FINRA ARBITRATION AS FINANCIAL REGULATION

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The Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization that oversees securities broker-dealers and administers a dispute resolution forum that has nearly exclusive jurisdiction over legal claims for many important parts of the securities industry. However, the legal scholarship has given limited attention to FINRA arbitration, generally touching on niche aspects of the process when it does. This Article tries to fill that gap by providing a comprehensive analysis of FINRA arbitration. It examines how FINRA arbitration differs from other forms of commercial arbitration outside of the securities context. It also explains how arbitration fits within FINRA's broader mandate as securities market regulator. The claim of this Article is that FINRA arbitration can be understood as a unique, indirect form of financial regulation once the dispute resolution process FINRA oversees is viewed as a systematic whole. By developing this thesis, the link between FINRA's dual role as financial regulator and arbitral forum is placed in a rigorous conceptual framework for the first time in the law literature.

INTRODUCTION

The Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization (SRO) that oversees the securities industry.[1] In addition to other functions, FINRA provides a forum for dispute resolution through arbitration and mediation.[2] In fact, FINRA arbitration is essentially the exclusive legal forum for disputes between investors and securities broker-dealers,[3] handling

* Associate Professor of Business Law, Indiana University Kelley School of Business. I would like to thank participants at presentations of this paper, at the 2024 Annual Conference for the Academy of Legal Studies in Business and the 2025 Pacific Southwest Conference for the Academy of Legal Studies in Business, for their helpful comments. I would also like to thank Joe Ledford for excellent research assistance.

1. *About FINRA*, FINRA, https://www.finra.org/about [https://perma.cc/569J-KBMB] (last visited Sep. 14, 2025, at 23:52 CST) ("FINRA . . . is authorized by Congress to protect America's investors by making sure the broker-dealer industry operates fairly and honestly. We oversee more than 624,000 brokers across the country—and analyze billions of daily market events."). A self-regulatory organization, or "SRO," is a non-governmental entity, typically comprised of industry participant members, that has the authority to create and enforce industry regulations and standards. *See generally* Saule T. Omarova, *Wall Street as a Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411 (2011) (providing a comprehensive overview of SROs in the financial industry and advocating that they play a more robust role with regard to systemic risks in the financial system); Steven L. Schwarcz, *Financial Industry Self-Regulation: Aspiration and Reality*, 159 U. PA. L. REV. PENNUMBRA 293 (2010) (providing further commentary on Professor Omarova's thesis). For a discussion of the unique features of FINRA as an SRO, see *infra* Part I.C.

2. *See Arbitration & Mediation*, FINRA, https://www.finra.org/arbitration-mediation [https://perma.cc/2RMS-9ASS] (last visited Sep. 3, 2025) (providing background on FINRA's arbitration and mediation services).

3. *See id.* ("FINRA operates the largest securities dispute resolution forum in the United States."); FINRA, FINRA DISPUTE RESOLUTION: ARBITRATION, MEDIATION AND THE NEUTRALS WHO SERVE 1, 1 (2013) https://www.finra.org/sites/default/files/14_0289%201_DR%20Promo%20Brochure.pdf [https://perma.cc/SHB2-LNMD] ("FINRA Dispute Resolution handles more than 99 percent of securities-related arbitrations and mediations in the United States through its network of regional offices."); *see also* Barbara Black, *The Past, Present and Future of Securities Arbitration between Customers and Brokerage Firms*, *in* RESEARCH HANDBOOK ON SECURITIES REGULATION IN THE UNITED STATES 412, 412 (J. Markham & R. Gjyshi eds., 2014) ("The Financial Industry Regulatory Authority ("FINRA") is, for all practical purposes, the sole arbitration forum for resolving disputes between broker-dealers, associated persons and their customers."). *See generally* Jill I. Gross, *The Customer's Nonwaivable Right to Choose Arbitration in the Securities*

the vast majority of claims among broker-dealers, their investor customers, and their employees.[4] FINRA arbitration is therefore an important feature of the legal landscape of the securities industry due to its exclusivity and comprehensiveness.

FINRA is also important due to its sheer caseload. Every year, several thousand legal disputes are arbitrated by FINRA.[5] This is a nontrivial figure, especially relative to comparable specialized dispute resolution forums. The National Futures Association, an SRO for the derivatives industry, handles less than one hundred filings per year.[6] The International Chamber of Commerce, which hosts a growing arbitral forum, registered 890 new cases in 2023.[7] Judicial Arbitration and Mediations Services, Inc. (JAMS)—which holds itself out as "the largest private provider of alternative dispute resolution . . . services worldwide"[8]—received 19,464 new cases last year.[9]

And yet, FINRA arbitration has received limited attention in the legal scholarship.[10] When it does, the tendency is to focus on relatively niche topics. Recent research includes FINRA's response to the 2020 COVID pandemic,[11] including the use of remote arbitration hearings.[12] Other articles have examined

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Industry, 10 BROOK. J. CORP. FIN. & COM. L. 383 (2016) (surveying the narrow exceptions to FINRA jurisdiction over disputes between securities broker-dealers and their investor customers).

4. *See infra* Part III.A (reviewing the categories of claims that are subject to FINRA jurisdiction).

5. According to statistics provided by FINRA, the rolling average in recent years is 3,000 to 6,000 arbitration matters filed and closed. *See Dispute Resolution Statistics*, FINRA [hereinafter FINRA, *Dispute Resolution Statistics*], https://www.finra.org/arbitration-mediation/dispute-resolution-statistics [https://perma.cc/4GGT-ZG8B] (last visited Sep. 4, 2025) (stating that in 2023, 3,382 new cases were filed, 3,027 were closed, and 3,337 remained open).

6. *See Arbitration Statistics*, NFA, https://www.nfa.futures.org/arbitration/arbitration-statistics.html [https://perma.cc/5HGF-ZLDR] (last visited Sep. 4, 2025) (showing cases filed for the years 2020 to 2025).

7. *ICC Releases Preliminary 2023 Arbitration and ADR Statistics*, INT'L CHAMBER OF COM.: NEWS AND PUBL'NS (June 10, 2024), https://iccwbo.org/news-publications/news/icc-releases-preliminary-2023-arbitration-and-adr-statistics/ [https://perma.cc/J586-4A4K].

8. *JAMS Releases 2023 Global Caseload Statistics Reflecting Growing Demand for ADR Services Worldwide*, JAMS (July 15, 2024), https://www.jamsadr.com/news/2024/jams-releases-2023-global-caseload-statistics [https://perma.cc/K675-A75F].

9. *Id.*

10. There is a somewhat larger, albeit still modest, body of literature on FINRA itself as a self-regulatory organization and securities industry supervisor in general. Notably, these articles tend to pass over the arbitration function completely. *See, e.g.*, Michael Deshmukh, *Is FINRA a State Actor? A Question That Exposes the Flaws of the State Action Doctrine and Suggests a Way to Redeem It*, 67 VAND. L. REV. 1173 (2014) (focusing on FINRA in the context of the state action doctrine); William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORN. L. REV. 1 (2013) (discussing the increasing resemblance of self-regulatory organizations to governmental entities); Onnig H. Dombalagian, *Self and Self-Regulation: Resolving the SRO Identity Crisis*, 1 BROOK. J. CORP. FIN. & COM. L. 329 (2007) (discussing the functions of self-regulatory organizations in light of proposals for new regulatory models in the securities industry).

11. *See, e.g.*, Kristen M. Blankley, *FINRA's Dispute Resolution Pandemic Response*, 13 ARB. L. REV., Dec. 1, 2021, at 1, 3 ("The purpose of this Article is to outline FINRA's response to the pandemic and provide critiques to its course of action.").

12. *See, e.g.*, Nicole G. Iannarone, *A Model for Post-Pandemic Remote Arbitration*, 52 STETSON L. REV. 394 *passim* (2022) (studying the experience of emergency remote arbitration by FINRA during the first eighteen months of the COVID-19 pandemic); David Horton, *Forced Remote Arbitration*, 108 CORN. L. REV. 137 *passim* (2022) (providing an empirical study of "forced," i.e., mandatory, remote arbitration from July 2020 to

the use of forum selection issues raised by mandatory arbitration clauses in investor contracts.[13] There are a few instances of empirical work on employment disputes[14] and small claims cases with pro se arbitration claimants.[15] There are also articles that use an international, comparative lens to contrast FINRA dispute resolution with securities arbitration in other jurisdictions around the world.[16] Lastly, FINRA's procedures for "expunging" information regarding investor arbitrations against broker-dealers from regulatory databases has given rise to a growing body of scholarship.[17]

What is lacking is a holistic view of FINRA arbitration within the broader ecosystem of both alternative dispute resolution and of securities regulation. This Article takes such an approach. The thesis of the Article is that once FINRA arbitration is examined from a systematic perspective, it can be understood as an indirect form of financial regulation. This is a nonobvious claim. The term "regulation" is typically used to refer to rules promulgated by a governmental body that mandate or prohibit certain behaviors.[18] FINRA, by contrast, is technically a not-for-profit corporation, not a legislative or executive agency.[19] Moreover, its arbitration forum at first glance serves merely as a platform for private resolution disputes. But as will be shown, FINRA

November 2021); Jill. I. Gross, *Post-Pandemic FINRA Arbitration: To Zoom or Not to Zoom*, 52 STETSON L REV. 363 *passim* (2022) (discussing the use of Zoom videoconferences for FINRA arbitrations in the wake of the COVID pandemic).

13. *See, e.g.*, Peter Giovini, *Arbitration and FINRA's Customer Code: A Tailored Approach to When a Forum Selection Clause May Supersede FINRA Rule 12200*, 91 FORDHAM L. REV. 994 *passim* (2022); Jill Gross, *FINRA Issues Regulatory Notice on Customers' and Employees' Right to Choose Securities Arbitration*, 34 ALTS. HIGH COST LITIG. 113 *passim* (2016).

14. *See, e.g.*, J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113 *passim* (2014); David B. Lipsky, Ronald L. Seeber & J. Ryan Lamare, *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1968-2008*, 65 DISP. RESOL. J. 12 *passim* (2010).

15. *See* Nicole G. Iannarone, *Small Claims Securities Arbitration*, 26 U. PA. J. BUS. L. 731 *passim* (2024).

16. *See, e.g.*, Alina Gatskova, *Mend It, Don't End it: How to Improve Securities Arbitration in the United States by Adopting Best Practices from the United Kingdom and Australia*, 41 FORDHAM INT'L L. REV. 1043 *passim* (2017); Byron Crowe II, *Financial Services ADR: What the United States Could Learn from South Africa*, 47 CORN. INT'L L.J. 145 *passim* (2014).

17. *See* James F. Tierney & Benjamin P. Edwards, *Stockbroker Secrets*, 26 U. PA. J. BUS. L. 793 *passim* (2022); Benjamin P. Edwards, *Adversarial Failure*, 77 WASH. & LEE L. REV. 1053 *passim* (2020); James T. Farris, *What You Do Not Know Can Hurt You: How the FINRA Expungement Process Is Endangering Future Investors Through a Lack of Information*, 42 HOFSTRA L. REV. 1227 *passim* (2014); Seth E. Lipner, *The Expungement of Customer Complaint CRD Information Following the Settlement of a FINRA Arbitration*, 19 FORDHAM J. CORP. & FIN. L. 57 *passim* (2013).

18. Such rules are sometimes known as "command-and-control" regulations. Louis Kaplow, *Optimal Regulation with Exemptions*, 66 INT'L J. INDUS. ORG. 1, 2 (2019) (noting that "[r]egulation across the globe most often employs a command-and-control approach" and providing economic models for how such an approach works). Fines and taxes provide an alternative to command-and-control regulations, which often function in a similar manner to encourage or discourage particular behaviors. *See generally* Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000) (demonstrating the interchangeability of fines, taxes, and prices for goods); Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93 (2015) (arguing that "Pigouvian taxes" are a superior instrument for lawmakers to regulate actions that produce negative externalities compared to traditional command-and-control rules).

19. *See infra* Part I.C.

arbitration in many respects represents a regulatory intervention into the securities industry that shapes the way capital markets work.

First, FINRA is more than an industry-led "self-regulatory organization." FINRA has extensive rule-making and enforcement powers that cover every corner of the broker-dealer industry and are exercised in a manner that resembles the Securities and Exchange Commission's (SEC) regulatory activities.[20] In fact, the shadow of the SEC hangs over everything FINRA does—under the federal securities laws, FINRA rulemakings are generally subject to SEC review, pre-approval, and veto.[21] For these reasons, among others, FINRA has been dubbed by some commentators as a quasi-governmental "deputy" of the SEC.[22] And as a result, the SEC's de facto dual mandate—to ensure investor protection while encouraging capital market efficiency—is embraced by FINRA as well.[23] Notably, this same dynamic with regard to the SEC applies to FINRA arbitration just as it does to FINRA's other rulemaking endeavors.[24] In a seminal line of Supreme Court decisions from the 1980s which dramatically expanded the scope of FINRA arbitration for investor claims against broker-dealers, the Supreme Court repeatedly held that securities claims could be safely shifted out of the federal courts because FINRA's arbitration policies and procedures were subject to SEC oversight.[25]

Second, and as a result of the foregoing, FINRA's arbitration program is more than a private dispute resolution forum. FINRA arbitration departs from the leading for-profit firms that offer commercial arbitration—such as the American Arbitration Association (AAA) and JAMS—which Professor Judith

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20. *See id.* (discussing FINRA's status as an SRO and its relationship with the SEC).

21. *See id.*

22. Daniel M. Gallagher, Comm'r Sec. & Exch. Comm'n, Market 2012: Time for a Fresh Look at Equity Market Structure and Self-Regulation, (Oct. 4, 2012) (referring to FINRA as a "deputy SEC"); *see also infra* Part I.C (reviewing similar views from other scholars and commentators).

23. *See* Hilary J. Allen, *The SEC as Financial Stability Regulator*, 43 J. CORP. L. 715, 728 (2014) ("The SEC has two clear legislative mandates: protecting investors, and promoting capital formation."); Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 173 (2016) [hereinafter Gross, *Historical Basis of Securities Arbitration*] (observing that FINRA has a "statutory obligation to enact rules that both facilitate trading in a 'free and open market' and protect investors"); *see also* 15 U.S.C. § 78o-3(b)(6) ("The rules of the association [FINRA] are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest . . . .").

24. *See* Credit Suisse First Bos. Corp. v. Grunwald, 400 F.3d 1119, 1130–32 (9th Cir. 2005) (explaining that the SEC has broad authority over FINRA arbitration rules and must approve them before they become effective).

25. *See* Shearson/Am. Express v. McMahon, 482 U.S. 220, 238 (1987) ("[T]he SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, [such that] enforcement does not effect a waiver of 'compliance with any provision' of the Exchange Act . . . ."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989) (repeating the argument regarding SEC authority laid out in *McMahon*); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28–29 (1991) (using similar logic in a holding that expanded FINRA arbitration jurisdiction over statutory employment claims).

Resnik have described as "private providers, free to specify procedures without public input."[26] The contrast can be seen across the board when examining FINRA arbitration functions.

For example, due to its nonprofit status, FINRA subsidizes the parties' arbitration and mediation costs along a number of margins.[27] Also unlike other forms of commercial arbitration, FINRA arbitrators fall into two distinct categories: "public" and "non-public," with FINRA rules specifying the proportion of each group that must comprise an arbitral panel depending on the parties and claims involved.[28] FINRA also leverages its enforcement powers in the arbitration context: parties that do not comply with subpoenas, discovery rules, or damages owed post-award may be subject to sanctions from FINRA (including not only monetary sanctions but also bans from the broker-dealer industry).[29] While most private arbitrations are subject to strict confidentiality provisions, FINRA requires the disclosure of arbitral awards and other relevant case information on publicly available databases that can be accessed by capital market investors.[30] Lastly, the scope of disputes covered by FINRA arbitration is unique. It is intentionally broad, hermetically sealing nearly all aspects of the broker-dealer industry: claims by investors against brokers, claims by brokers against one another, and claims between brokers and their employees.[31] FINRA's jurisdiction over these claims is not exclusively voluntary nor contractual on the part of the parties involved.[32] According to FINRA, it is a sanctionable violation of FINRA rules for securities broker-dealers to exercise contractual provisions in which employees agree to resolve disputes in outside arbitral forums, such as JAMs.[33]

When the unique features of FINRA arbitration are taken as a whole, a few themes stand out which align that process with both the overall posture of securities regulation as well as the broker-dealer industry's role in financial markets. One obvious aspect is a focus on speed, efficiency, and finality for the parties involved. Financial markets thrive on a predictable and low-cost transacting environment,[34] for which arbitration is generally better suited than drawn out litigation in court.[35] The fact that FINRA subsidizes its arbitration

26. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2852 (2015).

27. *See infra* Part III.B.

28. *See infra* Part III.C.

29. *See infra* Part III.D.

30. *See infra* Parts III.D.–E.

31. *See infra* Part II.B.1 (discussing the scope of FINRA's jurisdiction and claims covered).

32. *See id.*

33. *See infra* Part III.A (explaining the noncontractual basis for FINRA's arbitration jurisdiction).

34. *See generally* Ronald J. Gilson & Reiner H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984) (assessing mechanisms of market efficiency).

35. The efficiency and finality benefits of arbitration are widely touted and well-known. *See* KATHERINE V.W. STONE, RICHARD A. BALES & ALEXANDER J.S. COLVIN, ARBITRATION LAW 689 (4th ed. 2021) ("Deferential [judicial] review promotes finality, which was important to the merchants who advocated

and mediation proceedings reflects the fact that it is providing a regulatory "public good" in the economic sense of the term.[36]

A second underlying theme relates to the relationship of trust and confidence that is necessarily entailed between buyers and sellers of financial instruments.[37] FINRA arbitration is structured to safeguard the fiduciary or quasi-fiduciary relationships formed when contracting in markets for securities by extending equitable industry norms to the dispute resolution context while also seeking to balance the demands for technical expertise and neutrality in that process.[38] Notably, FINRA arbitrations are subject to an umbrella rule that prohibits actions that "may be deemed conduct inconsistent with just and equitable principles of trade" in the broker-dealer industry.[39]

Third, and finally, is the role of disclosure. Financial markets run on information.[40] Because that information is often asymmetrical among purchasers, sellers, and offerors of financial instruments (and because agents within a firm may have misaligned incentives to disclose), the federal securities laws are characterized by a mandatory disclosure regime.[41] The fact that FINRA arbitration departs from the norm of confidentiality in commercial arbitration aligns with the same goal of providing markets with information—regarding broker-dealers who sell stocks, rather than the securities themselves.[42] Notably, as Judge Easterbrook and Professor Fischel have pointed out in their influential

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the passage of the FAA [Federal Arbitration Act] in the 1920s to facilitate speedy resolution of their contractual issues."); Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 119 (2016) (stating the conventional wisdom that the "FAA was part of a broader [procedural reform] movement . . . to simplify court procedures, relieve overcrowded judicial dockets, and provide for improved, efficient methods of resolving disputes.").

36. *See generally* Keith L. Dougherty, *Public Goods Theory from Eighteenth Century Political Philosophy to Twentieth Century Economics*, 117 PUB. CHOICE 239 (2003) (providing an intellectual history of the "public goods" theory).

37. *See* Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisors*, 55 VILL. L. REV. 701, 701 (2010) ("Each day millions of Americans make critical decisions about which investments to buy or sell based on the recommendations of financial service professionals.").

38. See *infra* Part III for a fuller discussion. *See also* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 176 (emphasizing the historical role of industry norms and equitable standards in securities arbitrations).

