

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

The Exchange neither solicited nor received comments on the proposed rule change.

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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act<sup>12</sup> and Rule 19b-4(f)(2)<sup>13</sup> thereunder.

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

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NYSECHX-2023-25 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-NYSECHX-2023-25. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSECHX-2023-25 and should be submitted on or before February 8, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-99335; File No. SR-FINRA-2023-013]

**Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend the FINRA Codes of Arbitration Procedure and Code of Mediation Procedure To Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations**

January 11, 2024.

**I. Introduction**

On October 5, 2023, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the FINRA Code of Arbitration Procedure for Customer Disputes ("Customer Code"), the Code of Arbitration Procedure for Industry

Disputes ("Industry Code"), and the Code of Mediation Procedure ("Mediation Code") (collectively, the "Codes"), to revise and restate the qualifications for representatives in arbitrations and mediations in the forum administered by FINRA Dispute Resolution Services ("DRS").

The proposed rule change was published for public comment in the **Federal Register** on October 13, 2023.<sup>3</sup> The public comment period closed on November 3, 2023. The Commission received comment letters related to this filing.<sup>4</sup> On November 9, 2023, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to January 11, 2024.<sup>5</sup> On January 8, 2024, FINRA responded to the comment letters received in response to the Notice.<sup>6</sup> This order approves the proposed rule change.

**II. Description of the Proposed Rule Change**

*A. Background*

The Codes currently permit parties to arbitrations and mediations in the DRS forum to represent themselves, to be represented by an attorney at law in good standing, or to be represented by a non-attorney representative ("NAR").<sup>7</sup> Some NARs receive compensation in connection with their representation of parties ("compensated NARs").<sup>8</sup> Other NARs assist parties with their cases without compensation ("uncompensated NARs").<sup>9</sup> In addition, although the practice is not specifically addressed by the Codes, law students sometimes represent parties while practicing under the supervision of an attorney through securities arbitration clinics ("SACs").<sup>10</sup>

<sup>3</sup> See Exchange Act Release No. 98703 (Oct. 6, 2023), 88 FR 71051 (Oct. 13, 2023) (File No. SR-FINRA-2023-013) ("Notice").

<sup>4</sup> The comment letters are available at <https://www.sec.gov/comments/sr-finra-2023-013/srfinra2023013.htm>.

<sup>5</sup> See letter from Kristine Vo, Assistant General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, dated November 9, 2023. This letter is available at <https://www.finra.org/sites/default/files/2023-11/SR-FINRA-2023-013-ExtensionNo1.pdf>.

<sup>6</sup> See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 8, 2024 ("FINRA Response").

<sup>7</sup> See FINRA Rules 12208, 13208, and 14106.

<sup>8</sup> Notice at 71051.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 71051-52.

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>13</sup> 17 CFR 240.19b-4(f)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> See 15 U.S.C. 78s(b)(1).

<sup>2</sup> See 17 CFR 240.19b-4.

In response to DRS forum users' concerns regarding the conduct of compensated NARs, FINRA reviewed their representation of parties in arbitrations and mediations in the DRS forum.<sup>11</sup> FINRA found that compensated NARs represent customers in a small percentage (one percent) of the customer cases in the DRS forum.<sup>12</sup> Nevertheless, FINRA identified several allegations of improper conduct by compensated NARs in connection with their representation of parties in the DRS forum.<sup>13</sup> In contrast, FINRA did not identify any allegations of improper conduct by uncompensated NARs or law students.<sup>14</sup> FINRA expressed concern that parties may be harmed when compensated NARs are found to be engaged in the unauthorized practice of law under the law of the relevant United States ("U.S.") jurisdiction.<sup>15</sup> FINRA highlighted that compensated NARs have, for example, been enjoined from continuing their representation of parties during pending arbitrations after courts determined that the representation constituted the unauthorized practice of law.<sup>16</sup> DRS arbitrators have also issued awards dismissing claims, or finding against investors, after determining that a compensated NAR's representation of an investor constituted the unauthorized practice of law in the jurisdiction.<sup>17</sup>

