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Structural Barriers to Inclusion in Arbitrator Pools

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STRUCTURAL BARRIERS TO INCLUSION IN ARBITRATOR POOLS

Nicole G. Iannarone*

Abstract: Critics increasingly challenge mandatory arbitration because the pools from which decisionmakers are selected are neither diverse nor inclusive. Evaluating diversity and inclusion in arbitrator pools is difficult due to the black box nature of mandatory arbitration. This Article evaluates inclusion in arbitrator pools through a case study on securities arbitration. The Article relies upon the relatively greater transparency of the Financial Industry Regulatory Authority (FINRA) forum. It begins by describing the unique role that small claims securities arbitration plays in maintaining investor trust and confidence in the securities markets before describing why ensuring that the FINRA arbitrator pool is both diverse and inclusive is necessary for legitimacy. The Article then evaluates the forum’s arbitrator selection protocol and identifies barriers that may prevent newer entrants, who have diversified the arbitrator roster, from presiding over consumer investors’ claims. Using publicly available information, it then evaluates whether newly recruited arbitrators presided over smaller customer claims that concluded after a hearing from 2015 to 2019. The results indicate that only 0.98% of decisions in smaller claim investor cases were rendered by arbitrators who first appeared in FINRA’s awards database after diversity recruitment efforts began in 2015. Though FINRA has diversified its arbitrator roster, few small investors receive the benefit of new entrants. The results illustrate the limits of transparency and the need for additional information to evaluate whether arbitrator pools are inclusive. The Article concludes with interventions to permit evaluation of diversification efforts and eliminate barriers to inclusion in arbitrator pools. The case study and resultant recommendations provide guidance that may serve as best practices for consumer arbitration forums wishing to ensure transparency and inclusion in their arbitrator pools.

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INTRODUCTION

Forums that host mandatory consumer arbitration are increasingly facing pressure for failing to maintain diverse arbitrator rosters.¹ For example, the Financial Industry Regulatory Authority (FINRA), a quasi-governmental self-regulatory organization that is overseen by the U.S.

1. See generally AM. ASS’N FOR JUST., WHERE WHITE MEN RULE: HOW THE SECRETIVE SYSTEM OF FORCED ARBITRATION HURTS WOMEN AND MINORITIES (2021) [hereinafter AAJ ARBITRATOR DIVERSITY REPORT], <https://www.justice.org/resources/research/forced-arbitration-hurts-women-and-minorities> [<https://perma.cc/DPK4-V438>] (describing lack of diverse arbitrator pools at the American Arbitration Association (AAA), JAMS, and the Financial Industry Regulatory Authority (FINRA) and lack of diverse arbitrators deciding cases even when they appear on arbitrator selection lists); Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 WASH. U. L. REV. 965, 969 (2021) [hereinafter Cole, *Arbitrator Diversity*] (“Arbitration critics correctly observe that the arbitrator corps does not reflect the racial, ethnic, or gender diversity present in society at large.”).

Securities and Exchange Commission (SEC) and hosts the largest securities arbitration forum in the country,² has come under fire for maintaining a roster that critics claim is overwhelmingly white and male.³ Nearly all disputes between an investor and stockbroker are subject to mandatory arbitration in the FINRA Dispute Resolution Services forum.⁴ The near mandatory nature of the FINRA arbitration forum, coupled with its transparency and public accountability, position the forum as a unique case study for evaluating arbitrator pool diversity and instituting measurable change.⁵ In 2014, the Public Investor Advocate Bar Association (PIABA), a bar association whose members represent investors in claims against stockbrokers in the FINRA forum,⁶ issued a report on the composition of FINRA's arbitrator roster, concluding that the FINRA roster was insufficiently diverse.⁷ The PIABA Report found that of the 5,375 arbitrators then in FINRA's pool, 80% were male.⁸ PIABA found that the average arbitrator age was sixty-seven and that 40% of the roster was over the age of seventy.⁹ The PIABA Report asserted that FINRA's claims that it maintained a diverse arbitrator roster were incorrect.¹⁰ PIABA further criticized FINRA for failing to take any measures to quantify diversity within its arbitrator roster while simultaneously claiming that the roster was diverse.¹¹

Since the 2014 PIABA Report, in response to scholarly and internal

2. *About FINRA*, FINRA, <https://www.finra.org/about> [<https://perma.cc/RT2L-WLSL>] (“FINRA is a government-authorized not-for-profit organization that oversees U.S. broker-dealers. . . . 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.”); AAJ ARBITRATOR DIVERSITY REPORT, *supra* note 1.

3. See JASON R. DOSS, PUB. INVS. ARB. BAR ASS’N, THE IMPORTANCE OF ARBITRATOR DISCLOSURE (2014) [hereinafter PIABA REPORT], [https://piaba.org/sites/default/files/newsroom/2014-10/The%20Importance%20of%20Arbitrator%20Disclosure%20\(October%207,%202014\).pdf](https://piaba.org/sites/default/files/newsroom/2014-10/The%20Importance%20of%20Arbitrator%20Disclosure%20(October%207,%202014).pdf) [<https://perma.cc/GR5Z-Q2PB>].

4. See FINRA, RULE 12200 (2008); Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1179 (2010) [hereinafter Gross, *The End of Mandatory Securities Arbitration?*] (describing securities industry arbitration forum and near universal arbitration of customer disputes against industry members before FINRA Dispute Resolution); Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 801 (2015) (“The vast bulk of disputes between broker-dealers and their clients involve arbitration . . .”).

5. Gross, *The End of Mandatory Securities Arbitration?*, *supra* note 4, at 1179 (describing mandatory nature of FINRA arbitration); *About FINRA*, *supra* note 2 (describing SEC oversight of FINRA).

6. PIABA REPORT, *supra* note 3, at 1 n.1.

7. *Id.* at 24.

8. *Id.* at 28.

9. *Id.* at 28–29.

10. *Id.* at 24.

11. *Id.*

recommendations,¹² FINRA has increased transparency with regard to its arbitrator pool demographics,¹³ an action that may permit the assessment of FINRA's diversification efforts and potentially serve as a model for other arbitration forums.¹⁴ FINRA now maintains a webpage listing Dispute Resolution Service's efforts to ensure its arbitrator pool is inclusive.¹⁵ FINRA conducts a voluntary annual survey of its arbitrator pool to obtain information on the race, ethnicity, gender, age, and LGBTQ identity of its arbitrators and shares aggregate demographic information with the public.¹⁶ These actions to highlight efforts to diversify the roster—both in outreach and measurable change—indicate a greater degree of transparency within FINRA than other arbitral forums.¹⁷ Moreover, these efforts suggest a commitment to ensuring that investors have access to an arbitrator pool that is diverse.¹⁸ Accordingly, to the extent FINRA's transparency permits analysis of inclusion, FINRA's work may serve as model for other mandatory arbitration forums.

Approximately five years after it had been criticized for its own lack of diversity, FINRA responded to publicity surrounding entrepreneur and rapper Shawn Carter's (also known as Jay-Z) challenge to the American Arbitration Association (AAA) as an arbitration forum because AAA

12. See, e.g., FINRA DISP. RESOL. TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE FINRA DISPUTE RESOLUTION TASK FORCE 8 (2015), <https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf> [<https://perma.cc/GMJ5-T53S>] (“[T]he task force heard criticisms about the lack of diversity in the FINRA arbitrator pool and agrees that diversity must be increased.”); Benjamin P. Edwards, *FINRA's Diversity Dilemma*, INVESTMENTNEWS (Nov. 23, 2014), <https://www.investmentnews.com/finras-diversity-dilemma-59905> [<https://perma.cc/3Z77-SUSC>] (“Finra [sic] should seek to make the arbitration pool more diverse.”).

13. See, e.g., Nicole G. Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 NEV. L.J.F. 1, 6–7 (2020) [hereinafter Iannarone, *Finding Light*] (describing FINRA's transparency in reporting arbitrator diversity and FINRA studies undertaken to measure diversity).

14. See, e.g., Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practice of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016, 33,024 (June 10, 2015) (“Transparency and publicity are important aspects of assessing diversity policies and practices.”).

15. *Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA*, FINRA, <https://www.finra.org/arbitration-mediation/our-commitment-achieving-arbitrator-and-mediator-diversity-finra> [<https://perma.cc/NLM2-MNXL>].

16. *Id.*

17. *Id.* (detailing results of FINRA arbitrator diversity surveys from 2016 to 2020 and breaking down arbitrator identity by age, gender, race, ethnicity, and LGBTQ identification); *Roster Diversity & Inclusion*, AM. ARB. ASS'N, <https://www.adr.org/RosterDiversity> [<https://perma.cc/QTQ8-MBP7>] (describing that 27% of arbitrators are women and people of color without providing a breakdown of gender, racial, or ethnic identities); see also Gross, *The End of Mandatory Securities Arbitration?*, *supra* note 4, at 1188 (“FINRA Dispute Resolution actively promotes transparency of the arbitration process.”).

18. *Our Commitment*, *supra* note 15.

lacked sufficient Black arbitrators on its roster.¹⁹ FINRA suggested that its arbitrator roster exhibited more overall diversity than the AAA and that Carter would not have levied a similar challenge in the FINRA forum.²⁰ FINRA's Office of Dispute Resolution Director said that "arbitrator diversity has been his 'absolute number-one priority' since taking on his role on Dec[ember] 1, 2014," soon after the October 2014 publication of the PIABA Report.²¹ By capitalizing on press generated by Carter's fame,²² FINRA highlighted the work it had done to diversify its own arbitrator roster, but that does not mean that we should accept FINRA's claim that its roster is diverse at face value.²³ Indeed, not all agree that FINRA's arbitrator roster has sufficiently diversified since PIABA's 2014 report.²⁴

FINRA's assertions that its roster has changed are subject to study, with some limitations, from publicly available information.²⁵ While it is not possible to identify each arbitrator currently in FINRA's arbitrator pool, let alone that arbitrator's age, race, ethnicity, gender, or LGBTQ

19. Rita Raagas De Ramos, *What Jay-Z Wants, Finra Insists It Already Has*, FIN. ADVISOR IQ (Feb. 8, 2019), https://financialadvisoriq.com/c/2196683/263053/what_wants_finra_insists_already?referrer_module=mos [<https://perma.cc/P6NM-7FZE>].

20. *Id.*

21. *Id.*

22. Cole, *Arbitrator Diversity*, *supra* note 1, at 994 ("[T]he arbitrator selection process rarely inspires the kind of headlines that Jay-Z's case generated . . .").

23. FINRA notes, for example, that it has work to do. Raagas De Ramos, *supra* note 19 (quoting Richard Berry, FINRA Office of Dispute Resolution Director, stating "[t]his is something we have been working on for a long time, and it's part of our effort to continuously improve. You know, at the end of the day, we will never be done improving this program."); *Office of Dispute Resolution (ODR) and FINRA News*, 1 NEUTRAL CORNER (FINRA, New York, NY), 2020, at 2, <https://www.finra.org/sites/default/files/2020-03/neutral-corner-volume-1-2020-0331.pdf> [<https://perma.cc/B7YG-86WF>] ("While we are encouraged by these results and the incremental progress that has been made, we recognize that achieving our diversity goals is a long-term effort to which we will remain fully committed in the years ahead.").

24. *See, e.g.*, Megan Leonhardt, *The Huge Diversity Issue Hiding in Companies' Forced Arbitration Agreements*, CNBC: MAKE IT (June 7, 2021, 1:54 PM), <https://www.cnbc.com/2021/06/07/arbitrators-are-male-and-overwhelming-white-heres-why-it-matters.html> [<https://perma.cc/DN7Z-GKCG>] (highlighting an AAA report finding that AAA, JAMS, and FINRA, "three of the largest arbitration service providers in the country, are mostly male and overwhelmingly white"); *FINRA Could Learn from Jay-Z's Demand for Diversity in Arbitration*, GREEN & SCHAFLE LLC (Feb. 11, 2019), <https://broker-misconduct.com/blog/2019/2/11/find-could-learn-from-jay-zs-demand-for-racial-equality-in-arbitration> [<https://perma.cc/QD2P-WE8B>] (describing continued lack of diversity in FINRA arbitrator pool).

25. *See generally* Iannarone, *Finding Light*, *supra* note 13 (discussing FINRA's public disclosures and urging additional data disclosure); Charlotte S. Alexander & Nicole G. Iannarone, *Winning Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695 (2021) (using computational text analysis to study FINRA arbitration awards).

identity,²⁶ it is possible to measure whether new arbitrators are being chosen to serve and actually decide smaller investors' disputes.²⁷ This Article assesses—to the extent possible via FINRA's voluntary transparency—the results of FINRA's recent arbitrator recruitment gains.²⁸ Limiting the inquiry to publicly available information released by FINRA is intentional. This Article fits into a broader research agenda assessing whether the information publicly released by FINRA in the name of transparency is meaningful.²⁹ It also serves to inform other arbitration forums about how providing transparency can assist external evaluation of diversification and inclusion efforts and potentially increase public trust.

FINRA's assertions that it has increased the diversity of its roster since 2014 cannot be wholly assessed, because FINRA does not publicly release the names and individual demographic details of the members of its arbitration roster.³⁰ However, FINRA does release decisions in its arbitration cases.³¹ These awards provide sufficient information to determine whether arbitrators who joined after 2014—when FINRA faced criticism for a lack of diversity and began releasing arbitrator demographic information showing an overall more diverse pool—serve

26. See Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practice of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016, 33,021 (June 10, 2015) (“Agencies may publish information disclosed to them provided they do not identify a particular . . . individual . . . in an effort to balance concerns about confidentiality of information with the importance of sharing information.”).

27. FINRA claims under \$100,000 are decided by one arbitrator who has served on enough arbitration proceedings to qualify as a chair-qualified arbitrator. See *infra* section III.B (describing arbitrator selection and qualification). These single-arbitrator cases are the focus of this Article given the importance of smaller claims arbitration to the development of the overall mandatory securities system. See *infra* Part I. Moreover, smaller investors are more likely to be members of underrepresented groups. See *infra* section II.A.

28. The author anticipates further exploring this question by evaluating quasi-public information, specifically the arbitrator disclosure reports provided to the parties in arbitration, in future work.

29. See, e.g., Iannarone, *Finding Light*, *supra* note 13 (describing the need to conduct research into the extent of FINRA's transparency); Alexander & Iannarone, *supra* note 25 (describing research plans for computational text analysis of FINRA awards and BrokerCheck).

30. Iannarone, *Finding Light*, *supra* note 13, at 6; *Arbitrator Disclosure*, FINRA, <https://www.finra.org/arbitration-mediation/arbitrator-disclosure> [<https://perma.cc/H8LL-M6NG>] (describing arbitrator disclosure reports “provided to parties to help them make informed decisions during the arbitrator selection process”); *Sample Arbitrator Disclosure Report*, FINRA (Sept. 27, 2011), <https://www.finra.org/sites/default/files/ArbMed/p122952.pdf> [<https://perma.cc/9NBL-DNML>] (sample disclosure report does not detail arbitrator demographic information). FINRA releases information on the number of arbitrators available to serve in each of its hearing locations. See *Hearing Location Statistics*, FINRA, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/hearing-location-statistics> [<https://perma.cc/Y9W2-C9WU>].

31. See, e.g., *Arbitration Awards Online*, FINRA, <https://www.finra.org/arbitration-mediation/arbitration-awards> [<https://perma.cc/RM39-27M4>] (database containing FINRA arbitration awards).

as the sole arbitrators deciding the smallest customer disputes.³²

Every FINRA arbitration that results in a decision by an arbitrator is published in a publicly available database maintained on FINRA's website.³³ Each award must include, among other uniform information, the name(s) of the arbitrator(s) issuing the award.³⁴ Thus, it is possible to determine whether FINRA's addition of more arbitrators reflective of the population has led to any change in who is presiding over smaller investor claims. This Article tests the hypothesis that structural barriers within FINRA's arbitrator selection process make it difficult for a new entrant to the FINRA public arbitrator roster to be selected as an arbitrator in small claim proceedings filed against a stockbroker. Thus, the Article assesses inclusion—whether new entrants to FINRA's arbitrator pool preside over smaller cases as the sole arbitrator.³⁵

Part I analyzes the historic roots of securities arbitration, identifying the fair resolution of smaller consumer claims as the most important focus in creating a uniform, and now mandatory, dispute resolution system to ensure trust in the markets. If consumers did not believe they could fairly and efficiently resolve their disputes, they would not trust the securities markets. The unique oversight and accountability of FINRA's forum thus sets it apart from other mandatory arbitration forums, making it an interesting case study due to the possibility of constituent- and regulator-led change. Part II explores the historic lack of diversity in the financial industry and examines how lack of representation within it undermines consumer trust and confidence, raising significant questions about the legitimacy of a mandatory system that does not represent all investors. The Part ends with a discussion of recent industry sentiment supporting greater inclusion and the need to assess whether public statements are

32. See *infra* text accompanying notes 33 and 34 (describing information contained in FINRA arbitration awards).

33. FINRA, RULE 12904(h) (2018) (“All awards shall be made publicly available.”); *Arbitration Awards Online*, *supra* note 31.

34. FINRA, RULE 12904(e)(9) (2018) (“The award shall contain . . . [t]he names of the arbitrators.”).

35. See Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practice of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016, 33,018 (June 10, 2015) (inclusion is “a process to create and maintain a positive work environment that values individual similarities and differences, so that all can reach their potential and maximize their contributions to an organization”); Maria R. Volpe & Sheila M. Sproule, *The ADR Inclusion Network: Addressing Diversity Collectively*, ALTS. TO HIGH COST LITIG. (Int'l Inst. for Conflict Prevention & Resol., New York, NY), June 2019, at 81, https://static1.squarespace.com/static/596f7177f5e23161e2ee5cf8/5d75ce2b61770c1847fa9125/1568001579976/alt_37_6.pdf [<https://perma.cc/87TC-3PM9>] (“Inclusion is a more comprehensive term than diversity. It refers to not only paying attention to the representation of individuals from diverse backgrounds, but creating an inviting, fair, and respectful environment that will allow diversity efforts to succeed.”).

reflected in subsequent action, adding additional reasons why FINRA may be well positioned as a member of the financial industry to supplement diversity and inclusion measures in its arbitration forum. Part III examines the FINRA arbitrator pool and selection process and identifies structural barriers preventing the inclusion of newer arbitrator entrants in the pool for smaller claims. These barriers are examined because they may undermine FINRA's goal of ensuring diverse arbitrator options for a subset of disputes in which consumer trust is most necessary to foster confidence in the securities markets—smaller claims. Part IV details the results of an empirical study designed to evaluate the impact of the newly identified structural barriers to inclusion. It concludes that despite limitations with the available public data, new arbitrator entrants are a small proportion of the arbitrators hearing smaller customer claims in the FINRA forum and that public customers are not obtaining the benefit of FINRA's recent arbitrator pool diversification efforts. The Article concludes with a discussion of recommendations, including providing greater transparency to more fully assess an arbitral forum's inclusivity and eliminating known barriers that make it difficult for new entrants to serve as arbitrators. Though FINRA's accountability to the public and SEC oversight may more readily lead to changes in its mandatory arbitration forum, the lessons learned from studying the increased transparency of the FINRA forum can inform interventions necessary to ensure diversity and inclusion in other arbitration forums.

I. ARBITRATION OF CONSUMER SECURITIES CLAIMS

Research indicates that many investors lack the knowledge and skills to invest on their own.³⁶ It is perhaps then no surprise that many investors seek assistance from others,³⁷ including stockbrokers or brokerage firms,

36. See, e.g., JILL E. FISCH, ANDREA HASLER, ANNAMARIA LUSARDI & GARY MOTTOLA, *NEW EVIDENCE ON THE FINANCIAL KNOWLEDGE AND CHARACTERISTICS OF INVESTORS 1* (2019), https://www.usfinancialcapability.org/downloads/FINRA_GFLEC_Investor_Knowledge_Report.pdf [<https://perma.cc/2CTZ-WRKS>] (“[I]ndividuals are not well equipped to manage their personal finances, in particular, their financial investments.”).

37. Investors may obtain advice from a range of professionals who, if they are subject to regulation, are regulated in a fragmented fashion under different standards notwithstanding the fact that most consumer investors are unaware of the differences between each category of professional. See generally Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47 (2014) (describing differences in regulation between providers of investment advice); Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 VILL. L. REV. 701 (2010) (describing differences between fiduciary standards of broker-dealers and investment advisers). See also Barbara Black, *How to Improve Retail Investor Protection After the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 13 U. PA. J. BUS. L. 59, 60 (2010) (“[B]roker-dealers and investment

to assist them with their investment choices.³⁸ So, whether these investors are day traders who invested in GameStop and have a trading dispute with Robinhood or a retiree who received questionable advice from a stockbroker, they are most likely required to adjudicate their claims in the FINRA forum.³⁹ Many Americans have neither heard of securities arbitration nor know that if they have a brokerage agreement, they are most likely required to submit to arbitration if a dispute arises.⁴⁰ This is a significant concern, given that approximately one-third of Americans maintain investment accounts outside their retirement plans, and if they work with a stockbroker to manage any of their investments, they are bound to arbitrate.⁴¹ The 2018 National Financial Capability Study Investor Survey found that 61% of investors rely on professionals to choose investments for them at least sometimes.⁴² Sixty-five percent of

advisers are subject to different regulatory schemes and standards of conduct, which cause investor confusion and concern about the adequacy of retail investor protection.”)