39. FINRA, Rule IM-12000, IM-13000 (2008).

40. *See* Gadi Barlevy & Pietro Veronesi, *Information Acquisition in Financial Markets*, 67 REV. ECON. STUDS. 79, 79 (2000); *cf.* F.A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519 *passim* (1945) (making the broader point about information with respect to all goods and markets, not just financial assets).

41. The economic analysis of mandatory disclosure rules, and their precise theoretical justification (if any), has been subject to endless discussion and debate among financial economists and law-and-economics scholars. For a selection of some leading contributions, see generally Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81 (2007) (examining the effects of the adoption of mandatory disclosure regimes on shareholders); Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047 (1995) (discussing differing models of mandatory disclosure); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984) (analyzing the functions of mandatory disclosure requirements along with other legal rules against fraud).

42. See *infra* Part III.E for a fuller discussion of this point.

work on the law and economics of corporations,[43] a major function of the securities laws is to not only mandate but also *standardize* disclosures across firms.[44] In this sense, FINRA's (at first glance) somewhat overbearing claim to jurisdiction over the panoply of legal disputes arising from the broker-dealer industry begins to make sense.[45] Once all industry participants are "in the same boat together" with respect to the dispute resolution process, the arbitration process and accompanying public disclosure of case information by FINRA becomes a mode of standardization that may better enable cross-industry comparisons of publicly available information.[46]

As may be gathered from the analysis laid out above, this Article takes a positive, descriptive approach to FINRA arbitration.[47] The purpose is to explain the underlying functional logic of FINRA arbitration rather than provide a normative assessment of how well or poorly various aspects of the process perform.[48] Certainly a case can be made that any number of FINRA arbitration procedure rules are not perfectly calibrated to their apparent goals or might be improved along some margins. However, the systemic, functional view of securities arbitration set forth in this Article aims to provide a useful framework for future scholars who engage in those debates.[49]

The Article proceeds as follows. Part I provides an overview of FINRA, including its institutional structure, regulatory functions, and relationship to the securities industry. Part II details the mechanics of dispute resolution at FINRA, in the form of arbitration, mediation, and expungement proceedings. Part III explores how FINRA arbitration functions as a unique forum for dispute resolution and analyzes how the specific procedural rules outlined in Part II fit within FINRA's larger mandate as a financial market regulator. A brief conclusion follows.

I. FINRA: INSTITUTIONAL STRUCTURE & REGULATORY FUNCTIONS

This Part provides background on FINRA to frame the analysis that follows below. Part I.A surveys the origins and institutional history of FINRA. Part I.B discusses the regulatory activities that FINRA undertakes on behalf of

43. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (discussing the law and economics of corporations).

44. *Id.* at 290–304.

45. See *infra* Part III.E for a fuller discussion of this point.

46. See *id.*

47. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 1–4 (2004) (explaining the difference between positive/descriptive and normative analyses of the law).

48. *See id.*

49. *Compare, e.g.*, Nicole G. Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 NEV. L.J.F. 1, 1–2 (2020) (arguing that procedural reforms and transparency can mitigate arbitration's legitimacy concerns), *with* Benjamin P. Edwards, *Arbitration's Dark Shadow*, 18 NEV. L.J. 427, 430–33 (2018) (warning that the expansion of mandatory arbitration shrouds disputes from public view, undermines reputational checks, and allows arbitrators to drift away from the law).

the securities industry. Part I.C summarizes FINRA's governance structure, its status as a self-regulatory organization, and its relationship to the SEC. Part II will specifically detail dispute resolution at FINRA and the mechanics of its arbitration and mediation procedures.

A. Institutional History of FINRA

FINRA is one of the latest entries in a long tradition of SROs in the securities industry.[50] When Congress passed the Securities Exchange Act of 1934,[51] establishing the SEC, it also recognized a role for industry organizations, namely exchanges such as the New York Stock Exchange (NYSE), to perform regulatory functions under the supervision of the SEC.[52]

The role of SROs in the securities markets was again expanded with the 1938 Maloney Act.[53] The Maloney Act added Section 15A to the 1938 Securities Exchange Act to allow any association of brokers or dealers meeting certain statutory requirements to register with the SEC as a national securities association.[54] The purpose of the Maloney Act and of Section 15A was to allow the creation of SROs for the over-the-counter securities markets, which would parallel oversight activities of the NYSE for exchange-traded stocks.[55]

The National Association of Securities Dealers (NASD), FINRA's predecessor organization, was established in 1939 pursuant to the Maloney Act.[56] As of 1945, principals and customer-facing employees at broker-dealers

50. For the history of SROs in the securities industry, see Kenneth Durr & Robert Colby, *The Institution of Experience: Self-Regulatory Organizations in the Securities Industry, 1792–2010*, SEC. & EXCH. COMM'N HIST. SOC'Y (Dec. 1, 2010), https://www.sechistorical.org/museum/galleries/sro/index.php [https://perma.cc/UP8U-LSFZ]; Stuart Banner, *The Origin of the New York Stock Exchange, 1791–1860*, 27 J. LEGAL STUD. 113 *passim* (1998). For a recent policy discussion, see also Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 417–21 (2011) (advocating "embedded" self-regulation to address systemic risk); Steven L. Schwarcz, Response, *Financial Industry Self-Regulation: Aspiration and Reality*, 159 U. PA. L. REV. PENNUMBRA 293, 293–96 (2010) (arguing systemic risk reduction requires government oversight and noting industry lacks incentives to self-police).

51. 15 U.S.C. §§ 78a–rr.

52. *See* Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation after All*, *in* BUILDING RESPONSIVENESS AND RESPONSIBLE FINANCIAL REGULATORS IN THE AFTERMATH OF THE FINANCIAL CRISIS 233, 234 (Pablo Iglesias Rodriguez ed., 2015).

53. Maloney Act, Pub. L. No. 75-719, 52 Stat. 1070 (1938).

54. 15 U.S.C. § 78o-3. In order for associations of brokers or dealers to register with the SEC, the Maloney Act required a showing that the association guaranteed: (a) "fair representation of its members," (b) "equitable allocation of . . . dues," (c) prevention of "fraudulent and manipulative acts and practices," (d) prevention of unreasonable profits or unreasonable rates of commissions or other charges, (e) promotion of "just and equitable principles of trade," (f) appropriate member discipline, and (g) protection of "investors and the public interest." *Id.* § 78o-3(b).

55. *See* George C. Mathews, Comm'r, Sec. and Exch. Comm'n, A Discussion of the Maloney Act Program 3–4 (Oct. 23, 1938) (transcript available at https://www.sec.gov/news/speech/speecharchive/1938speech.shtml) [https://perma.cc/9RAW-RSKX].

56. Nat'l Ass'n of Secs. Dealers, Inc., 5 S.E.C. 627 (1939). *See generally* Vincent L. Briccetti, *Governmental Action and the National Association of Securities Dealers*, 47 FORDHAM L. REV. 585 (1979) (examining NASD as a governmental actor); John D. McGowan, The NASD: Origins, Recent Developments and Future Goals (Aug.

who were member firms of the NASD were required to register with the NASD.[57] The NASD remained the only SRO for over-the-counter securities markets for the following two decades.[58] From 1964 to 1983, the SEC provided oversight of broker-dealers who were not NASD members, through its so-called "SEC-Only" program.[59] The SEC-Only option was removed in 1983, however, when NASD membership became mandatory for over-the-counter securities broker-dealers.[60] The NASD also created the NASDAQ stock exchange in 1971[61] and ran NASDAQ until 2000, when it was divested from the NASD and reestablished as a publicly held, for-profit company.[62]

FINRA was formed in 2007 through a merger of the NASD and NYSE.[63] One of the motivations for the merger was an alleged duplicity and redundancy of requirements for broker-dealer firms that transact in both over-the-counter securities (thus, subject to NASD rules) and exchange-traded stocks (covered by the NYSE).[64] The NASD–NYSE merger solved this problem so that now,

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1974) (unpublished manuscript) (on file with the SEC Historical Society) (providing overview of NASD's history and regulatory role).

57. *See* Peirce, *supra* note 52, at 235.

58. *Id.*

59. The SEC-Only program was authorized by Congress through amendments to Section 15 of the Securities Exchange Act of 1934. *See* Pub. L. No. 88-467, 78 Stat. 565 (1964) (amending Section 15 of the Exchange Act); Peirce, *supra* note 52, at 235–36.

60. *See* U.S. SEC & EXCH. COMM'N, 49TH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1983, at 21 (1984). According to SEC staff, the decision to cede exclusive control to NASD was justified, because "even if the [SEC-Only] program were abolished, the Commission would still retain general oversight authority over SRO actions. Because all its rules would be reviewed by the Commission, specific complaints concerning NASD performance would also be heard." DIV. OF MKT. REGUL., U.S. SEC. & EXCH. COMM'N, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS, at VI-6 (1994). SEC review of NASD rule-making was provided by Congress pursuant to amendments to the Securities Exchange Act of 1934 passed in 1975. *See* STAFF OF S. COMM. ON BANKING, HOUSING, & URBAN AFFAIRS, 94TH CONG., SUMMARY OF PRINCIPAL PROVISIONS OF SECURITIES ACTS AMENDMENTS OF 1975, at 19 (Comm. Print 1975).

61. NASDAQ stands for "National Association of Securities Dealers Automated Quotations." Phil Mackintosh, *50 Years of Market Innovation*, NASDAQ (Feb. 11, 2021, at 14:49 ET), https://www.nasdaq.com/articles/nasdaq%3A-50-years-of-market-innovation-2021-02-11 [https://perma.cc/TVA8-ASGJ] (providing a historical timeline).

62. *See id.*; Peirce, *supra* note 52, at 237.

63. *See* Press Release, Fin. Indus. Regul. Auth., NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority - FINRA (July 30, 2007), https://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Sacks_FINRA.pdf [https://perma.cc/BPS6-GABU] (on file with U.S Court of Appeals for the Ninth Circuit).

64. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Gives Regulatory Approval for NASD and NYSE Consolidation (July 26, 2007) https://www.sec.gov/news/press/2007/2007-151.html [https://perma.cc/AGE9-YMSB] (explaining that the merger was "intended to help streamline the broker-dealer regulatory system, combine technologies, and permit the establishment of a single set of rules governing membership matters, with the aim of enhancing oversight of U.S. securities firms and assuring investor protection"); SEC. INDUS. ASS'N, THE COSTS OF COMPLIANCE IN THE U.S. SECURITIES INDUSTRY 9 (2006), https://www.sifma.org/wp-content/uploads/2017/06/costofcompliancesurveyreport1.pdf [https://perma.cc/UJE2-W7VR] ("Overlap and duplication of effort by regulators has contributed greatly to rapidly rising compliance-related staff expenditures at industry firms. Firms cite the lack of coordination among regulators as resulting in overlap and duplication of staff effort . . . . Having to keep track of regulatory initiatives from the SEC, NASD, NYSE, and others is very time consuming . . . ."). By one contemporaneous

FINRA regulates almost all broker-dealers.[65] In total, as of 2022, 3,378 firms were registered as FINRA members and 701,859 employees were licensed and registered with FINRA as financial professionals.[66] In size, FINRA is comparable to the SEC itself. FINRA's annual budget is nearly $1 billion and it has roughly 4,000 employees.[67]

B. Scope of Securities Regulation Activities at FINRA

FINRA performs a wide range of functions aside from dispute resolution. As a non-profit corporation organized under Delaware law, FINRA generally describes its "Objects or Purposes" as seeking "[t]o promote through cooperative effort the investment banking and securities business" as well as "to promote just and equitable principles of trade for the protection of investors."[68] In practice, this broad mission can be reduced to three functions:

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accounting, approximately 180 securities firms were members of both the NASD and NYSE and therefore subject to parallel SRO rules for their activities. *See* Peirce, *supra* note 52, at 238.

65. *See* Peter Giovine, Note, *Arbitration and FINRA's Customer Code: A Tailored Approach to When a Forum Selection Clause May Supersede FINRA Rule 12200*, 91 FORDHAM L. REV. 993, 997 (2022). A "broker" is defined under the securities laws as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). A "dealer" is defined as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." *Id.* § 78(c)(a)(5)(A). The broker-dealer terminology reflects the fact that many securities firms engage in both activities. *See* Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW. 395, 400 (2010); Robert Neal & David Reiffen, *The Effect of Integration Between Broker-Dealers and Specialists*, *in* THE INDUSTRIAL ORGANIZATION AND REGULATION OF THE SECURITIES INDUSTRY 177–206 (Andrew W. Lo ed., 1996).

66. FIN. INDUS. REGUL. AUTH., 2023 FINRA INDUSTRY SNAPSHOT 5, 14 (2023), https://www.finra.org/sites/default/files/2023-04/2023-industry-snapshot.pdf [https://perma.cc/CZ7X-5WNT].

67. FIN. INDUS. REGUL. AUTH., FINRA 2022 ANNUAL BUDGET SUMMARY 5, 8 (2023), https://www.finra.org/sites/default/files/2022-05/FINRA-2022-Annual-Budget-Summary.pdf [https://perma.cc/EA2H-Q5UU]. By comparison, the SEC requested a $2.4 billion budget from Congress for 2024 and expects to staff 5,475 positions. U.S. SEC. & EXCH. COMM'N, FISCAL YEAR 2024: CONGRESSIONAL BUDGET JUSTIFICATION ANNUAL PERFORMANCE PLAN 3 (2023), https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf [https://perma.cc/XH8T-B83R].

68. The full language from FINRA's incorporation reads as follows:

> (1) To promote through cooperative effort the investment banking and securities business, to standardize its principles and practices, to promote therein high standards of commercial honor, and to encourage and promote among members observance of federal and state securities laws; (2) To provide a medium through which its membership may be enabled to confer, consult, and cooperate with governmental and other agencies in the solution of problems affecting investors, the public, and the investment banking and securities business; (3) To adopt, administer, and enforce rules of fair practice and rules to prevent fraudulent and manipulative acts and practices, and in general to promote just and equitable principles of trade for the protection of investors; (4) To promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members; (5) To establish, and to register with the Securities and Exchange Commission as, a national securities association pursuant to Section 15A of the Securities Exchange Act of 1934, as amended, and thereby to provide a medium for effectuating the purposes of said Section; and (6) To transact business and to purchase, hold, own, lease, mortgage, sell, and convey any and all property, real and personal, necessary, convenient, or useful for the purposes of the Corporation.

(1) rulemaking, through requirements that govern industry practices; (2) examinations, carried out upon member firms; and (3) enforcement of non-compliance with FINRA's rules along with the federal securities laws.[69]

FINRA's rulemaking activities are vast and defy easy summary.[70] One prominent set of rules, already mentioned, involves registration. Member firms must register with FINRA and ensure that certain of their employees are properly trained, licensed, and registered as well.[71] Once registered, member firms and their employees are subject to a lengthy rulebook that is more or less comprehensive with respect to their business operations and commercial conduct.[72] FINRA rules include accounting and financial balance sheet requirements for member firms; client-facing rules for brokers, such as "know your customer" and "best execution" obligations; anti-fraud and anti-money laundering provisions; and technical standards for executing and clearing trades, such as margin requirements.[73] According to one recent count, FINRA has filed an estimated 1,613 rulemaking notices in the Federal Register.[74]

FINRA also carries out examinations of member firms and issues annual reports on its findings.[75] Some of these examinations are routine. FINRA examines each member firm at least once over the course of a four-year examination cycle.[76] Other examinations, known as "cause" exams, are ad hoc

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Restated Certificate of Incorporation of the Financial Industry Regulatory Authority, Inc., FINRA (July 2, 2010), https://www.finra.org/rules-guidance/rulebooks/corporate-organization/restated-certificate-incorporation-financial [https://perma.cc/U9F3-XXZK].

69. *See id.*

70. *See* Daniel M. Gallagher, *U.S. Broker-Dealer Regulation*, *in* REFRAMING FINANCIAL REGULATION: ENHANCING STABILITY AND PROTECTING CONSUMERS 136, 137 (Hester Peirce & Benjamin Klutsey eds., 2016) ("The rules and regulations governing broker-dealers and their activity are encyclopedic in volume and detail.").

71. *See FINRA Qualification and Registration Requirements Frequently Asked Questions (FAQ)*, FINRA, https://www.finra.org/registration-exams-ce/qualification-exams/registration-requirements-faq [https://perma.cc/Y8YQ-UPTZ] (last visited Sep. 22, 2025).

72. *See FINRA Rules*, FINRA, https://www.finra.org/rules-guidance/rulebooks/finra-rules [https://perma.cc/JZ73-9EMT] (last visited Sep. 4, 2025).

73. *Id.*; *see also FINRA Manual*, FINRA, https://www.finra.org/rules-guidance/rulebooks [https://perma.cc/2YGZ-5LHF] (last visited Sep. 22, 2025) (providing an overview of FINRA's rules and guidelines); FINRA, Rule 2090 (2012) (explaining the "know your customer" rule); FINRA, Rule 5310 (2014) (explaining the "best execution" FINRA obligations); FINRA, Rule 3310 (2018) (explaining the anti-money laundering requirements under FINRA); FINRA, Rule 4210 (2024) (explaining the "margin requirements" under FINRA).

74. James Fallows Tierney, The Stock Exchange Rulemaking Firehose: A Law-as-Data Approach 9 (Dec. 27, 2023) (unpublished manuscript) (on file with The Association of American Law Schools).

75. *See, e.g.*, FINRA, 2023 REPORT ON FINRA'S EXAMINATION AND RISK MONITORING PROGRAM *passim* (2023), https://www.finra.org/sites/default/files/2023-01/2023-report-finras-examination-risk-monitoring-program.pdf [https://perma.cc/J6ZP-V8WA].

76. FINRA, FINRA EXAMINATION AND RISK MONITORING PROGRAMS (2021), https://www.finra.org/rules-guidance/guidance/reports/2021-finras-examination-and-risk-monitoring-program [https://perma.cc/BW5C-7WFB]; *see also FINRA Examination and Risk Monitoring Programs*, FINRA, https://www.finra.org/rules-guidance/key-topics/finra-examination-risk-monitoring-programs [https://perma.cc/Y3XA-9JHQ] (last visited Sep. 4, 2025) (stating FINRA examines member firms at least once every four years).

exams triggered by customer complaints or regulatory tips through FINRA's reporting portals.[77] FINRA also performs industry-wide risk monitoring activities through multi-firm sweep examinations on issues of particular interest, such as trading in cryptocurrency assets or cybersecurity.[78] Given the scope of FINRA membership, this activity amounts to thousands of examinations per year.[79]

Lastly, FINRA has statutory authority to bring enforcement measures against industry members and their "associated persons" that have violated its own rules or federal securities law.[80] FINRA sanctions include censures, fines, restitution to investors, suspensions, and permanent bars from the industry.[81] FINRA enforcement actions are sometimes settled immediately through letters of "Acceptance, Waiver and Consent," by which a proposed sanction is imposed without challenge.[82] If not, sanctions may be imposed at FINRA "disciplinary proceedings" held before a three-person panel.[83] Determinations made at FINRA disciplinary proceedings are appealable to FINRA's National Adjudicatory Council.[84] FINRA National Adjudicatory Council decisions can

77. *FINRA Examination and Risk Monitoring Programs*, FINRA, https://www.finra.org/rules-guidance/key-topics/finra-examination-risk-monitoring-programs [https://perma.cc/Y3XA-9JHQ] (last visited Sep. 4, 2025).