Moreover, FINRA expressed concern that NARs are not subject to professional qualification requirements, ethical rules, disciplinary processes, and client protections that the states and other U.S. jurisdictions apply to attorneys who represent parties in the DRS forum.<sup>18</sup> As such, customers of compensated NARs do not benefit from the client protections and disciplinary

processes that apply to attorneys and may have limited recourse if they are harmed by the misconduct of compensated NARs.<sup>19</sup>

For the reasons discussed above, FINRA filed the proposed rule change to revise and restate the qualifications for representatives of parties using the DRS forum, as described below.<sup>20</sup>

### B. Proposed Rule Change

FINRA Rules 12208(c), 13208(c), and 14106(c) currently prohibit compensated and uncompensated NARs from representing parties in arbitration and mediation if: (1) state law prohibits such representation; (2) the prospective representative is currently suspended or barred from the securities industry in any capacity; or (3) the prospective representative is currently suspended from the practice of law or disbarred.<sup>21</sup> FINRA Rules 12208(d), 13208(d), and 14106(d) further provide that issues regarding the qualifications of a person to represent a party in arbitration or mediation are governed by applicable law and may be determined by an appropriate court or other regulatory agency.<sup>22</sup>

#### 1. Disallowing Compensated NARs in the DRS Forum

The proposed rule change would prohibit a person who is not an attorney and who receives compensation in any manner in connection with the representation (*i.e.*, a compensated NAR) from representing a party at any stage of an arbitration or mediation proceeding. Specifically, the proposed rule change would state that any party in an arbitration or mediation proceeding held in a U.S. hearing location may be represented by "a person who is not an attorney, who has not received, and will not receive, compensation in any manner in connection with the representation."<sup>23</sup>

To help ensure that a NAR is not receiving compensation in connection with their representation of a party in the DRS forum, proposed Rules 12208(b)(1)(C), 13208(b)(1)(C), and 14106(b)(1)(C) would require the NAR

and the party being represented to attest that the NAR is not receiving compensation. Specifically, the proposed rule change would state that a party could be represented in arbitration or mediation by an uncompensated NAR, provided that "prior to the representation, the person or the party files with the Director through the Party Portal a written statement, signed by the person and the party, attesting that the person has not received, and will not receive, compensation in connection with the representation."<sup>24</sup>

#### 2. Codifying the Role of Law Students and SACs

The Codes do not specifically address the representation of parties in the DRS forum by law students supervised by attorneys through SACs.<sup>25</sup> The proposed rule change would amend the Codes to codify the current practice of allowing a party to be represented by an enrolled law student participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney.<sup>26</sup> Specifically, the proposed rule change would state that any party in an arbitration or mediation proceeding held in a U.S. hearing location may be represented by "a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney."<sup>27</sup>

#### 3. Persons Prohibited From Representing Parties in the DRS Forum

The Codes currently provide that non-attorneys may not represent a party if state law prohibits such representation, the person is currently suspended or barred from the securities industry in

<sup>24</sup> Proposed Rules 12208(b)(1)(C), 13208(b)(1)(C), and 14106(b)(1)(C). Under the Customer Code and Industry Code, the term "Director" means the Director of DRS. See FINRA Rules 12100(m), 12103, 13100(m), and 13103. Under the Mediation Code, the term "Director" refers to the Director of Mediation of DRS. See FINRA Rules 14100(d) and 14103. The Party Portal provides forum users with a secure, online location for claim filing and interactions relating to case administration. Parties use the Party Portal to, among other things, file claims, pay filing fees, receive documents from and send documents to DRS, receive service of claims, submit answers to claims, submit additional case documents, view the status of cases, select arbitrators, schedule hearings and send documents to other Party Portal case participants. See, e.g., FINRA Rules 12300, 12302, 12402, 12403, 13300, 13302, and 13404. Since mediation is voluntary in all instances, DRS permits parties to a mediation proceeding to use the Party Portal on a voluntary basis to submit and view their mediation case information and documents. See FINRA Rule 14109(b) and (h); see also Notice at 71054 n.37.

<sup>25</sup> See Notice at 71051–52.

<sup>26</sup> See proposed Rules 12208(b)(1)(B), 13208(b)(1)(B), and 14106(b)(1)(B).