38. JUDY T. LIN, CHRISTOPHER BUMCROT, GARY MOTTOLA & GERRI WALSH, FINRA INV. EDUC. FOUND., INVESTORS IN THE UNITED STATES: A REPORT OF THE NATIONAL FINANCIAL CAPABILITY STUDY 8 (2019), https://www.usfinancialcapability.org/downloads/NFCS_2018_Inv_Survey_Full_Report.pdf [<https://perma.cc/PEZ3-YE44>].

39. Chris Dolmetsch & Christopher Yasiejko, *Robinhood Suits Come Daily, but an Outcome May Be Years Away*, BLOOMBERG (Jan. 29, 2021, 1:20 PM), <https://www.bloomberg.com/news/articles/2021-01-29/robinhood-suits-arrive-daily-but-an-outcome-may-be-years-away> [<https://perma.cc/THC4-CW8G>].

40. 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. 349, 364 (“63.29% of survey participants who answered this question and identified themselves as customers (629 responses) were aware that the customer agreement contained a PDAA before the dispute arose; 36.71% of customers were not aware.”). Many laypersons are not familiar with arbitration at all. See Kristin M. Blankley, Ashley M. Votruba, Logen M. Bartz & Lisa M. PytlikZillig, *ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration*, 99 NEB. L. REV. 797, 816 (2021) (finding 20.1% of surveyed community members had “no familiarity with arbitration”).

41. LIN ET AL., *supra* note 38, at 3 (“Just under a third (32%) of the national population have investments in non-retirement accounts. This percentage has changed little from 30% in 2015.”); GARY MOTTOLA, FINRA INV. EDUC. FOUND., INSIGHTS: FINANCIAL CAPABILITY: A SNAPSHOT OF INVESTOR HOUSEHOLDS IN AMERICA 1 (2015), https://www.finrafoundation.org/sites/finrafoundation/files/A-Snapshot-of-Investor-Households-in-America_0_0_0.pdf [<https://perma.cc/YR28-UVCR>] (“Approximately 6 in 10 households in the United States own securities investments—typically through taxable accounts, IRAs or employer-sponsored retirement plans. However, this figure drops to a little over 3 in 10 if only taxable investments are considered.”). Investors whose accounts are managed by fiduciary-level investment advisers governed by the Investment Company Act of 1940 are not generally subject to mandatory FINRA arbitration. See generally Lazaro & Edwards, *supra* note 37 (describing divergent regulatory schemes applicable to stockbrokers, investment advisers, and insurance providers); *Guidance on Disputes Between Investors and Investment Advisers That Are Not FINRA Members*, FINRA, <https://www.finra.org/arbitration-mediation/guidance-disputes-between-investors-and-investment-advisers-are-not-finra-members> [<https://perma.cc/U7SD-JJYQ>].

42. LIN ET AL., *supra* note 38, at 8.

surveyed investors will also discuss investment options with a professional before investing on their own.⁴³ When broken down by gender, 64% of women, versus 58% of men, defer to professionals to make investment choices for them.⁴⁴ Most non-retirement investors are white, making up 73% of American households holding taxable investment accounts.⁴⁵ The 27% non-white holders of taxable investment accounts comprise 11% Hispanic investors, 8% Black investors, 7% Asian investors, and 1% Native American investors.⁴⁶ The disparity in taxable account ownership by race and ethnicity drops after adjustment for income and education.⁴⁷ Simply put, people of color are under-represented as members of the investing public.

Should the median non-retirement account investor have a dispute with a stockbroker,⁴⁸ that claim would most likely be subject to FINRA's smaller claim arbitration process, known as Simplified Arbitration.⁴⁹ The median non-retirement account balance is \$6,200.⁵⁰ The mean American account balance is \$4,500.⁵¹ Surveys repeatedly find, however, that over

43. *Id.*; see also *id.* at 9 (“[A]mong respondents who at least sometimes let a professional choose their investments, nearly three-quarters (72%) also decide based on their own research at least sometimes.”).

44. *Id.* at 9.

45. MOTTOLA, *supra* note 41, at 2 (“And 73 percent of respondents from households that own taxable investments are white, compared to 67 percent for households with only retirement accounts, and 61 percent for households without accounts.”).

46. *Id.* at 3.

47. *Id.* at 9 (“[T]he 14 percentage point difference between white and [B]lack households in terms of taxable account ownership noted above drops in half to 7 percentage points after controlling for key demographic variables such as income and education. And the 11 percentage-point difference between white and Hispanic households drops to 4 percentage points.”).

48. See CONSTANTIJN W.A. PANIS & MICHAEL J. BRIEN, BROKERAGE ACCOUNTS IN THE UNITED STATES, at i (2015), <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/brokerage-accounts-in-the-us.pdf> [<https://perma.cc/8Z3S-QYDX>] (finding that 27% of American households with a brokerage account relied upon a broker's advice, with a median non-retirement investment account balance of \$6,200).

49. See FINRA, RULE 12800 (2018) (“This rule applies to arbitrations involving \$50,000 or less . . .”). Simplified Arbitration rules provide consumers a default procedure under which the case is decided with no hearing, *id.*, which typically moves much more quickly. Investors can also elect between two hearing options—a special proceeding via telephone with abbreviated timeframes and means for presenting evidence or a regular hearing, *id.* See also *infra* Part III (describing different proceeding types).

50. PANIS & BRIEN, *supra* note 48, at i; see also Nicole G. Iannarone, *Computer as Confidant: Digital Investment Advice and the Fiduciary Standard*, 93 CHI.-KENT L. REV. 141, 148 (2018) (describing need to service accounts deemed small by financial professionals).

51. Jesse Bricker, Lisa J. Dettling, Alice Henriques, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, Sarah Pack, John Sabelhaus, Jeffrey Thompson & Richard A. Windle, *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL. (Bd. of Governors of the Fed. Rsrv. Sys., Washington, D.C.) Sept. 2017, at 1, 19, <https://www.federalreserve.gov/publications/files/scf17.pdf> [<https://perma.cc/F99T-L5EV>].

40% of average Americans would struggle to pay an unexpected expense of \$400.⁵² Accordingly, if the average American had a dispute with their stockbroker or brokerage firm, a claim that falls under Simplified Arbitration rules would be significantly important to them.

Underpinning the initial development of securities arbitration through its subsequent evolution to a uniform, mandatory process is the key principle that if consumers did not believe they could fairly and efficiently resolve their disputes, they would not trust the securities markets. Arbitration was a feature of the securities industry as early as the 1790s, nearly as soon as the industry began in the United States.⁵³ At that time, arbitration was a necessity: it filled a gap for those securities contracts that were not enforceable at law and gave customers the ability to trust that when they purchased a security contract from an exchange member, they would have the ability to obtain redress should a problem subsequently arise.⁵⁴ As will be described in this section, the move from voluntary to mandatory took many years, with active engagement of the industry, regulators, judicial, and public participants.⁵⁵ The modern progression to mandatory arbitration under uniform provisions under the SEC's oversight began with a focused look at the plight of regular investors—those with the smallest claims—and the protections built therein formed the bases for modern securities arbitration of all claim sizes.⁵⁶ At the same time, this progression was largely spearheaded by the securities industry, which may illustrate capture of the dispute resolution mechanism due to

52. BD. OF GOVERNORS OF THE FED. RESRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 (2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> [<https://perma.cc/2P2Q-K2R9>]; Ann Carrns, *Even in Strong Economy, Most Families Don't Have Enough Emergency Savings*, N.Y. TIMES: YOUR MONEY (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/your-money/emergency-savings.html> [<https://perma.cc/K74X-EYLY>] (“The Pew Charitable Trusts found in 2015 that many families lacked funds to cover a \$2,000 expense. And the Federal Reserve has repeatedly found that a significant share of households would struggle to cope with an unexpected \$400 expense, although it reported in May that the percentage of households able to handle unexpected expenses had ‘improved markedly’ . . .”).

53. Jill I. Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 175–76 [hereinafter Gross, *Historical Basis*] (tracing history of arbitration of industry securities disputes in the United States beginning in late 1790s).

54. *Id.*; see also STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860*, at 250 (1998).

55. Gross, *Historical Basis*, *supra* note 53, at 180–82.

56. *Id.* (describing investor protection and trust creation goals of arbitration in securities realm); Jill I. Gross, *AT&T Mobility and the Future of Small Claims Arbitration*, 42 S.W. L. REV. 47, 63–64 (2012) (describing origins of small claims arbitration); Alexander & Iannarone, *supra* note 25, at 1708–12 (describing progression of securities arbitration from voluntary to mandatory and investor protection origins); *infra* notes 68–70 and accompanying text (describing development of small claims arbitration).

the securities industry's involvement in the design process which led a mechanism designed for investor protection to favor industry players.⁵⁷ As will be shown, the recognition that legitimacy is necessary for public support of securities markets and arbitration, as well as regulatory oversight of securities arbitration, position FINRA as a case study where deficiencies in the arbitral system may more likely be altered.

Early in the twentieth century, several important actors supported arbitration. Self-regulated organizations (SROs) like the securities exchanges⁵⁸ adopted arbitration as a dispute resolution device relating to securities and allowed investors to invoke arbitration.⁵⁹ Congress illustrated its support of arbitration via passage of the Federal Arbitration Act (FAA).⁶⁰ The newly created Securities & Exchange Commission (SEC) encouraged arbitration.⁶¹ Despite this support, courts were skeptical of arbitration.⁶² Arbitration involving federal securities claims was particularly suspect and scrutinized: courts erected judicial barriers to mandatory arbitration of securities claims such that few investor claims were actually arbitrated despite SRO willingness to hear the claims.⁶³ In 1953, the United States Supreme Court spoke definitively when it

57. See, e.g., Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CIN. L. REV. 573, 606–07 (2017) [hereinafter Edwards, *The Dark Side of Self-Regulation*] (“[Regulatory capture] generally ‘denotes the misalignment of incentives of government actors who pursue narrow private interests that may conflict with the public interest they purport to serve.’” (quoting Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 629 (2012))); *id.* at 585 (“FINRA also maintains control over industry regulation and the extent of investor protection available by channeling customer disputes through its arbitration forum.”).

58. See 15 U.S.C. § 78c(a)(26) (“The term ‘self-regulatory organization’ means any national securities exchange, registered securities association, or registered clearing agency . . .”). For a brief history of the formation of self-regulatory organizations in the financial industry, see Edwards, *The Dark Side of Self-Regulation*, *supra* note 57, at 578–82.

59. Gross, *Historical Basis*, *supra* note 53, at 175–76.

60. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1947) (codified as amended at 9 U.S.C. § 2) (recognizing the validity, irrevocability, and enforcement of arbitration agreements).

61. See Sec. & Exch. Comm’n, Opinion Letter, Release No. 34-131 (Mar. 21, 1935), *as reprinted in Westlaw*, 1935 WL 29028 (suggesting that the SEC “encourage its members to offer customers a standard arbitration agreement requiring that resort be had to arbitration at the election of either the customer or the member, and providing for arbitration before independent arbitral tribunals at the election of the customer”).

62. 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, 2861–65 (2015); Robert S. Clemente, *Trends in Securities Industry Arbitration: A View of the Past, the Present, and the Future: “The Dream, the Nightmare, and the Reality”*, N.Y. ST. BAR J., Sept.–Oct. 1996, at 18 (“In spite of this [judicial] hostility, securities industry arbitration continued throughout its nearly 200-year history to be recognized as a viable alternative method of resolving securities industry disputes.” (emphasis omitted)).

63. Gross, *Historical Basis*, *supra* note 53, at 181.

addressed the arbitrability of securities claims in *Wilko v. Swan*⁶⁴ and refused to enforce a pre-dispute arbitration agreement (PDAA) in a contract between a consumer investor and stockbroker.⁶⁵ For several subsequent decades, consumer investors with Securities Act claims thus had two choices: if a PDAA existed in their brokerage agreement, they could either voluntarily proceed in arbitration or file a federal claim in federal court notwithstanding the PDAA.⁶⁶ Nevertheless, the SROs continued to embrace arbitration as a viable means for resolving customer claims and offered it as a voluntary mechanism for investors to resolve disputes with their brokers, with most SROs developing their own arbitral forums.⁶⁷

The small claims securities dispute resolution system shaped and formed the foundation of the now ubiquitous and mandatory securities arbitration system. In the mid-1970s, the SEC gained more authority over SROs and, accordingly, their arbitration procedures.⁶⁸ Among the ways the SEC exercised this authority was guiding SROs towards a uniform procedure for resolving customer disputes involving smaller sums.⁶⁹ The SEC believed a set of uniform small claims arbitration procedures was essential for ensuring overall investor trust in the securities markets because it would “contribute significantly to the protection of investors (which is the objective of the federal securities laws),” increase consumer investor participation in the markets, and support the SROs’ commitment

64. 346 U.S. 427 (1953).

65. *Id.*

66. Gross, *Historical Basis*, *supra* note 53, at 181. Pure state law claims were subject to arbitration. Subsequently, mixed state and federal securities claims arising from the same transaction presented issues as to where they would be heard and whether a federal claim or arbitration would advance first or if they would proceed concurrently. *See generally* Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 *FORDHAM L. REV.* 279 (1984) (describing mixed claims); Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 *HOUS. L. REV.* 327, 333–34 (1996) (describing the intertwining doctrine and subsequent decisions related to arbitrable and nonarbitrable claims arising from a single transaction); B. Judson Hennington, III, *Unravelling the Intertwining Doctrine: Dean Witter Reynolds, Inc. v. Byrd*, 37 *ALA. L. REV.* 457 (1986); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) (rejecting the intertwining doctrine); *id.* at 224–26 (White, J., concurring) (questioning *Wilko*). Later Supreme Court precedent overruled *Wilko* and made this doctrine obsolete. *See infra* notes 72–75 and accompanying text.

67. Gross, *Historical Basis*, *supra* note 53, at 181 (describing adoption of arbitration by AMEX in 1964, the National Association of Securities Dealers (NASD) in 1968, and the Chicago Board Options Exchange, Inc. (CBOE) in 1973); Constantine N. Katsoris, *Securities Arbitration: A Clinical Experiment*, 25 *FORDHAM URB. L.J.* 193, 193 (1998) (describing SRO adoption of securities arbitration for customer disputes pre-1978 and development of uniform arbitration code).

68. Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97; *see also* Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 *BROOK. L. REV.* 1459, 1465 (1996).

69. Settling Disputes Between Customers and Registered Brokers and Dealers, Exchange Act Release No. 12,528, 9 SEC Docket 833, 834 (June 9, 1976).

to observing “high standards of commercial honor.”⁷⁰ The result of this SEC/industry collaboration—the first uniform securities arbitration code focusing on the voluntary resolution of smaller claims—was adopted by the major SROs and approved by the SEC by the end of 1978.⁷¹

Within the next decade, this voluntary code would have significantly more impact. In the late 1980s, the Supreme Court reversed course from *Wilko*, issuing rulings in a series of cases that functionally led to nearly all investors being required to arbitrate disputes with their stockbrokers.⁷² The securities industry quickly embraced *Wilko*'s demise: mandatory arbitration of consumer disputes with stockbrokers soon became the status quo, and the number of securities arbitration proceedings grew exponentially.⁷³ After the merger of the National Association of Securities Dealers (NASD) and New York Stock Exchange (NYSE) Member Regulation into a new SRO called the Financial Industry Regulatory Authority (FINRA) in 2007,⁷⁴ one forum became the host of nearly all

70. *Id.* at 834; *see also* Integrated Nationwide System for the Resolution of Investor Disputes, Exchange Act Release No. 12,974, 10 S.E.C. Docket 955, 955 (Nov. 15, 1976) (stating that, absent such a system, “individual investors may not have, in every respect, the measure of protection anticipated by the federal securities laws, including the just and equitable principles of trade which regulated exchanges and associations are required to enforce”).

71. Order Approving Proposed Rule Changes, Exchange Act Release No. 14737, 1978 WL 196611 (May 4, 1978) (approving New York Stock Exchange (NYSE) and American Stock Exchange (AMEX) proposals); Order Approving Proposed Rule Changes, Exchange Act Release No. 14881, 1978 WL 196225 (June 22, 1978) (approving Pacific Stock Exchange (PSE) and Chicago Board Options Exchange (CBOE)); Order Approving Proposed Rule Change, Exchange Act Release No. 14892, 1978 WL 196232 (June 23, 1978) (approving National Association of Securities Dealers (NASD)); Order Approving Proposed Rule Change, Exchange Act Release No. 14896, 1978 WL 196243 (June 26, 1978) (approving Philadelphia Stock Exchange (PHLX)); Order Approving Amended Proposed Rule Change, Exchange Act Release No. 15390, 16 SEC Docket 425 (Dec. 8, 1978) (approving Midwest Stock Exchange (MSE)). *See generally* SEC. INDUS. CONF. ON ARB., FIRST REPORT—REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION (1977) (describing initial work towards uniform code); *id.* at Exhibit A (proposed rules for small claims arbitration); *id.* at Exhibit D (consumer guide for small claims arbitration).

72. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *see also* Seligman, *supra* note 66, at 328 (describing decisions from 1985 through 1989 leading to mandatory securities arbitration).

73. *See* Seligman, *supra* note 66, at 328–29; Barbara Black, *Establishing a Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35, 35 (2000). Though it never reached the same volume as the SRO-sponsored forums, the AAA once had a securities arbitration program. Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483, 525 (1996).

74. Order Approving Proposed Rule Change to Amend the By-Laws of NASD, Exchange Act Release No. 56,145, 72 Fed. Reg. 42,169 (July 26, 2007); Nancy Condon & Herb Perone, *NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority—FINRA*, FINRA (July 30, 2007), <https://www.finra.org/media-center/news-releases/2007/nasd-and-nyse-member-regulation-combine-form-financial-industry> [<https://perma.cc/SQ47-458V>] (“FINRA was created through the consolidation of NASD and the member regulation, enforcement and arbitration operations of the New York Stock Exchange.”).

securities disputes: FINRA Dispute Resolution Services.⁷⁵

Most disputes administered by FINRA come to the forum through a PDAA in a broker-dealer/customer agreement mandating that any disputes arising from the relationship be resolved in the FINRA forum.⁷⁶ FINRA rules provide that the customer may initiate an arbitration if a customer either does not have a PDAA in a brokerage contract or does not have a written brokerage contract.⁷⁷ It is a violation of FINRA rules for the broker-dealer or associated person to object to the forum.⁷⁸ This history and evolution of securities arbitration, and in particular of small claims arbitration, should inform inquiry into whether the current system still achieves its investor protection and trust-creation goals while emphasizing the legitimacy and oversight aspects of FINRA arbitration that position it as an ideal case study for studying and suggesting improvements to diversity in arbitrator pools.⁷⁹

II. PERCEPTION OF FAIRNESS: LACK OF DIVERSITY IN THE FINANCIAL INDUSTRY AND MANDATORY ARBITRATION

The perception of fairness has long been a concern in securities arbitration, an essentially mandatory regime designed to ensure systemic trust.⁸⁰ Industries led by homogeneous parties that pit consumers against sophisticated repeat players raise fairness concerns.⁸¹ Those concerns are

75. *FINRA Dispute Resolution Services: Arbitration & Mediation*, FINRA, <https://www.finra.org/arbitration-and-mediation> [<https://perma.cc/98VQ-ZW4S>] (“FINRA operates the largest securities dispute resolution forum in the United States . . .”); Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 495 n.13 (2008) (“[D]ue to consolidation and the 2007 merger of the regulatory functions of NASD and the New York Stock Exchange (NYSE), FINRA is now the only meaningful forum for securities arbitration, handling more than 95% of the cases.”).

76. Benjamin P. Edwards, *Arbitration’s Dark Shadow*, 18 NEV. L.J. 427, 430 (2018).

77. FINRA, RULE 12200 (2007).

78. FINRA, RULE IM-12000 (2007) (“It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to: (a) fail to submit a dispute for arbitration under the Code as required by the Code . . .”).

79. *See, e.g.*, Gross, *Historical Basis*, *supra* note 53, at 185 (“FINRA, as well as industry and investor advocates, should recall and reinforce the historical basis of securities arbitration as a mechanism to protect investors.”).

80. *See, e.g.*, Constantine N. Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 FORDHAM J. CORP. & FIN. L. 49, 51 (2008) (“Unless such [securities arbitration] procedures are fair in fact as well as in appearance, however, their popularity as a means for settling securities disputes will greatly diminish, especially if the public is limited to applying these procedures to resolve their disputes before only one self-regulating organization (SRO), FINRA.”).