78. *Targeted Exam Letters*, FINRA, https://www.finra.org/rules-guidance/guidance/targeted-examination-letters [https://perma.cc/5PCR-K5FV] (last visited Sep. 22, 2025) ("FINRA and other regulators conduct targeted exams, known as sweeps, to gather information and carry out investigations. Sweep information is used to focus examinations and pinpoint regulatory response to emerging issues."); *see, e.g.*, *Crypto Asset Communications*, FINRA (2022), https://www.finra.org/rules-guidance/guidance/targeted-examination-letters/crypto-asset-communications [https://perma.cc/6FJK-AUHM]; *Targeted Examination Letter on Cybersecurity*, FINRA (2014), https://www.finra.org/rules-guidance/guidance/targeted-exam-letter/cybersecurity [https://perma.cc/BR5E-6VZL].

79. Peirce, *supra* note 52, at 241 (noting that in 2012, FINRA conducted more than 1,800 routine firm examinations and 5,100 cause examinations).

80. In fact, as an SRO registered under the federal securities laws, FINRA's capacity to impose disciplinary measures is a statutory obligation. *See* 15 U.S.C. § 78o-3(b)(7); *see also Enforcement*, FINRA, https://www.finra.org/rules-guidance/enforcement#results [https://perma.cc/63Y6-R5UC] (last visited Sep. 4, 2025) (describing FINRA's enforcement function and objectives). *See generally* Barbara Black, *Punishing Bad Brokers: Self-Regulation and FINRA Sanctions*, 8 BROOK. J. CORP. FIN. & COM. L. 23 (2013) (providing an overview of the FINRA enforcement regime); James Fallows Tierney, *Reconsidering Securities Industry Bars*, 29 STAN. J. LAW, BUS. & FIN. 134 (2024) (focusing on industry bars in particular).

81. *See* 15 U.S.C. § 78o-3(b)(7) (authorizing a range of sanctions including "expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction"). *See generally* FINRA, SANCTION GUIDELINES (2024), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [https://perma.cc/QKM3-H7BA] (providing additional context and guidance on FINRA's sanction determination process).

82. Tierney, *supra* note 80, at 147. *See* Johnny Clifton, Exchange Act Release No. 69982, 106 SEC Docket 3451, at *2 n.11 (July 12, 2013) ("AWCs are the means through which many FINRA disciplinary actions are settled prior to the filing of a complaint.").

83. Black, *supra* note 80, at 28 ("FINRA disciplinary proceedings are heard before a panel chaired by a professional hearing officer and two industry representatives.").

84. *See id.* at 24 (providing insights into the FINRA appeals process from the perspective of a former member of the FINRA National Adjudicatory Council). The FINRA Board of Governors may in some cases supply an additional layer of review for National Adjudicatory Council sanction decisions. *See id.* at 28.

subsequently be appealed to the SEC,[85] after which the SEC's action may also be subject to arbitrary-and-capriciousness review in the federal courts.[86] The scale of FINRA's enforcement activities is substantial. In 2022, FINRA imposed $54.5 million in fines, recovered $26.2 million in restitution to investors, expelled 7 firms, suspended 328 brokers, and permanently barred 227 more brokers.[87]

C. FINRA Governance: An "Independent" SRO

FINRA's governance structure and its relationship to the securities industry are complicated and worthy of note. Indeed, while nominally considered an SRO, FINRA styles itself as an "independent" regulator;[88] and rightly so, because it stands apart from the industry it represents in important ways. FINRA also has a complex relationship with the SEC. Commentary in the academic literature generally recognizes that FINRA is an SRO in name only,[89] and operates in many respects as a quasi-state actor or ancillary "deputy" to the SEC.[90]

FINRA is run by a twenty-two-member Board of Governors which includes the FINRA chief executive officer.[91] The FINRA Board of Governors

85. 15 U.S.C. § 78s(d)(2). *See* Black, supra note 80, at 28 ("All disciplinary proceedings are subject to de novo review by the SEC, on the agency's own motion or upon application by any 'aggrieved' person."). The SEC has statutory authority to "cancel, reduce, or require the remission of such sanction." 15 U.S.C. § 78s(e)(2). The SEC can also remand to FINRA for further proceedings. *See* § 78s(e)(1)(A).

86. 15 U.S.C. § 78y(b)(4); *see also id.* § 78y(a)(1) (providing judicial review for any "person aggrieved" by the SEC order). For arbitrary-and-capriciousness review, see Administrative Procedure Act, Pub. L. No. 89-554, § 706(2)(A), 80 Stat. 378, 393 (1966) (codified as amended at 5 U.S.C. § 706(2)(A) (2012)). As a practical matter, judicial review and the accompanying "case law on SEC programs about broker-dealer regulation[s]" is heavily concentrated in the D.C. Circuit. *See* Kyle Langvardt & James Fallows Tierney, *On "Confetti Regulation": The Wrong Way to Regulate Gamified Investing*, 131 YALE L.J.F. 717, 731 n.62 (2022) (discussing the D.C. Circuit's outsized role in the review of SEC and FINRA actions).

87. FINRA, 2022 FINRA ANNUAL FINANCIAL REPORT 3 (2023), https://www.finra.org/sites/default/files/2023-06/2022_Annual_Financial_Report.pdf [https://perma.cc/QA2H-LBBC].

88. *See, e.g.*, *Investment and Securities Account Restrictions Under FINRA's Code of Conduct*, FINRA, https://www.finra.org/careers/investment-and-securities-account-restrictions-under-finras-code-conduct [https://perma.cc/A78B-5TH8] (last visited Sep. 22, 2025) ("The Financial Industry Regulatory Authority (FINRA) is the largest independent regulator for all securities firms doing business in the United States.").

89. *See* Peirce, *supra* note 52, at 233 (noting that FINRA's "governance structure means that it is not accountable to the industry it regulates the way an SRO [typically] would be"); DAVID R. BURTON, REFORMING FINRA 2 (2017) https://www.heritage.org/markets-and-finance/report/reforming-finra [https://perma.cc/ET52-6LGT] ("Although FINRA's predecessor organizations (the NASD and the NYSE's regulatory arm) were once true SROs, FINRA is not."); *see, e.g.*, Deshmukh, *supra* note 10, at 1191; Birdthistle & Henderson, *supra* note 10; Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 197 (2008); Dombalagian, *supra* note 10, at 329–31. *But see* Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CONN. L. REV. 573 (2017) (arguing that FINRA is more responsive to industry interests than its structure suggests).

90. *See* Gallagher, *supra* note 22 (referring to FINRA as a "deputy SEC").

91. *See FINRA Board of Governors*, FINRA, https://www.finra.org/about/governance/finra-board-governors [https://perma.cc/Q4GW-7H8Y] (last visited Sep. 4, 2025).

consists of thirteen public governors—defined as individuals with no "material business relationship" with broker-dealers subject to FINRA oversight—and ten industry representatives.[92] The tilt in favor of public governors is required under FINRA's by-laws.[93] Similarly, non-industry members are required to predominate on the nominating committee for FINRA's Board of Governors.[94] SEC Commissioner Hester Peirce has argued that, because of this structure, FINRA is "[a]n organization run by a board that is dominated by people who are not in the industry [and] is not an SRO; it is a regulator with industry representation."[95] In fact, the current board structure set forth under FINRA's by-laws reflects a statutory mandate under amendments to the 1934 Securities Exchange Act, as well as the influence of growing SEC oversight.[96]

Moreover, a similar dynamic appears below the board level. As a study by Professor Onnig Dombalagian points out, staffing at NASD (and by extension FINRA) is predominantly comprised of career compliance professionals rather than broker-dealers: "It has also long been observed that the need to develop specialized compliance inspection and enforcement functions within each SRO results in the delegation of responsibility to full-time paid staffs, who may or may not have managerial or operational experience in any of the SRO's member firms."[97] Accordingly,

> [a]s SRO personnel begin to look more like the SEC, it will be increasingly difficult to envision SROs performing the traditional buffering function between industry competition and SEC regulation. Instead, SROs, such as the NASD, are likely to behave as if they are an extension of the Commission's own compliance and enforcement arms . . . .[98]

Regardless of how far these claims may be taken by some commentators, they clearly establish a distinct ambiguity as to the "self" in self-regulation.

While maintaining a significant degree of separation from industry interests, FINRA is subject to oversight by the SEC in a number of ways. Most directly,

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92. *See id.* (noting that the industry seats are in part allocated to provide representation based on firm size, including three designated seats for small firms, one seat for mid-sized firms, and three seats for large firms); *see also* FINRA, BY-LAWS OF THE CORPORATION, § 1(ss) https://www.finra.org/rules-guidance/rulebooks/corporate-organization/article-i-definitions [https://perma.cc/7A7Q-G968] (last visited Sep. 4, 2025) ("'Public Director' means a Director of the NASD Regulation Board or NASD Dispute Resolution Board who is not an Industry Director and who otherwise has no material business relationship with a broker or dealer or a self regulatory organization registered under the Act . . . .").

93. *See* FINRA, BY-LAWS OF THE CORPORATION, § 4(A) https://www.finra.org/rules-guidance/rulebooks/corporate-organization/article-i-definitions [https://perma.cc/5JHF-ZWTR] (last accessed Sep. 4, 2025).

94. *Id.* § 4(9).

95. Peirce, *supra* note 52, at 244.

96. Securities Exchange Act of 1934 § 6(a)(3), 15 U.S.C. § 78f(a)(3); Securities Exchange Act of 1934 § 15A(b)(4), 15 U.S.C. § 78o-3(b)(4); *see also* Birdthistle & Henderson, *supra* note 10, at 12 ("[A]fter several scandals, the SEC required FINRA to include more members of the public on its board of directors.").

97. Dombalagian, *supra* note 10, at 330.

98. *Id.*

because FINRA is registered as a "securities association" by the SEC, the SEC can theoretically revoke FINRA's SRO status—thus effectively abolishing the organization—at any time.[99] The SEC has authority to undertake ex ante review of FINRA rulemakings,[100] and ex post review of FINRA disciplinary actions.[101] As the discussion of FINRA's board composition suggests, the SEC has also spearheaded more basic structural changes to the NASD and FINRA over the years.[102]

In practice, however, FINRA retains a certain amount of independence from the SEC as well.

For one, FINRA's monopoly as the exclusive broker-dealer SRO provides some leverage.[103] FINRA is also self-funding and sets its own budget.[104] Perhaps not surprisingly, then, a Government Accountability Office review found that the "SEC's oversight of FINRA's programs and operations varied, with some programs and operations receiving regular oversight and others receiving limited or no oversight."[105] In an influential article surveying many of the features described above, Professors Birdthistle and Henderson have gone so far as to ask whether FINRA and similarly structured SROs have become a "fifth branch" of the U.S. government (beneath the shadow "fourth branch" of the administrative regulatory state epitomized by the SEC).[106] Although perhaps an overstatement, it is nonetheless fair to say that FINRA is far from a traditional SRO.

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This Part has provided an overview of FINRA. A bird's eye view of the institution is important for understanding dispute resolution at FINRA for two reasons. First, FINRA's dispute resolution forum is embedded in a broader mission of market oversight and investor protections. This distinguishes

99. *See* Peirce, *supra* note 52, at 246.

100. 15 U.S.C. § 78s(b)(1)–(b)(2), (c). *See* Peirce, *supra* note 52, at 245 ("The SEC can abrogate, add to, or delete FINRA rules through notice-and-comment rulemaking.").

101. 15 U.S.C. §§ 78s(d)–(e). *See supra* note 85 and accompanying text.

102. *See* Peirce, *supra* note 52, at 245 ("As the SEC's enforcement action against the NASD in 1996 illustrates, the SEC can force structural and governance changes through enforcement proceedings.").

103. *See* Birdthistle & Henderson, *supra* note 10, at 23 ("The creation of FINRA created a monopoly for broker SROs, with both good and bad effects.").

104. *See* Peirce, *supra* note 52, at 245 ("FINRA operates with substantial independence from the SEC. FINRA can set its own rulemaking and disciplinary agendas and budget without SEC input.").

105. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-265, SECURITIES REGULATION: OPPORTUNITIES EXIST TO IMPROVE SEC'S OVERSIGHT OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY 7 (2012), https://www.gao.gov/assets/gao-12-625.pdf [https://perma.cc/3NK3-Z3G6].

106. Birdthistle & Henderson, *supra* note 10; *see id.* at 3 ("Many historians trace the rise of the 'fourth branch' to New Deal legislation that created a variety of new administrative agencies."); *id.* at 5 ("We describe several mechanisms that appear to be driving the 'self' out of financial SROs, rendering them ever more quasi-governmental in nature. . . . Whether they fully appreciate it or not, financial SROs are transforming into a 'fifth branch' of government.").

FINRA from other prominent commercial arbitration bodies, such as the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS), which are purely aimed at providing an alternative to litigation in the state and federal court system.[107] Second, despite the SRO label, it is inaccurate to say that dispute resolution at FINRA is conducted or administered by the securities industry itself. At this point in its history, FINRA is a sui generis organization that has quasi-governmental features. As a result, the tendency to interpret various mechanisms and procedural rules in FINRA arbitration as providing a "home-court advantage" of sorts to industry participants is potentially misleading.

II. MECHANICS OF DISPUTE RESOLUTION AT FINRA

This Part turns to FINRA's dispute resolution function. Part II.A introduces the origins and development of dispute resolution by FINRA and its predecessor the NASD. Part II.B looks at the FINRA arbitration process, the primary focus of this Article's analysis. Part II.C reviews FINRA's mediation services, which provide an important complement and potential alternative to arbitration. Part II.D discusses FINRA's so-called expungement proceedings, which affect how the claims and outcomes of FINRA arbitrations are subject to regulatory disclosure. The following Parts III and IV will analyze how dispute resolution at FINRA fits within the broader world of alternative dispute resolution and FINRA's mission as a financial regulator, respectively.

A. Legal Origins and Development

Arbitration in the securities industry has a surprisingly long and continuous history.[108] The NYSE, in its original 1817 constitution, required disputes among members of the stock exchange to be arbitrated before the NYSE Board.[109] The NASD joined the NYSE in offering an arbitral forum in 1968, when it

107. *See How We Operate*, FINRA, https://www.finra.org/about/how-we-operate [https://perma.cc/8L8M-4ZUG] (last visited Sep. 8, 2025); *see also Who We Are*, AM. ARB. ASS'N, https://www.adr.org/about-us/ [https://perma.cc/C8D4-W699] (last visited Sep. 8, 2025) (describing itself as an alternative dispute resolution forum to litigation); *Arbitrators and Arbitration Services*, JUD. ARB. AND MEDIATION SERV., https://www.jamsadr.com/arbitration?tab=overview [https://perma.cc/GJB3-7SRT] (last visited Sep. 8, 2025) (discussing JAMS's ability to deliver a fair and expeditious result outside of the courtroom).

108. *See generally* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23 (discussing the history behind why arbitration is used to resolve disputes in the securities industry); Black, *supra* note 3, (providing a comprehensive explanation of the history of securities arbitration).

109. Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 176 (citing FRANCIS L. EAMES, THE NEW YORK STOCK EXCHANGE 13 (1894)); *see also* NYSE BD. CONST. § 17 (Feb. 25, 1817) ("All questions of dispute in the purchase or sale of Stocks shall be decided by a majority of the board . . ."). As early as 1831, the NYSE also oversaw arbitrations brought by customers of its member broker-dealers. *See* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860, at 272–73 (1998).

adopted its first Code of Arbitration Procedure.[110] By 1972, the NASD rules had been amended to require member firms and associated persons to submit to arbitration at the request of a customer.[111] During the 1970s—after the SEC gained greater oversight over SROs with the 1975 amendments to the Securities Exchange Act—arbitration procedures at NASD and other SROs became more formalized.[112] NASD arbitration was facilitated in this period when broker-dealer began inserting provisions known as pre-dispute arbitration agreements (PDAAs) in contracts with retail customers.[113]

Securities arbitration in its current form dates to a pair of Supreme Court decisions in the 1980s—*Shearson/American Express, Inc. v. McMahon*[114] (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*[115] (1989). *McMahon* held that legal claims under the 1934 Securities Exchange Act were arbitrable;[116] *Rodriguez de Quijas* held the same for claims arising under the 1933 Securities Act.[117] Previously, NASD arbitrations were often limited to state law claims, because the Supreme Court had held that claims raising a federal question under the securities laws were non-arbitrable.[118] The *McMahon* and *Rodriguez de Quijas* decisions led to a boom in broker-dealer arbitrations at the NASD during the 1990s.[119]

Following the rise of securities arbitrations, the NASD (and later FINRA) undertook initiatives to review and improve its dispute resolution procedures.[120] The first of these came in 1994, when the NASD Board of Governors established an Arbitration Policy Task Force,[121] which eventually produced the 1996 Report on Securities Arbitration Reform (also known as the "Ruder Report" due to the leadership of Northwestern University Law

110. Deborah Masucci, *Securities Arbitration—A Success Story: What Does the Future Hold?*, 31 WAKE FOREST L. REV. 183, 185 (1996).

111. *Id.* at 185.

112. *See* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 182 (stating that the 1975 amendments "accelerated the evolution, already begun in the early twentieth century, of securities arbitration from an informal, speedy hearing before an expert, industry-affiliated panel to a protracted, litigation-like, heavily regulated hearing before non-expert neutrals with virtually no industry experience or knowledge"); *see generally* Barbara Black & Jill I. Gross, *Making It Up as They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991 (2002) (explaining how the formalization of private arbitration has complicated efforts to ensure arbitrators follow substantive law).

113. *See* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 181 ("Gradually [from the 1950s–70s], more and more broker-dealers inserted PDAAs in their retail customer form agreements, and litigated customers' challenges to their enforceability.").

114. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).

115. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483 (1989).

116. *McMahon*, 482 U.S. at 238.

117. *Rodriguez de Quijas*, 490 U.S. at 483.

118. *See* Wilko v. Swan, 346 U.S. 427, 434–35 (1953), *overruled by, Rodriguez de Quijas*, 490 U.S. 477.

119. *See* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 183 (noting that "[a]fter *McMahon*, [there was a] sharp increase in the use of SRO arbitration").

120. *See id.* (observing that after *McMahon*, "SROs [including NASD] regularly engaged in reviews of their arbitration processes to ensure they offered a fair forum").

121. *Id.*

Professor David S. Ruder, the task force Chair).[122] While concluding that NASD arbitration was a "relatively efficient, fair, and less costly forum for resolution of disputes involving public investors, member firms, and firm employees,"[123] the Ruder Report also made a series of recommendations to improve the system.[124] In response, NASD filed over sixty-five rule proposals from 1997 to 2007 to implement recommendations of the Ruder Report.[125] According to a 2007 "Report Card" providing self-review of those activities, NASD found that it had taken action on "nearly every key recommendation" of the Ruder Report.[126]

More recently, in 2014, FINRA revisited the Ruder Report by convening the FINRA Dispute Resolution Task Force, led by former University of Cincinnati Law Professor Barbara Black.[127] The FINRA Dispute Resolution Task Force completed its work in December of 2015, issuing its final report and recommendations,[128] informally known as the "Black Report."[129] The Black Report "focused its attention on securities disputes involving customers of brokerage firms, and its recommendations primarily address these disputes."[130] Among other things, the Black Report emphasized the need for further investment in FINRA's arbitrator pool and encouraged the practice of written decisions accompanying awards.[131] FINRA issued a Final Status Report on the implementation of the Black Report in 2019, which summarized the actions taken by FINRA on each of the Black Report's 51 recommendations.[132]

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122. *See* DAVID S. RUDER ET AL., SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. 3 (1996) [hereinafter RUDER REPORT].

123. *Id.* at 1.

