because the claimant had not sustained his burden of proof); Halling v. Cape Sec. Inc., FINRA Disp. Resol. Case No. 16-00519 (2017) (Brahin, Arb.) (finding that representation by compensated NARs in the DRS forum was not legally permissible in Kansas, and striking customer claimant's pleadings); see also Wells v. Worden Cap. Mgmt., LLC, FINRA Disp. Resol. Case No. 19-02241 (2020) (Carvell, Arb.) (ordering claimant to proceed pro se or retain an attorney following compensated NAR's withdrawal in response to respondents' motion to strike the statement of claim on the basis that claimant's compensated NAR engaged in the unauthorized practice of law by filing the claim); Neuss v. Wells Fargo Inv., LLC, FINRA Disp. Resol. Case No. 10-01320 (2011) (Albini, Arb.) (partially granting respondents' motion in limine to disqualify claimants' compensated NAR, and denying claimants' motion to suspend the hearing and dismiss claims without

arbitration forum, DRS does not participate in the decision-making process by arbitrators. The decisions are made by independent arbitrators selected by parties. To that end, and for the protection of parties that may be harmed due to the lack of recourse when compensated NARs are found by other adjudicators to be engaged in the unauthorized practice of law, FINRA does not support prohibiting arbitrators from enforcing state laws with respect to the practice of law.³⁴

C. Compensated NARs Lack Accountability for Engaging in Misconduct Harming Investors

The risk of potential harm to parties represented by compensated NARs is heightened because there is no direct regulation of compensated NAR conduct; they are not subject to the professional qualification requirements, ethical rules, disciplinary processes, and client protections that the states and other U.S. jurisdictions apply to attorneys.³⁵ Compensated NARs' interactions with prospective clients are not subject to regulation like

prejudice); *Best v. Columbus Advisory Group, Ltd.*, FINRA Disp. Resol. Case No. 18-03337 (2020) (Putnam, Arb.) (dismissing claimant's case with prejudice as a sanction for material and intentional failure to comply with the arbitrator's order issued during the compensated NAR's representation of the claimant).

³⁴ See generally Comm'r Peirce Statement supra note 15 (asking "[s]hould FINRA, instead of adopting a prohibition on non-lawyers getting paid to represent investors, prohibit its arbitrators from taking on the role of enforcing state laws with respect to the practice of law?").

³⁵ Generally, licensed attorneys are required to have: (1) completed a bachelor's degree program (or its equivalent) and a legal education as required by a licensing state; (2) passed a state bar exam; (3) passed the Multistate Professional Responsibility Examination; (4) passed a licensing state's character and fitness review, which includes questions about academic conduct at law school, criminal history, social conduct in general and any applicable disciplinary actions; and (5) taken a legal binding oath with a licensing state's supreme court or high-court equivalent. In addition, many states require attorneys to complete continuing legal education, including ethics credits, to maintain a law license. For more information on state-by-state requirements to become a lawyer, see generally <https://www.lawyeredu.org>.

In addition, all jurisdictions require lawyers to abide by rules of professional conduct, which are enforced through state disciplinary processes. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 317 (2002).

the state disciplinary rules on lawyer advertising and solicitation.³⁶ Compensated NARs also are not required to purchase malpractice insurance and their clients are not protected by statewide client protection funds.³⁷ As the Division correctly found, “excluding compensated NARs from the DRS forum is a reasonable approach to help ensure that persons representing claimants in the DRS forum for compensation adhere to professional standards and can be held to account when they do not (e.g., attorneys) or lack the pecuniary incentive to engage in improper conduct (e.g., uncompensated NARs).”³⁸

D. Prohibiting Compensated NARs Will Protect Investors From Potential Harm Without Unduly Impacting Representation Within the DRS Forum

FINRA agrees with the Division that concerns that parties with claims of \$100,000 or less may have difficulty obtaining legal counsel are outweighed by the threat of harm,

