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

RE: File No. SR-FINRA-2024-008 (Proposed Rule Change to Amend FINRA Rule 12800 (Simplified Arbitration) to Clarify and Amend the Applicability of the Document Production Lists) – Response to Comments

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority, Inc. (“FINRA”) in response to comments received by the Securities and Exchange Commission (“SEC” or “Commission”) regarding the above-referenced rule filing. The proposed rule change would amend the FINRA Code of Arbitration Procedure for Customer Disputes to clarify and, in some instances, amend the applicability of the Document Production Lists to simplified customer arbitrations administered under FINRA Rule 12800 (“Proposal”).¹

The Commission published the Proposal for public comment in the Federal Register on May 28, 2024, and received seven comments in response.² All commenters expressed

¹ See Securities Exchange Act Release No. 100204 (May 21, 2024), 89 FR 46210 (May 28, 2024) (Notice of Filing of File No. SR-FINRA-2024-008).

² See Letter from Steven B. Caruso, dated May 24, 2024 (“Caruso”); letter from Nikki Junda, Student Intern, Elissa Germaine & Christine Lazaro, Supervising Attorneys, St. John’s University School of Law, to Vanessa Countryman, Secretary, SEC, dated June 17, 2024 (“St. John’s”); letter from Jill I. Gross, Vice Dean for Academic Affairs and Professor of Law, Elisabeth Haub School of Law, Pace University, to Secretary, SEC, dated June 18, 2024 (“Gross”); letter from Nicole G. Iannarone, Associate Professor of Law, Thomas R. Kline School of Law, Drexel University, to Vanessa Countryman, Secretary, SEC, dated June 18, 2024 (“Iannarone”); letter from Clare M. Farrelly, Student Intern & Janene Marasciullo, Director, Fairbridge Investor Rights Clinic, Elisabeth Haub School of Law, Pace University, to Vanessa Countryman, Secretary, SEC, dated June 18, 2024 (“Pace”); letter from Joseph C. Peiffer, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Secretary, SEC, dated June 18, 2024 (“PIABA”); and

general support for the Proposal. Three commenters also suggested modifications.³

The following are FINRA’s responses to the commenters’ suggested modifications.

I. Proposed Rule Text

A. Technical Amendment

The Proposal would codify that the Document Production Lists apply to simplified customer arbitrations in which the customer requests a regular hearing. Specifically, proposed Rule 12800(g)(1)(A) would provide that “The Document Production Lists, described in Rule 12506, apply to arbitrations in which the customer requests an Option One hearing.”

In addition, the Proposal would amend FINRA Rule 12800(g)(1) to give customers in the two remaining types of simplified customer arbitrations—paper cases⁴ and special proceedings⁵—the option to request whether they want the Document Production Lists to apply to all parties. Specifically, proposed Rule 12800(g)(1)(B) would provide that “Rule 12506 does not apply to arbitrations in which the customer requests no hearing, pursuant to paragraph (c)(2) of this Rule, or to arbitrations in which the customer requests an Option Two special proceeding, pursuant to paragraph (c)(3)(B) of this Rule, unless the customer requests that the Document Production Lists apply to all parties when initiating an arbitration pursuant to Rule 12302 or, if the customer is a respondent, no later than the answer due date pursuant to Rule 12303, regardless of the parties’ agreement to extend any answer due date.”

St. John’s suggested revising proposed Rule 12800(g)(1)(B) to “mirror the language” in proposed Rule 12800(g)(1)(A) such that both provisions begin with “The Document Production Lists, described in Rule 12506...”. FINRA believes that this suggested change would provide additional clarity to the proposed rule text and, therefore, has determined to amend proposed Rule 12800(g)(1)(B) in Partial Amendment No. 1 to

letter from Scott Eichhorn, Director & Melanie S. Cherdack, Associate Director, University of Miami Investor Rights Clinic, to Vanessa Countryman, Secretary, SEC, dated June 18, 2024 (“Miami”).

³ Miami, Pace and St. John’s.