124. For a summary of recommendations, see *id.* at 1–3. Recommendations included matters such as allowing for punitive damages as a remedy in arbitral awards, expanding the NASD's voluntary mediation program, and improving arbitrator selection, quality, and training. *Id.* at 2.

125. Jill I. Gross, McMahon *Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 514 (2008).

126. NASD DISP. RESOL., THE ARBITRATION POLICY TASK FORCE REPORT—A REPORT CARD 5 (2007), https://www.finra.org/sites/default/files/Industry/p036466.pdf [https://perma.cc/HA5P-XBEU].

127. *See* FINRA DISP. RESOL. TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE FINRA DISPUTE RESOLUTION TASK FORCE 1, app. I, 1 (2015) [hereinafter FINRA BLACK REPORT], https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf [https://perma.cc/DLD7-HGAR]; *see also id.* at 1 (describing the timeline of the report, beginning in June 2014); *see also id.* at app. I, 1–2 (listing task force members, including Professor Black as Chair).

128. *Id.* at 4.

129. Jill I. Gross, *FINRA Dispute Resolution Task Force Releases its Final Report, with Support for Mediation and Live Hearings*, 34 ALTS. 19, 19 (2016) (providing an overview of the Black Report).

130. FINRA BLACK REPORT, *supra* note 127, at 4.

131. *Id.* at 5 ("It is the unanimous, strongly held opinion of the task force that the most important investment in the future of the FINRA forum is in the arbitrators."); *id.* at 6 ("The task force believes that encouraging the writing of explained decisions is the second most important category of recommendations that it is making, because the availability of explained decisions would improve the transparency of the forum.").

132. *See* FINRA, FINRA DISPUTE RESOLUTION TASK FORCE RECOMMENDATIONS: FINAL STATUS REPORT *passim* (2019) [hereinafter FINAL STATUS REPORT],

The workings of FINRA dispute resolution, reviewed directly below, reflect the results of this process.

B. Arbitration

FINRA administers several thousand arbitrations each year.[133] Logistically, this is handled through four regional offices: Northeast (headquartered in New York City); Southeast (Boca Raton), Midwest (Chicago), and West (Los Angeles).[134] FINRA's National Arbitration and Mediation Committee (NAMC) oversees these activities from FINRA's New York City headquarters.[135] The discussion below breaks down how FINRA arbitration works in terms of: (1) the parties and legal claims covered; (2) procedures for bringing and hearing claims; and (3) the composition of arbitrators and panels.

1. Parties, Arbitrability & Legal Claims

FINRA arbitrations involve one of three kinds of disputes: (a) disputes between customers and member firms; (b) disputes between member firms and their "associated persons,"[136] i.e., employees registered with the SEC; and (c) disputes between FINRA's broker-dealer member firms.[137]

FINRA has jurisdiction to conduct arbitrations between FINRA broker-dealers and their customers via two mechanisms. First, it is standard practice for FINRA members to include PDAAs in contracts with retail investor clients.[138] Second, pursuant to FINRA Rule 12200, customers also have a

https://www.finra.org/sites/default/files/DR_task_report_status_011519.pdf [https://perma.cc/J5J9-KHH4].

133. *See supra* note 5 and accompanying text.

134. *Hearing Locations & Contacts*, FINRA, https://www.finra.org/arbitration-mediation/about/locations-contacts [https://perma.cc/LAK9-VKYE] (last visited Sep. 22, 2025).

135. *National Arbitration and Mediation Committee (NAMC)*, FINRA, https://www.finra.org/arbitration-mediation/national-arbitration-and-mediation-committee-namc [https://perma.cc/3WP3-UHEW] (last visited Sep. 8, 2025). Drexel University law professor, Nicole Iannarone, chaired FINRA's NAMC until Darlene Pasieczny of Samuels Yoelin Kantor LLP took over in 2021. *See Professor Nicole Iannarone Appointed Chair of FINRA's National Arbitration and Mediation Committee*, DREXEL UNIV. THOMAS R. KLINE SCH. L. (June 29, 2021), https://drexel.edu/law/news/articles/overview/2021/June/nicole-iannarone-chair-finra-national-arbitration-and-mediation-committee [https://perma.cc/A4DG-PFLN]; Mia Luthi, *Pasieczny Appointed to FINRA's National Arbitration and Mediation Committee*, SAMUELS YOELIN KANTOR LLP (June 4, 2021, at 14:03 PT), https://samuelslaw.com/2021/06/pasieczny-appointed-to-finras-national-arbitration-and-mediation-committee/ [https://perma.cc/S3PU-NTX7].

136. FINRA, Rule 12100(w)(2) (2024) (defining "associated persons" as "a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a [FINRA] member").

137. FINRA, REGULATORY NOTICE 16–25: FORUM SELECTION PROVISIONS INVOLVING CUSTOMERS, ASSOCIATED PERSONS AND MEMBER FIRMS 1 (2016), https://www.finra.org/sites/default/files/notice_other_file_ref/Regulatory-Notice-16-25.pdf [https://perma.cc/6FLL-4RNW]; FINRA, Rule 13200(a) (2008).

138. *See* Iannarone, *supra* note 15, at 738 ("[T]oday[] nearly every contract between an investor and a stockbroker forces the investor to arbitrate.").

unilateral right to demand arbitration, even when a contractual basis under a PDAA is lacking.[139] Complicated forum selection issues arise when FINRA members or customers seek to waive arbitration and pursue claims in state or federal court, but for the most part, arbitration of disputes is mandatory for claims relating to FINRA members' business dealings with customers.[140] FINRA's arbitration docket contains roughly 3,000 active customer cases from year to year.[141] Depending on the year, customer arbitrations represent between one-half and two-thirds of all FINRA arbitrations.[142] Common categories of claims brought by FINRA customers include breach of fiduciary duty, negligence, misrepresentation, and breach of contract.[143]

Employees of FINRA-regulated firms also have recourse to arbitration.[144] Securities employment arbitration in the securities industry began with an NASD program in 1986,[145] and since then PDAAs have become standard provisions in employment contracts with brokerage firms.[146] FINRA Rule 13200 also generally requires arbitration of employment disputes where a PDAA is absent.[147] Workplace discrimination claims provide a notable exception. An important 1991 Supreme Court decision, *Gilmer v. Interstate/*

139. *See* FINRA, Rule 12200 (2008) (providing that "[p]arties must arbitrate a dispute under the [FINRA] Code if: Arbitration under the Code is either: (1) Required by a written agreement, or (2) Requested by the customer" so long as "[t]he dispute arises in connection with the business activities of the member"); *see also* FINRA, Rule 2268(d)(1)–(2) (2011) (stating that PDAAs may not "limit[] the ability of a party to file any claim in arbitration" or "limit[] . . . the rules of any self-regulatory organization"); FINRA, REGULATORY NOTICE 16-25: FORUM SELECTION PROVISIONS INVOLVING CUSTOMERS, ASSOCIATED PERSONS AND MEMBER FIRMS 5 (2016) (stating that any denial or limitation of "a customer's right to request FINRA arbitration, even if the customer seeks to exercise that right after having agreed to a forum selection clause specifying a venue other than a FINRA arbitration forum, would violate FINRA Rules 2268 and 12200[]").

140. *See generally* Giovine, *supra* note 65 (discussing conflicting opinions in the circuit courts about forum selection issues for FINRA arbitrations); Kevin Neumar, *Arbitration Agreements or Forum Selection Clauses Involving FINRA Members: Circuit Split Creates Confusion, Increases Investor Skepticism*, 17 DUQ. BUS. L.J. 289 (2015) (analyzing conflicting case law about forum selection following the implementation of FINRA).

141. *See* FINRA, *Dispute Resolution Statistics*, *supra* note 5 (breaking down the aggregate and proportional number of customer arbitrations for 2022 to 2024 and showing 1,093 new customer cases filed for 2023, 1,651 total cases closed, and 3,337 total cases remaining open).

142. *See id.* (showing proportional statistics on customer arbitrations for 2022 to 2024).

143. *See id.* (listing statistics for the "Top 15 Controversy Types in Customer Arbitrations").

144. *See* J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113, 115–16 (2014); Jill I. Gross, *The Final Frontier: Are Class Action Waivers in Broker-Dealer Employment Agreements Enforceable?*, 12 ARB. L. REV. 96, 96–97 (2020) [hereinafter Gross, *Final Frontier*]; David B. Lipsky, Ronald L. Seeber & J. Ryan Lamare, *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986-2008*, 65(1) DISP. RESOL. J. 12, 54 (2010).

145. *See* Lipsky, Seeber & Lamare, *supra* note 144 ("The securities employment arbitration program began in 1986. Between 1986 and 2008, about 3,200 employment awards were issued.").

146. *See* Gross, *Final Frontier*, *supra* note 144; *see also* FINRA DISP. RESOL. TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE FINRA DISPUTE RESOLUTION TASK FORCE 2 (2015), https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf [https://perma.cc/JZF3-GDHX] (noting that PDAAs are standard in brokerage employment contracts).

147. *See* FINRA, Rule 13200 (2008) ("Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons.").

Johnson Lane, Corp., held that a stock broker who consented to mandatory arbitration under his SEC registration forms waived the right to take a statutory age discrimination claim against his employer to federal court.[148] In 1999, however, the SEC approved an NASD request to make arbitration voluntary for discrimination claims.[149] FINRA Rule 13201 also states that arbitration is optional for employment claims involving statutory discrimination or sexual harassment.[150] Roughly a third of all FINRA arbitrations are employment cases.[151] Common claims include owed compensation, wrongful termination, defamation,[152] and breach of contract more generally.[153]

Lastly, FINRA members arbitrate disputes against each other under FINRA Rule 13200 so long as "the dispute arises out of the business activities of a member or an associated person."[154] Disputes between member firms that fall outside of FINRA Rule 13200 have on occasion gone to court.[155] Arbitrations between brokers represent about two percent of all FINRA

148. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

149. *See* NASD, NASD NOTICE TO MEMBERS 99-96, EMPLOYMENT ARBITRATION RULES: SEC APPROVES NEW ARBITRATION DISCLOSURE RULE AND PROCEDURES FOR EMPLOYMENT ARBITRATION 735 (1999) https://www.finra.org/sites/default/files/NoticeDocument/p004042.pdf [https://perma.cc/3TK3-VVTY].

150. *See* FINRA, Rule 13201 (2022) ("A claim alleging employment discrimination in violation of a statute, 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. If the parties agree to arbitrate such a claim, the claim will be administered under Rule 13802."); *see also* FINRA, Rule 13802 (2022) (providing special procedural protections in employment discrimination or sexual harassment cases).

151. *See* FINRA, *Dispute Resolution Statistics*, *supra* note 5 (providing raw case numbers and a proportionate breakdown of "intra-industry" cases, which are primarily employment related).

152. Defamation is a surprisingly common employment claim in the securities industry because FINRA firms must file a Form U-5 with the SEC within thirty days of an associated person's termination of employment. *Form U5*, FINRA, https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u5 [https://perma.cc/59SJ-UHYK] (last visited Sep. 22, 2025). The U-5 requires broker-dealers to disclose the basis for termination, which often includes allegations of wrongdoing such as "churning" customer accounts. *Id.* Some states, such as New York, provide absolute immunity from defamation claims arising from U-5s, while other states provide partial immunity or none. *See generally* Nat Stern, *Rethinking Absolute Immunity From Defamation Suits in Private Quasi-Judicial Proceedings*, 21 U. N.H. L. REV. 117 (2022) (arguing that granting absolute immunity to Form U-5 filings undervalues reputational interests); Joseph W. Catuzzi, *Please Be Delicate With My Permanent Record: The Pendulum Inches Towards Absolute Privilege in* Merkham v. Wachovia, 58 VILL. L. REV. 211 (2013) (discussing trend toward absolute privilege for defamatory Form U-5 statements); Dayna B. Tann, *Licensing A Lie: The Privilege Attached to the Form U-5 Should Reflect the Realities of the Workplace*, 83 ST. JOHN'S L. REV. 1017 (2009) (arguing that granting absolute privilege to defamatory Form U-5 statements leaves brokers defenseless against reputational harm); Gary J. Lieberman, *Form U5 Defamation Claims on the Rise at FINRA: Be Prepared!*, LITTLER (Mar. 25, 2021), https://www.littler.com/publication-press/publication/form-u5-defamation-claims-rise-finra-be-prepared [https://perma.cc/46W9-ZZCP] (noting the rise in Form U-5 defamation claims and the need for accurate termination reporting).

153. FINRA, *Dispute Resolution Statistics*, *supra* note 5 (listing the "Top 15 Controversy Types in Intra-Industry Arbitrations").

154. FINRA, Rule 13200 (2008).

155. *See, e.g.*, Valentine Cap. Asset Mgmt., Inc. v. Agahi, 174 Cal. App. 4th 606, 627 (2009) (holding that a claim for misappropriation of trade secrets involving FINRA member firms could be litigated in California state court). FINRA also allows certain claims involving insurance issues to be brought in court rather than arbitrated. *See* FINRA, Rule 13201 (2022).

cases.[156] While relatively rare—or at least underdiscussed compared to customer and employment cases—arbitration between brokerage firms has the longest historical pedigree of any form of alternative dispute resolution in the securities industry.[157]

2. FINRA Arbitration Procedures

FINRA has two parallel sets of procedures for its arbitrations, depending on the parties involved: the Code of Arbitration Procedure for Customer Disputes (the 12000 series of FINRA Rules, known as the "Customer Code") and the Code of Arbitration Procedure for Industry Disputes (the 13000 series of FINRA Rules, known as the "Industry Code") for disputes among or between FINRA firms and FINRA associated persons.[158] Although the Customer Code and Industry Code depart in some respects, they contain many identical provisions related to essentials.[159] In general, FINRA arbitration is designed to be a more efficient, expedited alternative to civil litigation in the courts system.[160]

a. Pleadings & Arbitrator Selection

FINRA arbitrations begin with a claimant filing a "Statement of Claim" along with a "Submission Agreement," in which the claimant declares their consent to arbitrate.[161] Like a civil complaint, the Statement of Claim sets forth the facts, parties, legal claims, and relief sought by the claimant.[162] Unlike a civil complaint, a Statement of Claim is not subject to strict pleading requirements and can be drafted in a relatively informal manner. Accordingly, under FINRA Rule 12208, customers have the option of proceeding in arbitration pro se, being represented by an attorney in good standing, or being represented by non-attorneys subject to certain qualifications.[163] After a Statement of Claim is filed,

156. *See* David B. Lipsky, J. Ryan Lamare & Abhishek Gupta, *The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry*, 52 INDUS. REL. 314, 322 (2013) (providing an estimate).

157. *See* Gross, *The Historical Basis of Securities Arbitration*, *supra* note 23, at 175–76 (noting that arbitration between and among securities firms dates back centuries).

158. *Compare* FINRA, Rule 12000–12905 (2024) (the Customer Code), *with* FINRA, Rule 13000–13905 (2024) (the Industry Code).

159. *See* FINRA, DISPUTE RESOLUTION SERVICES: ARBITRATOR'S GUIDE 9 n.1 (2024) [hereinafter FINRA, ARBITRATOR'S GUIDE], https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf [https://perma.cc/38AC-N9KK].

160. *Overview of Arbitration & Mediation*, FINRA, https://www.finra.org/arbitration-mediation/about/arbitration-vs-mediation [https://perma.cc/V8N4-JF92] (last visited Sep. 8, 2025) ("Arbitration is similar to going to court, but more efficient, cost effective, and less complex than litigation.").

161. *See* FINRA, Rule 12302 (2017) (providing requirements for a Statement of Claim and Submission Agreement under the Customer Code); FINRA, Rule 13302 (2017) (providing parallel rules under the Industry Code).

162. *See* FINRA, Rule 12302 (2017); FINRA, Rule 13302 (2017).

163. *See* FINRA, Rule 12208 (2008) (setting forth rules for "Representation of Parties" in customer cases).

the responding party then has forty-five days to file an Answer.[164] In FINRA arbitrations, an Answer can be an omnibus document that includes a respondent's alternative statement of facts, legal defenses, counter-claims, cross-claims, third-party claims, and so on.[165]

Arbitrator selection follows the submission of pleadings. FINRA has two categories of arbitrators, "Public" and "Non-Public."[166] Public Arbitrators need not be licensed attorneys, but they must qualify under a series of FINRA requirements meant to filter out individuals with extensive professional experience at a broker-dealer or in positions connected to the securities industry.[167] Non-Public Arbitrators include individuals with industry experience who otherwise satisfy FINRA's arbitrator qualifications.[168] The parties select arbitrators through a list-and-rank system.[169] FINRA uses an internal algorithm to randomly generate a list of ten "chair-qualified" Public Arbitrators.[170] The parties are then allowed to strike four names from the list and must rank the remaining six candidates.[171]

The composition of a FINRA arbitration panel depends on the parties as well as the size and nature of the claims at issue. For customer claims less than $50,000, the panel consists of a single Public Arbitrator,[172] and a special set of "simplified arbitration [procedures]" apply.[173] For customer claims between

164. *See* FINRA, Rule 12303 (2024) (providing requirements for answering a claim under the Customer Code); FINRA, Rule 13303 (2024) (providing requirements for answering a claim under the Industry Code).

165. *See* FINRA, Rule 12303, 13303 (2024). In civil litigation, Answers are generally more limited documents that contain formalistic admissions or denials to allegations in the complaint and list of affirmative defenses without the accompaniment of extensive legal argument. *See* FED. R. CIV. P. 8(b), (c).

166. *See* FINRA, REGULATORY NOTICE 17-29, SEC APPROVES AMENDMENTS TO ARBITRATION CODES TO REVISE THE DEFINITION OF NON-PUBLIC ARBITRATOR EFFECTIVE DATE: OCTOBER 9, 2017 (2017) https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-29.pdf [https://perma.cc/5FLV-SVE2] (summarizing the distinction and updating the definitions to their current form).

167. *See* FINRA, Rule 12100(aa) (2024) (setting forth the criteria for Public Arbitrators).

168. *See* FINRA, Rule 12100(t) (2024) ("The term 'non-public arbitrator' means a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under paragraph (aa).").

169. *How Parties Select Arbitrators*, FINRA, https://www.finra.org/arbitration-mediation/about/arbitration-process/arbitrator-selection [https://perma.cc/V3NK-2W6T] (last visited Sep. 8, 2025) (providing an overview of the methodology).

170. FINRA, Rule 12400 (2022) ("List Selection Algorithm and Arbitrator Rosters"); *How Parties Select Arbitrators*, *supra* note 169 (providing an overview of the methodology); *see also* KPMG, REPORT ON THE FINRA ARBITRATOR LIST SELECTION PROCESS AND TECHNOLOGY 4–5 (2023) https://www.finra.org/sites/default/files/2023-10/finra-arbitrator-list-selection-process-technology-report.pdf [https://perma.cc/RN7B-NGJR] (reporting the results of an outside audit of FINRA's arbitrator selection system).

171. *How Parties Select Arbitrators*, *supra* note 169.