81. John D. Feerick & Linda Gerstel, *The Role of Arbitration Counsel in Ensuring Legitimacy and Efficiency*, N.Y. L.J., May 29, 2019, at 1, 4 (“All arbitration stakeholders have an interest in making sure that arbitration as a practice is not viewed or used as a tool for those with greater bargaining

magnified when it appears the forum lacks diversity, has high barriers to inclusion, or is largely controlled by the industry it purports to regulate.⁸² Taken together, these critiques raise fundamental questions of fairness if investors have no choice but to arbitrate any dispute they have against a stockbroker, undermining the legitimacy of the forum as well as the roles it plays in investor protection and ensuring confidence in the securities markets.⁸³ How can an investor expect a fair consideration if it is both true that the industry controls the dispute resolution system and consumer investors who are not white males over the age of sixty are unlikely to see arbitrators with backgrounds like their own?⁸⁴ Similar critiques can be made of mandatory arbitration in other consumer contexts.⁸⁵ As described below, the financial industry, ADR community, and FINRA, specifically, are increasingly focused on the equity concerns raised by each of these critiques, recognizing there is significant room for improvement and indicating that regulatory oversight and industry support may permit FINRA to lead other mandatory arbitration forums in diversifying arbitration rosters.

A. *Diversity in the Financial Industry*

Despite proof that diversity benefits the financial industry, the industry is largely white and male.⁸⁶ A recent study establishes, for example, that

power because they are repeat players. Wielding unequal power to exact a disproportionate benefit is unfair and is also likely to result in legal changes that send these claims back to the courts.”).

82. See, e.g., Barr, *supra* note 4, at 802 (“Generally speaking, the [FINRA] pool of arbitrators has close ties to the financial industry, lacks diversity, and is infrequently updated.”); Edwards, *The Dark Side of Self-Regulation*, *supra* note 57 (describing capture of FINRA board); Steven Davidoff Solomon, *The Government’s Elite and Regulatory Capture*, N.Y. TIMES: DEALBOOK (June 11, 2010, 2:00 PM), <https://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture> [<https://perma.cc/N2KM-U6QR>] (describing capture).

83. Feerick & Gerstel, *supra* note 81, at 3 (“Recent criticism of arbitration has focused on three issues: the impartiality and independence of party appointed arbitrators, diversity, and access to justice.”); Armeen F. Mistry, *Lack of Diversity Continues to Hurt Alternative Dispute Resolution*, TROUTMAN PEPPER (May 26, 2020), <https://www.troutman.com/insights/lack-of-diversity-continues-to-hurt-alternative-dispute-resolution.html> [<https://perma.cc/GJ7Z-DRCQ>] (“[T]here is also a credible argument that a homogeneous arbitration panel will be unable to fully understand a diverse claimant’s concerns. This leads to a loss of faith in the process.”).

84. Feerick & Gerstel, *supra* note 81, at 3 (“To trust the system, participants must trust that arbitrators reflect their values.”).

85. See *infra* section II.B.

86. SUNDIATU DIXON-FYLE, KEVIN DOLAN, VIVIAN HUNT & SARA PRINCE, DIVERSITY WINS: HOW INCLUSION MATTERS 3 (2020), <https://www.mckinsey.com/~media/mckinsey/featured%20in%20sights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf?shouldIndex=false> [<https://perma.cc/8XUW-4GZQ>] (“[T]here is a substantial performance differential—48 percent—between the most and least gender-diverse

“African Americans have been largely excluded from senior leadership opportunities [in financial regulatory agencies] since the New Deal” and that there is “a near total exclusion of African Americans from roles as senior policy staffers in current financial regulatory agencies, regardless of the political affiliation of the political appointees making hiring and staffing decisions.”⁸⁷ Additionally, America’s corporate boards and executive suites lack diversity, leading to recent rule changes to push companies to diversify.⁸⁸

Diversity within the financial industry has been a concern for decades,

companies.”); *id.* at 4 (“In 2019, fourth-quartile companies for executive-team gender diversity were 19 percent more likely than companies in the other three quartiles to underperform on profitability.”); MAJORITY STAFF OF H. COMM. ON FIN. SERVS., 116TH CONG., DIVERSITY AND INCLUSION: HOLDING AMERICA’S LARGE BANKS ACCOUNTABLE 3 (2020), <https://docs.house.gov/meetings/BA/BA13/2020212/110498/HHRG-116-BA13-20200212-SD003-U1.pdf> [<https://perma.cc/9622-6J4D>] (“Banks and other financial services firms claim to agree with the underlying premise that diverse, inclusive organizations can be more profitable and productive. But despite the known benefits, the financial services industry, including our nation’s banks, remains mostly white and male. This is not only true of banks’ workforces and executive ranks, but is also true for banks’ boards of directors, suppliers, and asset managers.”); Kristin Johnson, Steven A. Ramirez & Cary Martin Shelby, *Diversifying to Mitigate Risk: Can Dodd–Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795, 1806–18 (2016) (describing empirical data supporting increased diversity in financial sector); Matt Krentz, *Survey: What Diversity and Inclusion Policies Do Employees Actually Want?*, HARV. BUS. REV. (Feb. 5, 2019), <https://hbr.org/2019/02/survey-what-diversity-and-inclusion-policies-do-employees-actually-want> [<https://perma.cc/E5LH-3MBZ>] (“[C]orporate diversity still lags, especially at the top levels, which continue to be dominated by white heterosexual men.”); Sylvia Ann Hewlett, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, HARV. BUS. REV., Dec. 2013, <https://hbr.org/2013/12/how-diversity-can-drive-innovation> [<https://perma.cc/U5NB-N259>] (“[D]iversity unlocks innovation and drives market growth.”); Richard B. Evans, Melissa Porras Prado, A. Emanuele Rizzo & Rafael Zambrana, *Identity, Diversity, and Team Performance: Evidence from U.S. Mutual Funds* (Ctr. for Econ. Pol’y Rsch., Discussion Paper No. DP14305, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526029 [<https://perma.cc/ZYP4-HP2G>] (finding diverse teams outperform homogeneous teams).

87. Chris Brummer, *What Do the Data Reveal About (the Absence of Black) Financial Regulators?* 3 (Brookings Inst., Working Paper, 2020), <https://www.brookings.edu/wp-content/uploads/2020/09/ES-09.02.20-Brummer.pdf> [<https://perma.cc/97D2-NXVV>].

88. Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN’S L. REV. 837, 838 (2003) (“Today, corporate America is still largely governed by white males. Of the 11,500 Fortune 1000 board seats, African Americans hold 388 and Hispanics hold only 86. In other words, these two groups, which together comprise about 30% of the United States population, hold a combined 4.1% of all Fortune 1000 board seats. Women hold only 14% of the seats. Worse yet, 90% of all senior executives at Fortune 1000 companies are white males.” (citations omitted)).

The SEC recently approved securities exchange NASDAQ’s proposal to require that companies listed on the exchange provide aggregate disclosures “on the voluntary self-identified gender and racial characteristics and LGBTQ+ status” for members on the company’s board of directors and “to have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority or LGBTQ+.” See Order Approving Proposed Rule Changes Related to Adopt Listing Rules Related to Board Diversity, Exchange Act Release No. 92,590, 86 Fed. Reg. 44,424 (Aug. 6, 2021).

with social justice organizations and Congress intervening to nudge the industry towards greater inclusion with little impact.⁸⁹ Congressional action following the 2008 financial crisis included provisions on diversity and inclusion in the financial industry due to the overwhelming impact the economic downturn had upon communities of color and women.⁹⁰ Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)⁹¹ required that federal financial agencies, including the SEC, each establish an Office of Minority and Women Inclusion (OMWI).⁹² These provisions charge the director of each agency's OMWI with the responsibility of "assessing the diversity policies and practices of entities regulated by the agency."⁹³ Professors Johnson, Ramirez, and Shelby argue that in enacting section 342, Congress viewed diversity and inclusion as a remedy to the financial crisis and "one mechanism to achieve superior risk management in the financial sector."⁹⁴

A coalition of financial industry agencies, including the SEC, implemented section 342 via a joint statement.⁹⁵ Because the SEC regulates FINRA, the SEC's OMWI assesses FINRA under section 342.⁹⁶ The agencies' implementation of section 342 was designed to encourage transparency and voluntary self-assessment so that best practices in the

89. See, e.g., Sandra D. Grannum, *Why Does Racial Equality, Diversity and Inclusion Continue to Elude Wall Street?*, in *SECURITIES ARBITRATION* 2020, at 165, 165–70 (2020) (describing diversity measures from 1997 Rainbow PUSH Wall Street Project through Dodd-Frank).

90. Anthony M. Sharett, *Dodd-Frank Section 342: An Analysis of an Emerging Regulation Impacting the Financial Services Industry*, A.B.A.: BUS. L. TODAY (Sept. 16, 2015), https://www.americanbar.org/groups/business_law/publications/blt/2015/09/03_sharett/ (last visited Nov. 29, 2021) ("Statistics demonstrate that communities of color, some of which were targeted by predatory practices, were disproportionately impacted both as consumers and employees of financial services companies. Likewise, large institutions' efforts to utilize women-owned and minority-owned businesses decreased significantly during the economic downturn. The impact from the financial crisis has been long-lasting for diverse populations and many believe that concerted efforts to promote diversity ideals have been severely undermined.").

91. Pub. L. No. 111-203, § 342, 124 Stat. 1376, 1541–45 (2010) (codified at 12 U.S.C. § 5452).

92. *Id.* § 342(a)(1).

93. *Id.* § 342(b)(2)(C).

94. Johnson et al., *supra* note 86, at 1803.

95. Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, Exchange Act Release No. 75,050, 80 Fed. Reg. 33,016 (May 22, 2015).

96. U.S. SEC. & EXCH. COMM'N, STANDARDS FOR ASSESSING THE DIVERSITY POLICIES AND PRACTICES OF ENTITIES REGULATED BY THE SECURITIES AND EXCHANGE COMMISSION: FREQUENTLY ASKED QUESTIONS 2 (2018) [hereinafter SEC, FAQ], <https://www.sec.gov/files/DAR-FAQ.pdf> [<https://perma.cc/S635-2YHF>] ("Entities regulated by the SEC include . . . [s]elf-regulatory organizations.").

diversity and inclusion space would enter the financial sphere.⁹⁷ Thus, the SEC's OMWI sends a form Diversity Assessment Report⁹⁸ to regulated entities with more than 100 employees no more than once every two years seeking voluntary responses and offering flexibility by permitting regulated entities to "conduct self-assessments in any manner that works best based upon their unique characteristics."⁹⁹ Regulated entities who respond need not worry about disclosure of their individual information: the SEC "[w]ill not identify a particular entity or disclose confidential business information."¹⁰⁰ The SEC OMWI notes that the Joint Standards contemplate that the regulated entity "conduct a self-assessment of its diversity policies and practices at least annually."¹⁰¹

Perhaps unsurprisingly given how the agencies implemented section 342, SEC regulated entity response rates to the SEC OMWI's assessment surveys have been low. The SEC OMWI requested 1,500 regulated entities voluntarily complete the Diversity Assessment Report (or submit their own self-assessment) in 2018.¹⁰² Only thirty-eight responses were received, covering 5% of SEC regulated entities invited to respond.¹⁰³ SEC OMWI noted in its FY2019 report to Congress that the "number of individual diversity self-assessments received from SEC-regulated entities during the first year was lower than expected."¹⁰⁴

97. Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, Exchange Act Release No. 75,050, 80 Fed. Reg. at 33,024 ("The Agencies interpret the term 'assessment' to mean self-assessment. Entities that have successful diversity policies and practices allocate time and resources to monitoring and evaluating performance under their diversity policies and practices on an ongoing basis. Entities are encouraged to disclose their diversity policies and practices, as well as information related to their assessments, to the Agencies and the public.").

98. The form is available online via the SEC's Office of Minority & Women Inclusion. OFF. OF MINORITY & WOMEN INCLUSION, U.S. SEC. & EXCH. COMM'N, HOW TO COMPLETE AND SUBMIT THE DIVERSITY ASSESSMENT REPORT FOR ENTITIES REGULATED BY THE SEC, <https://www.sec.gov/files/OMWI-DAR-20.pdf> [<https://perma.cc/ALD8-3HP2>].

99. SEC, FAQ, *supra* note 96, at 4. Accordingly, regulated entities have wide latitude in determining what type of information to submit and how to submit it. *Id.*

100. OFF. OF MINORITY & WOMEN INCLUSION, U.S. SEC. & EXCH. COMM'N, DIVERSITY ASSESSMENT REPORT FOR ENTITIES REGULATED BY THE SEC (2020), https://www.sec.gov/files/DAR_Webinar_March_2020.pdf [<https://perma.cc/H6YG-86LC>].

101. SEC, FAQ, *supra* note 96, at 4. Regulated entities are not required to submit diversity assessment information at all and are only requested to submit to the SEC at most every two years. *Id.*

102. OFF. OF MINORITY & WOMEN INCLUSION, U.S. SEC. & EXCH. COMM'N, DIVERSITY ASSESSMENT REPORT FOR ENTITIES REGULATED BY THE SEC: SUMMARY OF YEAR ONE RESULTS 1 (2018), https://www.sec.gov/files/SEC_Diversity_Assessment_Report_Year_One_Summary%20Report.pdf [<https://perma.cc/4VBR-U2WM>].

103. *Id.*

104. OFF. OF MINORITY & WOMEN INCLUSION, U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT TO CONGRESS 36 (2020), https://www.sec.gov/files/OMWI_Annual_Report_FY2019_508.pdf [<https://perma.cc/JB4L-Y9M5>].

Whether section 342 will push SEC-regulated entities towards greater transparency and best practices remains to be seen,¹⁰⁵ but the need for greater diversity and inclusion within the financial sector remains critical, and support for it may prompt FINRA to voluntarily make changes to its mandatory forum. As greater numbers of investors, including more women and people of color, enter the securities market in a post-Covid world, ensuring that their backgrounds and experiences are reflected in the securities arbitration pool remains critical for ensuring trust in the system.¹⁰⁶

B. Arbitrator Diversity in ADR and FINRA's Dispute Resolution Pool

Even if section 342's assessment mandate does not require FINRA to assess diversity and inclusion in its mandatory securities arbitration system, diversity and inclusion are necessary to legitimize a mandatory system created to foster trust from the investing public and should prompt analysis of diversification efforts.¹⁰⁷ This is especially so where one side—the respondent industry member—appears in the forum on a regular basis¹⁰⁸ and appears to regulate itself as a member of the very entity that

105. Though outside the scope of this article, the SEC may wish to nudge FINRA towards greater diversity and inclusion through section 342 inquiries about FINRA's arbitrator pool composition.

106. MARK LUSH, ANGELA FONTES, MEIMEIZI ZHU, OLIVIA VALDES & GARY MOTTOLA, FINRA FOUND. & NORC, *INVESTING 2020: NEW ACCOUNTS AND THE PEOPLE WHO OPENED THEM 1* (2021), https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf [<https://perma.cc/6DY5-AVUQ>] (noting that during COVID-19 pandemic, there was “a surge in retail investors who entered the markets using taxable, non-retirement investment accounts via online brokers”); *id.* at 2 (“New Investors were younger, had lower incomes, and were more racially diverse than Experienced Entrants and Holdover Account Owners.”); CHARLES SCHWAB CORP., *THE RISE OF THE INVESTOR GENERATION* (2021), <https://www.aboutschwab.com/generation-investor-study-2021> [<https://perma.cc/XM4R-9XMM>] (“15 percent of all current U.S. stock market investors say they first began investing in 2020 . . .”).

107. David H. Burt & Laura A. Kaster, *Why Bringing Diversity to ADR Is a Necessity*, ACC DOCKET, Oct. 2013, at 41, https://www.cpradr.org/news-publications/articles/2013-09-30-why-bringing-diversity-to-adr-is-a-necessity-acc/_res/id=Attachments/index=0/Why-Bringing-Diversity-D-Burt.pdf [<https://perma.cc/VL65-YR56>] (“The lack of diversity in the demographics of the neutrals selected in alternative dispute resolution (ADR) proceedings is a serious issue. . . . [I]t becomes an issue of fairness that the decisionmakers or facilitators should be representative of the individuals, institutions and communities that come before them.”); Volpe & Sproule, *supra* note 35, at 92 (“Moreso [sic] than other contexts, it is particularly important for dispute resolution practitioners to pay attention to diversity . . .”).

108. *See* Volpe & Sproule, *supra* note 35, at 92 (“The emphasis on choosing interveners who are known to users or their representatives led to the selection of handpicked providers, even when the roster lists may be diverse. As a result, it is understandable that there has been a lingering obliqueness about who serves as a dispute resolver in a field that relies on relationships and addresses complex psychological factors like unconscious bias. This is compounded by processes that are virtually unknown to users and others who have little or no knowledge about them.”).

manages the forum.¹⁰⁹ FINRA's Dispute Resolution forum should ensure a diverse arbitrator pool and inclusion of underrepresented arbitrators for two distinct, but related, reasons: (1) representation of the investing public is necessary for legitimacy¹¹⁰ and (2) overall decision-making improves when diverse perspectives are included.¹¹¹

First, the legitimacy of the FINRA forum requires ensuring that all consumer investor voices are represented in the forum at the arbitrator level.¹¹² The importance of representation within juries has long been understood—absent a jury of one's peers, litigants rightly question the legitimacy of the decision rendered.¹¹³ Similarly, scholars recognize the important role that increased diversity in the judiciary plays in ensuring the legitimacy of the judicial system.¹¹⁴ FINRA proceedings are decided by an arbitrator, a design decision that places the decisionmaker somewhere between a judge and a jury.¹¹⁵ This intentional design decision offers benefits by drawing from a wider pool of experiences and

109. See, e.g., section II.A (discussing critiques of arbitration forum administered by organizations that regulate their own conduct).

110. Cole, *Arbitrator Diversity*, *supra* note 1, 972–73 (“[T]he lack of diversity in the arbitrator corps unquestionably adds to the perception of arbitration as an unfair and unbalanced process that is geared against ‘the little guy,’ particularly when that ‘little guy’ is a woman and/or a member of a minority group. Addressing diversity concerns may help convince disputants that an arbitral forum is a fair and neutral setting where justice is done and is *seen* to be done.” (emphasis in original)).

111. Burt & Kaster, *supra* note 107, at 42.

112. See, e.g., Mistry, *supra* note 83 (“[T]here is consensus that in a deliberative process like ADR, practitioners should reflect their claimants’ demographics. Unlike traditional litigation, claimants in ADR have an opportunity to choose their panel, and they may wish (for very good reasons) to choose arbitrators who are similar to themselves and have had similar experiences.”); *id.* (“[C]lients need to trust the neutral third party conducting the process, and claimants are more likely to trust an arbitration panel that reflects their identity.”).

113. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).

114. See, e.g., Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000) (“The lack of racial diversity on our nation’s courts threatens both the quality and legitimacy of judicial decision-making.”); Linda Maria Wayner, *The Affirmatively Hispanic Judge: Modern Opportunities for Increasing Hispanic Representation on the Federal Bench*, 16 TEX. WESLEYAN L. REV. 535, 547 (2010) (“[T]he mere appearance of excluding Hispanics from the bar perpetuates a latent distrust of legal institutions in general.”); Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN. L. REV. 247, 248–49 (2016) (describing “legitimizing function” of racial and ethnic diversity in federal judiciary). See generally Vera Shikhelman, *Diversity and Decision-Making in International Judicial Institutions: The United Nations Human Rights Committee as a Case Study*, 36 BERKELEY J. INT’L L. 60 (2018) (describing importance of diversity for legitimacy in international context).

115. 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) (“We also note that the decision makers in the FINRA system function as a type of hybrid between a judge and a jury.”).

backgrounds than the judiciary currently reflects while requiring training of all arbitrators—including those without prior legal experience.¹¹⁶ Indeed, this design feature provides FINRA with an advantage in creating a more inclusive and better-trained arbitrator pool than either a jury or the bench can currently provide.¹¹⁷ As Professor Sarah Rudolph Cole argues, diversity and inclusion are necessary to ensure public trust and confidence that mandatory arbitration is a fair dispute resolution mechanism.¹¹⁸ Accordingly, unless FINRA ensures that all arbitrators in the pool are included, its dispute resolution system is not a basis from which the investing public can derive trust in the securities markets because a non-diverse arbitral pool undermines the legitimacy of the forum.