<sup>27</sup> See proposed Rules 12208(b)(1)(B), 13208(b)(1)(B), and 14106(b)(1)(B).

<sup>11</sup> *Id.* at 71052.

<sup>12</sup> *Id.* at 71054.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 71053.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *id.* at n.16 (stating that "[g]enerally, licensed attorneys are required to have: (1) completed a bachelor's degree program (or its equivalent) and a legal education as required by a licensing state; (2) passed a state bar exam; (3) passed the Multistate Professional Responsibility Examination; (4) passed a licensing state's character and fitness review, which includes questions about academic conduct at law school, criminal history, social conduct in general and any applicable disciplinary actions; and (5) taken a [legally] binding oath with a licensing state's supreme court or high-court equivalent. In addition, many states require attorneys to complete continuing legal education, including ethics credits, to maintain a law license. In addition, all jurisdictions require lawyers to abide by rules of professional conduct, which are enforced through state disciplinary processes.").

<sup>19</sup> *Id.* at 71053.

<sup>20</sup> FINRA stated that the amendments would be effective for arbitrations and mediations filed in the DRS forum on or after the effective date. Notice at 71055.

<sup>21</sup> Notice at 71054.

<sup>22</sup> *Id.* As noted above, an arbitrator may also address issues regarding the qualifications of a person to represent a party in the DRS forum. See Notice at 71053 n.21 (citing dismissed cases involving findings that a compensated NAR's representation of an investor constituted the unauthorized practice of law).

<sup>23</sup> Proposed Rules 12208(b)(1)(C), 13208(b)(1)(C), and 14106(b)(1)(C).

any capacity, or the person is currently suspended from the practice of law or disbarred.<sup>28</sup> The proposed rule change would retain the substance of these provisions, while also stating that the laws of U.S. jurisdictions that are not states may also disqualify the person from representing a party.<sup>29</sup> The proposed rule change would also apply these prohibitions generally to all persons, including attorneys.<sup>30</sup> Furthermore, the proposed rule change would specifically preclude a person who is currently suspended from or denied the privilege of appearing or practicing before the Commission from representing a party in the DRS forum.<sup>31</sup>

Specifically, the proposed rule change would state that no person may represent a party in an arbitration or mediation proceeding held in a U.S. hearing location if: “(A) the laws of a state of the United States, the District of Columbia, or commonwealth, territory, or possession of the United States with jurisdiction over the representation prohibit the representation; (B) the person is currently suspended or barred from the securities industry in any capacity; (C) the person is currently suspended from the practice of law or disbarred; or (D) the person is currently suspended from or denied the privilege of appearing or practicing before the Securities and Exchange Commission.”<sup>32</sup>

#### 4. Determinations of Qualifications of Representatives

The Codes currently provide, in part, that “[i]ssues regarding the qualifications of a person to represent a party in arbitration [or mediation] are governed by applicable law and may be

<sup>28</sup> See FINRA Rules 12208(c), 13208(c), and 14106(c).

<sup>29</sup> See proposed Rules 12208(b)(2)(A), 13208(b)(2)(A), and 14106(b)(2)(A).

<sup>30</sup> See proposed Rules 12208(b)(2)(C), 13208(b)(2)(C), and 14106(b)(2)(C). The prohibitions would not apply retroactively to persons who are suspended or barred from the securities industry and who are representing a party in a proceeding at the time of the effective date of the proposed rule change. See Notice at 71055 n.50. The proposed rule change would apply to arbitrations and mediations filed in the DRS forum on or after the effective date and would preclude such representation going forward. Notice at 71055.

<sup>31</sup> See proposed Rules 12208(b)(2)(D), 13208(b)(2)(D), and 14106(b)(2)(D). This prohibition would not apply retroactively to persons who are suspended or denied the privilege of appearing or practicing before the Commission and who are representing a party in a proceeding at the time of the effective date of the proposed rule change. See Notice at 71055 n.51. The proposed rule change would apply to arbitrations and mediations filed in the DRS forum on or after the effective date and would preclude representation by such parties going forward. Notice at 71055.