172. FINRA, Rule 12401(a) (2012).

173. FINRA, Rule 12800 (2025) (setting forth procedures for simplified customer arbitration). Although there are complicated exceptions and options for customers with smaller claims to enhance the length of the process, the default rule is for FINRA's simplified arbitrations to be decided "on the papers" without discovery or a hearing. *See id.*; *see also Simplified Arbitrations*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/simplified-

$50,000 and $100,000, the default is a single arbitrator unless the parties agree to a three-person panel.[174] The default rule for claims over $100,000, or for claims seeking certain forms of injunctive relief, is a three-person panel unless the parties opt for a single arbitrator.[175] Likewise, a single Public Arbitrator is the default in employment arbitrations for claims less than $100,000.[176] For more complex employment claims, a three-person panel consisting of one Non-Public and two Public Arbitrators is the norm.[177] Disputes between FINRA-member firms are decided by a panel of one or three Non-Public Arbitrators.[178]

FINRA's pool of arbitrators is vast: From year to year there are approximately 6,000 arbitrators available, two-thirds of whom are categorized as Public.[179] Although FINRA requires arbitrators complete an in-house training before serving on a panel,[180] FINRA arbitrators are independent contractors not otherwise affiliated with FINRA.[181] Importantly, FINRA arbitrators cannot bill parties by the hour for arbitration services.[182] Instead, they receive an "honorarium" from FINRA pursuant to FINRA Rule 12214 which is calibrated based on the length of the arbitral hearing, chairperson responsibilities, and so on.[183] While the Black Report emphasized the need for greater compensation of FINRA arbitrators,[184] honorariums have remained

arbitrations [https://perma.cc/WZ2W-P2JR] (last visited Sep. 8, 2025) (offering an overview of the procedure).

174. FINRA, Rule 12401(b) (2012).

175. FINRA, Rule 12401(c) (2012). The FINRA default in multiple-arbitrator cases is a majority-public panel with one Non-Public Arbitrator. *See Regulatory Notice 11-05: Customer Option to Choose an All Public Arbitration Panel in All Cases*, FINRA (Feb. 1, 2011), https://www.finra.org/rules-guidance/notices/11-05 [https://perma.cc/8H9Z-R98V]. But pursuant to a set of 2011 amendments to the FINRA Rules, customers now have the option of selecting an all-public panel. *Id.*

176. *See* FINRA, Rule 13401(a)–(b) (2012) (setting forth the relevant dollar thresholds); FINRA Rule 13402(b) (2022) ("Disputes Between Associated Persons or Between or Among Members and Associated Persons").

177. *See* FINRA, Rule 13401(a)–(c) (2012); FINRA, Rule 13402(b) (2022).

178. *See* FINRA, Rule 13402(a) (2022) ("Disputes Between Members").

179. Suzanne Barlyn, *Purging Wall Street from FINRA's Public Arbitrator List*, REUTERS (Jan. 28, 2013, at 9:51 ET), https://www.reuters.com/article/finra-arbitration/refile-comply-purging-wall-street-from-finras-public-arbitrator-list-idUSL1E9CHAVP20130128/ [https://perma.cc/8KD7-LMKU].

180. *See Arbitrator Training*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/arbitrator-training [https://perma.cc/X4ZJ-43SR] (last visited Sep. 10, 2025).

181. *Overview of Arbitration & Mediation*, FINRA, https://www.finra.org/arbitration-mediation/about/arbitration-vs-mediation#:~:text=Arbitrators%20who%20hear%20or%20review,outside%20of%20the%20financial%20industry [https://perma.cc/V65W-V2TN] (last visited Sep. 4, 2025, at 23:06 CST).

182. *See* FINRA, Rule 12214(a) (2021); *see also Honoraria & Expenses for Arbitrators*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/honoraria-expenses [https://perma.cc/FH6R-KEWN] (last visited Oct. 6, 23:54 CST) (stating that arbitrators should not ask the parties to pay above the fixed rate).

183. *Id.* ("FINRA will pay the panel an honorarium, as follows: (1) $300 to each arbitrator for each hearing session in which he or she participates; (2) an additional $125 to the chairperson for each prehearing conference in which he or she participates; (3) an additional $250 per day to the chairperson for each hearing on the merits . . . .").

184. *See* FINRA BLACK REPORT, *supra* note 127, at 7–8.

relatively modest over time,[185] to the extent that FINRA arbitrations have been described as quasi pro bono matters for arbitrators.[186]

b. Motions & Discovery

Once a panel of arbitrators has been appointed, FINRA schedules an Initial Pre-Hearing Conference (IPHC).[187] The IPHC is held via videoconference and allows the parties to establish a schedule for the arbitration, from discovery to the final hearing date.[188] FINRA recommends arbitrators read their "IPHC Script" to the parties[189] and encourages the panel to set a final hearing date within nine months of the IPHC unless the parties agree on a later date.[190]

After the IPHC, parties to a FINRA arbitration are entitled to bring various motions before the panel, but the extensive, formalistic motion practice found in state or federal courts is discouraged.[191] Moreover, FINRA arbitrators have limited discretion to consider and rule upon dispositive motions, such as a motion to dismiss, before a final hearing on the merits.[192] A significant exception is motions to dismiss on grounds that claims are barred under FINRA's "eligibility rule."[193] The FINRA Eligibility Rule functions similarly to a traditional statute of limitations and states that a claim must be submitted to arbitration within six years of the "occurrence or event giving rise to the

185. *See* FINAL STATUS REPORT, *supra* note 132, at 1–2.

186. *See* Mark R. Joelson, *Arbitration in the United States Under the Financial Industry Regulatory Authority*, 31 ARB. INT'L 465, 469 (2015) ("[F]or established arbitrators, who are aware of the fees normally available in private arbitration venues, a commitment to FINRA arbitration represents a *pro bono* endeavour.").

187. FINRA, Rule 12500(a) (2024) ("After the panel is appointed, the Director will schedule an Initial Prehearing Conference before the panel, except as provided in paragraph (c) of this Rule."). FINRA Rule 12500(c) allows parties to waive the IPHC and provide relevant documentary submission instead. *Id.* at 12500(c) (2024).

188. FINRA, Rule 12500(b)–(c) (2024) (discussing the format and matters covered at an IPHC).

189. *Initial Pre-Hearing Conference Arbitrator's Script*, FINRA (Jan. 28, 2022), https://www.finra.org/sites/default/files/iphc_script.pdf [https://perma.cc/ZB9L-SSX8].

190. *See* FINRA, ARBITRATOR'S GUIDE, *supra* note 159, at 25.

191. *See, e.g.*, FINRA, Rule 12309 (2024) (allowing for motions to amend claims); FINRA, Rules 12312 (2008), 12313 (2008), 12314 (2024) (motions to join, sever, and consolidate claims); FINRA, Rule 12213 (2008) (motion to change hearing location); FINRA, Rule 12601 (2020) (motion to postpone a hearing); *see also* FINRA, Rule 12503(a)(1) (2024) ("Before making a motion, a party must make an effort to resolve the matter that is the subject of the motion with the other parties. Every motion, whether written or oral, must include a description of the efforts made by the moving party to resolve the matter before making the motion."); FINRA, Rule 12503(a)(2) (2024) ("Written motions are not required to be in any particular form, and may take the form of a letter, legal motion, or any other form that the panel decides is acceptable.").

192. *See* FINRA, Rule 12504(b) (2024); FINRA, Rule 13504 (2024) (providing a similar procedure for Industry Cases); FINRA, ARBITRATOR'S GUIDE, *supra* note 159, at 49 ("FINRA believes that parties have the right to a hearing in arbitration. Therefore, motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and granted only under limited circumstances.").

193. *See* FINRA, Rule 12206 (2024); FINRA, Rule 13206 (2024) (providing the same standard for Industry Cases).

claim."[194] Unlike other motions, the panel must issue a unanimous, written decision in order to dismiss claims under the Eligibility Rule.[195]

As with all arbitrations, FINRA arbitration provides a more truncated form of discovery than is allowed under the Federal Rules of Civil Procedure or analogous procedural rules in state court.[196] Depositions are generally discouraged and may only be authorized by the arbitration panel in exceptional circumstances, such as allowing an ill or dying witness to testify.[197] Likewise, written interrogatories permitted under Rule 33 of the Federal Rules of Civil Procedure are discouraged in FINRA arbitrations.[198] Under FINRA discovery Rules 12506 and 13506, however, parties can make document requests upon each other to the extent those requests are relevant to the case.[199] In Customer Cases, the parties are provided with a "Discovery Guide" which contains two lists of documents—one list for customers, another for FINRA members—that are presumptively discoverable under the FINRA Rules.[200]

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194. FINRA, Rule 12206(a) (2024). FINRA member firms cannot shorten the six-year eligibility period by contractual provisions in customer PDAAs. *See Regulatory Notice 21-16: Predispute Arbitration Agreements for Customer Accounts*, FINRA (Apr. 21, 2021), https://www.finra.org/rules-guidance/notices/21-16 [https://perma.cc/SC9H-EHKY]; *cf.* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) (holding that NASD arbitrators, rather than the courts, have exclusive jurisdiction to determine the timeline of a dispute, and therefore the merits of a motion to dismiss under the Eligibility Rule).

195. FINRA, Rule 12206(b)(5) (2024); FINRA, Rule 13206(b)(5) (2024). There are a number of other FINRA procedures specific to Eligibility Rule motions. Motions based on the Eligibility Rule have priority over other motions to dismiss and must be ruled on by the panel first. FINRA, Rule 12206(b)(7); FINRA, Rule 13206(b)(7). Eligibility Rule motions must also be filed separately from the Answer at least ninety days before a final hearing, and parties have an option to argue the motion at a supplemental prehearing conference. *See* FINRA, Rule 12206(b)(1), (2), (4); FINRA, Rule 13206(b)(1), (2), (4).

196. *See* Austin O'Brien, *The Use of Discovery in Arbitration: How the Practice of Discovery Services the Goals of Arbitration*, 74 DISP. RESOL. J. 79, 79 (2016) ("Discovery is a significant and often troublesome facet of adjudication in common law jurisdictions. In the United States, discovery is, in fact, a hallmark of our legal system. Indeed, twelve of the eighty-six Federal Rules of Civil Procedure deal with discovery. This proportion is not entirely surprising given the privileged place that discovery is afforded in litigation. Not only is discovery ripe for 'abuses, intrusions, delays, and costs,' but it is also frequently the longest lasting and most expensive part of a case, particularly if the case never makes its way to trial.").

197. *See* FINRA, Rule 12510 (2008) ("Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances . . . ."); FINRA, Rule 13510 (2022) (providing similar language for Industry Cases).

198. *Compare* FED. R. CIV. P. 33 (allowing the parties to serve no more than twenty-five interrogatories on each other and requiring the opposing party to respond), *with* FINRA, Rule 13506(a) (2017) ("Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute . . . . Standard interrogatories are generally not permitted in arbitration."). The same holds true for Requests for Admission under Federal Rule of Civil Procedure 36.

199. *See* FINRA, Rules 12506 (2017), 12507 (2017) (covering discovery in Customer Cases). Parties to a FINRA arbitration may also file motions to compel production when opposing parties fail to comply with Rule 12506 or Rule 13506. *Id.* at 12506 (2017), 13506 (2017); *see also id.* at 12509 (2008), 13509 (2008) (covering motions to compel discovery).

200. *See Discovery Guide*, FINRA, 1 (Dec. 2013), https://www.finra.org/sites/default/files/ArbMed/p394527.pdf [https://perma.cc/UG2X-EEA4] ("While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and arbitrators retain their flexibility in the discovery process. Arbitrators can: order the production of documents not provided for by the Lists; order that parties do not have to produce certain

Third-party discovery is an area where FINRA arbitration can be relatively robust. Under Rules 12513 and 13513, an arbitration panel can order the production of documents or appearance for testimony from any FINRA-associated person or member firm.[201] And these orders are likely to be effective due to FINRA's disciplinary and licensing authority over the third parties under its jurisdiction.[202] Parties can also request an arbitral panel to issue subpoenas to third-party firms or individuals unaffiliated with FINRA.[203] Lastly, the FINRA Rules require parties to produce all documents, witness lists, and related materials they intend to use at the final evidentiary hearing twenty days before the scheduled hearing date,[204] and they do not allow omitted documents or unlisted witnesses to be used at the hearing unless there is a showing of good cause.[205]

c. The Final Evidentiary Hearing & Arbitral Award

FINRA arbitrations conclude with a final evidentiary hearing on the merits.[206] At the final hearing, parties are invited to give oral argument, submit evidence, examine witnesses, and otherwise present their case in a format similar to an informal court trial.[207] The final hearing is held in-person unless

documents on the Lists in a particular case; and alter the production schedule described in the 12500 series of rules.").

201. *See* FINRA, Rules 12513 (2019), 13513 (2019) (covering third-party subpoenas of FINRA members or associated persons in Customer and Industry Cases, respectively).

202. *See* Nicole Iannarone & Darlene Pasieczny, *Discovery Abuse in Customer Cases*, FINRA, 7 (2022), https://www.finra.org/sites/default/files/2022-09/neutral-corner-volume-3-2022-0927.pdf [https://perma.cc/6KA7-2BD9] ("It is a violation of FINRA Rule 2010 for a member or associated person to 'fail to appear or to produce any document in his possession or control' pursuant to FINRA arbitration rules."). In at least one instance, a FINRA member has been fined over $1 million for discovery violations. *Id.* (citing Letter from OFS Secs., Inc. to Dep't of Enf't, FINRA (May 4, 2015), https://www.finra.org/sites/default/files/fda_documents/2013036797001_FDA_JG41372%20%282019-1563050957458%29.pdf [https://perma.cc/SX3Z-G5G5]).

203. *See* FINRA, Rules 12512 (2019), 13512 (2019) (covering third-party subpoenas of non-FINRA members or persons in Customer and Industry Cases, respectively).

204. *See* FINRA, Rules 12514(a) (2024), 13514(a) (2024) (requiring pre-hearing document sharing in Customer and Industry Cases, respectively).

205. *See* FINRA, Rules 12514(c) (2024), 13514(c) (2024) (excluding materials that were not produced prior to a final hearing in Customer and Industry Cases, respectively).

206. An exception appears when claimants proceed under FINRA's special rules for a "simplified" arbitration on the pleadings, usually for claims of less than $50,000—parties may also agree in writing to forego a final hearing. *See* FINRA, Rule 12600(a) ("Hearings will be held, unless: (1) The arbitration is administered under Rule 12800(c) [for simplified arbitrations]; (2) The parties agree otherwise in writing; or (3) The arbitration has been settled, withdrawn or dismissed."). *See generally* Iannarone, *supra* note 15, at 741–45 (detailing the procedures for "small claims" securities arbitrations).

207. *See* FINRA, Rule 12607 (2008) ("Generally, the claimant shall present its case, followed by the respondent's defense. The panel has the discretion to vary the order in which the hearing is conducted, provided that each party is given a fair opportunity to present its case."); *see also* STEPHEN J. WARE & ARIANA R. LEVINSON, PRINCIPLES OF ARBITRATION LAW, 121 (2017) ("A hearing is to arbitration what a trial is to litigation.").

the parties opt for a remote hearing.[208] As with most arbitrations, the Federal Rules of Evidence or analogous state evidentiary rules do not apply in FINRA hearings; the panel is free to admit or exclude documents and testimony based on freestanding notions of relevance, prejudice, and equity to the parties.[209] The record in a FINRA arbitration is closed at the end of the final merits hearing unless the panel in its discretion invites parties to provide post-hearing briefs or documentary submissions.[210]

The FINRA rules exhort a panel to "endeavor" to issue an arbitral award disposing of a case within thirty business days of the record being closed.[211] Although all FINRA awards must be in writing, an award will only contain a short and plain statement of the parties, claims, and relief granted unless the parties jointly agree to request an "explained decision" in which the panel sets out its legal rationale in the style of a judicial opinion.[212] In their awards, FINRA panels have discretion to provide most of the same varieties of relief as civil

208. *See* FINRA, Rule 12600(b) (2024) ("The hearing will generally be held in person unless the parties agree to, or the panel grants a motion for, another type of hearing session."). The default of an in-person hearing was temporarily suspended by FINRA during the COVID pandemic of 2020, sparking a flurry of commentary on the remote format. *See* Blankley, *supra* note 11 (surveying FINRA's response to in-person hearings in 2020 and 2021); Iannarone, *supra* note 12 (discussing the role of remote arbitration after the pandemic); Horton, *supra* note 12 (examining the dilemmas of "forced" remote arbitration).

209. *See* FINRA, Rule 12604(a) (2023) ("The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence."). One notable but vague constraint on the panel's evidentiary decisions is the Federal Arbitration Act, which states that an arbitral award may be vacated where arbitrators refused "to hear evidence pertinent and material to the controversy." Federal Arbitration Act, 9 U.S.C. § 10(a)(3); *see also* WARE & LEVINSON, *supra* note 207, at 125 ("Rules of evidence are historically intertwined with the jury. Understandable then, that arbitration (without a jury) nearly always has less elaborate rules of evidence than those used in jury trials."); *cf.* Paul Radvany, *The Importance of the Federal Rules of Evidence in Arbitration*, 36 REV. LITIG. 469, 470–71 (2016) (arguing that the federal rules have an indirect effect on norms of how arbitration parties and panels consider the admissibility of evidence). *See generally* Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. MAR. L. & COMM. 35 (2003) (providing a useful overview of the rules of evidence for arbitration in general).

210. *See* FINRA, Rule 12608(c) (2008) ("In cases in which a hearing is held, the panel will generally close the record at the end of the last hearing session, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the panel will inform the parties when the submissions are due and when the record will close.").

211. *See* FINRA, Rule 12904(d) (2018).

212. *See id.* at 12904(e) (2018) (listing the information that must be included in all written awards); *id.* at 12904(g) (explaining the parameters for "explained decisions").

courts, including compensatory money damages,[213] punitive damages,[214] injunctive relief,[215] and attorneys' fees.[216]

In contrast to its disciplinary procedures, FINRA has no internal appeal process for either customer or industry disputes.[217] To challenge an arbitral award, parties may file a motion to vacate in the relevant state or federal court pursuant to the Federal Arbitration Act.[218] However, the Federal Arbitration Act and associated caselaw set a high bar for the vacatur of arbitral awards, including those from FINRA.[219]

C. Mediation

Arbitration is not the only dispute resolution process FINRA administers. As an adjunct to its arbitration system, FINRA also has a mediation program.[220] Although thin scholarly literature exists that deals with FINRA arbitration, there is essentially zero research or commentary, even in passing, on securities mediation.[221] This is an oversight, because a comprehensive understanding of

213. *See* FINRA ARBITRATOR'S GUIDE, *supra* note 159, at 66–67 (discussing the various methods for calculating money damages).

214. *See id.* at 69 ("Upon a party's request, arbitrators may consider punitive damages as a remedy if a respondent has engaged in serious misconduct that meets the standards for such an award."); *see also* Stephen J. Choi & Theodore Eisenberg, *Punitive Damages in Securities Arbitration: An Empirical Study*, 39 J. LEGAL STUDS. 497, 498 (2010) (performing an empirical analysis of 6,803 securities arbitration awards and finding that punitive damages were awarded in 9.1% of cases (304) in which the respondent was found liable).

215. Under the FINRA Rules, parties must seek temporary injunctive relief by court orders, but permanent injunctive relief can subsequently be granted by the arbitration panel. *See* FINRA, Rule 13804(a)–(b) (2017) ("Temporary Injunctive Orders; Requests for Permanent Injunctive Relief").

216. FINRA ARBITRATOR'S GUIDE, *supra* note 159, at 71 (discussing the availability of attorneys' fees).

217. *See id.* at 9 ("There is no appeal process within FINRA under the Code of Arbitration Procedure for Customer Disputes or the Code of Arbitration Procedure for Industry Disputes . . . .").

218. *See* Federal Arbitration Act, 9 U.S.C. §§ 10–12 (setting forth the process for judicial review and vacatur of arbitral awards).