³⁶ See, e.g., Cal. Rules of Prof'l Conduct R. 7 (2018) (ensuring that attorney advertisements or solicitations are not misleading, clearly identifiable as advertisements; ensuring the advertiser's accountability; and mitigating the use of any undue duress or pressure by prohibiting, for example, solicitation of a potential client through in-person, telephone or real-time electronic communication); N.Y. Rules of Prof'l Conduct R. 7.3 (amended 2017) (prohibiting attorneys from engaging in solicitation or advertisement by in-person or telephone contact or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; providing examples of prohibited forms of solicitations and advertisements); Restatement (Third) of The Law Governing Lawyers § 1 cmt. b (2000) (providing that federal courts often apply the ethical rules and standards adopted by the state in which the court sits). NARs may be subject to more general state marketing regulations. See, e.g., Cal. Bus. & Prof. Code § 17511 (amended 2023) (requiring telephone solicitors to register prior to doing business in California).

³⁷ A “client protection fund” is a pool of money funded and maintained by a bar association or regulatory agency, the purpose of which is to reimburse clients who have suffered financial loss due to the dishonest acts of lawyers. See American Bar Association (“ABA”), A History of Client Protection Rules, https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/history; see also ABA Center on Professional Responsibility, Survey of Lawyers' Funds for Client Protection 2017-2019, at 8 (2020), https://qa.americanbar.org/content/dam/aba/administrative/professional_responsibility/2017-2019-cp-survey.pdf.

³⁸ See Approval Order supra note 2, 89 FR 3481, 3484.

including harm to investors, presented by compensated NARs³⁹ whose interactions with customers are not subject to professional standards of conduct.⁴⁰ Furthermore, because compensated NARs represent only a small percentage (one percent) of parties in the DRS forum, the potential impact of SR-FINRA-2023-013 on representation within the DRS forum may be limited and is thus a reasonable way for FINRA to prevent potential harms caused by compensated NARs without unduly impacting representation within the DRS forum.⁴¹

FINRA has proposed, and the Division has approved, amendments to balance the need for parties to be able to avail themselves of representation in the DRS forum with protecting those parties, the integrity of the DRS forum, and the public interest generally from the potential harmful conduct and lack of recourse that may come from representation by compensated NARs. For example, SR-FINRA-2023-013 would codify the current practice whereby a party may be represented by a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the

³⁹ See generally Comm’r Peirce Statement supra note 15 (asking if “the protection afforded by [SR-FINRA-2023-013 is] worth the cost to a segment of investors that may most need assistance”).

⁴⁰ See Approval Order supra note 2, 89 FR 3481, 3484. FINRA notes that it makes available efficient and cost-effective alternative processes to a full arbitration proceeding for certain smaller claims. For example, claimants may proceed “on the papers,” where a chair-qualified arbitrator will make a decision based solely on the documents submitted. See FINRA Rules 12800 and 13800; see also Simplified Arbitrations: Three Ways to Present Your Case to Arbitrators, <https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/simplified-arbitrations>.

FINRA has also introduced several incentives to encourage parties with smaller claims to resolve their disputes through FINRA mediation. For example, FINRA may offer mediation by telephone at no cost or at a significantly reduced hourly fee to parties arbitrating certain smaller claims. FINRA also encourages parties in arbitration to mediate by waiving the fee to postpone a hearing, except in cases of late postponement requests. See FINRA’s Mediation Program for Small Arbitration Claims, <https://www.finra.org/arbitration-mediation/about/mediation-process/finras-mediation-program-small-arbitration-claims>.

⁴¹ See id. But see Comm’r Peirce Statement supra note 15 (stating “[t]he void of representation for investors with low-dollar claims remains particularly acute” and that SR-FINRA-2023-013 “could exacerbate the problem by preventing non-lawyers from getting compensated to represent investors in arbitration proceedings”).

supervision of an attorney. Currently, the Codes do not specifically address the representation of parties in the DRS forum by law students. SACs, and the law students who participate in these programs, provide an inexpensive option for parties who qualify and may not be able to find or afford any attorney. Moreover, these representations may be regulated by state rules that govern the performance of legal services by law students and the attorneys who supervise them.⁴² Accordingly, FINRA believes that it would be appropriate to codify the role of law students—who would otherwise technically be considered NARs under SR-FINRA-2023-013—in providing representation to investors through SACs.⁴³