<sup>32</sup> Proposed Rules 12208(b)(2)(D), 13208(b)(2)(D), and 14106(b)(2)(D).

determined by an appropriate court or other regulatory agency.”<sup>33</sup> The Codes also currently provide that “[i]n the absence of a court order, the arbitration [or mediation] proceeding shall not be stayed or otherwise delayed pending resolution of such issues.”<sup>34</sup> To improve the clarity of these provisions, the proposed rule change would make non-substantive changes to them.<sup>35</sup> Specifically, the proposed rule change would state that “[a] challenge to the qualifications of a representative made outside of the [arbitration or mediation] proceeding shall not stay or otherwise delay the [arbitration or mediation] proceeding in the absence of a court order.”<sup>36</sup>

### III. Discussion and Commission Findings

After careful review of the proposed rule change and the comment letters, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association.<sup>37</sup> Specifically, as explained in more detail below, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.<sup>38</sup>

#### A. Disallowing Compensated NARs in the DRS Forum

##### 1. General Prohibition

As noted above, FINRA is proposing to amend the Codes to revise and restate the qualifications for representatives of parties using the DRS forum to disallow compensated NARs from representing parties in the DRS forum. FINRA is proposing these rule changes in response to several allegations of improper conduct by compensated NARs in connection with their representation of parties in the DRS forum (e.g., compensated NARs aggressively soliciting customers to

<sup>33</sup> FINRA Rules 12208(d) and 13208(d); see FINRA Rule 14106(d).

<sup>34</sup> FINRA Rules 12208(d) and 13208(d); see FINRA Rule 14106(d).

<sup>35</sup> Notice at 71055.

<sup>36</sup> Proposed Rules 12208(d) and 13208(d); see proposed Rule 14106(d).

<sup>37</sup> In approving this rule change, the Commission has considered the rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>38</sup> 15 U.S.C. 78o–3(b)(6).

bring claims in the DRS forum).<sup>39</sup> Specifically, FINRA stated that compensated NARs have a pecuniary incentive to engage in misconduct when seeking new client relationships or bringing claims in the DRS forum, and that parties harmed by such conduct lack recourse against compensated NARs who are not directly regulated.<sup>40</sup> Nevertheless, while FINRA acknowledged that as a result of disallowing compensated NARs, some parties may have difficulty in obtaining counsel, FINRA stated that the proposed rule change “balances the need for parties, including investors, to be able to avail themselves of representation in the DRS forum with protecting those parties, the integrity of the DRS forum, and the public interest generally from the potential harmful conduct and lack of recourse that may come from representation by compensated NARs.”<sup>41</sup>

Commenters generally supported the proposed rule change.<sup>42</sup> One commenter stated that “it is in the best interest of investors to disallow compensated [NARs] from representing customer claimants in FINRA arbitration.”<sup>43</sup> A second commenter similarly stated that the proposed rule change would “reduce the risk that parties, including investors, may be significantly harmed by the activities of compensated

<sup>39</sup> See Notice at 71052.

<sup>40</sup> FINRA also stated that although compensated NARs may be subject to state laws governing general business practices, they are not subject to the specific and extensive professional qualification requirements, ethical rules, disciplinary processes and client protections that the states and other U.S. jurisdictions apply to attorneys who represent parties in the DRS forum. Further, compensated NARs’ interactions with customers are not subject to regulation like the state disciplinary rules on lawyer advertising and solicitation. See Notice at 71052–53.

<sup>41</sup> Notice at 71055–56; see also Notice at 71054, 71058. FINRA acknowledged that for claims of \$100,000 or less, an attorney may believe that their share of a potential award might be too small to justify the effort, not all investors will qualify for assistance by SACs, and that investors may ultimately have to represent themselves. *Id.*

<sup>42</sup> See letters from Steven B. Caruso, dated October 7, 2023 (“Caruso Letter”); Joseph C. Peiffer, President, Public Investors Advocate Bar, to Vanessa Countryman, Secretary, Commission, dated November 3, 2023 (“PIABA Letter”); Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, to Secretary, Commission, dated November 3, 2023 (“Cetera Letter”); Christine Lazaro, Supervising Attorney, Elizabeth Allhusen, Legal Intern, Camille Perbost, Legal Intern, and Elissa Germaine, Supervising Attorney, Securities Arbitration Clinic of St. John’s University School of Law, to Vanessa Countryman, Secretary, Commission, dated November 3, 2023 (“St. John’s Letter”); see also letter from Lynne Brundage, dated January 5, 2024 (describing an experience with the DRS forum that is outside the scope of the proposed rule change).