219. The statutory bases for vacatur include corruption, fraud or undue means, arbitrator misconduct, or arbitrators who "exceed[] their powers." *See id.* § 10. Courts have at times attempted to craft other grounds for vacatur, but they are similarly narrow and highly limited, such as "'manifest disregard' of the law." *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (quoting Wilko v. Swan, 346 U.S. 427, 436–37 (1935)) (surveying the conflicting lower court standards for vacating arbitral awards); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 833–34 (1996). After the Supreme Court's 2008 decision in *Hall Street*, however, any judicial expansion of the FAA statutory categories—including the "manifest disregard" standard—is generally disapproved. *See* Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 585 (2008). *See also* Ashley K. Sundquist, *Do Judicially Created Grounds for Vacating Arbitral Awards Still Exist? Why Manifest Disregard of the Law and Public Policy Exceptions Should Be Considered Under Vacatur*, 2015 J. DISP. RESOL. 407 (2015) (arguing that courts should still have wiggle room to apply the "manifest disregard" standard).

220. *FINRA's Mediation Process*, FINRA, https://www.finra.org/arbitration-mediation/about/mediation-process [https://perma.cc/4MQ5-XKPA] (last visited Sep. 9, 2025).

221. For perhaps the lone exception, see generally Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. DISP. RESOL. 329 (2006) [hereinafter Gross, *Securities Mediation*] (discussing the emergence of mediation as a method of dispute resolution open to individual investors and explaining the relative benefits of mediation in securities dispute resolution). A brief mention of mediation (for the pre-FINRA era) is also made in Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 476–77 (2006).

FINRA arbitration, and how it functions alongside FINRA's broader mission as a financial regulator, should be situated within a context where mediation is recognized as a significant form of dispute resolution for securities claims.[222]

The roots of FINRA mediation date back to at least 1995, when the NASD launched a formal mediation program.[223] When FINRA was established in 2007, it carried on with the prior NASD mediation program, which had steadily grown over time.[224] In 2013, FINRA also launched a Mediation Program for Small Arbitration Claims which provides a streamlined, remote process for claims of $100,000 or less.[225] Under its Small Arbitration Claims program, FINRA waives any mediation filing fees and provides mediation services free of charge for claims of $25,000 or less.[226]

FINRA mediation is a nonbinding, voluntary process that parties who contemplate bringing or defending arbitrable claims can initiate before proceeding to arbitration.[227] Under the FINRA's 14000 series of rules, which

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222. *Cf.* Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 157 (2015) (reviewing the mediation-arbitration distinction and arguing that the negotiation-based format of mediation has become legalized over time and is converging with arbitration and the court system); Yijia Lu, *Med-Arb and Arb-Med: A Law and Economic Analysis*, 27 HARV. NEGOT. L. REV. 253, 256 (2021) ("All . . . hybrid mechanisms [linking mediation and arbitration] are creative attempts to bring the best of both worlds—arbitration's finality and mediation's flexibility. Hybrid mechanisms are becoming increasingly popular in dispute resolution.").

223. *Notice to Members 95-62: SEC Approves New NASD Mediation Rules that Take Effect August 1, 1995*, FINRA (Aug. 1, 1995), https://www.finra.org/rules-guidance/notices/95-62 [https://perma.cc/NVP7-AHJX]; *Notice to Members 95-1: NASD Solicits Comment on New Mediation Program and Draft Mediation Rules*, FINRA (Jan. 1, 1995), https://www.finra.org/rules-guidance/notices/95-1 [https://perma.cc/566N-B6RN]. Technically the first NASD mediations began in 1989. *See id.* ("From 1989 to 1993 the NASD Arbitration Department engaged in two pilot mediation programs."); *see also* Gross, *Securities Mediation*, *supra* note 221, at 336–43 (providing an overview of the early history).

224. *See* Gross, *Securities Mediation*, *supra* note 221, at 331 ("Since 1989, securities mediation administered by NASD Dispute Resolution (NASD-DR) has exploded."); *see id.* at 332 n.14 (citing *NASD Stats,* 2004, SEC. ARB. ALERT 2005-02-01 (Jan. 12, 2005)) ("Mediation filings have increased steadily since 1989, peaking at 1,217 cases filed for mediation in 2004.").

225. Joan Protess, *FINRA'S Mediation Program for Small Arbitration Claims*, FINRA, 1 (2014), https://www.finra.org/sites/default/files/14_0220%201_Neutral%20Corner_Volume%202.pdf [https://perma.cc/ZTB4-NRQ7] (providing an overview and noting the original 2013 small claim threshold of $50,000); *see also FINRA's Mediation Program for Small Arbitration Claims*, FINRA, https://www.finra.org/arbitration-mediation/about/mediation-process/finras-mediation-program-small-arbitration-claims [https://perma.cc/25QP-TD3V] [hereinafter *FINRA Small Claims*] (providing the current small claims threshold of $100,000).

226. *FINRA Small Claims*, *supra* note 225; *see also* FINRA, Rule 14110 (2008) (setting forth a fee schedule and other rules for "Mediation Fees").

227. *See FINRA's Mediation Process*, *supra* note 220 ("If there is a dispute which is not yet in arbitration, one of the parties can directly request mediation. This is called a 'straight-in mediation request.'"); *see also* James D. Yellen & Edward W. Larkin, *Ten Tips for an Effective Securities Mediation*, FINRA, 1 (2018), https://www.finra.org/sites/default/files/Mediation_Not_Murder.pdf [https://perma.cc/YCZ2-82D4] ("Mediation of securities disputes provides parties with a voluntary, less adversarial and less formal process that should lead to a resolution in less time and for less money. Since mediation is voluntary and non-binding, the parties are free to withdraw from mediation at any time."); Gross, *Securities Mediation*, *supra* note 221, at 366 ("The securities mediation process revolves around party choice and self-determination, leaving disputants with a strong sense that they had a full opportunity to participate in its outcome. In fact, the most important decision—the decision to participate at all—is determined entirely by party choice.").

governs mediation,[228] parties can also submit to mediation after an arbitration is in progress.[229] If both parties agree in writing to mediate, the next step is the mediator selection process.[230] As with arbitration, FINRA provides a randomized mediator list for parties to strike-and-select from.[231] This is only one option, however, and in general the mediator selection process is more flexible than is the case with arbitrators.[232] FINRA's pool of mediators is also small relative to its arbitrator roster. While maintaining thousands of arbitrators, FINRA-authorized mediators number in the few hundreds.[233]

As stated, FINRA's mediation program serves as a significant adjunct to its arbitration activities. For each of the years 2021 to 2023, over 600 customer cases were submitted to FINRA mediation.[234] For the same years, according to FINRA, the settlement rate for mediated cases was between 85-91%.[235] Moreover, the average turnaround time for mediations was roughly 120 days—substantially shorter than even the relatively expedited timeline of a FINRA arbitration.[236] A non-negligible portion of FINRA's overall arbitration caseload is therefore resolved on a speedy, consensual basis through mediation.

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228. *See* FINRA, Rule 14101 (2008); *see also id.* at 14104(a) (2008) ("Mediation under the Code is voluntary, and requires the written agreement of all parties. No party may be compelled to participate in a mediation or to settle a matter by FINRA, or by any mediator appointed to mediate a matter pursuant to the Code."); *id.* at 14104(b) (2008) ("If all parties agree, any matter that is eligible for arbitration under the Customer Code or Industry Code, or any part of any such matter, or any dispute related to such matter, including procedural issues, may be submitted for mediation under the Code.").

229. *FINRA's Mediation Process*, *supra* note 220 ("Mediation can be initiated two ways with FINRA: either before a dispute enters an arbitration, or while the dispute is still going through the arbitration process. If a dispute is already in arbitration, one or both parties can contact their arbitration administrator about their desire to mediate. FINRA staff will contact the other side to see if they agree to mediate the dispute.").

230. *See id.* (explaining the mediator selection process); *see also* FINRA, Rule 14107 (2012) (providing the rules for mediator selection).

231. *FINRA's Mediation Process*, *supra* note 220 ("After conferring with the parties, FINRA will send a list of proposed mediators from its roster. The mediators on the list may have subject-matter expertise or other experience that is consistent with the parties' needs in the case. . . . The parties may select their mediator from the initial list FINRA sends or may ask for additional lists.").

232. *Compare* FINRA, Rule 14107(a) (2012) ("A mediator may be selected: (1) By the parties from a list supplied by the Director; (2) With the Director's approval upon receipt of the parties' joint request, from a list or other source the parties choose; or (3) By the Director if the parties do not select a mediator after submitting a matter to mediation."), *and FINRA's Mediation Process*, *supra* note 220 ("The parties may also agree to mediate with a FINRA-approved mediator [not provided on a proposed FINRA list] by advising the mediation staff at any time during the process."), *with* discussion *supra* Part II.B.1 (providing an overview of FINRA's arbitrator selection rules).

233. *See FINRA Dispute Resolution Services Party's Reference Guide*, FINRA, 8 (Jan. 18, 2024) https://www.finra.org/sites/default/files/Partys-Reference-Guide.pdf [https://perma.cc/N5L3-EEV5] ("More than 200 FINRA mediators, diverse in culture and background, have met our rigorous mediator training and mediator experience standards.").

234. *See 2023 Dispute Resolution Statistics: Mediation Statistics Through December*, FINRA (2023, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2023 [https://perma.cc/7AV6-LDX5] (listing 637 mediations for 2023, 746 mediations for 2022, and 617 mediations for 2021).

235. *See id.* (recording an 85% settlement rate for 2023, 91% settlement rate for 2022, and 89% settlement rate for 2021).

236. *See id.* (listing an average mediation "turnaround time" of 121 days for 2023, 127 days for 2022, and 140 days for 2021).

D. Expungement Proceedings

While FINRA's mediation program has gone largely overlooked, one aspect of the FINRA dispute resolution system that has received some notice in the scholarly commentary is its so-called "expungement" process.[237] Under the federal securities laws, FINRA is required to collect relevant regulatory information regarding its registered broker-dealers and associated persons (i.e. licensed securities professionals) at those firms on an ongoing basis.[238] FINRA meets this statutory obligation by operating what is known as the Central Registration Depository (CRD), a database that is used by the SEC, state securities regulators, other SROs, and FINRA registered securities firms.[239] The CRD database includes information regarding criminal proceedings, regulatory actions, civil court judgments, financial events and—most relevant here—FINRA arbitrations brought by customers against FINRA broker-dealers and their associated persons.[240] In turn, FINRA makes the CRD information publicly available to investors through a free-to-use platform called BrokerCheck.[241] Expungement refers to a process whereby associated persons at FINRA firms can seek to have customer dispute information removed from the CRD and BrokerCheck.[242] The discussion below will walk through the nuts-and-bolts of this somewhat complicated, but important, adjunct to FINRA arbitration.

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237. *See supra* note 17 and accompanying text.

238. *See* Securities Exchange Act of 1934 § 15A(i), 15 U.S.C. § 78(o); *see also* FINRA, *Regulatory Notice 23-12: FINRA Adopts Amendments to the Codes of Arbitration Procedure to Modify the Process Relating to the Expungement of Customer Dispute Information*, FINRA (Aug. 11, 2023) [hereinafter *FINRA Expungement Regulatory Notice*], https://www.finra.org/rules-guidance/notices/23-12 [https://perma.cc/MTC3-PFV5] ("FINRA is mandated by federal statute to collect and maintain registration information about member firms and their associated persons.").

239. *See Discussion Paper – Expungement of Customer Dispute Information*, FINRA, 1 (April 2022) [hereinafter *FINRA Expungement Discussion Paper*], https://www.finra.org/sites/default/files/2022-04/Expungement_Discussion_Paper.pdf [https://perma.cc/ZV7F-KCVX] ("FINRA is mandated by federal statute to collect and maintain registration information about RFPs. To satisfy this statutory responsibility, FINRA operates the Central Registration Depository (CRD), which is used by FINRA, the Securities and Exchange Commission (SEC), other self-regulatory organizations (SROs), state securities regulators and securities firms."). The CRD was originally established under the NASD in 1981. *See* Black, *supra* note 3, at 33.

240. *See FINRA Expungement Discussion Paper*, *supra* note 239, at 2 ("In addition to customer dispute information, FINRA maintains other registration information in the CRD system, including information about criminal proceedings, regulatory actions, civil judicial judgments and financial events.").

241. *See BrokerCheck by FINRA*, FINRA, https://brokercheck.finra.org/ [https://perma.cc/8U22-3HJL] (last visited Sep. 18, 2025); *About Broker Check*, FINRA, https://www.finra.org/investors/investing/working-with-investment-professional/about-brokercheck [https://perma.cc/NYX7-VQD5] (last visited Sep. 18, 2025); *see also FINRA Expungement Discussion Paper*, *supra* note 239, at 20 n.4 ("BrokerCheck fulfills FINRA's statutory obligation under Section 15A(i) of the Securities Exchange Act of 1934 (Exchange Act) to establish and maintain a readily accessible electronic or other process, to receive and promptly respond to inquiries regarding registration information on, among others, broker-dealer firms and RFPs. BrokerCheck displays information from the CRD system.").

242. *See FINRA Expungement Regulatory Notice*, *supra* note 238.

As an initial matter, not all information on the CRD and BrokerCheck may be subject to expungement. Criminal proceedings, regulatory actions, civil judgments, and the like are not contemplated for expungement.[243] What *can* be expunged is "customer dispute information" concerning associated persons at FINRA registered firms.[244] Customer dispute information is a relatively broad category. FINRA requires registered broker-dealers to update an associated person's Form U4 or U5 within thirty days of learning about a pending legal dispute initiated by customers who allege sales practice violations against associated persons.[245] The Form U4 or U5 information, which is uploaded to the CRD and BrokerCheck, must include where the associated person was working, the factual allegations in the dispute, the amount of damages demand, and the status of the dispute.[246] FINRA firms must produce Form U4/U5 disclosures even if they believe the allegations are untrue, inaccurate, or malicious and do so while a dispute is still pending unresolved.[247] FINRA persons must also provide this information regarding associated persons who are unnamed in the dispute but discussed in the pleadings.[248] Because BrokerCheck functions as a kind of Yelp.com for broker-dealer professionals, FINRA expungement addresses the understandable concern that associated persons may have about unsubstantiated yet career-damaging allegations remaining publicly available on an indefinite basis.[249]

FINRA Rules 12805, 13805, and 2080 contain the relevant guidelines for how this process works.[250] First, associated persons must obtain a court order directing FINRA to expunge customer dispute information from the CRD and BrokerCheck.[251] In theory, an associated person may proceed directly in

243. *See* FINRA *Expungement Discussion Paper*, *supra* note 239, at 2 ("FINRA rules do not contemplate expungement of these [categories of] disclosure event types.").

244. *Id.*; *see also id.* at 20 n.7 (noting that FINRA maintains information about employment terminations of associated persons on CRD, which may also potentially be expunged).

245. *Id.* at 4.

246. *Id.* at 3–4.

247. *Id.* at 3.

248. *Id.* at 4.

249. *See id.* at 1 ("The collection of registration information in the CRD system and the disclosure of the information through BrokerCheck serves three important purposes: (1) *allowing investors to obtain information about an [associated person] or securities firm with whom they may do business*; (2) providing securities regulators with a critical regulatory tool in overseeing the activities of [associated persons] and in detecting regulatory problems; and (3) *providing securities firms with information for use in making informed employment decisions*.") (emphasis added).

250. *See* FINRA, Rule 12805 (2022) ("Expungement of Customer Dispute information from the Central Registration Depository (CRD) System"); FINRA, Rule 13805 (2023) (("Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System"); FINRA, Rule 2080 (2009) ("Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System").

251. *See* FINRA, Rule 2080(a) (2009) ("Members or associated persons seeking to expunge information from the CRD system arising from disputes with customers must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief.").

court.[252] But generally speaking, the court order is obtained by confirming an underlying FINRA arbitration award in which an expungement request is granted.[253] Rule 2080 also includes the substantive standard for awarding expungement; it requires that an associated person make one of three showings, either that:

> (A) the claim, allegation or information is factually impossible or clearly erroneous;
> (B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
> (C) the claim, allegation or information is false.[254]

In 2023, FINRA made an important set of amendments to Rules 12805 and 13805, which revised the framework for how associated persons may proceed with expungement requests.[255] The current ground rules are as follows.

FINRA allows associated persons to initiate an expungement request one of three ways. First, if an associated person is named in an arbitration, they can file a motion to the panel seeking expungement, which is then decided by the panel along with the merits.[256] Second, if an associated person is not a named party, they can request a named party—typically, the broker-dealer where they work or formerly worked—to make the expungement motion on their behalf.[257] Third, associated persons can make a "straight-in request" to FINRA,

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252. *See* Black, *supra* note 3, at 33 ("Since the inception of the CRD system in 1981, NASD generally honored court-ordered expungement . . . .").

253. *Id.* Up until 1999, the NASD had a practice of honoring arbitration awarded judgments without an accompanying court order. *Id.* In 2003, the NASD officially adopted what is now FINRA Rule 2080 and required arbitration awards granting expungement to be confirmed by a court of competent jurisdiction. *See id.* at 34; *see also* NASD Proposed Rule 2130 on Expungement of Customer Dispute Information, 68 Fed. Reg. 11435, 11436 (Mar. 4, 2003) (proposing the rule change that eventually became FINRA Rule 2080).

254. FINRA, Rule 2080(b)(1)(A)–(C) (2009); *see also* FINRA, Rule 12805(c)(8)(A)(i)(a)–(c) (2023) (citing the same three standards); FINRA, Rule 13805(c)(9)(A)(i)(a)–(c) (2023) (citing the same three-part standard).

255. *See FINRA Expungement Regulatory Notice*, *supra* note 238 (providing an overview of the amendments). The 2023 amendments supplemented or replaced certain aspects of a prior FINRA guidance document first developed in 2013 and revised periodically thereafter. *See Notice to Arbitrators and Parties on Expanded Expungements Guide*, FINRA (Sep. 2017) https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/notice-arbitrators-and-parties-expanded-expungement-guidance [https://perma.cc/NLU6-S26B]; s*ee also FINRA Expungement Discussion Paper*, *supra* note 239, at 6 (noting the role of the 2013 guidance).

256. *See* FINRA, Rule 12805(a)(1)(A) (2022) ("An associated person named as a respondent in an investment-related, customer-initiated arbitration may request expungement during the arbitration of the customer dispute information associated with the customer's statement of claim . . . ."). If an associated person respondent does not move for expungement during the arbitration in which they are named, they waive the right to seek expungement at a later date. *See id.*; *see also* FINRA Rule 12805(a)(1)(D) (2022) ("If an associated person requests expungement pursuant to Rule 12805(a)(1)(C) and the investment-related, customer-initiated arbitration closes by award after a hearing, the panel shall consider and decide the expungement request during the arbitration in accordance with Rule 12805(c), and issue its decision on the expungement request in the same award."). An exception is for expedited "simplified" arbitrations decided on the papers. *See FINRA Expungement Regulatory Notice*, *supra* note 238.