Second, the inclusion of more diverse arbitrators in the FINRA arbitrator pool will lead to better decision-making overall. Unlike arbitration forums where parties agree upon an arbitrator, arbitrators in FINRA proceedings in some instances must have prior experience in the forum: to serve as an arbitrator on a smaller case, an arbitrator must first serve on multiple three-arbitrator panels.¹¹⁹ Studies show that diversity of experience and background leads to better decision-making.¹²⁰ Thus, three-arbitrator panels that include diverse voices will benefit the forum in multiple ways. Most immediately, the parties to the disputes heard by a diverse three-arbitrator panel will receive the benefit of better decision-making in their own cases because the three arbitrators will be working together to render a decision.¹²¹ Subsequently, the experiences gained by all three arbitrators in such cases will benefit parties in later cases as the

116. FINRA's arbitrator qualifications and selection process was intentionally designed to consider the unsettled debate between party representatives in securities representation: whether the decisionmaker should more resemble a judge or a jury member. *See infra* section III.A. Thus, FINRA arbitrators come from a wide range of backgrounds and only half are lawyers. *See infra* note 191. This diversity of experience and background thus sets FINRA arbitration apart from the federal judiciary which has been criticized for a lack of deep diversity—different educational, socio-economic, and experiential backgrounds. *See, e.g.,* Iuliano & Stewart, *supra* note 114, at 251 (“Drawing from 225 years of data on the educational backgrounds of federal judges, we find that today—more than any other point in history—a small number of law schools dominate the federal judiciary. This is true for both federal judges and their law clerks. Ultimately, we argue that these educational trends provide evidence of declining deep-level diversity in the federal judiciary.”).

117. *See supra* note 115 and accompanying text.

118. Cole, *Arbitrator Diversity*, *supra* note 1, at 969–70.

119. *See infra* section III.B (describing arbitrator panel composition for smaller and larger claims and experiential requirements for service as chair).

120. Burt & Kaster, *supra* note 107, at 42 (“[D]ifferences in approach and points of view improve group decisions more than the capacity of the individuals who contribute to those decisions because of the ability to bring in different perspectives, interpretations, problem-solving approaches and decision models.” (citing SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2008))).

121. *See id.*

decision makers mature in their role. More overall decision makers will benefit claimants without experience in the forum.¹²² Finally, investors with smaller claims overseen by a single arbitrator will also benefit whether their case is heard by a newer or more experienced arbitrator. Newer arbitrators, whether a member of an under-represented group themselves or not, will become qualified to hear smaller claims where they are the sole arbitrator after having benefitted from the wisdom and knowledge of prior panels, likely bringing what they have learned in those proceedings to proceedings they decide on their own.¹²³ Experienced arbitrators will also benefit from the inclusion of diverse perspectives on panels, providing them with deeper knowledge and experience to bring to smaller claims they preside over as the sole neutral. The investing public benefits from the more experienced decision-making skills of arbitrators who gain experience in a more diverse arbitrator pool on two levels. First, investors who subsequently bring a claim are more likely to have that claim heard by an arbitrator with a deeper pool of experience. Second, investors who turn to publicly available awards to evaluate the merits of a potential claim or whether to hire a particular stockbroker are able to access a more robust set of awards to guide them.¹²⁴

Despite recognizing the importance of inclusion, achieving diversity and including diverse panelists has been difficult within the overall alternative dispute resolution (ADR) community and at FINRA.¹²⁵ Inclusion in the ADR field has been slowed by identified barriers including the processes by which neutrals are added to a roster and the means by which forums or parties select neutrals from a roster to hear a specific proceeding.¹²⁶ Panel members who have participated in more

122. See Mistry, *supra* note 83 (“Increasing the pool of arbitrators may provide greater choice for claimants, encourage better performance among ADR practitioners, and reduce the likelihood of repeat appointments that may disadvantage inexperienced claimants.”).

123. See FINRA, RULE 12401 (2012) (number of arbitrators); *id.* 12400(c) (2020) (qualification for chairperson roster).

124. See Iannarone, *Finding Light*, *supra* note 13, at 3 (describing use of awards database to investigate potential claims).

125. See generally Maria R. Volpe, *Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research*, 19 PEPP. DISP. RESOL. L.J. 201, 205 (2019) (describing importance of diversity in dispute resolution).

A recent study of the roster of the National Academy of Arbitrators, whose members are chosen to preside over arbitrable disputes involving labor and employment issues, found a striking underrepresentation of persons of color. See Homer C. La Rue & Alan A. Symonette, *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, 63 HOW. L.J. 215, 221 (2020) (“We have determined that as of January 25, 2019, the Academy had accepted 1484 members over its 72 years; approximately 35 persons or 2.35% of that group were persons of color. Half of those persons of color have been admitted within the last 25 years.”).

126. See Volpe & Sproule, *supra* note 35, at 81, 92–93.

proceedings tend to be favored over those without a record, making it difficult for forums that recruit new, diverse arbitrators to ensure that recent entrants preside over or mediate disputes.¹²⁷

To address these concerns, lawyers have called for greater diversity in alternative dispute resolution.¹²⁸ Scholars have called for the collection and study of existing public data as well as increased transparency from ADR forums so they can better assess inclusion.¹²⁹ ADR forums—including AAA, JAMS, and FINRA—are increasingly releasing aggregate survey information on the demographics of their neutral rosters.¹³⁰ The data in the aggregate paint a stark picture. For example, AAA's recent demographic data show that over 78% of responding arbitrators are male and 88% are white.¹³¹ Black arbitrators make up 3.9%

127. *Id.* at 93 (“[D]ispute resolution organizations express difficulty in ensuring a diverse pool of dispute practitioners. These organizations also operate with their own criteria for placing practitioners on their rosters that creates another set of constraints and challenges, which makes it more difficult to ensure that the diverse practitioners on the roster will get chosen over the known practitioners who are called upon more frequently.”).

128. See SECTION OF DISP. RESOL. REP. TO THE HOUSE OF DELEGATES, AM. BAR ASS'N, RESOLUTION 105, <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf> (last visited Nov. 29, 2021) (“RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities (‘diverse neutrals’) and to encourage the selection of diverse neutrals . . .”). The report accompanying Resolution 105 concluded that “the available data show that diversity within Dispute Resolution significantly lags the legal profession as a whole.” *Id.* at 2.

129. Volpe, *supra* note 125, at 206 (“Research is needed to amass more extensive and systematic data about all aspects of dispute resolution processes and practices, a state of affairs that has been a longstanding concern of the dispute resolution field.”); *id.* at 207–08 (calling for greater transparency of ADR professional backgrounds to study diversity).

130. See, e.g., *Our Commitment*, *supra* note 15 (FINRA arbitrator and mediator demographic information); JAMS, JAMS PANELIST DEMOGRAPHIC SURVEY (CCP SECTION 1281.96) (2019), <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Panelist-Demographic-Survey-2019.pdf> [<https://perma.cc/8XE9-CBJU>] (JAMS self-reported aggregate arbitrator and mediator demographic information); AM. ARB. ASS'N, ARBITRATOR DEMOGRAPHIC DATA, https://www.adr.org/sites/default/files/document_repository/ArbitratorDemographicData_01132020.pdf [<https://perma.cc/YHE5-WNRZ>] (AAA self-reported aggregate arbitrator and mediator demographic information).

Some groups outside of these arbitral forums have begun identifying neutrals who are also racial or ethnic minorities. See, e.g., NANCY M. THEVENIN & KATHERINE SIMPSON, SIMPSON DISP. RESOL., ARBITRATORS OF AFRICAN DESCENT, <https://www.simpsonadr.net/files/ArbitratorsofAfricanDescentAugust2020-Final.pdf> [<https://perma.cc/9BM5-H65D>] (list including self-identified FINRA qualified arbitrators); *ADR Resources: NBA Certified Panel of Arbitrators and Mediators: View Our Roster of Certified Arbitrators and Mediators*, NAT'L BAR ASS'N, https://www.nationalbar.org/NBAR/about/Resources/ADR_RESOURCES/NBAR/content/ADR_Resources.aspx?hkey=646eda8a-d9a5-4450-b8ff-dcaa07a1d136 [<https://perma.cc/BL59-5FGC>] (identifying arbitrators who are members of the National Bar Association, the largest association of predominantly Black lawyers).

131. AM. ARB. ASS'N, *supra* note 130.

of the responding arbitrators. JAMS data suggest a similar lack of diversity, with 71.16% of responding arbitrators identifying as male, and 87.13% identifying as white.¹³² At 4.04%, JAMS has a similar proportion of Black arbitrators as AAA.¹³³

FINRA's metrics looked very similar to AAA and JAMS in 2014 when PIABA released its study of FINRA's arbitrator pool demographics.¹³⁴ PIABA is a bar association whose members represent claimants in FINRA securities arbitration.¹³⁵ It conducted its study to assess the fairness of mandatory securities arbitration by looking to diversity, capture, and disclosure in FINRA's neutral roster.¹³⁶ The PIABA Report focused on the age and gender of all neutrals who appeared on a FINRA arbitrator selection list.¹³⁷ PIABA's findings mirror AAA and JAMS current gender demographics: an 80/20 split between male and female arbitrators.¹³⁸ The PIABA Report also found that the average age of a FINRA arbitrator was sixty-nine, with 40% of the arbitrator pool over the age of seventy and 17% over the age of eighty.¹³⁹ A FINRA Task Force charged with studying the forum similarly found that diversity was a concern within the forum and something FINRA should remedy.¹⁴⁰

The PIABA Report and the Task Force's findings appear to have prompted FINRA Dispute Resolution to take a close look at its arbitrator roster and to act.¹⁴¹ Starting in 2015, FINRA began measuring and sharing aggregate, self-reported demographic information of arbitrator pool members.¹⁴² These disclosures were shared by FINRA as a result of its self-stated commitment "to provide transparency about the current

132. JAMS, *supra* note 130, at 2–3.

133. *Id.*

134. PIABA REPORT, *supra* note 3, at 28–30.

135. *Id.* at 1 n.1.

136. *Id.* at 8–9.

137. *Id.* at 26–27. PIABA relied upon Arbitrator Disclosure Reports provided to it by its members. *Id.* at 26. Those members had received the reports while representing clients in the FINRA forum. *Id.*

138. *Id.* at 28–30.

139. *Id.*

140. FINRA DISP. RESOL. TASK FORCE, *supra* note 12, at 8 (“[T]he task force heard criticisms about the lack of diversity in the FINRA arbitrator pool and agrees that diversity must be increased.”).

141. PIABA REPORT, *supra* note 3, at 11 (“Right now, investors are forced into FINRA’s flawed system to seek justice. PIABA believes that a viable alternative would do much to clean up FINRA’s arbitration system and, thus, urges Congress to pass the Investor Choice Act of 2013 making securities arbitration optional for investors.”); *Our Commitment*, *supra* note 15 (“FINRA Dispute Resolution Services embarked on an aggressive campaign to recruit new arbitrators with a particular focus on adding arbitrators from diverse backgrounds, professions, and geographical locations . . .”).

142. *Our Commitment*, *supra* note 15 (“To track our progress, we hired a third-party consultant to survey—on an anonymous and voluntary basis—the demographics of the neutrals on our roster in 2016, 2017, 2018, 2019, and 2020.”); *see also* Volpe, *supra* note 125, at 209.

makeup of our arbitrator roster.”¹⁴³ The disclosures also responded both to PIABA’s criticisms that the recruitment of arbitrators was a black box by sharing what FINRA had done to address a lack of diversity within its arbitrator pool¹⁴⁴ and the 2015 Dispute Resolution Taskforce’s recommendation that FINRA continue efforts to diversify the pool, indicating that FINRA is positioned to make moves to increase diversity in its forum.¹⁴⁵ FINRA noted that it had reached out “to more than 100 minority and women’s organizations,” “attend[ed] conferences that attract individuals of varied backgrounds,” and “network[ed] and host[ed] events with diversity-based organizations” all in efforts to expand its arbitrator roster.¹⁴⁶

FINRA’s efforts to diversify its arbitrator roster have been commended, though it and others recognize that additional work must be undertaken.¹⁴⁷ The demographics of FINRA’s arbitrator pool have shifted since the PIABA Report and FINRA began its diversification interventions.¹⁴⁸ FINRA’s 2019 survey suggested that almost 40% of arbitrator entrants that year were women, increasing the overall roster percentage of women to 29%, a nearly 10% change from PIABA’s 2014 report.¹⁴⁹ Black arbitrators comprised 19% of the new arbitrator entrants in the 2019 survey, increasing the percentage of Black arbitrators from 4% to 9% of the FINRA roster in just five years.¹⁵⁰ FINRA’s new arbitrator entrants in recent years, on the whole, reflect greater diversity than was present in the neutral pool in 2014.¹⁵¹ FINRA continues to take

143. *Our Commitment*, *supra* note 15. That FINRA states a commitment to disclosure is not surprising given the significant role that disclosure plays as a regulatory device in securities laws. *See, e.g.*, Nicole G. Iannarone, *Rethinking Automated Investment Adviser Disclosure*, 50 U. TOL. L. REV. 433, 438–40 (2019) (describing ubiquity and role of disclosure across spectrum of securities regulation).

144. *See* PIABA REPORT, *supra* note 3, at 7.

145. FINRA DISP. RESOL. TASK FORCE, *supra* note 12, app. IV at 2 (“FINRA should aggressively recruit applicants for the arbitrator pool, with a view to increasing both the depth and the diversity of the pool.”).

146. *Our Commitment*, *supra* note 15.

147. FINRA DISP. RESOL. TASK FORCE, *supra* note 12, at 9 (“The task force commends FINRA’s recent recruitment efforts. It recommends that FINRA continue efforts to develop effective strategies to recruit aggressively applicants for the arbitrator pool, with a view to increasing both the depth and the diversity of the pool, and to monitor the results.”); *id.* at 9–10 (“FINRA’s website, as well as its recruitment materials, should be reviewed to ensure that they convey a message of inclusiveness and do not discourage from applying qualified and diverse individuals with a variety of educational backgrounds and work experiences.”).

148. *Compare* PIABA REPORT, *supra* note 3, at 28–31 (PIABA 2014 findings), *with* *Our Commitment*, *supra* note 15 (changes to neutral roster demographics since the PIABA report).

149. PIABA REPORT, *supra* note 3, at 28.

150. *Our Commitment*, *supra* note 15.

151. *Id.*

steps to add more diverse arbitrators to its roster.¹⁵²

Coupled with the transparency FINRA provides through its publicly available awards, its recent efforts to diversify its arbitrator pool position it well to serve as a case study into the impact of increasing arbitrator pool diversity across mandatory arbitration forums. FINRA's arbitrator pool should be specifically examined to determine whether its interventions resulted in inclusion. Societal focus on increasing diversity, equity, and inclusion in recent years makes this an opportune time to investigate the impact of diversity interventions on inclusion. Today, financial industry participants, including FINRA member firms, seem invested in retreating from the homogeneity that has plagued the field for decades, taking cues from their constituents and protestors to denounce racism and highlight commitments to equity and inclusion. FINRA reiterated its commitment to diversity and inclusion mid-2020 after the death of George Floyd, with its board publicly stating that it "support[s] management's determination to work collaboratively with others to promote greater diversity and inclusion across the industry, so that the industry can better engage traditionally underinvested communities and better represent and serve the needs of all investors."¹⁵³ A year later, FINRA followed through on its initial statement, issuing a request for comment "on any aspects of our rules, operations and administrative processes that may create unintended barriers to greater diversity and inclusion in the broker-dealer industry or that might have unintended disparate impacts on those within the industry."¹⁵⁴ SEC commissioners have repeatedly stated their support for further diversification of who invests in America, closing the racial investment gap.¹⁵⁵

152. *Id.* ("While we are encouraged by these short-term results and incremental progress made, we recognize this is a long-term effort. There is more progress to make and we remain fully committed toward achieving our diversity goals.").

153. *Statement of the FINRA Board of Governors*, FINRA (June 11, 2020), <https://www.finra.org/about/governance/finra-board-governors/statement-bog-from-june-11-2020> [<https://perma.cc/HRR6-LQ8H>].

154. *Regulatory Notice 21-17: Diversity and Inclusion: FINRA Seeks Comment on Supporting Diversity and Inclusion in the Broker-Dealer Industry*, FINRA (Apr. 29, 2021), <https://www.finra.org/sites/default/files/2021-04/Regulatory-Notice-21-17.pdf> [<https://perma.cc/QGH6-V5WA>]; see also Benjamin P. Edwards, *FINRA Diversity Initiative*, LAW PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (July 1, 2021), https://lawprofessors.typepad.com/business_law/2021/07/finra-diversity-initiative.html [<https://perma.cc/7ZR3-V6MD>]; Letter from Nicole G. Iannarone, Assistant Professor of L., Drexel Univ. Sch. of L., to Jennifer Piorko Mitchell, Off. of the Corp. Sec'y, FINRA (June 25, 2021), https://www.finra.org/sites/default/files/NoticeComment/Nicole%20G.%20Iannarone_6.25.2021%20-%202021%206%2025%20Iannarone%20Comment%20FINRA%20Reg%20Notice%2021-17.pdf [<https://perma.cc/FN3L-4SEV>].

155. See, e.g., Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at the Meeting of the Investor Advisory Committee (Sept. 24, 2020), <https://www.sec.gov/news/public-statement/clayton->

Financial services firms based in Minneapolis, many of whom appear regularly as respondents in the FINRA forum, also issued public statements after George Floyd's death supporting equity, anti-racism, diversity, and inclusion.¹⁵⁶ Ameriprise CEO Jim Cracchiolo publicly denounced racism and recommitted to prior efforts to "be part of the solution and a positive influence as an organization and industry leader."¹⁵⁷ Cracchiolo committed to "furthering our important diversity and inclusion efforts that have always served to strengthen our culture."¹⁵⁸ Leaders of major financial institutions outside Minneapolis likewise publicly stated their support for Black Lives Matter and pledged to taking substantial and meaningful steps to address racial disparities in their companies.¹⁵⁹ For example, Wells Fargo CEO Charles Scharf stated that "our company will do all we can to support our diverse communities and foster a company culture that deeply values and respects diversity and inclusion."¹⁶⁰

iac-2020-09-24 [https://perma.cc/4JLS-X7XM] ("I firmly believe the Commission's focus on promoting diversity, inclusion, and opportunity, both within the SEC and in the industries and markets we oversee, is of paramount importance. . . . Over 60 million U.S. households are currently invested in our markets, but a closer look reveals considerable differences across demographic groups. For example, while an estimated 61 percent of white households are invested, whether directly or through retirement accounts, that number falls to 31 percent for black households and 28 percent for Hispanic households. We should continually assess where we can do more to facilitate an inclusive environment for new investors, and this is particularly true for those from underrepresented communities in order to address the existing wealth gap.").

156. See, e.g., Janet Levaux, *Twin Cities Financial Firms Speak Out After Floyd's Killing, Protests*, THINKADVISOR (June 1, 2020, 3:41 PM), <https://www.thinkadvisor.com/2020/06/01/twin-cities-financial-firms-speak-out-after-floyds-killing-protests/> [https://perma.cc/27BK-HWBN] (detailing statements by CEOs in the Minneapolis/St. Paul area).

157. Jim Cracchiolo, *A Message from Jim Cracchiolo, Chairman and Chief Executive Officer*, AMERIPRISE FIN. (June 2, 2020), <https://www.ameriprise.com/financial-planning/about/responsible-business/message-from-CEO/> [https://perma.cc/KU46-W4XD].

158. *Id.*

159. See, e.g., Hugh Son, *'Appalled'—Here's What Wall Street CEOs Are Saying About the Killing of George Floyd and Protests Rocking US Cities*, CNBC (June 1, 2020, 3:15 PM), <https://www.cnbc.com/2020/06/01/wall-street-ceos-speak-out-about-george-floyd-and-protests-rocking-us-cities.html> [https://perma.cc/66DS-C534] (collecting public statements of financial institution leaders); *id.* (statement of Citigroup's Chief Financial Officer) ("These systemic problems will not go away until we confront them head on. So we must continue to speak up and speak out whenever we witness hatred, racism or injustice."); *id.* (statement of Jamie Dimon, CEO of J.P. Morgan Chase) ("Now, more than ever, each of us must be inclusive in our work and in the neighborhoods where we operate."); *id.* (statement of Brian Moynihan, CEO of Bank of America) ("[W]e can and will build on what our company is already doing. . . . This includes our ongoing work to help drive diversity and inclusion, racial equality, economic opportunity and upward mobility, and to deliver on our purpose.").

160. *Id.*

C. *Measuring Impact of FINRA's Arbitrator Pool Diversification*

The current seemingly-universal statements calling for greater diversity and inclusion within the financial industry and within FINRA's arbitrator pool must be assessed to determine if the financial industry assertions are in fact being implemented or are better described as "woke-washing."¹⁶¹ Recognizing that FINRA admits that it has work to do does not mean, however, that its progress to date should not be studied to determine if investment in arbitrator recruitment efforts translates into new entrants serving as arbitrators.¹⁶² Or, in other words, now that more are invited to the pool, are they included in the free swim?

FINRA's diversity metrics do not include information concerning whether and to what extent the newly-recruited members of its arbitrator pool have been selected to serve as arbitrators.¹⁶³ FINRA may believe that the diversity of the pool, and not of whether diverse panelists are selected, is the most important metric.¹⁶⁴ ADR experts, however, disagree.¹⁶⁵ Inclusion within ADR can only be achieved if all arbitrators on the roster have a real opportunity to, and do, serve as neutrals adjudicating a proceeding.¹⁶⁶ Indeed, some argue that diverse neutrals may be deterred from joining a forum if it is not evident that they will be included therein.¹⁶⁷ FINRA publicly asserts, and many scholars agree, that FINRA

161. Erin Dowell & Marlette Jackson, "Woke-Washing" Your Company Won't Cut It, HARV. BUS. REV. (July 27, 2020), <https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it> [<https://perma.cc/U24G-Q4PG>] (defining woke-washing as "appropriating the language of social activism into marketing materials"); see also Marcia Narine Weldon, *Wokewashing and the Board*, LAW PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Aug. 14, 2020), https://lawprofessors.typepad.com/business_law/2020/08/wokewashing-and-the-board.html [<https://perma.cc/5ME2-AA6U>] ("Wokewashing occurs when a company attempts to show solidarity with certain causes in order to gain public favor."); Dowell & Jackson, *supra* ("Empty company statements can seem to say that Black lives only matter to big business when there's profit to be made.").

