

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94942; File No. SR-FINRA-2022-012)

May 18, 2022

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend FINRA Rule 13000 Series (Code of Arbitration Procedure for Industry Disputes) to Align the Code with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 13, 2022, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Exchange Act,³ which renders the proposed rule change effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Code of Arbitration Procedure for Industry Disputes (“Code”) to align the Code with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (“Act”). The proposed rule change would also make a conforming amendment to FINRA Rule 2263.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

The Act was signed into law on March 3, 2022, and took effect immediately.⁴ The Act amends Title 9 of the Federal Arbitration Act⁵ by providing in relevant part:

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

⁴ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022). The Act applies with respect to any dispute or claim that arises or accrues on or after the date of enactment of the Act.

⁵ 9 U.S.C. 2.

The Act prohibits mandatory arbitration of sexual assault and sexual harassment claims by permitting persons alleging conduct constituting a sexual assault dispute or sexual harassment dispute to elect not to enforce predispute arbitration agreements in cases that relate to those disputes.⁶ However, the Act does not prohibit parties from agreeing to arbitrate such claims after a dispute has arisen.⁷

FINRA Rule 13201 relates to the arbitration at FINRA Dispute Resolution Services' ("DRS") forum of statutory employment discrimination claims ("SD claims").⁸ Specifically, FINRA Rule 13201(a) provides that "[an SD claim] is not required to be arbitrated under the Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it either before or after the dispute arose." Although FINRA rules do not require arbitration of SD claims under

⁶ The Act also permits persons alleging conduct constituting a sexual assault dispute or sexual harassment dispute to elect not to enforce predispute joint-action waivers in cases that relate to those disputes. The Act defines "predispute joint-action waiver" as an agreement that "would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement." See supra note 4. FINRA rules are consistent with this provision of the Act because FINRA rules provide that class action and statutory collective action claims may not be arbitrated under the Code. See FINRA Rule 13204.

⁷ See H.R. REP. NO. 117-234, at 18 (2022) ("The Committee states that pursuant to clause 3(c)(4) of House Rule XIII, H.R. 4445 improves access to justice for survivors of sexual assault and harassment by allowing these parties to elect arbitration after a dispute has arisen"). The applicability of the Act to an agreement to arbitrate and the validity and enforceability of an agreement to which the Act applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator. See supra note 4.

⁸ FINRA Rule 13100(bb) provides that "[t]he term 'statutory employment discrimination claim' means a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute." FINRA rules do not explicitly address the treatment of sexual assault claims.

the Code, in practice, employment agreements may require associated persons to arbitrate such claims.

In light of the changes set forth in the Act, FINRA is proposing amendments to its rules to align the rules to the Act and make other conforming changes.⁹

Proposed Amendments to FINRA Rule 13100

FINRA is proposing to amend FINRA Rule 13100 to add definitions of “sexual assault claim” and “sexual harassment claim” that are consistent with the definitions of “sexual assault dispute” and “sexual harassment dispute” in the Act.¹⁰ Specifically, proposed FINRA Rule 13100(aa) would provide that “[t]he term ‘sexual assault claim’ means a claim involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 of the United States Code or similar applicable Tribal or State law, including when the victim lacks capacity to consent.” In addition, proposed FINRA Rule 13100(bb) would provide that “[t]he term ‘sexual harassment claim’ means a claim relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”¹¹

Proposed Amendments to FINRA Rule 13201

FINRA is proposing to amend FINRA Rule 13201 to align it with the Act by adding new paragraph (c) to provide that a party alleging a sexual assault or sexual harassment claim that has

⁹ The proposed rule change would apply to all members, including members that are funding portals or have elected to be treated as capital acquisition brokers (“CABs”), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference.

¹⁰ Under FINRA Rule 13100(e), “[t]he term ‘claim’ means an allegation or request for relief.” Under FINRA Rule 13100(n), “[t]he term ‘dispute’ means a dispute, claim or controversy. A dispute may consist of one or more claims.”