257. *See* FINRA, Rule 12805(a)(2)(A)-(E) (2022) (setting forth the procedures for "on behalf of" expungement requests for unnamed parties).

which initiates a separate, standalone arbitration proceeding from the arbitration in which the relevant customer dispute allegations were made.[258]

Expungement awards must be decided by a full FINRA panel of three public arbitrators.[259] The panelists are randomly selected by FINRA, meaning that associated persons seeking expungement are not allowed to rank or strike particular arbitrators.[260] Unlike for other proceedings, there is no majority vote rule—the panel must be unanimous in favor of issuing an expungement award.[261] The customer who made the allegations that a FINRA-associated person seeks to be expunged must be served and invited to participate in the expungement arbitration hearing.[262] Relevant state regulators also have the option of participating in the expungement proceeding.[263] If an arbitration panel issues an award granting expungement, an associated person must name FINRA in the subsequent civil proceeding in which they seek a court order to confirm the award.[264]

* * *

This Part has provided a detailed overview of the legal mechanics of FINRA arbitration and mediation. A major theme that has been highlighted throughout is how FINRA arbitration differs from litigation in state or federal court. In many ways, FINRA arbitration resembles commercial arbitration: limits on discovery, a restricted right of appeal, and so on, can also be found in the private dispute resolution process overseen at the American Arbitration Association (AAA) or JAMS. The emphasis in both contexts is on achieving speedy resolution, efficiency, and finality for the parties involved. The following Part III will focus on how FINRA arbitration is unique compared to other

258. *See id.* at 12805(a)(1)(D)(ii) (providing that so-called "straight-in" expungement requests can be made when "Investment-Related, Customer-Initiated Arbitration Closes Other than by Award or by Award without a Hearing"); *see also* FINRA, Rule 13805 (2023) (stating further procedures for straight-in expungement requests).

259. FINRA, Rule 13805 (a)(4) (2023) ("A three-person panel selected pursuant to Rule 13806 must hold an expungement hearing . . . ."); FINRA, Rule 13806(b)(1) (2023) ("The list selection algorithm shall randomly select three public arbitrators . . . ."). An exception to the full-panel requirement arises with expungement requests filed during the course of a simplified arbitration, which proceeds with a single arbitrator rather than a full panel. In those cases, the single arbitrator may decide the expungement request along with the merits. *See* FINRA, Rule 12800 (2025).

260. FINRA, Rule 13806(b)(4) (2023) ("The parties requesting expungement of customer dispute information shall not be permitted to strike any arbitrators selected by the list selection algorithm nor stipulate to their removal . . . .").

261. *See* FINRA, Rule 13805 (9)(A) (2023) (explaining "Unanimous Decision Required to Issue Award Containing Expungement Relief").

262. *See id.* at 13805(b)(1) (2023) (discussing notifications to customers).

263. *See id.* at 13805(b)(2) (2023) (discussing notifications to state securities regulators).

264. *See* FINRA, Rule 2080(b) (2009) ("Members or associated persons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents . . . ."); *see also id.* at 2080(b)(1)–(2) (providing certain narrow exceptions for naming FINRA in the court proceeding).

forms of arbitration. As will be shown, the distinctive features of FINRA arbitration, taken together, have the cumulative effect of shifting FINRA arbitration from just another form of dispute resolution to a quasi-regulatory intervention in securities markets. In other words, it will elaborate on this Article's claim that FINRA arbitration indirectly functions as financial regulation.

III. FINRA ARBITRATION AS FINANCIAL REGULATION

Part I of this Article laid out the institutional background of FINRA, and showed how it exercised regulatory powers that parallel those of the SEC, albeit in a quasi-private capacity. The previous Part II took a granular look at the mechanics of FINRA dispute resolution in its arbitration, mediation, and expungement proceedings. This Part circles back to this Article's main claim and ties the above materials together by showing how various aspects of FINRA arbitration collectively function as a form of financial regulation that aligns with the overarching goals of the securities laws. It identifies five dimensions along which FINRA arbitration differs from other forms of commercial arbitration and explains why those distinctions are functionally related to FINRA's mission as a securities market regulator.

A. Mandatory Jurisdiction & Scope of Claims Covered

One prominent feature of FINRA arbitration is its mandatory nature and the broad scope of claims covered. As detailed above, the breadth of FINRA jurisdiction extends to claims between brokers, investor claims against brokers, and employment disputes between broker-dealers and their "associated persons."[265] Often, the broad, mandatory nature of FINRA jurisdiction is misconstrued as purely the result of contracting norms in the broker-dealer industry.[266] This stems from the fact that broker-dealers uniformly rely on standard form contracts, and, as a matter of industry practice, these form contracts contain Pre-Dispute Arbitration Agreement (PDAA) terms that call for FINRA arbitration.[267] There are also frequent concerns raising the "adhesive" nature of PDAA contract provisions—they are generally considered unnegotiated, take-it-or-leave-it terms that are made possible by asymmetries in bargaining power between broker-dealers and their investors or employees.[268] Thus, the story goes, FINRA arbitration is mandatory for the same reasons that

265. *See* discussion *infra* Part II.B.1 (discussing the parties and claims eligible for FINRA arbitration).

266. *See supra* note 109 and accompanying text.

267. *See id.*

268. *See, e.g.*, Horton, *supra* note 12, at 195; *see also* Edwards, *supra* note 49, at 430 (noting that "nearly all brokerage industry contracts" contain provisions requiring investors to arbitrate claims in a FINRA arbitration).

binding consumer arbitration over cell-phone contracts or defective products has emerged in recent decades.[269] This narrative, however, obscures a number of important aspects of securities arbitration at FINRA and its overarching regulatory posture.

First, consider "industry" disputes that are brought into FINRA arbitration by broker-dealers against other broker-dealers.[270] These cannot be explained as a result of disparities in bargaining power. Neither are industry disputes related to the rise of arbitration as an alternative to litigation that has emerged over the past several decades, nor as an arbitrary byproduct of recent contracting norms in the broker-dealer industry. Instead, as Professor Jill Gross has written, arbitration among broker-dealers is a practice that has continuously been in place for multiple centuries.[271] And, not surprisingly, that centuries-long tradition has a functional logic that is rooted in the nature of the securities industry itself.[272]

The historical preference for arbitration in the securities industry was twofold. First, there was a premium on speed in the resolution of securities disputes, due to the fast moving nature of financial markets.[273] Second, securities market participants preferred arbitration because arbitration allows more room for considerations of equity over law and the ability to better police industry norms of fair play.[274] That is, arbitration was used to hold broker-dealers to a *higher* standard of professional probity than may otherwise be imposed under the common law of contract or tortious fraud. The rules governing FINRA arbitration reflect an attempt to preserve this longstanding practice. FINRA Rule 2010 states that "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[275] The high-level equitable principle embodied in FINRA Rule 2010 is also made directly applicable to the arbitration context via

269. *See* Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1174 (2010) ("Mandatory arbitration is under attack in the United States. In recent years, academics, media commentators, and consumer advocates have lamented the alleged evils of pre-dispute arbitration clauses in adhesive consumer and employment agreements.").

270. *See* discussion *infra* Part II.B.1(discussing broker versus broker claims).

271. *See* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 171 ("Since the very beginnings of stock and bond trading in the United States, the securities industry has used arbitration to resolve disputes among industry participants.").

272. *See id.* at 173–74.

273. *See id.* at 176 (arguing that the 19th century preference for arbitration was in part in order to "provide a rapid resolution of a dispute whose value changed quickly as the stock market rose or fell").

274. *See id.* ("[T]he historical evidence suggests [a historical preference for arbitration] was primarily to ensure that industry norms would be enforced, even if those norms were unlawful and not enforceable in court . . . .").

275. *See* FINRA, Rule 2010 (2008) (explaining "Standards of Commercial Honor and Principles of Trade").

FINRA Rule IM-12000[276] (for customer disputes) and FINRA Rule IM-13000 (for industry disputes).[277]

Second, the basis for FINRA's jurisdiction over investor or employee arbitrations with broker-dealers, while arguably more recent,[278] in part represents a shift in the nature of securities regulation rather than a new form of adhesive contracting. As detailed above, the floodgates for investor and employment arbitrations at NASD and later FINRA were open by a line of Supreme Court cases from the 1980s and early 1990s.[279] In these opinions, the Supreme Court specifically and repeatedly stated that an important basis for its decisions was that the arbitration process at NASD/FINRA would be subject to the oversight of the SEC, and presumably, tailored to conform with the SEC's goals of investor protections and capital market efficiency. For example, in its 1987 *McMahon* decision, the Court explained that "the Commission has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights."[280] Similarly, two years later in *Rodriguez de Quijas*, the Court stated that "aversion to arbitration as a forum for resolving disputes over securities transactions [is misplaced], especially in light of the relatively recent expansion of the Securities and Exchange Commission's authority to oversee and to regulate those arbitration procedures."[281]

The Supreme Court's line of decisions to move securities claims from court to arbitration should be placed in broader context as a determined policy choice about the substance of the federal securities laws, rather than a technical holding on a matter of civil procedure. As is well known, what we consider to be the existing body of federal securities law consists only partially of "laws" in the legislative statutory sense. There is no statutory basis for the law of insider trading.[282] Neither is there an explicit statutory private right of action for now-

276. *See* FINRA, Rule IM-12000 (2008) (listing actions that "may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010" in connection with customer arbitrations).

277. *See* FINRA, Rule IM-13000 (2008) (listing actions that "may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010" in connection with industry arbitrations).

278. "Arguably" here, because since its founding in 1817, the NYSE traditionally allowed customers of stockbrokers to bring claims in arbitration as well. *See* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 176 ("The ability of this early 1800s NYSE Board to accept jurisdiction over the arbitration of *customer* disputes was critical.").

279. *See* discussion *infra* Part II.A (discussing the caselaw from this period).

280. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 233–34 (1987). The Court went on to observe that "[i]n the exercise of its regulatory authority, the SEC has specifically approved the arbitration procedures of . . . the NASD." *Id.* at 234.

281. Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989).

282. *See* A.C. Pritchard, *The SEC, Administrative Usurpation, and Insider Trading*, 69 STAN. L. REV. ONLINE 55, 55 (2016) ("Congress has never enacted a prohibition against insider trading, much less defined it."). The prohibition on insider trading was first announced in an SEC administrative law case, *Cady, Roberts & Co.*, which was subsequently upheld and extensively elaborated in the federal courts. *See id.* (reviewing the caselaw history); *see also* Larry E. Ribstein, *Federalism and Insider Trading*, 6 SUP. CT. ECON. REV. 123, 125 (1998) ("An

ubiquitous securities fraud claims.[283] Likewise, the securities class action—the procedural vehicle with which most private securities fraud claims are now brought—is a judicial invention from the Supreme Court's 1988 ruling in *Basic v. Levinson*.[284] Given this background, the Supreme Court's decision to delegate dispute resolution in the broker-dealer industry to FINRA can be seen as one of many judicial renovations of the securities regulations by the federal courts just as much as it was a reflection of growing judicial "comfort" with arbitration.[285]

Third, and most importantly, FINRA's jurisdiction over securities broker-dealer disputes is regulatory, rather than contractual, under FINRA's own rules. FINRA Rule 12200 states that registered broker-dealers under FINRA's licensing authority "must arbitrate a dispute under the Code if . . . [t]he dispute arises in connection with the business activities of the member or the associated person . . . ."[286] The implications of this rule are broad. According to a 2016 Regulatory Notice issued by FINRA, Rule 12200 "preserves a customer's ability to resolve disputes through FINRA arbitration, regardless of whether arbitration is required by a written agreement."[287] A parallel rule, FINRA Rule 13200, also applies to disputes between broker-dealers and their employees.[288]

A Second Circuit decision from 2016, *Credit Suisse v. Tracy*, presents a telling example of how these rules work.[289] In *Tracy,* Credit Suisse entered into an employment contract containing a PDAA provision which designated JAMS arbitration as the choice of forum for disputes.[290] The Second Circuit held that the PDAA controlled, over the employee's objections, and Credit Suisse could proceed with arbitration in JAMS.[291] FINRA immediately responded with its the aforementioned 2016 Regulatory Notice, which specifically cited the Second Circuit decision, stating that *Tracy* was wrongly decided and contrary to

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acorn of vague language in the 1934 Act gradually became the sapling of equally vague but broader language in SEC Rule 10b-5 and finally a forest of federal anti-fraud law, with a large grove of insider trading law.").

283. *See* Joseph Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 963, 964 (1994) (arguing that the SEC has authority to reverse judicial decisions that implied a private right of action to bring securities law claims because such claims lack a statutory basis).

284. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 246–47 (1998) (creating a "fraud-on-the-market" presumption that allows class plaintiffs to plead the reliance element of a Section 10(b) fraud claim without providing evidence of individual class members' reliance on misrepresentations in corporate securities disclosures).

285. *See* Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433, 1438 (1996) (noting that a pair of 1984 Supreme Court decisions preceding *McMahon* in 1987 "reveal that the Justices were achieving a greater comfort level with arbitral solutions").

286. FINRA, Rule 12200 (2008).

287. *See Regulatory Notice 15-25: Forum Selection Provisions Involving Customers, Associated Persons and Member Firms*, FINRA (July 22, 2016) [hereinafter *Forum Selection Regulatory Notice*], https://www.finra.org/rules-guidance/notices/16-25 [https://perma.cc/2GKQ-EQQY].

288. *See id.* at 6; *see also* FINRA, Rule 13200 (2008) (covering employment disputes).

289. *See* Credit Suisse Sec. (USA) LLC v. Tracy, 812 F.3d 249, 251–57 (2d Cir. 2016).

290. *Id.* at 251.

291. *Id.* at 256.

FINRA Rules.[292] In the same Regulatory Notice, FINRA forcefully reminded Credit Suisse and similarly situated broker-dealers that "FINRA may sanction its members or associated persons for violating any of its rules by 'expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.'"[293] As the foregoing makes clear, the backbone of FINRA arbitration jurisdiction is not contractual, nor is it imposed by deep pocket broker-dealers negotiating adhesive PDAA provisions with their customers or employees. Instead—as was seen in *Tracy*—the full regulatory enforcement power of FINRA (and by implication the SEC) stands behind the proposition that broker-dealers must submit to FINRA arbitration in disputes with their customers or employees—essentially as a matter of federal securities law—notwithstanding any contractual agreements to the contrary.

To sum up, the quasi-regulatory structure of FINRA arbitration is evident in the scope of jurisdiction that FINRA wields over securities broker-dealer disputes. As is often the case for substantive industry regulations, the jurisdictional net cast by FINRA is meant to be mandatory and comprehensive. It is not (merely) a creature of contract, or a result of bargaining disparities among investors, employees and brokers, or of growing judicial comfort with arbitration. Instead, FINRA arbitration is designed to preserve the historically recognized need in capital markets for speedy, equitable dispute resolution. The Supreme Court has interpreted the federal securities laws in a manner which acknowledges that the specific procedural rules for FINRA arbitration are consistent with the overarching policy mandate of the SEC and FINRA. And FINRA itself—consistent with the Supreme Court's reasoning in this area—has sought to bar securities industry participants from other fora for commercial arbitration on similar grounds. A securities broker cannot "opt out" of FINRA arbitration for roughly the same reasons it cannot opt out of any other securities market regulation.

B. Subsidized Arbitrator & Mediation Fees

Another noticeable feature of FINRA arbitration, which distinguishes it from other venues for commercial arbitration, are the various subsidies that FINRA provides to make it less costly for parties to bring claims.[294] The most obvious aspect of this, noted above, is how FINRA arbitrators are paid.[295]

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292. *See Forum Selection Regulatory Notice, supra* note 287.

293. *Id.*

294. *See* Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2335 (2020) [hereinafter Gross, *Arbitration Archetypes for Enhancing Access to Justice*] ("FINRA subsidizes most of the cost of the forum for investors and associated claimants (including the cost of arbitrators) . . . .").

295. FINRA, Rule 12214(a) (2021).

FINRA arbitrators are not allowed to bill the parties hourly fees.[296] Instead, FINRA has a schedule for providing arbitrators with a modest "honorarium" for each hearing session.[297] A review of FINRA's publicly available case archives shows that, even for cases with multi-million dollar claims that end in written awards on the merits, the all-in costs of the parties for arbitrators honoraria often amounts to a few thousand dollars.[298]

The contrast with other leading commercial arbitration firms, namely AAA and JAMS, is significant. An initial issue for comparison's sake is transparency: "In terms of safeguarding data about its neutrals, the American Arbitration Association is a kind of Fort Knox, making this data available only when a party has opened an arbitration case."[299] Anecdotally, however, AAA arbitrators charge the parties $300 to $1,150 an hour.[300] The fee structure that legal disputants will see at JAMS is similar. As Robert Davidson and Matthew Rushton report, "JAMS arbitrators set their own hourly or daily rate. Fees range from US$400–US$1,200 per hour depending on the arbitrator selected."[301] Fees for mediators, who are also often arbitrators as well, are comparable.[302] Given that arbitrators' hourly fees are generally comparable to those of the lawyers representing the parties to a case, this means that perhaps a third of the attorney hours on a FINRA matter are provided at a nominal, quasi-pro bono rate.[303]

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296. *See Honoraria & Expenses for Arbitrators*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/honoraria-expenses [https://perma.cc/GTS7-72AE] (last visited Sep. 8, 2025, at 8:20 CST) ("Q. Can I charge my hourly rate, as I do in the other forums? A. No, the arbitrators' honorarium is set at a fixed rate. Arbitrators should not ask the parties, or the FINRA staff member assigned to the case, to pay a higher rate.").

297. *See* FINRA, Rule 12214 (2021) (listing the honorarium schedule for arbitrators*); see also supra* notes 165, 168 and accompanying text (discussing FINRA honoraria).

298. *See, e.g.*, Sala-Colon v. Pariter Wealth Mgmt. Grp., FINRA Case No. 24-0002 at 2–3 (Nov. 4, 2024) (seeking nearly $20 million in damages with total arbitrator hearing and discovery fees of $4,925 after award); *see also* Raymond James & Assoc., Inc. v. Magruder, FINRA Case No. 24-01654 at 1 (Oct. 25, 2024) (seeking $1,807,419 in damages and with award decided on the papers without hearing for a $300 arbitrator fee); Posillico v. Morgan Stanley Smith Barney LLC, FINRA Case No. 23-01580 at 2 (Sep. 27, 2024) (seeking $2,216,225 in damages with $2,585 in arbitrator hearing fees upon award).

299. Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RESOL. MAG., Spring 2017, at 8.

300. *Id.*

301. Robert B. Davidson & Matthew Rushton, *Overview: JAMS*, GLOB. ARB. REV. (Oct. 13, 2020), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/overview-jams [https://perma.cc/XE78-CWTW]; *see also* Rothman, *supra* note 299 ("JAMS, which also does not publish its arbitrator rates, there is a great deal of variance, with fees ranging from $400 per hour to $15,000 or more per day."); Mark Fotohabadi, *How Much Does Arbitration Cost*?, ADR TIMES (Oct. 2, 2023), https://adrtimes.com/how-much-does-arbitration-cost/ [perma.cc/DRH9-V8HN] ("Currently, surveys show that arbitrators charge between $375 and $1,125 an hour, with the midpoint being around $600.").

302. *See* Neal Koch, *How Mediation Firm JAMS Became the Dominant Player in the LA Market*, L.A. BUS. J. (July 5, 2020), https://labusinessjournal.com/services/law-legal-attorneys/how-mediation-firm-jams-became-dominant-player/ [perma.cc/NPL6-TZK8] (noting that JAMS mediators generally charge between $6,000 to $15,000 per day long mediation session).

303. *See* Rothman, *supra* note 299 ("A rule of thumb is that the most in-demand arbitrators' rates tend to mirror the rates of the most skilled litigators in their respective jurisdictions.").

Especially in cases with a three arbitrator panel, the result is that parties save tens of thousands of dollars in fees, if not more.