162. See *Our Commitment*, *supra* note 15.

163. See *id.* (noting statistics only relating to members of the arbitrator and mediator pool, not whether they are chosen on cases).

164. See *id.*; Raagas De Ramos, *supra* note 19 (writing FINRA Director of Dispute Resolution Services "says it's not about having diversity matching between the actual arbitrators selected and a party for a case, but it's all about the pool of arbitrators").

165. See, e.g., Cole, *Arbitrator Diversity*, *supra* note 1, at 969–70; Feerick & Gerstel, *supra* note 81, at 3 ("Improving the diversity of the pool of candidates is not enough if parties and counsel do not select diverse candidates. Setting benchmarks and collecting data on progress and publishing, and aggregating data help promote transparency about the state of diversity and facilitate improvements.").

166. See Cole, *Arbitrator Diversity*, *supra* note 1, at 968–69.

167. Volpe, *supra* note 125, at 212 ("[I]f the extent of varied backgrounds cannot be identified, efforts to attract future pools of applicants from them may be stifled because, among other reasons, they may not feel welcome.").

believes in transparency concerning the demographic makeup of its arbitrator pool¹⁶⁸ and it is on the whole more transparent than most arbitration forums.¹⁶⁹ If FINRA provided additional information not currently publicly available—such as the names of the arbitrators associated with each hearing location, the date when the arbitrator joined the roster, the number of times each arbitrator’s name has been included as a potential arbitrator on a list to the parties, the number of times the arbitrator has been appointed to serve, and the number of times the arbitrator served on a customer proceeding that resulted in a hearing and concluded with an award—FINRA’s efforts to foster diversity and inclusion could be evaluated.¹⁷⁰ Nevertheless, these current limitations should not halt assessment efforts. Evaluation of the limits of existing transparency and diversity efforts provide guidance to other arbitration forums seeking to become more representative of the consumers whose claims they determine. FINRA’s current disclosure regime provides a basis from which to evaluate two different but related concepts: (1) the utility of FINRA’s transparency; and (2) whether and to what extent newly recruited arbitrators, who exhibit more diversity than the pre-2015 pool, are included. In order to so study, an understanding of mechanics of arbitrator selection in FINRA proceedings is necessary.

168. See *Our Commitment*, *supra* note 15 (“FINRA strives to provide transparency about the current makeup of our arbitrator roster.”); Gross, *The End of Mandatory Securities Arbitration?*, *supra* note 4, at 1188 (“FINRA Dispute Resolution actively promotes transparency of the arbitration process.”). *But see* Choi et al., *supra* note 115, at 45 (arguing that the FINRA forum is not transparent); Barr, *supra* note 4, at 809 (describing lack of transparency, including lack of written decisions, as a “[p]rocedural [b]arrier[] to [f]ull and [f]air [a]djudication”).

169. See Iannarone, *Finding Light*, *supra* note 13, at 2–3.

170. See Volpe, *supra* note 125, at 213 (“While it is relatively easy to make a strong case for diversity in the dispute resolution field, its measurement remains challenging. Much needed are (1) demographic statistics, (2) a more explicit characterization of diversity itself, and (3) how context impacts diversity in the dispute resolution field.”). On the other hand, the public provision of some information—demographic information associated with each arbitrator—may prove problematic as some arbitrators might be reluctant to share it and parties might use it in unintended ways. See, e.g., *id.* at 212 (“Due to the limited access to processes, concerns about implicit biases, stigmas, and other reasons for non-disclosure, the measurement of diversity in the dispute resolution field remains daunting.”); see also Choi et al., *supra* note 115, at 60 (“We also note that the decision makers in the FINRA system function as a type of hybrid between a judge and a jury. The potential effect of juror experience as well as race, gender, and other juror characteristics has led to a complex system of jury selection. Given the potential significance of juror selection, a literature has developed on the extent to which it is appropriate for parties to consider certain characteristics in the selection or challenge of jurors. The parties to a FINRA arbitration participate in the selection of the arbitrators, just as litigants do in the selection of juries, but not judges. The party selection system raises the additional question, not presented by the judicial decision-making literature, of whether party selection can mitigate or eliminate the effect of characteristics that might bias the decision maker.”).

III. FINRA ARBITRATORS: POOL AND SELECTION

Arbitrator qualification and selection has long been viewed as necessary to ensure the substantive fairness to investor claimants and been a continued focus as FINRA and regulators review the FINRA Code of Customer Procedure.¹⁷¹ From the inception of securities arbitration to today, arbitrator selection has shifted to provide parties with more agency in selecting who will resolve the dispute in order to promote investor trust and confidence.¹⁷² Yet, the system also has embedded structural barriers preventing the expansion of the arbitrator roster for smaller claims—the very types of disputes that were so necessary to ensuring public trust and confidence in the securities markets. The following section provides an overview of the FINRA arbitrator qualification and selection system to contextualize the empirical analysis to come.

A. *Evolution of Arbitrator Qualification and Selection*

As early as 1977, the forum selected arbitrators in customer securities arbitration cases, a convention that continued for twenty years.¹⁷³ Thus, by the time the Supreme Court began its embrace of mandatory securities arbitration in *McMahon* and its progeny, parties had nearly a decade's worth of experience in a forum where they could not choose an arbitrator.¹⁷⁴ Shortly after the Supreme Court blessed securities arbitration in *McMahon*, the SEC began evaluating arbitrator classification and selection, asking whether individuals with significant securities experience, such as retired industry members, should serve as public

171. See Gross, *supra* note 75, at 119; FINRA DISP. RESOL. TASK FORCE, *supra* note 12, at 6 (“The quality of dispute resolution at the FINRA forum depends greatly on the abilities and commitment of the individuals who serve as arbitrators.”); NASD DISP. RESOL., THE ARBITRATION POLICY TASK FORCE REPORT: A REPORT CARD 7 (2007), <https://www.finra.org/sites/default/files/Industry/p036466.pdf> [<https://perma.cc/92D4-2WQS>] (“The core component of any arbitration system is, of course, the arbitrators.”).

172. See, e.g., FINRA DISP. RESOL. TASK FORCE, *supra* note 12, at 46 (“[D]espite FINRA’s adoption of rule changes designed to increase investor confidence (e.g., neutral-list selection procedures for arbitrators, the all public panel option), criticisms of mandatory arbitration persist, and the lack of investor choice continues to generate at least some distrust of the FINRA forum.”).

173. See SECURITIES INDUSTRY CONFERENCE ON ARBITRATION: NINTH REPORT 12 (1996); SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, FIRST REPORT: REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION 4–5 (1977); see also Katsoris, *supra* note 80, at 67 (“Initially, the Old Uniform Code provided that the Director of Arbitration of the SRO choose the panel and its chairperson, and directed that the majority of the panel of arbitrators be public arbitrators (not be from the securities industry) . . .”).

174. See Katsoris, *supra* note 80, at 67.

arbitrators and whether additional training was necessary.¹⁷⁵ The Securities Industry Conference on Arbitration (SICA) responded with a new model code specifying how public and industry arbitrators were to be classified and recommending that investor disputes would be resolved by a majority public panel, changes the SEC ultimately adopted.¹⁷⁶

But it was not until 1998 that parties had a voice in selecting arbitrators for securities disputes.¹⁷⁷ The change was recommended in a 1996 report by the National Association of Securities Dealers (NASD) Arbitration Policy Task Force.¹⁷⁸ The reforms recommended by the Ruder Report focused on meeting two aims: “first, the selection of unbiased, competent, experienced arbitrators, and second, opportunity for the parties to participate in arbitrator selection.”¹⁷⁹ The change was embraced by NASD “as a general principle that parties in arbitration be given more input into the selection of arbitrators.”¹⁸⁰

175. Letter from Richard G. Ketchum, Dir., U.S. Sec. & Exch. Comm'n, to James E. Buck, Senior Vice President & Sec'y, N.Y. Stock Exch. 2 (Sept. 10, 1987) (on file with *Washington Law Review*) (“[I]ndustry affiliations of public arbitrators may undermine public confidence regardless of the character of the individual arbitrator.”); *id.* at 4 (“[T]he SROs have administered virtually no formal training for arbitrators on matters relating to either . . . relevant state law, or securities law.”); *see also* Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 165 (2005) (arguing that NASD did not adequately train arbitrators and that the lack of expert arbitrators is detrimental to securities arbitration).

176. *See* Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Associations of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, Exchange Act Release No. 26,805, 54 Fed. Reg. 21,144 (May 10, 1989). *See generally* Mahlon M. Frankhauser & Linda M. Gardner, *An Up-to-Date Review of Judicial, Legislative, and Regulatory Developments in Arbitration with Financial Institutions*, 46 WASH. & LEE L. REV. 583, 614–24 (1989) (describing post-*McMahon* changes to securities arbitration procedures).

177. *See* Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 3 and 4 to Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Selection of Arbitrators in Arbitrations Involving Public Customers, Exchange Act Release No. 40,555, 63 Fed. Reg. 56,670 (Oct. 22, 1998).

178. *See generally* DAVID S. RUDER, LINDA D. FIENBERG, JOHN W. BACHMANN, STEPHEN J. FRIEDMAN, STEPHEN L. HAMMERMAN, J. BOYD PAGE, FRANCIS O. SPALDING & RICHARD E. SPEIDEL, *SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE* (1996) [hereinafter RUDER REPORT].

179. David S. Ruder, *Elements of a Fair and Efficient Securities Arbitration System*, 40 ARIZ. L. REV. 1101, 1104 (1998).

180. Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Selection of Arbitrators in Arbitrations Involving Public Customers, Exchange Act Release No. 40,261, 63 Fed. Reg. 40,761 (July 24, 1998); *see also* Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 3 and 4 to Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Selection of Arbitrators in Arbitrations Involving Public Customers, Exchange Act Release No. 40,555, 63 Fed. Reg. at 56,681–84 (approving NASD arbitrator classification and selection procedures); NASD DISP. RESOL., *supra* note 171, at 7 (“In November 1998, NASD

Subsequent years brought additional refinements, a process resulting from SRO monitoring of arbitrator selection in action.¹⁸¹ The “complicated rotational system” from which arbitrator names were drawn for selection was replaced “with a simplified random selection system” in 2007.¹⁸² In response to party complaints about “inexperienced chairpersons,” the arbitration code was also amended to create a new, separate list of chair-qualified arbitrators who completed a specialized training session and had certain experiences as an arbitrator within the forum before they were allowed to preside as a chair over a claim.¹⁸³ A chair leads the arbitration proceedings and has other responsibilities separate from the rest of the panel.¹⁸⁴ Previously, NASD had only offered voluntary training to arbitrators chosen to serve as a chair, but no other experiential or educational qualification had been required for chair

implemented the arbitrator list selection system. . . . NLSS allows the parties to have direct input into the arbitrator selection process and ensures that NASD staff does not control arbitrator appointment.”).

181. *See* Gross, *supra* note 75, at 22 (“NASD Dispute Resolution has been actively monitoring the quality of its arbitrator roster in recent years, and has adopted the Neutral List Selection System for arbitrator selection and has enhanced its training and testing requirements.”).

182. NASD DISP. RESOL., *supra* note 171, at 7.

183. *See* Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto, Exchange Act Release No. 55,158, 72 Fed. Reg. 4573 (Jan. 31, 2007) (approving changes to require training and prior service to serve as public chair arbitrator); NASD DISP. RESOL., *supra* note 171, at 7, 10–11 (“In response to the Task Force [Ruder] Report, NASD developed a training course in 1996 designed to assist arbitrators serving as chairpersons. The course instructs arbitrators on the additional responsibilities of arbitrators assuming the crucial role of chairperson. In 2003, NASD updated the materials for the chairperson course and converted the course to an online format. In the Revised Code [applicable in 2007], successful completion of this course will be a prerequisite for serving as a chairperson, unless the arbitrator can demonstrate substantially equivalent training or experience.”); FINRA OFF. OF DISP. RESOL., CHAIRPERSON TRAINING 6 (2021), https://www.finra.org/sites/default/files/FINRA_Chairperson_Training.pdf [<https://perma.cc/CUZ3-C4LR>] (“In their unique role, Chairpersons must: [e]nsure that their fellow panelists display appropriate arbitrator qualities[:]; [s]et an appropriate tone with the panel and the parties during all arbitration stages[:]; [d]emonstrate respect for all panel members and involve them in conducting fair hearings that result in final decisions on all properly submitted issues[:]; [d]emonstrate respect for all parties, representatives, and other hearing participants.”).

184. *See Regulatory Notice 21-04: FINRA Amends Arbitration Codes to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees*, FINRA (Apr. 19, 2021), <https://www.finra.org/rules-guidance/notices/21-04> [<https://perma.cc/5YFL-SCVC>] (“[C]hairs are required to lead the prehearing conferences and perform additional tasks in connection with the prehearings, such as setting discovery, briefing and motion deadlines, scheduling subsequent hearing sessions, and drafting prehearing orders.”); JASON RYAN DOSS & RICHARD STANISLAW FRANKOWSKI, *THE PRACTITIONER’S GUIDE TO SECURITIES ARBITRATION* 122 (2013) (“The rationale for having the chairperson roster is to ensure that at least one of the arbitrators on a panel has experience in procedural and substantive issues that arise in arbitration proceedings.”).

service until 2007.¹⁸⁵ FINRA has continued to modify the arbitrator selection process, with changes to chair eligibility requirements and classification of arbitrators as public or non-public, changes that impact who is able to hear various types of claims.¹⁸⁶

B. *Arbitrator Selection Process Today*

Today, the selection of arbitrators is guided by the quantum of relief requested by the party initiating the claim, known as the claimant.¹⁸⁷ Smaller claims are heard by a one-arbitrator panel, and larger claims are heard by a panel of three arbitrators unless the parties agree otherwise in writing.¹⁸⁸ The cut-off point for one arbitrator cases is \$100,000; in cases greater than that amount, or cases in which the claimant does not specify the amount of monetary damages, a three-arbitrator panel will decide the

185. Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto, Exchange Act Release No. 55,158, 72 Fed. Reg. at 4586–87 (approving change requiring public arbitrators to complete training and experience minimums before serving as a chair); Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes, Exchange Act Release No. 51,856, 70 Fed. Reg. 36,442 (June 15, 2005) (proposal to change customer code to require training and other qualifications prior to serving as a public chair); Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes, Exchange Act Release No. 51,857, 70 Fed. Reg. 36,430, 36,434 (June 15, 2005) (“Although NASD provides voluntary chairperson training to its arbitrators, arbitrators who serve as chairperson are not currently required to have chairperson training, to have any particular experience, or to meet any other specific criteria beyond the requirements for serving as an arbitrator. Over the years, one of the most frequent suggestions for improving the quality and efficiency of NASD arbitrations is to ensure that chairpersons, who play a vital role in the administration of cases, have some degree of arbitrator experience and training. NASD agrees that requiring trained and experienced chairpersons would significantly enhance the quality of its arbitration forum.”).

186. See Choi et al, *supra* note 115, at 52–57 (describing post-1998 changes to FINRA arbitrator selection process through 2014); see also Barr, *supra* note 4, at 803 (“FINRA and the SEC [have] garnered praise for this move, but its actual impact is not yet clear.”). An arbitrator is classified as non-public if they are qualified to serve as an arbitrator but have industry ties. FINRA, RULE 12100(t) (2020); see also *id.* 12100(aa)(1)–(4) (listing reasons for permanent bar from serving as a public arbitrator by virtue of working for an entity regulated by the SEC, serving for more than 15 years as an attorney or other professional to an SEC-regulated entity, or working for more than 15 years for a bank or similar entity that engaged in securities transactions); *id.* 12100(5)–(11) (describing temporary disqualification for service as public arbitrator due to own business activities, activities of employer, or immediate family member). A public arbitrator is any arbitrator who is not excluded from service due to significant industry ties. See generally *id.*

187. See *Arbitrator Selection*, FINRA, <https://www.finra.org/arbitration-mediation/arbitrator-selection> [<https://perma.cc/AT3B-H5MX>] (describing how arbitrators are selected in investor and industry cases); FINRA, RULE 12100(g) (“The term ‘claimant’ means a party that files the statement of claim that initiates an arbitration under Rule 12302.”); see also Barr, *supra* note 4, at 802 (describing arbitrator selection process and critiques thereof).

188. See generally FINRA, RULE 12401 (2012).

case.¹⁸⁹ One need not be an attorney in order to serve as a FINRA arbitrator, but instead must only have “at least five years of paid business and/or professional experience—inside or outside of the securities industry—and at least two years of college-level credits.”¹⁹⁰ It surprises many that an arbitrator deciding a FINRA proceeding need not be a lawyer and need not have (and, in fact must not have, in many circumstances) securities industry experience. A significant percentage of FINRA arbitrators are not lawyers.¹⁹¹ Throughout the years, there has been debate about whether securities or legal experience is necessary to securities arbitration, with the forum opting to strike a balance between experienced arbitrators and lay persons, a decision that some argue reduces arbitrator competence.¹⁹²

Parties drive arbitrator selection through a striking and ranking process.¹⁹³ Within thirty days after the last respondent’s answer is due, FINRA sends NLSS-generated lists to the parties so that they can strike and rank arbitrators.¹⁹⁴ In three-arbitrator cases, three lists are randomly

189. *Id.* 12401(c) (describing panel composition in cases where monetary damages sought by claimant exceeds \$100,000 or are not specified).

190. *Become an Arbitrator: Frequently Asked Questions (FAQ)*, FINRA, <https://www.finra.org/arbitration-mediation/become-arbitrator-frequently-asked-questions-faq> [<https://perma.cc/QTA9-F5PC>].

191. Gross, *supra* note 75, at 31–33 (noting that, in 2008, “more than half of NASD arbitrators [were] not lawyers”).

192. Ruder, *supra* note 179, at 1104 (“The Task Force struggled with the question whether arbitrators should be professionals who could bring expertise and procedural consistency to the arbitration process or whether they should be lay persons who would provide the informal and equitable characteristics customarily associated with arbitration. The Task Force recommended that arbitration panels continue to be composed of one industry member with knowledge and expertise regarding brokerage firm operation and securities matters and two public arbitrators. In recognition of the increasing procedural and substantive complexity of securities arbitration, the Task Force also recommended that panel chairs ‘should be required to demonstrate a strong command of NASD arbitration procedure and general arbitration techniques, as well as familiarity with industry practices and substantive law.’” (quoting RUDER REPORT, *supra* note 178)); FINRA DISP. RESOL. TASK FORCE, *supra* note 12, at 9 (“While the task force agreed that a deep and diverse pool of arbitrators is important to the operation of the forum, members expressed different views about the most important characteristics in an arbitrator. . . . Simply put, the question is whether the arbitrator should more closely resemble a juror or judge. Since the task force was not able to reach consensus on this question, it decided that the best solution was for FINRA to develop an arbitrator pool with sufficient variety to reflect the parties’ preferences.”).

193. FINRA, RULE 12400 (2020) (describing Neutral List Selection System and public chairperson eligibility); *id.* 12402(d), (f) (2017) (arbitrator selection in one-arbitrator cases); *id.* 12403(c)–(d) (2017) (arbitrator panel selection in three-arbitrator cases).

194. FINRA, RULE 12402 (2017) (cases with one arbitrator); *id.* 12403(c) (2017) (cases with three arbitrators).

generated by NLSS¹⁹⁵ and sent to the parties.¹⁹⁶ These lists include one list of fifteen public arbitrators, one list of ten non-public arbitrators, and one list of ten public, chair-qualified arbitrators.¹⁹⁷ An arbitrator is classified as non-public if they are qualified to serve as an arbitrator but have industry ties.¹⁹⁸ A public arbitrator is any arbitrator who is not excluded from service due to significant industry ties.¹⁹⁹ To become a chairperson, a public arbitrator must either (1) be a lawyer and have served as an arbitrator on at least one arbitration case that concluded in an award after a hearing or (2) have served on three arbitration panels that concluded in an award after a hearing.²⁰⁰ Public chairpersons currently have two chances to be selected in a three-arbitrator case; if their name does not appear on the chairperson list, they are eligible to be listed on the public list.²⁰¹ In the Philadelphia hearing location,²⁰² for instance, as of September 2021, there were thirty-two public chairs and 134 public arbitrators.²⁰³ If a customer claim seeking more than \$100,000 was filed and assigned to the Philadelphia hearing location at that time, assuming that none of the Philadelphia chairs have a conflict barring their service,²⁰⁴ ten names would be drawn from thirty-two²⁰⁵ to populate the public chair

195. *Arbitrator Selection*, *supra* note 187 (“The NLSS arbitrator list selection process is random. The randomized process has been verified by an Ernst & Young audit in a report that confirmed that a ‘random pool management algorithm [is] used to ensure that each arbitrator in the pool has the same opportunity to appear on a list as all other arbitrators in that pool.’”).