¹¹ The proposed rule change would also remove the reference to “sexual harassment” from the definition of SD claim in FINRA Rule 13100(bb). See supra note 8.

agreed to arbitrate before the dispute arose may elect post dispute not to arbitrate the claim under the Code.¹² Proposed paragraph (c) would also provide that the claim may be arbitrated if the parties agreed to arbitrate it after the dispute arose. Further, paragraph (c) would provide that sexual assault and sexual harassment claims would be administered in the forum under FINRA Rule 13802, which establishes the procedural requirements for administering SD claims in DRS’s arbitration forum today.¹³

Proposed Amendments to FINRA Rule 13803

FINRA is proposing amendments to FINRA Rule 13803 to ensure that sexual assault and sexual harassment claims are administered consistently with how SD claims are currently administered in DRS’s arbitration forum.¹⁴ Under the current framework, sexual harassment and sexual assault claims would be administered under FINRA Rule 13803 to the extent such claims constitute SD claims. The proposed rule change would add the terms “sexual assault claim” and “sexual harassment claim” to the title of FINRA Rule 13803 and throughout the rule to make

¹² The proposed rule change would also amend the title of FINRA Rule 13201 to clarify that the rule applies to sexual assault claims and sexual harassment claims.

¹³ FINRA Rule 13802 sets forth requirements as to the number of arbitrators on the panel, the composition of the panel, the filing fee, the relief available, and the availability of attorneys’ fees. FINRA is proposing to amend FINRA Rule 13802 to add the terms “sexual assault claim” and “sexual harassment claim” to the title and throughout the rule to clarify that it also applies to these types of claims.

¹⁴ Under FINRA Rule 13803, if an associated person files an SD claim in court and asserts related claims in DRS’s arbitration forum, a respondent who is named in both proceedings may bring a motion to compel the related arbitration claims to the same court proceeding. If the respondent does so, the respondent must assert all related claims it has against the associated person in the same court proceeding. FINRA Rule 13803 also permits the respondent to compel arbitration of related claims that are subject to mandatory arbitration. This provision applies where the respondent has not exercised its option to combine all claims in court.

explicit that it applies to the coordination of sexual assault and sexual harassment claims filed in court and other related claims that may be filed at DRS's arbitration forum.¹⁵

Proposed Amendments to FINRA Rule 2263

FINRA is proposing a conforming amendment to FINRA Rule 2263 to incorporate the language in proposed FINRA Rule 13201(c) into the written statement a member firm must provide to an associated person regarding the predispute arbitration clause in Form U4. Thus, firms would be required to disclose to the associated person that a party alleging a sexual assault or sexual harassment claim that has agreed to arbitrate before the dispute arose may elect post dispute not to arbitrate such a claim under the Code, and that such a claim may be arbitrated if the parties have agreed to arbitrate it after the dispute arose.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing. The operative date will be the date of the filing of the proposed rule change.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Exchange Act,¹⁶ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

¹⁵ Similarly, FINRA proposes to add the terms "sexual assault claim" and "sexual harassment claim" to other rules in the Code that reference SD claims to ensure that sexual assault and sexual harassment claims are administered consistently with how SD claims are currently administered in DRS's arbitration forum. See FINRA Rules 13402 (Composition of Arbitration Panels in Cases Not Involving a Statutory Discrimination Claim), 13510 (Depositions); Part VIII (Simplified Arbitration; Default Proceedings; Statutory Employment Discrimination Claims; and Injunctive Relief).

¹⁶ 15 U.S.C. 78o-3(b)(6).

principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change serves to align FINRA rules with the Act, which prohibits mandatory arbitration of sexual assault and sexual harassment claims. The proposed rule change would create parity between FINRA rules and the Act as to the circumstances under which sexual assault and sexual harassment claims may be arbitrated at DRS's forum. The proposed conforming amendments would also make clear that when such claims are arbitrated at DRS's forum, they will be processed like SD claims. Thus, the proposed rule change will enable DRS to continue to administer a fair dispute resolution forum and meet its investor protection goals in a manner consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change aligns FINRA rules with other requirements to which firms are subject and would not have additional economic impacts on firms or associated persons.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time

as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Exchange Act¹⁷ and Rule 19b-4(f)(6) thereunder.¹⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act.

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2022-012 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2022-012. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f)(6).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2022-012 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).