E. Expanding the Categories of Persons Prohibited From Representing Parties Will Help Prevent Problematic Representatives From Appearing in the DRS Forum

FINRA agrees with the Division that SR-FINRA-2023-013's expansion of the categories of persons prohibited from representing parties in the DRS forum are reasonable to help prevent problematic representatives from appearing in the DRS

⁴² See, e.g., N.Y. CLS Rules Sup. Ct. 805.5 (amended 2019); Cal. R. Ct. 9.42 (amended 2019); Fla. Bar Reg. R. 11 (amended 2023); Kan. Sup. Ct. R. 715 (adopted 2022); D.C. Ct. App. R. 48 (amended 2014); O.C.G.A. Title 15, Ch. 20 (amended 1994); see also Peter A. Joy & Robert R. Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 CLINICAL L. REV. 493 (2002) (describing the ethical obligations of law students and supervising attorneys).

⁴³ FINRA notes that parties to arbitrations and mediations in the DRS forum can represent themselves (pro se parties). FINRA has a dedicated web page to resources for individuals representing themselves. See Resources for Individuals Representing Themselves, <https://www.finra.org/arbitration-mediation/about/pro-se>. FINRA also advises arbitrators on the treatment of pro se parties, including advising arbitrators to be sensitive to the fact that the pro se party is most likely inexperienced in either litigation or the arbitration process, and that pro se parties may need some guidance from the panel. See FINRA Dispute Resolution Services Arbitrator's Guide, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

In addition, SR-FINRA-2023-013 provides that a party could be represented in arbitration or mediation by an uncompensated NAR, provided that prior to the representation, the uncompensated NAR or party files the required written attestation with the Director of DRS. See Approval Order supra note 2, 89 FR 3481, 3484.

forum.⁴⁴ Specifically, expanding the rule to provide that the laws of any U.S. jurisdiction, and not only states, may disqualify the person from representing a party helps ensure that persons in all relevant jurisdictions are covered by the rules' prohibitions.⁴⁵ Similarly, expanding the prohibitions to apply to all persons, not just attorneys, helps ensure that any person with a demonstrated track record of misconduct would be precluded from representing parties in the DRS forum.⁴⁶ Further, precluding a person who is currently suspended from, or denied the privilege of, appearing or practicing before the Commission from representing a party in the DRS forum precludes another group of persons with a demonstrated track record of misconduct from representing parties in the DRS forum.⁴⁷ By excluding problematic representatives from, and at the beginning of, the DRS process, SR-FINRA-2023-013 is a reasonable way to help enhance the integrity of those individuals representing parties in the DRS forum.⁴⁸

⁴⁴ See Approval Order supra note 2, 89 FR 3481, 3485. Currently, the Codes provide that non-attorneys may not represent a party if state law prohibits such representation, the person is currently suspended or barred from the securities industry in any capacity, or the person is currently suspended from the practice of law or disbarred. SR-FINRA-2023-013 would expand these prohibitions to state that no person may represent a party in an arbitration or mediation proceeding held in a U.S. hearing location if: (A) the law of the state of the United States, District of Columbia, or commonwealth, territory, or possession of the United States with jurisdiction over the representation prohibit the representation; (B) the person is currently suspended or barred from the securities industry in any capacity; (C) the person is currently suspended from the practice of law or disbarred; or (D) the person is currently suspended from or denied the privilege of appearing or practicing before the Commission. See Proposing Release supra note 3, 88 FR 71051, 71055.

⁴⁵ See id.

⁴⁶ See id.

⁴⁷ See id.

⁴⁸ See id.

Ms. Vanessa Countryman

May 8, 2024

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III. CONCLUSION

For the foregoing reasons, the Commission should find that SR-FINRA-2023-013 is consistent with the Exchange Act, and accordingly, it should be approved. If you have any questions, please contact me on 212-858-4106, or email: Kristine.Vo@finra.org.

Very truly yours,

/s/ Kristine Vo

Kristine Vo
Assistant General Counsel
Office of General Counsel