196. *Id.*

197. FINRA, RULE 12403(a) (2017).

198. *Id.* 12100(t) (2020); *see also id.* 12100(aa)(1)–(4) (listing reasons for permanent bar from serving as a public arbitrator by virtue of working for an entity regulated by the SEC, serving for more than fifteen years as an attorney or other professional to an SEC regulated entity, or working for more than fifteen years for a bank or similar entity that engaged in securities transactions); *id.* 12100(aa)(5)–(11) (describing temporary disqualification for service as public arbitrator due to own business activities, activities of employer, or immediate family member).

199. *Id.* 12100(aa).

200. *Id.* 12100(c) (describing requirements for chair qualification).

201. *Id.* 12403(a)(2) (2017) (“The Neutral List Selection System will generate the chairperson list first. Chair-qualified arbitrators who were not selected for the chairperson list will be eligible for selection on the public list. An individual arbitrator cannot appear on both the chairperson list and the public list for the same case.”).

202. Philadelphia is the hearing location nearest the author.

203. *Hearing Location Statistics*, *supra* note 30.

204. FINRA, RULE 12403(a)(3) (2017).

205. If a hearing location has less than thirty public chair arbitrators, FINRA alters the chair selection procedure by adding non-local public chairs to the pool. *See Hearing Location Statistics*, *supra* note 30 (“We expand arbitrator pools in select hearing locations as case demand requires.”); Notice of Filing of a Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 78,729, 81 Fed. Reg. 61,288 (Sept. 6, 2016) (“To expand the roster of public chairpersons

list.²⁰⁶ The remaining twenty-two names would then be added to the 134 public arbitrators. From these 156 names, fifteen would be chosen to populate the public arbitrator list.²⁰⁷

Each separately represented party then engages in striking and ranking of arbitrators on each list.²⁰⁸ Of the ten names on the public chairperson list, each separately represented party may strike up to four and must then rank the remaining six chairs in order of the party's preference.²⁰⁹ A similar process occurs for the public arbitrator list, except that each separately represented party may strike up to six names from the list.²¹⁰ After the parties' rankings are combined, FINRA selects the highest ranking non-stricken name on each of list to serve as the public chair and the public arbitrator.²¹¹

The non-public arbitrator selection mechanism follows a different procedure, permitting parties to strike up to all of the arbitrators on the non-public arbitration list.²¹² The rationale for this option is to ensure that customers have the ability to obtain an all-public panel if they so choose.²¹³ Many practitioners representing claimants may wish to strike all of the industry members unless the claimant has a particularly strong claim where the stockbroker is clearly engaged in substantial misconduct.²¹⁴ If any names remain on the non-public list, the highest

in locations where the ratio of cases to qualified public chairpersons is higher, FINRA asks many public chairpersons to serve in multiple hearing locations."); *Arbitration Selection*, *supra* note 187 (noting that three passes used by NLSS "to ensure that there is a sufficient arbitrator pool from which to generate random lists" for arbitrator selection).

206. FINRA, RULE 12403(a)(1) (2017).

207. *Id.*

208. *See generally id.* 12403(c). When I teach arbitrator selection to students, I share knowledge I gained from experienced claimants counsel, who have cautioned me about naming too many parties as respondents—in addition to increasing the complexity of the proceeding with marginal gain, it is possible for respondents to coordinate their ranking and striking to eliminate nearly all but their top choices for arbitrator. This provision for the ranking and striking of arbitrators presents opportunities for gamesmanship and its impact should be further examined, particularly where there is a mismatch between the number of parties and their respective resources. For example, claimants may have less ability to afford private counsel whereas brokerage firms may have inhouse counsel available to defend the firm and more significant monetary resources to obtain outside counsel for their stockbroker employees in the same proceeding.

209. FINRA, RULE 12403(c)(2) (2017).

210. *Id.*

211. *See id.* 12403(d)–(e) (describing list combination and selection procedure).

212. *Id.* 12403(c)(1); *see also* DOSS & FRANKOWSKI, *supra* note 184, at 124.

213. *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/9FKB-F9LY>] (codification of the all-public panel option).

214. *Cf.* Choi et al., *supra* note 115, at 46 ("FINRA's reforms to the definition of 'independent

ranked remaining arbitrator, after combining the parties' respective rankings, will serve on the panel.²¹⁵ If no non-public arbitrator remains, that space on the panel will be filled from the highest remaining public arbitrator on the public arbitrator list remaining after a public arbitrator is selected, followed by the chair list if the public arbitrator list cannot fill the vacancy.²¹⁶

Cases decided by one arbitrator follow a similar procedure, except that the sole arbitrator is selected from a single list of public, chair-qualified arbitrators.²¹⁷ Each separately represented party may strike up to four of the arbitrators on the public chair list, and they then rank any remaining arbitrators, with FINRA choosing the highest ranked remaining arbitrator to preside over the case after combining the parties' respective rankings.²¹⁸

C. *Barriers to Public Chair Qualification*

Restrictive experiential requirements hinder public arbitrators' ability to become chair-qualified. As a result of arbitrator selection mechanisms, single arbitrator proceedings present an interesting scenario. These proceedings determine smaller claims and are the reason for which a uniform arbitration code was originally created to address the need to instill public trust in arbitration and the securities markets.²¹⁹ Smaller claims can only be decided by public arbitrators who possess a combination of experience in hearing cases and complete specialized training, but who have no specialized experience in the securities industry lest their industry experience render them biased and unfairly prejudice claimants.²²⁰ As is true with cases that begin in a trial court, few

arbitrator' suggest concern about the role arbitrator background may play in the outcome of arbitration cases. The party selection process, however, may mitigate these effects as parties reject arbitrators who may be unsympathetic to their claims.'"). This choice is supported by scholarship establishing a correlation between an arbitrator's industry experience and a lower dollar recovery for unrepresented claimants. *Id.* at 73; see also Edwards, *The Dark Side of Self-Regulation*, *supra* note 57, at 587 ("[A]rbitrator background certainly influences outcome for investor claimants.'").

215. FINRA, RULE 12403(d) (2017).

216. *Id.* 12403(e)(3).

217. See generally FINRA, RULE 12402 (2017) (describing selection of arbitrators in one-arbitrator cases).

218. *Id.* 12402(d)–(f).

219. See *supra* notes 69–71 and accompanying text.

220. FINRA, RULE 12400(c) (2020) (describing eligibility criteria for inclusion on FINRA chairperson roster); see also *Arbitrators FAQ*, FINRA, <https://www.finra.org/arbitration-mediation/overview/additional-resources/faq/arbitrators> [<https://perma.cc/43BA-WCJX>] ("Arbitrators are eligible for the chairperson roster if they have completed chairperson training

proceedings initiated in the FINRA forum conclude with an arbitrator's award after a hearing.²²¹ For example, of all cases decided in the FINRA forum in 2019—industry and customer—only 13% were decided by arbitrators after a regular hearing.²²² Thus, after the 2007 chair qualifications were added, in order to qualify to appear on an arbitrator selection list for a smaller customer case, an arbitrator must have proceeded through several steps, which might take a significant amount of time to complete.²²³

The arbitrator could complete the prerequisites by serving as a public arbitrator in customer cases seeking greater than \$100,000.²²⁴ To proceed through this path, first, the arbitrator must appear on a list of public arbitrators in a customer case, not be stricken by any party, and be ranked high enough by all parties to be selected.²²⁵ Public arbitrators already face an uphill battle in this regard as public, chair-qualified arbitrators who are not already listed on the public chair list are included in the pool from which the public list is selected.²²⁶ Even if a public arbitrator makes it past these two barriers, the public arbitrator must also be lucky enough to serve on one of the historical average of 18% of cases that proceeds to an award

provided by FINRA and: have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least one arbitration administered by a self-regulatory organization in which hearings have held; or have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.”); Choi et al., *supra* note 115, at 46 (“FINRA’s reforms to the definition of ‘independent arbitrator’ suggest concern about the role arbitrator background may play in the outcome of arbitration cases.”).

221. See, e.g., *Resolution and Results for Customers*, FINRA, <https://www.finra.org/arbitration-mediation/resolution-and-results-customers> [<https://perma.cc/P9EW-TVJ5>] (“In FINRA arbitration, the majority of customer cases—approximately 69%—result in settlements reached by the parties. Typically, approximately 18% of all cases proceed to award.”).

222. *Dispute Resolution Statistics*, FINRA, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#virtual> [<https://perma.cc/P54A-ZFXS>].

223. FINRA, RULE 12400(c) (2020).

224. *Regulatory Notice 11-05: Customer Option to Choose an All Public Arbitration Panel in All Cases*, *supra* note 213, at 2.

225. See FINRA, RULE 12403 (2017) (describing selection process for public arbitrators in three-arbitrator cases).

226. *Id.* 12403(a)(2) (describing public chairs’ double chance to appear in a three-arbitrator proceeding, on either the public chair or public arbitrator lists). Note also that public chairs who obtained the experiential qualifications to serve as such before 2007 were eligible for their names to be listed on two lists, increasing their chances of obtaining the experiential qualification. See Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes, Exchange Act Release No. 51,856, 70 Fed. Reg. 36,442 (June 15, 2005) (proposal to change NASD customer code to require training and other qualifications prior to serving as a public chair in a customer case; describing prior selection process). That structural preference for arbitrators on the roster longer persists with the 2007 rule change. *Id.*

after a hearing instead of settling or being dismissed or withdrawn.²²⁷ Among the criteria parties use to evaluate arbitrators for the ranking and striking process is the arbitrator's past awards. This suggests that when a party is faced with the choice of striking an arbitrator with an acceptable and known award history versus an arbitrator with no record, the party will strike the new arbitrator, making it less likely for a new arbitrator to be selected.²²⁸ Some argue that the arbitrators who are most often chosen are those whose awards are most middle of the road.²²⁹ Moreover, there has been a significant decrease in the number of arbitration claims filed in recent years,²³⁰ thus lessening the chance that any arbitrator will gain the

227. See, e.g., *Resolution and Results for Customers*, *supra* note 221 ("In FINRA arbitration, the majority of customer cases—approximately 69%—result in settlements reached by the parties. Typically, approximately 18% of all cases proceed to award."). NASD recognized that the experiential qualification for public chair service would take time to meet due to the small percentage of claims that concluded via hearing, then four percentage points higher than the current rate. See Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto, Exchange Act Release No. 55,158, 72 Fed. Reg. 4573, 4587 (Jan. 31, 2007) ("NASD stated that it believes the requirement that an arbitrator serve on at least three arbitrations through award to be eligible for the chair roster is an objective standard that is easily measured, though not easy to meet. NASD stated that of the arbitration cases filed in the past four years, approximately 22% went to hearing." (footnotes omitted)).

228. DOSS & FRANKOWSKI, *supra* note 184, at 124 ("It is important for parties to conduct due diligence on the proposed arbitrators prior to ranking them. . . . Practitioners typically review FINRA's award database located on the FINRA website to gather more information about each case ruled upon by the proposed arbitrators . . ."); Choi et al., *supra* note 115, at 48 ("With respect to professional and retired arbitrators, whom some commentators have observed might display a more subtle form of bias due to their desire to be selected in future cases, we find some evidence that these arbitrators tend to issue lower awards. Further, we find that this effect is not mitigated by legal representation."); La Rue & Symonette, *supra* note 125, at 221 ("[T]he parties almost consistently select arbitrators with whom they are comfortable based on reputation or prior experience.").

229. See, e.g., Colleen Honigsberg & Matthew Jacob, *Deleting Misconduct: The Expungement of BrokerCheck Records*, 139 J. FIN. ECON. 800, 803 (2021) ("Theoretically, if both parties select the arbitrator with equal diligence, they will end up with the average arbitrator on the initial list of randomly assigned arbitrators."); Scot Bernstein, *Tampering with List Selection by Enhancing the Appointment Frequency of "Chair-Qualified" Arbitrators*, 13 PIABA BAR J. 13, 15 (2006) ("[A]s a practical matter, the arbitrators who serve most frequently will be those who have succeeded in keeping their balance of customer victories and customer losses reasonably close to the 50-50 mark Issuing split-the-baby awards may help those arbitrators as well.").

230. FINRA new case filings tend to decrease in times when the stock market is performing well, as was true in the period of 2010 through the present. See, e.g., Laura Sanicola, *FINRA Arbitration Cases Are Down, but the Rest of the Year May Tell Another Story*, INVESTMENTNEWS (Dec. 16, 2015), <https://www.investmentnews.com/finra-arbitration-cases-are-down-but-the-rest-of-the-year-may-tell-another-story-65067> [perma.cc/KZ2N-SVKF] (reporting that a FINRA spokesperson stated that FINRA filings "are countercyclical to the stock market," and that "[i]f the market goes down substantially, historically, we have seen a rise in case filings"); Liz Knueven, *The Average Stock Market Return over the Past 10 Years*, BUS. INSIDER (June 14, 2021, 7:40 AM), <https://www.businessinsider.com/personal-finance/average-stock-market-return> [https://perma.cc/L5KP-XDMW] ("[T]he S&P 500 has done slightly better than the historic 10-year average, with an annual average return of 13.6% in the past 10 years.").

experience needed to qualify as a chair.²³¹ If a new entrant is chosen to serve on a panel and the proceeding does not settle, it then takes on average sixteen to seventeen months for that matter to conclude after a hearing, with the result that even appointment to a proceeding that proceeds to an award means a significant time commitment before the experiential qualification is satisfied.²³² Second, this arbitrator would need to be an attorney who is currently licensed in one jurisdiction, or, if not an attorney, they would need to repeat their success in serving as an arbitrator on an additional two arbitrations, for a minimal total of three arbitrations concluding in an award after a hearing.²³³ Finally, the arbitrator would have to complete FINRA's training to serve as a public chair,²³⁴ a requirement for public chair service that FINRA reports is not completed by many public arbitrators who otherwise qualify to serve as chairs.²³⁵

Public arbitrators can also, counterintuitively, meet the experience qualification to serve as a public chair through arbitrator service on industry claims in addition to or instead of service on customer cases because FINRA requires experience in a self-regulatory organization overseen by arbitration in which a hearing is held and does not require service only in FINRA customer cases.²³⁶ The public chair experiential

231. Notice of Filing of Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 78,729, 81 Fed. Reg. 61,288 (Sept. 6, 2016) (“FINRA has had limited success in enrolling new public chairpersons. One reason is that for the last few years, FINRA’s arbitration caseload has remained low, and public arbitrators were not serving on a sufficient number of cases through award to meet the case experience requirements for attorney arbitrators outlined above.”). Indeed, the difficulty obtaining experience to serve as a chair was so significant that FINRA proposed a rule change in 2016 to reduce the experiential requirement for licensed attorneys from two hearings to one hearing. *See id.* (rule proposal); Order Approving Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 79455, 81 Fed. Reg. 88,720 (Dec. 8, 2016) (approving rule change).

232. *See 2020 Dispute Resolution Statistics*, FINRA, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2020> [<https://perma.cc/AMQ9-BY74>] (showing that average turnaround time for cases in which there was a regular hearing in 2019 was 16.9 months, and 16.5 months in 2018). This statistic only includes cases decided by an arbitrator that conclude via a regular hearing. *Id.* There are separate statistics for the two simplified hearing options—telephonic and on the papers. *Id.* Those hearings are overseen by a chair-qualified arbitrator. FINRA, Rule 12400 (2020). All hearing statistics—whether overseen by one or three arbitrators—are reported together. *Cf. Dispute Resolution Statistics*, *supra* (listing disposition of cases by hearing type and collecting data for hearing, special proceeding, or paper types).

233. FINRA, RULE 12400(c) (2020).

234. *Id.*

235. Notice of Filing of Proposed Rule Change Amending Code of Arbitration Procedure for Customer and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 78,729, 81 Fed. Reg. 61,288 (Sept. 6, 2016) (“FINRA has had limited success in enrolling new public chairpersons.”).

236. FINRA, RULE 12400(c) (2020).

qualification requires only that a public arbitrator sit on SRO-led arbitrations that conclude in an award after a hearing.²³⁷ FINRA, for example, is an SRO with more than one arbitral forum—one for the resolution of customer claims and another for the resolution of claims between industry actors.²³⁸ Because the experiential requirement for public chair qualification does not require experience in a customer case per se, it is possible that a public arbitrator may become a chair without ever having experienced a customer’s case. This is because public arbitrators do not only decide FINRA customer disputes; they are also tapped to decide intra-industry disputes.²³⁹ In a dispute between a stockbroker and a broker-dealer firm (or between two stockbrokers or brokerage firms), public arbitrators are chosen to serve much in the same way they serve in customer cases.²⁴⁰ Thus, a public, chair-qualified arbitrator oversees and decides a dispute involving a stockbroker and another industry member seeking \$100,000 or less.²⁴¹ In a case involving greater than \$100,000 between a stockbroker and another industry member, the proceeding will be decided by one public chair, a non-public arbitrator, and a public arbitrator.²⁴² As a result, it is entirely possible that a public arbitrator may obtain the experiential qualification to serve as a chair by only hearing disputes within the industry and dominated by industry perspectives.²⁴³

Though few FINRA arbitration proceedings—industry or customer—conclude with an award on the merits, one type of request for relief cannot conclude without an arbitrator’s award after a hearing: expungement.²⁴⁴ An expungement proceeding in arbitration is the first step a stockbroker takes towards removing information like a customer complaint from their disciplinary record, portions of which are available to the public via

237. *Id.*

238. See FINRA, RULE 12000 (2007) (Customer Code); *id.* 12101(a) (2008) (“The [Customer] Code applies to any dispute between a customer and a member or associated person of a member that is submitted to arbitration under Rule 12200 or 12201.”); *id.* 13000 (2007) (Industry Code); *id.* 13200(a) (2008) (requiring arbitration of disputes “between or among Members; Members and Associated Persons; or Associated Persons”).

239. See FINRA, RULE 13406(b) (2017).

240. *Id.*

241. *Regulatory Notice 09-43: SEC Approves Amendments to the Panel Composition Rules of the Arbitration Code for Industry Disputes*, FINRA (Aug. 31, 2009), <https://www.finra.org/rules-guidance/notices/09-43> [<https://perma.cc/32PB-L2VP>].

242. *Id.*

243. FINRA, RULE 12400(c) (2020).

244. See *id.* 2080 (2009) (obtaining an order of expungement); *id.* 12805 (2009) (expungement in customer cases); *id.* 13805 (2009) (expungement brought as an industry proceeding). See generally Christine Lazaro, *Has Expungement Broken BrokerCheck?*, 14 J. BUS. & SEC. L. 123, 129–34 (2014) (describing expungement generally).

FINRA's BrokerCheck tool.²⁴⁵ Stockbrokers can seek expungements in either industry or customer arbitration proceedings, and public arbitrators are among the neutrals who issue awards in these claims.²⁴⁶ Expungement claims forming the basis of industry arbitration claims have risen dramatically in recent years, with some reporting a 900% increase.²⁴⁷ Stockbrokers often include a request for expungement in their response to a customer's arbitration, and an award document in a customer case often details the results of the expungement hearing in proceedings where the underlying customer claim settled, was dismissed, or was voluntarily withdrawn.²⁴⁸ Arbitrators may only recommend the expungement of customer dispute data on three grounds: (1) "the claim, allegation or information is factually impossible or clearly erroneous;" (2) the stockbroker "was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds;" or (3) "the claim, allegation or information is false."²⁴⁹ Expungement is thus meant to be an extraordinary device to remove incorrect information from the regulatory record.²⁵⁰

Despite this seemingly high bar, expungements are granted in a

245. Honigsberg & Jacob, *supra* note 229, at 801 (stating that expungement "allows brokers to remove select allegations of misconduct through an arbitration process"); Lazaro, *supra* note 244, at 124–33 (describing Central Registration Depository, BrokerCheck, and purpose of expungement).

246. FINRA, RULE 12805 (2009) (customer); *id.* 13805 (2009) (industry); *id.* 12400 (2020) (customer); *id.* 13400 (2007) (industry).

247. See Benjamin P. Edwards, *Do Non-Adversarial Arbitrations Bias Arbitrators Over Time?*, BUS. L. PROF BLOG (Aug. 27, 2020), https://lawprofessors.typepad.com/business_law/2020/08/do-non-adversarial-arbitrations-bias-arbitrators-over-time.html [<https://perma.cc/G7XL-WX7A>] ("These expungement-only arbitrations have been rapidly increasing in volume. The PIABA Foundation found an over 900% increase in these cases from 2015 to 2018."). Expungement claims have been rising at this pace due to a recent FINRA rule change that increased the cost of obtaining an expungement. See, e.g., Mark Schoeff, Jr., *SEC Approves FINRA Rule Setting Minimum Fee for Expungement Requests*, INVESTMENTNEWS (June 10, 2020), <https://www.investmentnews.com/sec-approves-finra-rule-set-minimum-fee-expungement-requests-193912> [<https://perma.cc/CKD5-YF8E>] (describing FINRA rulemaking and the "\$1 trick" elimination with concurrent increase of expungement filing costs to approximately \$8,300).