FINRA also subsidizes the cost of its dispute resolution programs in other ways. FINRA's mediation program stands out here in particular.[304] To take just one example, under the "Small Arbitration Claims" program, FINRA waives mediation filing fees and provides a mediator free of charge.[305] There are others, and as Professor Iannarone has written, "FINRA provides numerous low-cost mediation solutions, especially during its yearly mediation month."[306] For similar reasons, Professor Jill Gross concludes that "FINRA arbitration is an arbitration archetype" for enhancing access to "justice" in the form of low-cost, efficient dispute resolution.[307]

From a regulatory theory perspective, FINRA dispute resolution represents a "public good" in the sense that term is used by economists.[308] In other words, there are positive externalities from robust, low-cost access to dispute resolution in securities markets that accrue more broadly than just to the disputing parties themselves. Third-party investors and markets more generally benefit from robust access to disputes resolution in broker-dealer disputes: these benefits include deterrence of wrongdoing, greater certainty that investments will be free from fraud or negligent conduct by broker-dealer, lower risks that prohibitive legal fees will prevent recovery as a practical matter in instances when securities professionals are in theory liable, and so on. FINRA underwrites these broader benefits to the market by subsidizing its arbitration and mediation fora.

C. Public versus Non-Public Arbitrators

A third prominent feature of FINRA arbitration that gives it a quasi-regulatory flavor turns on FINRA's distinction between "public" and "non-public" arbitrators.[309] FINRA's public versus non-public arbitrator distinction stands out as an institutional innovation compared to other formats for alternative dispute resolution, at places like AAA and JAMS, where no such categories exist.[310] Along with the basic distinction, FINRA also has rules

304. *See* discussion *supra* Part II.C (discussing FINRA mediation).

305. *FINRA Small Claims, supra* note 225.

306. *See* Nicole G. Iannarone, *Investor Justice*, 109 MINN. L. REV. 1153, 1217 n.332; *see also* Iannarone, *supra* note 15 (providing more detail on the mechanics of streamlined small claims arbitration at FINRA).

307. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, *supra* note 294, at 2336.

308. *See generally* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS (2d ed. 1996) (providing a comprehensive discussion of externalities, public goods, and club goods); *see also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 36–43 (1965) (providing a seminal account of the public goods concept).

309. The differentiating factor is that "public" arbitrators have limited affiliation with the securities industry. *See supra* note 167 and accompanying text.

310. *Compare, e.g.*, *FINRA*, Rules 12302 (2017), 13302 (2017), *with* Am. Arb. Ass'n. Com. Arb. Rule R-58(a) (2013) (referring simply to a "National [AAA] Roster" of arbitrators, without designation of public

regarding each arbitrator category's eligibility depending on case type: investor and employment cases must be decided by public arbitrators; or in the case of a three-person arbitral panel, by at least a majority of public arbitrators;[311] industry cases between broker-dealers can be decided by non-public arbitrators.[312]

What are the justifications for this mandatory structure for FINRA arbitration, which stands in tension with the usual contractual basis of alternative dispute resolution, where the parties are free to agree on the composition of decision-makers as they wish? According to Professor Iannarone, the "public versus non-public distinction was designed to situate arbitrators on a spectrum between judge and jury member."[313] Professor Choi and co-authors express a similar view, stating that "decision makers in the FINRA system function as a type of hybrid between a judge and a jury."[314] It is not clear how far this "hybrid" characterization can be pushed. In a bench trial, judges serve the same hybrid function as both fact-finder (in place of a jury) and trier of law.[315] And arbitration generally, at FINRA or otherwise, is based on the bench trial model.[316]

One clear purpose of the public versus non-public arbitrator distinction, however, is to minimize decision-maker bias. The assumption is that securities insiders are potentially biased in investor or employer cases, where a broker-dealer firm is in the role of respondent.[317] FINRA flips the optionality structure for arbitrator conflicts-of-interest that is embedded in most commercial arbitration platforms. For example, at the AAA, an arbitrator with experience in the relevant industry can be selected by the parties but later disqualified during the course of the arbitration upon a showing of bias.[318] At FINRA, by contrast, non-public arbitrators with securities industry ties—and the attendant

versus non-public arbitrators), *and* JAMS, Rule 7 (2021) (defining "Arbitrator," along with a neutrality requirement, without designation of public and non-public arbitrators).

311. *See* discussion *supra* Part II.B.1 (providing an overview of FINRA's arbitrator selection rules).

312. *See id.* The fact that neither group of arbitrators must be practicing attorneys, or even have legal training, is not unique to FINRA, but is another noteworthy feature of FINRA's arbitral roster. *See Become an Arbitrator*, FINRA, https://www.finra.org/arbitration-mediation/become-arbitrator [perma.cc/LCE8-LSVP] (last visited Sep. 8, 2025) (setting forth the basic qualifications, which do not include being a licensed attorney).

313. Iannarone, *supra* note 306, at 1197.

314. Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43, 60 (2014); *see also* Black, *supra* note 3, at 18–28 (providing legal background on how the FINRA arbitrator categories have evolved).

315. *See* W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1131 (2012) ("Bench trials are perhaps the closest analog to arbitration, because the judge (like the arbitrator) resolves merits-related factual disputes.").

316. *See id.*

317. *See* Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 350, 392–93 (2008) (presenting a survey of investor claimants' perceptions of fairness in NASD arbitration, from a period before many of the current parameters of FINRA arbitrator selection were reformed).

318. *See* Am. Arb. Ass'n, Consumer Arb. Rule R-17 (2025) ("Disqualification of Arbitrator").

potential for bias—are limited in their eligibility to serve in investor or employer cases from the outset. This posture, while more restrictive from a freedom of contract perspective, makes some sense in a context where claimants who are proceeding pro se or otherwise do not have sophisticated legal representation may fail to assert their rights to an unbiased arbitral panel. Indeed, the aforementioned study by Professor Choi and co-authors suggests that such oversights may be relatively common—their empirical study finds that putatively "public" FINRA arbitrators with relatively more connections to the securities industry tend to award lower damages to investor claimants.[319]

The option for exclusively non-public arbitrators in industry cases reflects a different dynamic. There, the specter of arbitrator bias is less pronounced: both claimant and respondent parties are broker-dealers, so if an arbitral panel is inclined to place a thumb on "industry interests" there is no obvious party on which to confer such a bias. In industry cases, the value of arbitrators with a professional background working in securities markets also makes sense. It is consistent with the historical (and logical) preference in securities arbitration for adjudicative decision-makers who are familiar with the technical workings of financial transactions, industry practice, and norms of equity.[320]

In short, FINRA arbitration mandates different categories of arbitrators for different categories of cases in a manner that hinders securities market participants' freedom of contract, in order to further the regulatory goals of FINRA and the SEC. The requirements for public arbitrators in customer cases involving claims against broker-dealers is consistent with the aim of investor protection. The availability of non-public securities industry insiders to decide cases between broker-dealers tailors the process with an eye toward capital market efficiency. In both instances, the regulatory posture of FINRA arbitration can be seen as departing from the procedural flexibility for arbitrator selection found in other venues for commercial arbitration and alternative dispute resolution.

D. Sanction Power for Subpoenas, Discovery Abuses, & Awards

A fourth important feature of FINRA arbitration that clearly reflects a regulatory modality is the availability of FINRA's sanctions power at various stages of the dispute resolution process. Recall that all the parties involved in a FINRA arbitration are already enveloped in a comprehensive set of rules and regulations governing the broker-dealer industry, which are enforced in parallel by FINRA and the SEC.[321] This state of affairs is in marked contrast to other forms of commercial arbitration, as well as litigation in the court system, where

319. Choi et al., *supra* note 314, at 72.

320. *See* Gross, *Historical Basis of Securities Arbitration*, *supra* note 23, at 176.

321. *See* discussion *supra* Part I.B (discussing FINRA's role as a broker-dealer regulator).

the parties are only under the court's jurisdiction insofar as the four corners of the legal matter at issue is concerned.

The upshot is that FINRA can bring its full array of disciplinary tools to bear on parties to the dispute and even on third-parties in certain instances. Such sanctions include fines, dismissal of a claim or defense, industry bars, and other forms of disciplinary action.[322] In court or in normal commercial arbitration, such power is more limited and usually takes the form of licensing sanctions on attorneys bringing the case, fee-shifting as a form of equitable relief, and so on.[323]

FINRA's enforcement authority appears in the course of arbitration in at least three forms. First, parties may be subject to sanctions for various "discovery abuses," such as withholding of relevant documents.[324] Second, third-parties who are registered with FINRA may be sanctioned for failing to comply with subpoena or related "order for production" requests.[325] And third, FINRA can impose sanctions on respondents who delay or fail to pay an award of damages within thirty days of an award being granted.[326] These are not merely tools that are theoretically at FINRA's disposal. Numerous examples can be found where FINRA has imposed sanctions on parties to an arbitration proceeding, including cases where the associated penalties were quite robust.[327] Also notable is the fact that FINRA's guidelines for disciplinary actions include a party's "arbitration history" as one factor in determining sanctions.[328]

322. *See* FINRA, Rules 12212 (2008), 13212 (2008) (setting forth available sanctions for any "party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel," including option for referral to FINRA's disciplinary body).

323. *See* FED. R. CIV. PRO. 11(c) (stating the rules for sanctions in federal court); *see also* Alan E. Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 911–12 (1987) (discussing Rule 11 sanctions in more depth); *see also* JAMS, Rule 29 (2021) ("[S]anctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees . . . ."); Am. Arb. Ass'n, Com. Arb. Rule R-58(a) (2013) ("The arbitrator may not enter a default award as a sanction.").

324. FINRA, Rules 12511 (2008), 13511 (2008) (discussing "Discovery Sanctions" in industry cases and industry cases, respectively).

325. FINRA, Rules 12513 (2019), 13513 (2019) ("Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents without Subpoenas"); *see also* Barry Temkin & Katie DiGeronimo, *Subpoenas and Orders of Appearance and Production*, FINRA, 1 (2017) https://www.finra.org/sites/default/files/neutral-corner-volume-3-2017.pdf [https://perma.cc/LED4-Z6860] ("An associated person or firm served with an order of production must comply at risk of incurring sanctions or disciplinary action.").

326. FINRA, Rule 12904 (2018) (regarding awards); *see also Statistics on Unpaid Customer Awards in FINRA Arbitration*, FINRA, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/statistics-unpaid-customer-awards-finra-arbitration [https://perma.cc/Y2EG-GUVE] ("In order to incentivize member firms or associated persons to pay customer awards, and restrict those who do not, FINRA suspends from the brokerage industry any member firm or associated person who fails to pay an arbitration award.").

327. *See, e.g.*, Iannarone, *supra* note 202; *see also Statistics on Unpaid Customer Awards in FINRA Arbitration*, *supra* note 326 (listing statistics on sanctions and industry bars from unpaid awards).

328. FINRA SANCTIONS GUIDELINES, at 2 (discussing the role of a party's arbitration history).

The interpretation of arbitral sanctions as an extension of FINRA's regulatory power is straightforward. In court, or in a case before AAA or JAMS, it is basically impossible for a financial institution or its legal representatives to do anything that violates "securities laws." Yet in FINRA arbitration, misconduct in a dispute resolution context can result in violations of rules such as FINRA Rule 2010[329] and ultimately a bar from working in the securities broker-dealer industry as a whole. Beyond this technical legal distinction, there is of course the practical reality that the availability of FINRA's regulatory enforcement authority provides a powerful incentive for the parties to comply with the rules and procedures governing the arbitration, an incentive that would not otherwise exist if the dispute was proceeding in a different forum.

E. Confidentiality, Disclosure & Expungement

Finally, and perhaps most importantly from a securities law perspective, is the role of disclosure in FINRA arbitration. A defining feature of commercial arbitration is that it is confidential.[330] The awards and pleadings from most arbitrations, including those hosted by JAMS and the AAA, are not publicly available.[331] At the same time, the defining feature of the securities laws is their focus on mandatory disclosure of information to investors.[332] "Sunlight is said to be the best of disinfectants,"[333] is the often repeated line from Justice Brandeis, when speaking of the animating principle behind the federal securities laws.[334] The rationale for mandatory disclosure is that capital markets run on information—specifically, information about the financial performance of

329. *See* FINRA, Rule 2010 (2020).

330. *See* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1255 (2005) (stating the conventional wisdom that "[c]onfidentiality has long been part of the mythology of alternative dispute resolution (ADR). That is to say, one of the apparent virtues of ADR is that its processes have been viewed as confidential."). By contrast, state and federal court cases are generally public proceedings protected in part by the First Amendment, albeit with exceptions that allow certain case contents to be sealed. *See generally* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2016) (examining the publicity of court proceedings in the First Amendment context).

331. *See, e.g.*, JAMS, Rule 26(a) (2021) ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision."). There are, of course, numerous complicated exceptions here as well. *See generally* Samuel Estreicher & Steven C. Bennet, *The Confidentiality of Arbitration Proceedings*, 240 N.Y. L.J. 31 (Aug. 13, 2008) (discussing exceptions to confidentiality rules in arbitration proceedings).

332. *See* JAMES D. COX, ROBERT HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION: CASES & MATERIALS 5–11 (2017) (discussing the role of mandatory disclosure as a bedrock principle of the federal securities laws).

333. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

334. As Richard Epstein has pointed out, Justice Brandeis never troubled to provide a justification for exactly how or when his famous catch phrase should hold true in the context of securities regulation, and it has since been treated as a pithy truism. *See* Richard A. Epstein, *Rethinking Disclosure Obligations in Securities Regulations: Why Less Is (Much) More*, 2023 MICH. ST. L. REV. 1035, 1036 (2023).

public companies that is necessary to make a forward-looking valuation of the securities they issue.[335]

This Article's thesis—that FINRA arbitration represents a hybrid of dispute resolution and financial regulation—is plain to see in the disclosure-and-expungement context. As discussed above, FINRA arbitration contains a complex set of rules that attempt to strike a balance between the traditional norm of confidentiality in arbitration and the traditional norm of disclosure in the securities laws.[336] In the first instance, any case information from a FINRA arbitration that may be relevant to securities regulators must be promptly uploaded by FINRA to the Central Registration Depository (CRD) database, as well as its public-facing counterpart, BrokerCheck.[337] It is only after the presumption of public access has been satisfied by this process that licensed broker-dealers may challenge those disclosures through FINRA's special "expungement" proceedings.[338] Moreover, in order to successfully have information expunged, the claimant broker-dealer must make a persuasive showing to the FINRA tribunal that the information in question is false, misattributed, factually impossible, and so forth.[339] The spirit behind this whole process is to cleanse misleading or defamatory allegations that appear in frivolous strike suits from the public record.

The two-step process, which FINRA administers as described above, is closely analogous to how disclosure functions in the broader securities regulation. Under the securities laws, a cause of action for wrongful disclosure typically lies only if the information disclosed is materially misleading.[340] The point is not for firms offering securities to inundate investors with useless, irrelevant, trivial, or unreliable information.[341] Rather, it is to ensure that any significant information released to the public can be relied on as accurate when making the decision to buy, sell, or hold a security.[342] This same logic explains the purpose of expungement. The BrokerCheck database, which public investors are free to use in order to evaluate the reputations of securities broker-dealers, loses much of its value if the information it makes available is riddled with slanderous hearsay. The securities laws seek to channel reliable information to investors who are evaluating a particular stock; FINRA's

335. *See* Gilson & Kraakman, *supra* note 34, at 552.

336. *See supra* Part II.D.

337. *See id.*

338. *See id.*

339. *See id.*

340. *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b); Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a); COX ET AL., *supra* note 332, at 695–96 (describing the basics of securities fraud under the 1933 and 1934 Acts).

341. *See* COX ET AL., *supra* note 332, at 619–20 (explaining the materiality principle pervades most of securities regulation).

342. *See id.*

disclosure-and-expungement process serves the same purpose with regard to particular stock-brokers.

Another, more subtle analogy between disclosure under the securities laws and in FINRA arbitration can be drawn as well. This relates to the role of standardization. As is occasionally acknowledged, the Great Depression era federal securities statutes did not introduce the concept of disclosure to securities markets.[343] Prior to the 1930s, investors were bombarded with disclosures of various kinds—some mandated by the stock exchange, some mandated under state "Blue Sky" laws, and some provided voluntarily by firms in order to inform the public about their financial prospects.[344] In their magisterial work on the subject, Judge Easterbrook and Professor Fischel observe that the primary novelty of the federal securities laws was not disclosure itself, but rather the mandatory *standardization* of disclosures.[345] After 1933, disclosures regarding securities that were offered to the public were required to include relatively uniform content in a relatively uniform format; after 1934, disclosures in connection with stocks that were publicly traded on secondary markets had to be updated with a relatively uniform frequency—in quarterly 10-Qs and annual 10-Ks.[346] The benefit of standardization, Easterbrook and Fischel explain, is that it allows investors to digest information about securities more efficiently and to make comparisons across different securities more reliable.[347]

The standardization concept is relevant to FINRA arbitration due to its peculiar jurisdictional rules. As explained above, the source of FINRA's jurisdiction over securities disputes is largely regulatory, rather than contractual in form—the ambition is to mandate that all or nearly all disputes in the broker-dealer industry are subject to FINRA's uniform set of rules and procedures.[348] An interesting byproduct of this approach arises in conjunction with FINRA's disclosure activities. Because all investor claims against brokers are funneled within FINRA arbitration, and because all investor-relevant information from those arbitrations is produced by FINRA to the CRD and BrokerCheck, regulators and the general public gain access to a relatively standardized, comprehensive set of disclosures about the allegations and disposition of legal

343. *See* EASTERBROOK & FISCHEL, *supra* note 43, at 276–90 ("By 1934, when Congress first required annual disclosures by some companies, every firm traded on the national markets made voluminous public disclosure certified by independent auditors.").

344. *See id.* For further historical perspective, see Ross L. Watts & Jerold L. Zimmerman, *Agency Problems, Auditing, and the Theory of the Firm: Some Evidence*, 26 J.L. & ECON. 613, 616–28 (1983); George Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132, 133–34 (1973).

345. EASTERBROOK & FISCHEL, *supra* note 43, at 290–304 (evaluating possible rationales for mandatory standardization of disclosures).

346. *See id.* at 303–04.

347. *See id.*

348. *See supra* Part III.A.

claims across the entire industry. The regulatory public good that is made possible via FINRA's arbitration-related disclosures would be less valuable if, for example, a substantial subset of FINRA arbitrations were transferred by broker-dealers to more confidential arbitral settings such as the AAA or JAMS. Once again: standardized disclosure rules under the securities laws allow investors to make more efficient and reliable comparisons across stocks; the comprehensive jurisdiction reach and uniform disclosure procedures at FINRA allow investors to make more efficient and reliable comparisons across broker-dealers who sell stocks.

CONCLUSION

This Article has examined FINRA arbitration from a systemic perspective that is largely absent from the legal literature. It does so by situating the rules and procedures of FINRA arbitration within the broader context of the financial regulation of the securities industry. The argument is that FINRA arbitration departs from both litigation in court and alternative dispute resolution in the form of commercial arbitration. On one hand, FINRA arbitration eschews the characteristic trappings of civil litigation in state or federal court: jury trials, formalistic pleading, prolonged discovery, extensive appeal rights, and so on. In this sense, FINRA arbitration takes a streamlined approach that is typical of other venues for arbitration. On the other hand, FINRA arbitration incorporates a number of unique features that distinguish it from prominent private dispute resolution venues such as the American Arbitration Association (AAA) and Judicial Arbitration & Mediation Services (JAMS). These features include mandatory, non-contractual jurisdictional rules, specialized categories of arbitrators, subsidized arbitrator (and mediator) services, FINRA's own sanctioning powers, and a complex disclosure framework that is managed on the back-end through expungement proceedings. Taken together, it is argued, these features collectively work to tailor FINRA arbitration to the underlying goals of the securities laws that are administered in conjunction by FINRA and the SEC and thereby cause dispute resolution at FINRA to resemble an indirect form of financial regulation.