⁴ A “paper case” is when the customer does not request a hearing and the arbitrator will render an award based on the pleadings and other materials submitted by the parties. See FINRA Rule 12800(c)(2).

⁵ A “special proceeding” is an abbreviated hearing. See FINRA Rule 12800(c)(3).

provide that “The Document Production Lists, described in Rule 12506, do not apply to arbitrations in which the customer requests no hearing, pursuant to paragraph (c)(2) of this Rule, or to arbitrations in which the customer requests an Option Two special proceeding, pursuant to paragraph (c)(3)(B) of this Rule, unless the customer requests that the Document Production Lists apply to all parties when initiating an arbitration pursuant to Rule 12302 or, if the customer is a respondent, no later than the answer due date pursuant to Rule 12303, regardless of the parties’ agreement to extend any answer due date.”

B. Deadline for Customer Respondent to Request that the Document
Production Lists Apply in a Paper Case or Special Proceeding

The Proposal would provide that a customer respondent in a paper case or special proceeding may request that the Document Production Lists apply no later than the answer due date, regardless of the parties’ agreement to extend any answer due date.⁶ FINRA Rule 12303 provides that respondent(s) must serve each other party with an answer to the statement of claim within 45 days of receipt of the statement of claim. Pace commented that it is “very supportive of the proposed amendment,” but recommended that a customer respondent in a paper case or special proceeding be able to request that the Document Production Lists apply when the customer respondent files the answer, even if the parties agree to extend the answer due date.

FINRA believes that the Proposal appropriately balances the expedited nature of simplified customer arbitrations and the ability of customer respondents to make an informed decision regarding whether to use the Document Production Lists and, therefore, has determined not to make the suggested change. Expeditious resolution of disputes is one of the goals of arbitration.⁷ In a non-expedited case, FINRA Dispute Resolution Services (“DRS”) recommends commencing evidentiary hearings within nine months from the Initial Prehearing Conference.⁸ In a special proceeding, DRS recommends setting a hearing date within four months from the Initial Prehearing Conference.⁹ If, as suggested by Pace, a customer respondent could request that the Document Production Lists apply when filing the answer in a special proceeding, and the customer respondent does not file an answer until right before the special proceeding hearing date, this would require the arbitrator and parties to reschedule the hearing to a date at least two months later than originally scheduled to allow parties adequate time to respond to the Document Production

⁶ See Proposal, supra note 1, 89 FR 46210, 46211.

⁷ See FINRA DRS Initial Prehearing Conference Script for Single Arbitrator Cases, p. 6, https://www.finra.org/sites/default/files/2022-08/iphc_script_single_cases.pdf.

⁸ See id. at 7.

⁹ See id. at 6.

Lists.¹⁰ Similarly, in paper cases, which are typically the most expedited form of FINRA arbitration, allowing customer respondents to request that the Document Production Lists apply when filing the answer rather than by the answer due date, could significantly delay the turnaround times for such cases.¹¹ Thus, FINRA is concerned that Pace's suggested approach would not align with the expedited nature of simplified customer arbitrations.

As discussed in the Proposal and in more detail below, if the SEC approves the Proposal, FINRA will develop and publish guidance about discovery to assist parties, including respondent customers, in making informed decisions regarding whether to request to use the Document Production Lists in their cases.¹² If a customer respondent does not timely elect to apply the Document Production Lists to all parties, proposed Rule 12800(g)(1)(B) would retain the current provision in the rule that the arbitrator has the discretion to use relevant portions of the Document Production Lists in a manner consistent with the expedited nature of simplified customer arbitrations.¹³ In addition, the Proposal would retain the current provision in Rule 12800(g)(2) that permits the parties to request documents and information from each other.¹⁴

¹⁰ FINRA Rule 12506(b)(1) provides that unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, parties must either: (1) produce to all other parties all documents in their possession or control that are described in Document Production Lists 1 and 2; (2) identify and explain the reason that specific documents described in Document Production Lists 1 and 2 cannot be produced within the required time, and state when the documents will be produced, and serve this response on all parties and file this response with the Director; or (3) object as provided in FINRA Rule 12508 and serve this response on all parties and file this response with the Director.