248. See, e.g., Alexander & Iannarone, *supra* note 25, at 1731 fig.5 (describing frequency of top 100 terms appearing in customer cases concluding with an award in five year period between May 1, 2013 and May 1, 2018 and including "expungement"); *Karsch v. Stanley*, No. 19-00628, 2021 WL 4910243, at *3 (FINRA Oct. 13, 2021) (Gallagher, Jaffe & Cini, Arbs.) (documenting award in customer case where underlying claims settled and hearing only related to expungement).

249. FINRA, RULE 2080(b) (2009).

250. See *id.*; *Frequently Asked Questions About FINRA Rule 2080 (Expungement)*, FINRA, <https://www.finra.org/registration-exams-ce/classic-crd/faq/finra-rule-2080-frequently-asked-questions> [<https://perma.cc/JU9B-5H27>] ("FINRA recognizes that expungement of a CRD record under any circumstances is an extraordinary remedy and should be used only when the expunged information has no meaningful regulatory or investor protection value.").

substantial percentage of customer cases.²⁵¹ FINRA's chair qualification standards require only that the arbitrator serve in a proceeding that resolves via an award after a hearing, so theoretically at least, an expungement proceeding would meet the experiential qualification for subsequent chair service.²⁵² Although FINRA does not count these proceedings towards chair qualification, some public arbitrators may first participate on a panel hearing a customer's substantive claim after serving in multiple cases where they are considering whether a customer claim upon which a stockbroker or brokerage firm paid monetary damages is false, factually impossible, or clearly erroneous.²⁵³ The impact that being exposed to claims that customers are, in essence, lying about conduct that results in a monetary payment to them, may inject bias into the pool of arbitrators solely responsible for the adjudication of smaller customer claims.²⁵⁴

Taken together, the expungement process and the possibility of obtaining chair qualification by service on industry cases may mean that while FINRA endeavored to create an arbitrator pool without ties to the

251. In a prior project, Professor Charlotte Alexander and I established through computational textual analysis of FINRA customer awards that 41% of customer cases that concluded in an award between May 1, 2013 and May 1, 2018 were the result of a hearing held after the customer settled the underlying claims and reflected the panel's decision as to whether a claim that the parties agreed to resolve outside the arbitration process should be removed from the stockbroker's record. Awards reflecting the arbitrator's decision on a stockbroker's expungement claim in a customer case were more prevalent than awards reflecting either a complete customer win or loss. See Alexander & Iannarone, *supra* note 25, at 1732–33. Others have determined that expungements are recommended from 80% to nearly 97% of the time. See, e.g., Honigsberg & Jacob, *supra* note 229, at 801 (“Of the expungement requests that are adjudicated on the merits, over 80% are successful.”); PIABA, EXPUNGEMENT STUDY OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION 1 (2013), <https://piaba.org/system/files/2018-01/REPORT%20-%20Expungement%20Study%20of%20the%20Public%20Investors%20Arbitration%20Bar%20Association.pdf> [<https://perma.cc/9MK9-KCL7>]; *Stockbroker Arbitration Slates Wiped Clean 9 Out of 10 Times*, PIABA, <https://www.piaba.org/in-the-media/stockbroker-arbitration-slates-wiped-clean-9-out-10-times-0> [<https://perma.cc/3CWD-BCXD>] (“For the most recent time period[,] mid-May 2009 through the end of 2011, expungement relief was granted in nearly every instance—96.9 percent of the cases resolved by settlements or stipulated awards.”). As a point of comparison, FINRA reports that arbitrators award consumers damages ranging from 28% to 45% of arbitration proceedings that conclude with an award after a hearing between 2016 and 2021. See *Dispute Resolution Statistics*, *supra* note 222 (2016–2021 results).

252. FINRA, RULE 12400(c) (2020).

253. See also Edwards, *supra* note 247 (“Investors may fear that these arbitrators will see investors as liars because they have been exposed to unopposed expungement hearing after unopposed expungement hearing.”). Given the prevalence of expungement-only cases in which public arbitrators participate, additional study is required to determine if these cases produce bias and whether expungement claims are better heard by a separate pool of arbitrators to maintain the objectivity of the public arbitrator pool.

254. *Id.* (describing potential bias-inducing aspects of expungement proceedings). Such an impact may also be magnified in cases where the same counsel represents stockbrokers seeking expungement and subsequently defends stockbrokers in customer-initiated arbitration proceedings.

industry, its arbitrator qualification rules undermine that initial goal in the smaller claims deemed most important to ensuring investor trust in the securities markets.²⁵⁵ Moreover, the 2007 amendments setting forth chair experience and education criteria decrease the pool from which customers in smaller claims can expect to draw from for their claims, a result that FINRA predicted before the rule went into effect.²⁵⁶ This potential impact—the lessened ability of consumers to benefit from more representative, truly public, and newer arbitrators hearing their smaller claims—directly conflicts with FINRA’s diversification goals. Whether the experiential qualification for public chair service is in fact a bar to newer entrants to the FINRA arbitral pool is subject to empirical measurement, which will be undertaken in the next Part.

IV. STUDY METHODOLOGY AND FINDINGS

The identification of structural barriers to diversity and inclusion in FINRA’s arbitrator pool is itself enough to necessitate rulemaking to remedy the costs of exclusion. In other arbitral forums, a project would simply end there. FINRA’s transparency, however, provides a rare opportunity to empirically evaluate the impact of arbitrator qualification and selection rules on inclusion, benefitting both the participants in the FINRA forum and building a roadmap for assessing the efficacy of diversity and inclusion measures undertaken by any arbitral forum.

255. See DOSS & FRANKOWSKI, *supra* note 184, at 122 (“The rationale for having the chairperson roster is to ensure that at least one of the arbitrators on a panel has experience in procedural and substantive issues that arise in arbitration proceedings. On the other hand, the eligibility requirements of the rule dictate that the chair-qualified arbitrator serve on multiple arbitration cases, which as a practical matter could discourage those arbitrators from making ruling that would expose them to risk of being stricken in future cases.”).

256. Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes, Exchange Act Release No. 51,856, 70 Fed. Reg. 36,442 (June 15, 2005); *see also* Bernstein, *supra* note 229, at 15 n.6 (“NASD believes that the requirement that an arbitrator serve on at least three arbitrations through award to be eligible for the chair roster is an objective standard that is easily measured. While this standard is easy to measure, it is not easy to meet. Of the arbitration cases filed in the past four years, approximately 22% went to hearing.”); *id.* at 27–28 (predicting two to three times greater chance of public chair arbitrators appearing on lists in three arbitrator cases). Indeed, FINRA reworked the experiential requirement for attorney public arbitrators as a result of the difficulty in obtaining the requisite experience as stated in the 2007 rule change. Notice of Filing of Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 78,729, 81 Fed. Reg. 61,288 (Sept. 6, 2016) (reducing number of hearings through award that a licensed lawyer public arbitrator must complete from two to one to obtain experiential requirement for public chair qualification).

A. *Hypothesis and Study Design*

The empirical study was designed to assess the extent to which post 2014 arbitrator entrants presided as the sole public-chair arbitrator on a smaller claim brought by a customer. The hypothesis is that as a result of structural barriers to service as a public chairperson in a single arbitrator customer case, few of the arbitrators who joined after 2014, who are on the whole more diverse than members of the pre-2015 arbitrator pool,²⁵⁷ would have decided contested proceedings brought by customers whose claims were below \$100,000. The study focuses on this metric due to the specific public protection and market trust functions of smaller claims arbitration coupled with the greater likelihood of a customer with a smaller claim being a member of an underrepresented group, suggesting that increasing inclusion of new arbitrator entrants is necessary to satisfy the investor protection and market trust aims of securities arbitration.²⁵⁸

The project began with a bulk download of all publicly available FINRA arbitration awards from its Awards Database through December 2019.²⁵⁹ FINRA Dispute Resolution Services hears cases related to both intra-industry and customer versus industry disputes.²⁶⁰ All awards were reviewed to classify by case type and exclude intra-industry claims.²⁶¹ The data were limited to the study time period of investor claims filed between January 1, 2015 through December 31, 2019.²⁶² The awards were then classified by the type of panel that decided the claim, either a one or three

257. See, e.g., *Our Commitment*, *supra* note 15 (noting that women joining roster in 2018–2019 comprised 39% of new entrants versus 23% women on overall roster in 2015); *id.* (Black arbitrators constituting 19% of entrants in 2018–2019 versus 4% of overall arbitrator pool in 2015); see also *supra* Part II.

258. The author anticipates future study of new arbitrator entrant appearance in three-arbitrator cases to further study the impact of barriers to inclusion in those claims.

259. *Arbitration Awards Online*, *supra* note 31 (“FINRA’s Arbitration Awards database enables users to perform Web-based searches for FINRA and historical NASD arbitration awards free of charge, seven days a week.”).

260. *Code of Arbitration Procedure*, FINRA, <https://www.finra.org/arbitration-mediation/code-arbitration-procedure> [<https://perma.cc/ZU44-MRA9>] (describing customer and industry codes, the claims that they govern, and providing links to each).

261. The case type was determined by reviewing metadata associated with each file wherein the classification of the case was noted or, where metadata were not available, manually reviewing and coding each award.

262. Metadata associated with each case indicates the year in which it was filed. Moreover, FINRA’s case naming convention begins with the last two digits of the year in which the case was filed followed by a dash and a series of numbers denoting which number the case is of all cases filed within that year. Note, however, that not all cases filed between 2014 and 2019 had been fully adjudicated before the conclusion of 2019.

arbitrator panel.²⁶³ The final data set included 715 awards in cases decided by one arbitrator that were filed between January 1, 2015 and December 31, 2019.

The individual awards within the study set were hand reviewed to code information including the identity of the arbitrator, the type of hearing, the damages requested and awarded, if applicable, how the investor claimant was represented, and the outcome of the proceeding. The arbitrator name coding was then hand reviewed to identify the unique arbitrators appearing within the data set and calculate the frequency with which they appeared in the data set. Each unique arbitrator's name was then used as a search term within FINRA's awards database to identify the earliest available arbitration case upon which the arbitrator served through hearing.²⁶⁴ This date very conservatively serves as a proxy for whether the given arbitrator had been part of the arbitration pool prior to FINRA's 2015 recruitment efforts.²⁶⁵

B. Results

The data include 715 total awards filed between January 1, 2015 and December 31, 2019 that were decided by a single, public chair-qualified arbitrator and resulted in a published award after a hearing. Four hundred and fifty-one unique arbitrators appeared in the 715 total awards. Of those unique arbitrators, seven, or 1.55%, were arbitrators who first appeared in the FINRA awards database as an arbitrator after December 31, 2014.²⁶⁶ Of the overall arbitration cases that proceeded to an award, only 0.98% were decided by public chair-qualified arbitrators who first appeared in the awards database as an arbitrator in a case filed after December 31, 2014 ("New Arbitrators").

Of these seven New Arbitrators, at least one likely joined the FINRA

263. Cases seeking \$100,000 or less are decided by one arbitrator, and cases seeking in excess of that amount are decided by three arbitrators. FINRA, RULE 12401 (2012). There are some claims seeking greater than \$100,000 determined by one arbitrator, including default proceedings and claims where the parties agreed to resolution by a single, chair-qualified arbitrator. FINRA, RULE 12801(b)(2)(B) (2020) (single arbitrator appointed in default proceedings); *id.* 12105 (2008) (permitting modification of some FINRA rules by agreement of the parties in writing).

264. This metric is an imperfect proxy for when an arbitrator joined FINRA's arbitration pool and likely understates how long an arbitrator has been registered as a FINRA arbitrator for the reasons more fully described in *supra* sections III.B–C.

265. *Id.* The use of this metric as a proxy likely classifies arbitrators as post-2014 entrants to the neutral roster even if they joined before that date due to the entry barriers previously discussed.

266. Several arbitrators either currently or previously appeared as counsel for industry or customer parties, requiring a deeper analysis than simply searching for a name match. *See, e.g.,* Campagna v. Gary Goldberg & Co., Inc., No. 09-06683, 2011 WL 4054876, at *2 (FINRA Sept. 1, 2011) (Olney, Gross & Chin, Arbs.) (listing Jill I. Gross as neutral); Harney v. Stone, No. 03-07962, 2004 WL 1907188, at *1 (Aug. 3, 2004) (listing Jill I. Gross as counsel for claimant).

arbitrator pool before 2015 because that arbitrator's first publicly available award lists that arbitrator as the public-chair.²⁶⁷ The arbitrator's first service could not be as a public chair, so this arbitrator likely joined the roster before 2015.²⁶⁸ None of the seven New Arbitrators appear more than once in the data, showing that each decided exactly one customer case. Five New Arbitrators first appeared in FINRA's Awards Database in 2015,²⁶⁹ one in 2016,²⁷⁰ and one in 2017.²⁷¹ The data suggest that virtually no customers in small cases whose case concluded via award after a hearing benefitted from the increased diversity FINRA achieved in the overall pool from 2015-2019. This also suggests that the above-identified barriers to public chair service are substantial.²⁷²

A review of the data also tells a striking story about the public chairs who decided contested claims in single arbitrator customer cases over the past five years: an extremely long tenure on the FINRA arbitration roster. When collectively assessing the unique arbitrators in the dataset, including New Arbitrators, the average year the proceeding in which they first appeared in FINRA's Awards Database was filed was 2000. In fact, the study resulted in a finding that 238, or 52.6%, of the unique arbitrators in the dataset first appeared in FINRA's Awards Database in arbitration cases filed before January 1, 2001, a tenure of nearly twenty years on the FINRA arbitration roster.²⁷³

267. See, e.g., *Iskander v. Citigroup Global Markets, Inc.*, No. 15-00448, 2017 WL 1406980, at *2 (FINRA Apr. 10, 2017) (Panossian-Bassler, O'Keefe & Mass, Arbs.) (industry case recommending expungement of cause of associated person's termination in which New Arbitrator serves as chair).

268. See *supra* Part III (discussing history of arbitrator qualification rules).

269. See *Iskander*, 2017 WL 1406980, at *2 (industry case recommending expungement of cause of associated person's termination in which New Arbitrator serves as chair); *Sgrignoli v. Morgan Stanley*, No. 15-00681, 2016 WL 6663134, at *2 (FINRA Nov. 1, 2016) (Walker, Webb & Giblin, Arbs.) (denying all of claimant's claims for lack of causation and recommending expungement); *Cummings v. UBS Fin. Servs., Inc. of P.R.*, No. 15-00709, 2017 WL 1295415, at *4 (FINRA Mar. 29, 2017) (Healey, Lauziere & Ostrov, Arbs.) (awarding compensatory damages to claimant regarding Puerto Rico bond product failure); *Fernandez v. UBS Fin. Servs., Inc. of P.R.*, No. 15-02121, 2016 WL 7325667, at *2 (FINRA Dec. 9, 2016) (Potter, Warren & Duchesne, Arbs.) (awarding \$375,726 of \$4,700,000-\$6,600,000 requested regarding Puerto Rico bond product failure); *Caposino v. Euro Pac. Cap., Inc.*, No. 15-00721, 2016 WL 6125018, at *3 (FINRA Oct. 13, 2016) (Haynes, Thornburg & Kane, Arbs.) (denying all of claimant's claims and recommending expungement).

270. See *Treacy v. Oppenheimer & Co., Inc.*, No. 17-00188, 2018 WL 1211613, at *1-2 (FINRA Feb. 26, 2018) (Miron, Antonelli & Grinsberg, Arbs.) (awarding compensatory damages of \$300,000 to claimants who sought \$338,417.03 in compensatory damages and recommending expungement against associated person against whom claimants withdrew all claims during the hearing).

271. See *Dancy v. Wedbush Sec. Inc.*, No. 16-00847, 2017 WL 3085489, at *2-3 (FINRA July 13, 2017) (Klein, Thomsen & Payne, Arbs.) (awarding full damages to claimants).

272. See *supra* section III.C.

273. This figure understates the length of time an arbitrator has appeared on the FINRA roster because it relates to first date of service and not first date of availability. Moreover, for the reasons

Evaluating the results in tandem with effective dates of FINRA rule changes identified as potential barriers preventing new entrants from deciding smaller customers' claims provides additional information. Nearly all arbitrators in the data first appeared in the FINRA Awards Database as panelists on cases filed before any prior experience or specialized education was required for chair service.²⁷⁴ Indeed, 368 of the unique arbitrators, or 81.6%, first appeared in the FINRA Awards Database in a claim filed before FINRA changed the rules to restrict service on single arbitrator cases to public chairs with experiential and educational requirements.²⁷⁵ Only one of the unique arbitrators, who also happens to be a New Arbitrator, first appeared in the FINRA Awards Database in a case filed after FINRA revised its public chair qualifications to reduce from two to one the number of arbitrations a lawyer arbitrator must participate in to meet the experiential requirement for subsequent chair service.²⁷⁶ Moreover, 166, or 36.8%, of the unique arbitrators first appeared in cases filed before 1998, meaning that they were appointed by FINRA to serve on a proceeding before the parties had the ability to participate in arbitrator selection.²⁷⁷

To put it another way, the study illustrates that over one-third of the unique arbitrators in one-arbitrator cases filed between 2014 and 2019 were decided by arbitrators who obtained experience before the parties had a say in arbitrator selection and over four-fifths served before chairs

described in Part III, a significant number of claims that conclude in a final award are expunged from associated persons' CRD records. *See supra* section III.C. Expungement thus may serve to remove information from the public record. Settled cases with repeat players may magnify an informational asymmetry between consumers and broker dealers as broker dealers maintain knowledge of an arbitrator's service on a settled case and any actions taken before the case was settled while the public consumer has no access to that information because it is not included as part of FINRA's public record.

274. *See supra* note 256 and accompanying text (describing 2007 FINRA rule change requiring experiential and education requirement for public chair service and 2017 rule change reducing experiential requirement for attorney arbitrators due to difficulty of obtaining requisite experience).

275. *See id.*

276. *Treacy*, 2018 WL 1211613, at *1–2 (awarding compensatory damages of \$300,000 to claimants who sought \$338,417.03 in compensatory damages and recommending expungement against associated person against whom claimants withdrew all claims during the hearing). It is not clear from the award whether the New Arbitrator, Howard Alan Grinsberg, is an attorney or not. He appears to serve as an arbitrator for both the Newark and New York City hearing locations, potentially increasing his probability of being selected for service. *Id.* at *1 (listing Grinsberg as arbitrator in hearing located in Newark, NJ); Paul Steven Lindemann v. J.P. Morgan Sec., LLC, No. 20-03916, 2021 WL 5039762, at *1 (FINRA Oct. 21, 2021) (Grinsberg, Arb.) (listing Grinsberg as arbitrator in hearing located in New York, NY).

277. *See supra* section III.A (describing pre-1998 FINRA rules mandating that the neutral(s) be selected by the Director of Arbitration).

presided over panels.²⁷⁸ These results may suggest that any protection potentially emanating from chair qualification is not particularly valued by repeat players. Similarly, it appears that chair qualification standards are indeed a substantial bar for new arbitrators to overcome, and customers with smaller claims are unlikely to have their claims decided by newer entrants to FINRA's arbitration roster, raising questions as to whether FINRA's diversification efforts have resulted in inclusion in smaller claims cases.²⁷⁹

C. *Limitations and Open Questions*

The data are incomplete and cannot paint a full picture of new arbitrator entrants' experiences in FINRA arbitration. While FINRA releases more information about its mandatory securities arbitration forum than most consumer arbitration forums, FINRA's transparency has limits.²⁸⁰ FINRA maintains data that are not publicly available, some of which are available to arbitration participants and other that are not. FINRA releases to the parties and their counsel the education, employment background, and cases assigned to an arbitrator appearing on a selection list, information that may be aggregated by repeat players for their benefit.²⁸¹ Parties in cases that resolve via settlement or the claimant's voluntary dismissal are not publicly reported, but the parties involved are aware of who the arbitrator was and may have had impressions of and interactions with that neutral. FINRA maintains additional information in aggregate form that is not publicly available, including the identities of all arbitrators on the roster, when they joined the roster, whether they are an attorney, their

278. See *supra* notes 274–277 and accompanying text.

279. The study did not investigate whether new entrants obtained the experiential qualification and presided over three-arbitrator panels as chairs during the study period because of the focus on smaller investor's claims given their specific role in creating trust and confidence in the securities markets and the likelihood that claimants with smaller claims are themselves most likely to be members of underrepresented groups. While it may be possible that investors with claims over \$100,000 have obtained some benefit of a more diversified public chair arbitrator pool post-2014, this question—and the impact of the most resourced investors potentially having access to the most diverse arbitrator pool—will be addressed in subsequent research by the author.