<sup>43</sup> PIABA Letter at 1.

NARs.”<sup>44</sup> A third commenter stated that “NARs have a greater propensity than attorneys to engage in improper or disruptive conduct.”<sup>45</sup> A fourth commenter agreed with each of FINRA’s concerns, stating that the proposed rule change is “important and necessary to protect investors from improper conduct by compensated [NARs,] . . . who are not governed by the same constraints as licensed attorneys or law students under the supervision of licensed attorneys. . . . [A]nd individuals who fall prey to incompetent representation by a NAR may not have any method of recourse.”<sup>46</sup>

Compensated NARs represent claimants in a small percentage of the overall customer cases in the DRS forum but have demonstrated a higher propensity to engage in improper conduct in connection with their representation than their counterparts, including uncompensated NARs.<sup>47</sup> Similarly, compensated NARs are less likely to be subject to professional qualification requirements, ethical rules, disciplinary processes, and client protections than attorneys who represent parties in the DRS forum.<sup>48</sup> Further, compensated NARs’ interactions with customers are not subject to regulation like the state disciplinary rules on lawyer advertising (e.g., failure to disclose disciplinary history or assuring customers that they would recover investments).<sup>49</sup> Thus, to the extent compensated NARs aggressively solicit customers to bring claims in the DRS forum, pursue frivolous claims, charge clients non-refundable fees, or engage in additional misconduct, including the unauthorized practice of law, customers generally would not have recourse that would be available had they engaged an attorney.<sup>50</sup> By prohibiting compensated NARs from representing parties in the DRS forum, the proposed rule change removes the participation of individuals who have a financial incentive to engage in improper conduct in connection with their representation of parties in the DRS forum. As such, excluding compensated NARs from the DRS forum is a reasonable approach to help ensure that persons representing claimants in the DRS forum for compensation adhere to professional standards and can be held to account when they do not (e.g., attorneys) or lack the pecuniary

incentive to engage in improper conduct (e.g., uncompensated NARs).

The Commission recognizes that some claimants with smaller claims who might have otherwise considered representation by a compensated NAR may have more difficulty obtaining representation as a result of the proposed rule change. Similarly, claimants with smaller claims may incur additional costs to retain an attorney or risk worse outcomes by representing themselves at a hearing. However, these concerns are outweighed by the threat of harm, including harm to investors, presented by compensated NARs whose interactions with customers are not subject to professional standards of conduct. Furthermore, because compensated NARs represent only a small percentage (one percent) of parties in the DRS forum, the potential impact of the proposed rule change on representation within the DRS forum may be limited and is thus a reasonable way for FINRA to prevent potential harms caused by compensated NARs without unduly impacting representation within the DRS forum.

## 2. Statement of No Compensation for Uncompensated NAR Representation

As noted above, the proposed rule change provides that a party could be represented in arbitration or mediation by an uncompensated NAR, provided that prior to the representation, the uncompensated NAR or party files the required written attestation with the Director of DRS. Commenters generally supported the proposed rule change.<sup>51</sup>

The proposed rule change requiring a written attestation that a NAR has not received and will not receive compensation in connection with its representation of a party is a reasonable obligation that would permit FINRA to verify that the NAR is uncompensated and help to ensure that all parties are aware of this requirement, thus supporting the regulatory goal of excluding compensated NARs from the DRS forum. For these reasons, the proposed rule change is reasonable.