¹¹ See 2023 Dispute Resolution Statistics, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2023> (providing that the turnaround time for paper cases in 2023 was five months).

¹² See Proposal, *supra* note 1, 89 FR 46210, 46212.

¹³ See *id.* at 46211.

¹⁴ See *id.*

II. Guidance for Parties and Arbitrators

A. Guidance for Parties

The Proposal states that if the SEC approves the Proposal, FINRA will develop and publish guidance about discovery that will be available to all parties in simplified customer arbitrations.¹⁵ The guidance would include information to assist customers in making an informed decision regarding whether to request to use the Document Production Lists in their case.¹⁶ For example, the guidance would include information about the Document Production Lists—List 1 outlines the documents that member firms and associated persons shall produce and List 2 outlines the documents that customers shall produce.¹⁷ The guidance would be easily accessible and understandable to all parties.¹⁸

St. John's noted its support of the proposed creation of new guidance, but also recommended that FINRA make "existing guidance on its website easier to locate for parties in simplified [customer] arbitrations." In response to St. John's comment, FINRA has updated the "Overview of Arbitration & Mediation" web page by adding a hyperlink to cross-reference the "Simplified Arbitrations" web page and, therefore, make it more easily accessible to parties.¹⁹

St. John's suggested that FINRA hyperlink to the Discovery Guide within the FINRA Rules whenever the Document Production Lists are mentioned. In addition, St. John's suggested that FINRA hyperlink any cross-referenced FINRA Rules within FINRA Rule 12800. In response to St. John's comment, FINRA has updated the "Related Links" section of the web pages for FINRA Rules 12506, 12507, 12508 and 12800 to include a

¹⁵ See *id.* at 46212.

¹⁶ See *id.*

¹⁷ See Miami (suggesting that FINRA's explanation of the discovery process "cover not only the member firm's or associated person's obligations under the Discovery Guide, but also the discovery obligations imposed on the investor").

¹⁸ See Miami (suggesting that FINRA "provide an easily accessible, plain language explanation of the discovery process and how it will differ with use of the Discovery Guide").

¹⁹ See Overview of Arbitration & Mediation, <https://www.finra.org/arbitration-mediation/about/arbitration-vs-mediation>.

hyperlink to the Discovery Guide web page.²⁰ In addition, FINRA has updated the FINRA Rule 12800 web page by adding hyperlinks to any cross-referenced FINRA Rules.²¹

B. Guidance for Arbitrators

Miami noted that “additional arbitrator training is necessary to effectuate the presumptive exchange of documents and information pursuant to the Discovery Guide.” Miami also commented that this training “should give arbitrators more leeway to award sanctions against represented parties in cases involving *pro se* investors, where investors might not have the ability to gauge the merits of objections.” FINRA notes that it currently provides mandatory training and various other resources to arbitrators regarding the discovery process. For example, arbitrators are not eligible to serve on FINRA arbitration cases until they have successfully passed the Basic Arbitrator Training Program, which includes a module dedicated to the Initial Prehearing Conference and discovery process.²² The learning objectives of this module include, among other things, understanding the discovery process and timelines; ruling on discovery requests based on the papers; and imposing discovery sanctions when a party fails to provide sufficient information or documents.²³ This module notes that while it is essential for arbitrators to remain impartial, *pro se* parties may need more procedural direction and specific deadlines for discovery requests and responses.²⁴

In addition to the mandatory Basic Arbitrator Training Program, DRS requires advanced training for arbitrators to qualify as chairpersons. The chairperson training contains three modules with information about the discovery process and issues, including motions to compel discovery.²⁵ DRS also offers voluntary, subject-specific training

²⁰ See FINRA Rules 12506, 12507, 12508 and 12800.

²¹ See FINRA Rule 12800.

²² See Arbitrator Training, <https://www.finra.org/arbitration-mediation/rules-case-resources/arbitrator-training> (discussing how after FINRA approves an arbitrator candidate’s application, the candidate must complete the comprehensive Basic Arbitrator Training Program to become eligible to serve on arbitration cases).