### B. Codifying the Role of Law Students and SACs

As noted above, FINRA stated that it is proposing to amend the Codes to codify the current practice whereby a party may be represented by a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney. FINRA

stated that SACs and the law students who participate in these programs provide an inexpensive option for customers who qualify and may not be able to find or afford an attorney. Moreover, these representations may be regulated by state rules that govern the performance of legal services by law students and the attorneys who supervise them.<sup>52</sup> Accordingly, FINRA stated that it would be appropriate to codify the role of law students in providing representation to investors through SACs.<sup>53</sup>

Commenters generally supported the proposed rule change.<sup>54</sup> One of these commenters stated that for a clinic that provides pro bono representation to investors who otherwise are unable to find an attorney due to the size of their claims or the uncertainty of collectability, “it is critical that law school students in clinic programs remain able to represent customers in the DRS forum to fill the access to justice gap with ethical representation for investors who cannot otherwise afford it.”<sup>55</sup> Similarly, a second commenter stated that it supports the proposed rule change “because it benefits both the parties and the system by helping to assure that parties have access to expertise that they may lack or cannot afford to pay for.”<sup>56</sup> In order to improve parties’ access to representation in the DRS forum, this commenter recommended that FINRA study what it means to be the “equivalent” to a law school clinic within the meaning of the proposed rule change. Specifically, the commenter suggested that FINRA (1) determine if such institutions exist and, if they do, (2)(a) consider what qualifications or restrictions may be necessary to allow them to represent parties in the DRS forum and (b) consider and publish standards for programs that would satisfy the “or equivalent” provision in proposed Rule 12208(b)(1)(B).<sup>57</sup> In response, FINRA stated that it included the “or equivalent” provision in the proposed rule change “to account for flexibility in law school programs (e.g., a law school without a formal clinical program, but that has students

<sup>52</sup> See Notice at 71055.

<sup>53</sup> *Id.*

<sup>54</sup> See Caruso Letter, PIABA Letter, Cetera Letter, and St. Johns Letter.

<sup>55</sup> St. John’s Letter at 2.

<sup>56</sup> See Cetera Letter at 2; see also Caruso Letter (stating that the Commission should approve the proposed rule change codifying the current practice governing SACs on an expedited basis).

<sup>57</sup> See Cetera Letter at 2–3. While the proposed rule change does not identify programs that are “equivalent” to a law school clinic at this time, it leaves open the opportunity to capture such a program if one were to come forward.

<sup>44</sup> Caruso Letter at 3.

<sup>45</sup> Cetera Letter at 2.

<sup>46</sup> St. John’s Letter at 1.

<sup>47</sup> See *supra* notes 12–13.

<sup>48</sup> See *supra* note 18.

<sup>49</sup> See *supra* note 40 and Notice at 71061.

<sup>50</sup> See Notice at 71052–53.

<sup>51</sup> See Caruso Letter, PIABA Letter, Cetera Letter, and St. Johns Letter.

providing legal services under the supervision of a law school professor).”<sup>58</sup> Further, while FINRA is not aware of any such programs at this time, should one arise, FINRA would “make an evaluation on a case-by-case basis and provide guidance as appropriate.”<sup>59</sup>

Currently, a party in arbitration or mediation may be represented by a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney. This practice, however, is not currently codified in the FINRA rulebook. Accordingly, parties may not be aware that this option is available when they are seeking representation. The proposed rule change should help make customers seeking to use the forum aware of this alternative option for representation. Similarly, it should also provide clarity to law school students and the attorneys that supervise them. Law school clinical programs lack the pecuniary incentive to engage in the conflicted conduct described above and are under the supervision of attorneys, thus helping to ensure that a customer’s representative is subject to professional standards of conduct. As such, the proposed rule change reasonably balances the needs of customers who might otherwise be unable to obtain legal representation with protecting parties from the conflicts associated with compensated NARs.

### C. Persons Prohibited From Representing Parties in the DRS Forum

As noted above, the Codes currently provide that non-attorneys may not represent a party if state law prohibits such representation, the person is currently suspended or barred from the securities industry in any capacity, or the person is currently suspended from the practice of law or disbarred.<sup>60</sup> The proposed rule change is retaining the substance of the current provisions but would expand the scope of the rule in three ways.

First, the proposed rule change would add that the laws of U.S. jurisdictions that are not states (*i.e.*, the District of Columbia, or a commonwealth, territory, or possession of the United States) may also disqualify the person from representing a party.<sup>61</sup> FINRA stated that the current rule’s prohibition on representing a party if state law prohibits the representation does not

fully address FINRA’s concerns with the unauthorized practice of law by compensated NARs because it is not always clear in advance of the arbitration or mediation whether a compensated NAR’s representation of a party in arbitration or mediation in a particular jurisdiction is legally permissible. As such, incorporating this new, broader standard into the proposed rule change would help protect the integrity and quality of the DRS forum and protect investors by incorporating the disqualification provisions of all relevant jurisdictions.<sup>62</sup>

Second, the proposed rule change would prohibit all persons, not just non-attorneys, from practicing in the DRS forum who meet the aforementioned conditions.<sup>63</sup> FINRA stated that all persons, including attorneys, should be prohibited from practicing in the DRS forum if these conditions apply.<sup>64</sup>

Third, the proposed rule change would preclude a person who is currently suspended from, or denied the privilege of, appearing or practicing before the Commission from representing a party in the DRS forum.<sup>65</sup> As with the above changes, FINRA stated that incorporating this standard into the proposed rule change would help protect the integrity and quality of the DRS forum and protect investors.<sup>66</sup>

Commenters generally supported the proposed rule change.<sup>67</sup> The proposed rule change’s expansion of the categories of persons prohibited from representing parties in the DRS forum are reasonable to help prohibit problematic representatives from appearing in the DRS forum. Specifically, expanding the rule to provide that the laws of any U.S. jurisdiction, and not only states, may disqualify the person from representing a party helps ensure that persons in all relevant jurisdictions are covered by the rules’ prohibitions. Similarly, expanding the prohibitions to apply to all persons, not just attorneys, helps ensure that any person with a demonstrated track record of misconduct would be precluded from representing parties in the DRS forum. Further, precluding a person who is currently suspended from, or denied the

privilege of, appearing or practicing before the Commission from representing a party in the DRS forum precludes another group of persons with a demonstrated track record of misconduct from representing parties in the DRS forum. By excluding problematic representatives from, and at the beginning of, the DRS process, the proposed change is a reasonable way to help enhance the integrity of those individuals representing parties in the DRS forum.

### D. Determinations of Qualifications of Representatives

As noted above, the proposed rule change would make some clarifying changes to the current provision that prevents delay of a proceeding while a challenge to the qualifications of a person to represent a party is resolved outside of the DRS forum. Specifically, the proposed rule change would simplify the Codes’ language to state that a challenge to the qualifications of a representative made outside of the arbitration proceeding shall not stay or otherwise delay the proceeding in the absence of a court order. Commenters generally supported the proposed rule change.<sup>68</sup> The proposed change makes no substantive changes to the rule, and reasonably clarifies the language regarding challenges outside of the DRS forum that could affect the progression of an active proceeding.

## IV. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.<sup>69</sup>

*It is therefore ordered* pursuant to Section 19(b)(2) of the Act<sup>70</sup> that the proposal (SR-FINRA-2023-013), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>71</sup>

**Sherry R. Haywood,**  
Assistant Secretary.

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<sup>68</sup> See Caruso Letter, PIABA Letter, Cetera Letter, and St. Johns Letter.

<sup>69</sup> 15 U.S.C. 78o-3(b)(6).

<sup>70</sup> 15 U.S.C. 78s(b)(2).

<sup>71</sup> 17 CFR 200.30-3(a)(12).

<sup>62</sup> *Id.* at 71055.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See proposed Rules 12208(b)(2)(D), 13208(b)(2)(D), and 14106(b)(2)(D). FINRA stated that this prohibition would not apply retroactively to persons who were suspended or denied the privilege of appearing or practicing before the Commission prior to the effective date of the proposed rule change. See Notice at 71055 n.51.

<sup>66</sup> Notice at 71055.

<sup>67</sup> See Caruso Letter, PIABA Letter, Cetera Letter, and St. Johns Letter.

<sup>58</sup> FINRA Response at 2.

<sup>59</sup> *Id.*

<sup>60</sup> See FINRA Rules 12208(c), 13208(c), and 14106(c).

<sup>61</sup> Notice at 71055.