²³ See FINRA DRS Basic Arbitrator Training Program Transcript, p. 21, <https://www.finra.org/sites/default/files/2024-05/FINRA-Basic-Arbitrator-and-Expungement-Training-Full-Course-Transcript.pdf>.

²⁴ See id. at 28.

²⁵ See FINRA DRS Chairperson Training Transcript, pp. 4-6, 9-15, 17-21, https://www.finra.org/sites/default/files/2024-05/FINRA_Chair-Training-Full-Transcript.pdf.

modules. For example, DRS offers an online course titled “Discovery, Abuses and Sanctions” that focuses on the respective duties of arbitrators and parties in the discovery process.²⁶ The course explains the Discovery Guide; discusses the need for orders of confidentiality; helps arbitrators recognize and address discovery abuses; and reviews possible sanctions if they become necessary.²⁷ There is an online assessment at the end of the course, which must be completed to receive credit.²⁸

FINRA also periodically provides updates and reminders to arbitrators regarding discovery procedures via Neutral Workshops and a quarterly newsletter, The Neutral Corner, both of which are available on FINRA’s website.²⁹ Lastly, the DRS Arbitrator’s Guide—a resource for arbitrators that contains information about the DRS forum, policies

²⁶ See Arbitrator Training, <https://www.finra.org/arbitration-mediation/rules-case-resources/arbitrator-training> (discussing the Discovery, Abuses and Sanctions advanced training course for arbitrators).

²⁷ See id.

²⁸ See id.

²⁹ See, e.g., The Neutral Corner Volume 1-2024 (Questions and Answers: Motions to Compel), <https://www.finra.org/sites/default/files/2024-03/neutral-corner-volume-1-2024-0329.pdf>; The Neutral Corner Volume 3-2022 (Discovery Abuse in Customer Cases), <https://www.finra.org/sites/default/files/2022-09/neutral-corner-volume-3-2022-0927.pdf>; The Neutral Corner Volume 4-2021 (Bits, Bytes and E-Discovery Fights: Part IV), <https://www.finra.org/sites/default/files/2021-12/neutral-corner-volume-4-2021-1230.pdf>; The Neutral Corner Volume 3-2021 (Bits, Bytes and E-Discovery Fights: Part III), <https://www.finra.org/sites/default/files/2021-09/neutral-corner-volume-3-2021-0930.pdf>; The Neutral Corner Volume 2-2021 (Bits, Bytes and E-Discovery Fights: Part II), <https://www.finra.org/sites/default/files/2021-06/neutral-corner-volume-2-2021-0630.pdf>; The Neutral Corner Volume 1-2021 (Bits, Bytes and E-Discovery Fights), <https://www.finra.org/sites/default/files/2021-03/neutral-corner-volume-1-2021-0331.pdf>; The Neutral Corner Volume 1-2021 (Understanding the Assertion of Legal Privileges in Arbitration Proceedings), <https://www.finra.org/sites/default/files/2021-03/neutral-corner-volume-1-2021-0331.pdf>; and The Neutral Corner Volume 1-2019 (Discovery Abuses Can Be Costly), <https://www.finra.org/sites/default/files/2019-09/neutral-corner-volume-1-2019-0319.pdf>. See also Neutral Workshop Audio and Video Files, <https://www.finra.org/arbitration-mediation/rules-case-resources/arbitrator-training/neutral-workshop-audio-and-video-files> (explaining how the Spring 2018 Neutral Workshop video includes tips from practitioners to alleviate common issues related to discovery, among other things).

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and procedures—dedicates two sections to educating arbitrators on discovery and motions.³⁰ In light of these currently available resources, FINRA does not anticipate providing additional arbitrator training on the discovery process at this time.

III. Conclusion

FINRA believes that the foregoing responds to the suggestions raised by the commenters on the Proposal. If you have any questions, please contact me at (212) 858-4115, or email: Carissa.Laughlin@finra.org.

Best regards,

/s/ Carissa Laughlin

Carissa Laughlin
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³⁰ See FINRA DRS Arbitrator's Guide, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.