280. Iannarone, *Finding Light*, *supra* note 13, at 6–7. *But see* Edwards, *supra* note 76, at 432.

281. Iannarone, *Finding Light*, *supra* note 13, at 6–7. During the arbitrator selection process, FINRA provides detailed information, contained on an Arbitrator Disclosure Report, to the parties in the proceeding to assist them in their selection. FINRA, RULE 12402(c)(1) (2017) (stating that along with list generated by NLSS in one arbitrator cases, “parties will also receive employment history for the past 10 years and other background information for each arbitrator listed”); *see also Sample Arbitrator Disclosure Report*, *supra* note 30 (providing background information not otherwise publicly available to parties engaged in arbitrator selection, including cases currently assigned to arbitrator involving public customers or members of industry that may subsequently conclude without an award).

chair-qualification status, the cases where they have been appointed to serve, and every case they have decided (whether or not it was subsequently expunged). There is no question that the examination of such data would provide a more robust analysis of the experience of new entrants to FINRA's arbitrator pool.²⁸²

Despite the data limitations, however, a study of incomplete public data fulfills an important function.²⁸³ Doing so makes it possible to ascertain what knowledge, if any, consumer investors can obtain from the only sources available to them. Indeed, the data comprise information that FINRA advises customers to search before they select a stockbroker,²⁸⁴ and it is the information FINRA touts as part of its transparency in the arbitration sphere setting itself apart from other arbitral forums.²⁸⁵ Studying this inherently limited data elucidates FINRA's claims that it believes in transparency and is transparent, showing both what the information FINRA provides signals to the public and the extent to which the data's limitations make reliance on conclusions drawn there from difficult.

Should FINRA wish to correct what it believes to be misperceptions because incomplete data were all that is publicly available, it should publicly provide the data from which a complete study can be undertaken to eliminate informational asymmetries and make the data available to the constituents it is intended to serve: consumer investors required to arbitrate in its mandatory forum. Such data transparency may also benefit consumers required to arbitrate in other forums if subsequent FINRA transparency nudges those forums towards greater transparency as to diversity and inclusion in their own arbitrator pools. The current data in the most transparent mandatory forum suggest, however, that five years after FINRA took significant steps to, and did, diversify its arbitrator roster, customer claimants in smaller cases are not obtaining the benefit of those efforts. Providing additional data may permit study of the reasons why newer arbitrators are not serving as chairs in smaller claims.

282. At the same time, however, there is some information related to an arbitrator's diversity statuses that, if disclosed, could have the unintended consequence of resulting in the arbitrator being selected less often due to an impermissible bias leading a party to strike the arbitrator based solely upon the basis of that bias.

283. Iannarone, *Finding Light*, *supra* note 13, at 11–12.

284. *Id.* at 4–5.

285. FINRA, DISCUSSION PAPER—FINRA PERSPECTIVES ON CUSTOMER RECOVERY 3 (2018), https://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf [<https://perma.cc/KAK3-KKMV>] (illustrating FINRA securities arbitration award transparency included in same category as court for metric of “Awards or Judgments Publicly Available”).

V. INCREASING INCLUSION IN THE SMALLER CLAIMS ARBITRATOR POOL

The study indicates that new arbitrators face hurdles before they can preside over smaller claims. As noted above, however, the incomplete publicly available information and the study's focus on investors with smaller claims makes it impossible to fully evaluate the impact of FINRA's efforts to diversify its pool.²⁸⁶ Accordingly, as FINRA—and other forums—assess diversity and inclusion efforts, it is essential both that they increase transparency while also working to dismantle barriers that may hinder progress. This Part addresses these tandem interventions to enable full realization of FINRA's diversity and inclusion aims in its Dispute Resolution space.

A. *Increasing Transparency*

Transparency plays an important role in FINRA arbitration proceedings, bolstering the legitimacy of the forum by providing information from which investors can determine that if they have a dispute with a stockbroker, it will be fairly resolved.²⁸⁷ This legitimacy in turn supports consumer trust in the securities markets.²⁸⁸ FINRA's decision to publicly release all awards in every arbitration that leads to an award provides an extremely deep and rich pool for evaluating the impact of its recruitment of new and more diverse arbitrators.²⁸⁹ Despite FINRA's commitment to transparency concerning arbitrator pool diversity,²⁹⁰ the decision to limit publicly available information to only final decisions rendered by arbitrators and aggregate diversity statistics related to the overall pool makes it challenging to assess whether and to what extent new arbitrators are being offered the opportunity to serve, are chosen to serve, and are able to obtain chair qualification and preside over smaller claims.²⁹¹ Publicly providing additional transparency—releasing additional categories of information—will permit assessment of the

286. See, e.g., Volpe, *supra* note 125, at 206 (“Research is needed to amass more extensive and systematic data about all aspects of dispute resolution processes and practices, a state of affairs that has been a longstanding concern of the dispute resolution field.”); *id.* at 206–08 (calling for greater transparency of ADR professional backgrounds to study diversity).

287. See *supra* Part I.

288. *Id.*

289. See *Arbitration Awards Online*, *supra* note 31; FINRA, RULE 12904(e) (2018) (listing information contained in award document).

290. *Our Commitment*, *supra* note 15 (“In sharing the findings [of the arbitrator demographic studies], FINRA strives to provide transparency about the current makeup of our arbitrator roster.”).

291. See *supra* section IV.C.

impact of diversification efforts.²⁹² It will also permit the identification of potential barriers to greater inclusion embedded within FINRA rules and/or party action in arbitration selection as the source of new entrant exclusion.²⁹³ In addition, the transparency will assist in efforts to cultivate the investing public's trust while illustrating the extent of FINRA's commitment to true inclusion.²⁹⁴

1. Award Transparency

As an initial matter, FINRA should reconsider the transparency of its award documents. FINRA's current level of transparency in making publicly available all awards rendered in its jurisdiction exceeds that of other arbitral forums.²⁹⁵ That does not mean, however, that awards can be used to fully assess whether arbitrators of diverse backgrounds are selected to preside over cases.²⁹⁶ Arbitration cases that settle are not recorded via an award, despite the fact that the settlement amount may be required to be reported to the public via an individual broker's profile in the BrokerCheck database.²⁹⁷ BrokerCheck disclosures are intended to permit the public to determine a host of information concerning complaints against the stockbroker, including the general nature of the claim and settlement amount, in contrast to other forums—including

292. Mistry, *supra* note 83 (“Major ADR players should continue tracking, publishing, and considering diversity-related statistics.”).

293. *Id.* (arguing ADR forums “should also make the panel selection process as transparent as possible” because “[i]ncreasing transparency in the arbitrator selection process allows claimants to better consider diversity in their selection”).

294. Professor Sarah Rudolph Cole has advocated for increased transparency about arbitrators to be maintained outside the arbitral forum. *See* Cole, *Arbitrator Diversity*, *supra* note 1, at 991–92 (arguing for increased information about arbitrators to be provided not by arbitration forums but instead by individual arbitrators and non-forum affiliated aggregation sites). Cole's proposal would eliminate informational asymmetries currently existing between repeat players and unrepresented lay persons and even the playing field between such parties if FINRA does not increase its own transparency. *See supra* sections III.B–C (describing information used in arbitrator selection process by repeat players that is unavailable to public or infrequent participants in the forum). In addition, such externally maintained transparency would permit a greater range of information to be available to all FINRA arbitration constituents, including evaluation of the parties' experiences and feedback that would not be released by an arbitral forum. *See* Cole, *Arbitrator Diversity*, *supra* note 1, at 991–92 (describing potential for parties to share information concerning their experiences with specific arbitrators).

295. *See supra* section II.B (comparing and contrasting transparency levels of FINRA, AAA, and JAMS).

296. *See supra* section IV.C (describing limitations of empirical study).

297. *See, e.g.*, FINRA, RULE 4530(a)(1) (2020) (reporting requirements for customer disputes); *see also* Iannarone, *Finding Light*, *supra* note 13, at 3–5 (describing information reported on BrokerCheck resulting from settlement of arbitration claims).

court—where settlement amounts are kept secret.²⁹⁸ Because this regulatory information is already available to parties, albeit in an abbreviated form, there is not a confidentiality concern to exclude it from a database of publicly available awards.

FINRA should expand its award transparency by requiring a public award document when a case closes either by (1) settlement or (2) arbitrator decision. Increasing transparency by providing award documents related to settlements in addition to fully adjudicated proceedings would provide the public with greater access to information that is already available on BrokerCheck, while making it easier to assess that information in context.²⁹⁹ Reframing award requirements to mandate written awards when a claim settles would also permit all potentially interested persons³⁰⁰—not just the parties to that proceeding—to have full knowledge of the types of claims an arbitrator had previously participated in, the parties and representatives with whom the arbitrator had previously interacted, and how often the arbitrator had been chosen to serve but was unable to earn an experiential credit because the claim settled. Broadly reframing awards would also provide the transparency necessary to alleviate the limitations to the study detailed in this Article.³⁰¹ Accordingly, FINRA should expand the types of claims required to be documented via an award to buttress public trust and confidence in its arbitration forum.

2. *Arbitrator Pool Transparency*

Another limitation to fully accessing FINRA's diversity and inclusion efforts is its selective distribution of arbitrator disclosure reports only to parties in a filed arbitration. Disclosure reports should be both more widely available and revised to contain all information concerning an arbitrator's inclusion on a list or selection in a proceeding, whether settled or concluded via an award. This transparency intervention requires two changes: (1) adding currently missing categories of information to FINRA's arbitrator disclosure reports; and (2) creating a publicly accessible database through which disclosure reports are available and searchable.

298. *About BrokerCheck*, FINRA, <https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck> [<https://perma.cc/86L7-SQ3X>].

299. *See, e.g., id.* ("FINRA provides the following two databases as supplements to BrokerCheck: FINRA Arbitration Awards Online . . . [and] FINRA Disciplinary Actions Online . . .").

300. For example, this information may be of interest to regulators and scholars studying the impact of FINRA rules, the investing public as they decide whether to invest, and parties to future disputes who are faced with decisions about how to rank and strike arbitrators.

301. *See supra* section IV.C (describing limitations of study).

a. *Expanding Information Included on Arbitrator Reports*

Parties receive substantial information about individual arbitrators on the comprehensive arbitrator disclosure reports they receive during the arbitrator selection phase of a proceeding.³⁰² On each arbitrator's report is a listing of the current cases upon which they serve as an arbitrator and the cases in which they served where an award was rendered.³⁰³ At present, these reports do not retain a historical record of all the cases upon which the arbitrator was appointed.³⁰⁴ Instead, they only list the cases that were decided by the arbitrators after a hearing.³⁰⁵ Thus, if an arbitrator participated in pre-hearing conferences, discovery conferences, or issued other orders and the case settled, an informational asymmetry exists. Repeat players who were parties to that dispute have access to the arbitrator's pre-settlement actions in making their arbitrator selection decisions, but the general public does not.³⁰⁶ This presents multiple concerns that can be alleviated if FINRA expanded its arbitrator disclosure reports to list all cases upon which an arbitrator had been selected to serve and the disposition of that case.

First, were FINRA to capture the historical data of proceedings upon which an arbitrator was appointed but did not render a decision along with the current information contained on the arbitrator disclosure report, that transparency would permit a more robust study of barriers to chair qualification. In particular, researchers could study whether the failure to obtain chair experience is tied to the experiential requirements for chair service or party behavior. For example, it would be possible to determine if the chair qualification experiential requirement is too stringent if it is seen that arbitrators are appointed to—and engage in significant service—on matters before they ultimately settle. It would also permit researchers to study party behavior and bias with regard to particular arbitrators. Thus, if an arbitrator is often appointed but all cases to which the arbitrator is appointed with the same claimant or respondent settle, it may be the case that that party's representative believes the arbitrator would render an award adverse to the party. Similarly, party behavior in settling cases before they reach award may be determined to be strategic to avoid permitting a certain arbitrator from gaining the experience to qualify for

302. *Arbitrator Disclosure*, *supra* note 30 (describing arbitrator disclosure reports “provided to parties to help them make informed decisions during the arbitrator selection process”); *Sample Arbitrator Disclosure Report*, *supra* note 30.

303. *Sample Arbitrator Disclosure Report*, *supra* note 30.

304. *Id.*

305. *Id.*

306. *Id.*

chair service.

Second, such disclosure would eliminate information asymmetries between repeat players and less resourced parties who do not have experience in the forum or connection with those who do.³⁰⁷ That is particularly so if FINRA were also to maintain on each arbitrator's disclosure report the number of times the arbitrator's name appeared on a list and the total number of times the arbitrator has been appointed to a proceeding that resolved without an award. For example, a claimant who files an arbitration claim against a repeat-player respondent is at a significant disadvantage in the arbitrator selection process because the repeat-player respondent knows how their prior arbitrator ruled on prehearing matters in a settled case.³⁰⁸ Eliminating this informational asymmetry would increase consumer trust in the fairness of the FINRA forum.

b. Expanding Accessibility of Arbitrator Disclosure Reports

No matter the information included on an arbitrator disclosure report, if that information is not equally accessible by all constituents, it is not transparent. At present time, the only constituents who receive arbitrator disclosure reports are parties to a pending proceeding. This system privileges repeat players—typically respondents and lawyers who represent claimants and respondents repeatedly in the forum. Such an asymmetry in favor of repeat respondents and lawyers undermines the perception of fairness in the forum. As an initial matter, investors may be concerned that the system will not be fair to them when they are not able to independently assess the available arbitrators as they are making a decision as to which type of financial adviser they will retain. Such a result undermines trust in FINRA arbitration as a fair mechanism for resolving securities disputes. An additional layer of asymmetry appears for parties who either appear pro se or retain counsel who is not experienced in the forum. Repeat players and their counsel have institutional knowledge of members of the arbitrator pool. This is especially a concern for investors with smaller claims as scholars have noted that it is particularly difficult for investors with claims under \$100,000 to obtain counsel to represent them in the forum.³⁰⁹ These investors should have access to the same

307. *See supra* section III.B (describing repeat player use of information received in prior proceedings to assist in arbitrator selection).

308. *See id.* (describing party behavior and informational asymmetries in arbitrator selection).

309. *See* Nicole G. Iannarone, Assistant Clinical Professor & Dir., Ga. State Univ. Coll. of L. Inv. Advoc. Clinic, Prepared Remarks at the Meeting of the Investor Advisory Committee (Oct. 12, 2017), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/nicole-iannarone-remarks-iac-101217.pdf> [<https://perma.cc/752J-DKJ8>].

information that experienced counsel and repeat players currently maintain as institutional knowledge. Providing such information—in a searchable form—would permit pro se parties and less experienced counsel to close the information gap while permitting researchers and other interested parties to evaluate inclusion in the arbitration forum.

Expanding the information available on arbitrator disclosure reports to include all appointments—whether the claim settled or resolved via award—and making these reports publicly available are transparency-increasing interventions that would, taken together, assist audit of FINRA’s diversity measures and eliminate informational asymmetries that suggest unfair advantages to repeat players.³¹⁰

3. Location Transparency

FINRA should also provide information concerning the experiences of arbitrators in each hearing location.³¹¹ There are significant differences between the total number of arbitrators and cases in different hearing locations.³¹² Yet FINRA’s current arbitrator pool diversity metrics only reflect the entirety of the arbitrator pool.³¹³ Comparing a new arbitrator’s experience in Anchorage to another’s in New York may not, for many reasons, be a fair comparison.³¹⁴ New York and Anchorage are different cities with different populations.³¹⁵ Barriers and successes in achieving equity and inclusion in each location may look very different.³¹⁶

The current reporting only of the number of arbitrators by hearing

310. See, e.g., Katsoris, *supra* note 80, at 51 (“Unless such [securities arbitration] procedures are fair in fact as well as in appearance, however, their popularity as a means of settling securities disputes will greatly diminish, especially if the public is limited to applying these procedures to resolve their disputes before only one self-regulating organization (SRO), FINRA.”).

311. *Hearing Location Statistics*, *supra* note 30.

312. *Id.* (listing number of cases, public chairs, public arbitrators, and non-public arbitrators by hearing location).

313. See *Our Commitment*, *supra* note 15 (reporting national arbitrator pool diversity statistics).

314. For example, there are currently only six cases and one local public chair in Anchorage, AK, compared to 589 cases and 152 local public chairs in New York, NY. *Hearing Location Statistics*, *supra* note 30. 57.9% of persons in Anchorage identify as white persons who are not Hispanic/Latino compared to 60.1% of New Yorkers. *Compare Quick Facts: Anchorage Municipality, Alaska (County)*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/anchorage_municipality_alaska_US/PST045219 [<https://perma.cc/C796-EW7E>], with *Quick Facts: New York City, New York*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/newyorkcity_newyork. [<https://perma.cc/332V-3HKY>]. In New York, nearly 25% of citizens identify as Black or African American persons versus nearly 6% in Anchorage. *Quick Facts: New York City, New York*, *supra*; *Quick Facts: Anchorage Municipality, Alaska (County)*, *supra*.

315. *Quick Facts: New York City, New York*, *supra* note 314; *Quick Facts: Anchorage Municipality, Alaska (County)*, *supra* note 314.

316. *Quick Facts: New York City, New York*, *supra* note 314; *Quick Facts: Anchorage Municipality, Alaska (County)*, *supra* note 314.

location—and not arbitrator demographic information, when they joined the roster, and the average time it takes to satisfy the experiential requirement to serve as chair—makes it impossible for the public to determine if FINRA’s diversity recruitment efforts have been successful in any hearing location. Moreover, it is impossible to determine if certain hearing locations are so homogeneous as to be entirely unfair to investors because they lack representation.³¹⁷ Providing information concerning the diversity of the arbitrator pool associated with each hearing location will assist in determining the impact of FINRA’s diversity recruitment measures and whether the forum is fair to investors. Other forums considering transparency as a diversity and inclusion approach should similarly ensure that the data they provide permits evaluation of the relevant hearing location.

Taken together, this triad of transparency interventions could play a significant role in addressing the limitations identified by the study, evaluating the impact of FINRA’s diversity recruitment initiative, and promoting consumer trust in the forum.³¹⁸ It is currently not possible to evaluate, using publicly available information, whether the predicted structural barriers³¹⁹ are preventing newer arbitrators from gaining the experiential qualification because chairs have a greater chance of appearing in any arbitration. If information including when an arbitrator first joined the pool, how many lists they had been named to, how many cases they were appointed to serve upon that either settled or were resolved via an award, and the hearing location they were assigned to were available, it would be possible to ascertain whether FINRA rules or the preferences or biases of the parties in the ranking and striking process were contributing to the lack of appearance of new arbitrators.³²⁰ If FINRA rules present barriers, they can be modified; and if the issue with non-selection of new arbitrator entrants lies with the parties, further study can be conducted to determine what is driving party reluctance to consider

317. Indeed, without information on arbitrator demographics by hearing location, FINRA may be subject to challenge as a mandatory forum in the same fashion Jay-Z challenged the AAA. *See* Raagas De Ramos, *supra* note 19.

318. *See* AM. BAR ASS’N, *supra* note 128, at 2 (describing impact lack of transparency has on efforts to increase inclusion); *id.* at 7 (“[T]he confidentiality and privacy that are integral elements of most dispute resolution processes reduce public awareness of the scope of the problem, most notably awareness on the part of the stakeholders in the best position to bring about change—clients.”).

319. *See supra* section III.C (describing potential structural barriers to inclusion on FINRA’s arbitrator pool).

320. *See* AM. BAR ASS’N, *supra* note 128, at 2 (“[Q]ualified diverse neutrals are less likely to be selected due to the network-based and confidential nature of the profession, which in combination, results in selection of neutrals taking place in relative obscurity, enabling implicit bias to play a greater role in selection . . .”).

new entrants to the neutral roster and whether any of their actions are premised on bias.³²¹

B. Rule Modifications to Increase Inclusion

Arbitration scholars have proposed major changes to arbitrator selection and qualification rules to eliminate barriers to inclusion of diverse arbitrators, suggestions that may also improve the FINRA forum.³²² Cole proposes revising arbitrator selection provisions and creating permanent arbitrator panels to ensure the selection of an arbitrator from a diverse arbitrator pool.³²³ La Rue and Symonette propose changes to arbitrator selection by, among other things, guaranteeing a certain percentage of arbitrators exhibiting diverse characteristics.³²⁴ Though FINRA arbitration differs from many arbitral forums discussed in these scholars' work, structural interventions of this type would increase inclusion in the FINRA forum. Specifically, as applied to FINRA's smaller claims cases, rule changes to promote inclusion could include eliminating barriers that preference existing arbitrators, increasing opportunities for new arbitrators to appear on lists and be selected, and rethinking the public chair experiential qualification standard. These potential changes can include eliminating the double selection preference currently enjoyed by public, chair-qualified arbitrators, providing a selection preference to guarantee a diverse non-chair list, and providing alternate paths to chair qualification.

1. Eliminating the Public Chair Qualified Arbitrator Preference

A barrier preventing new arbitrator entrants from opportunities to appear on arbitrator slates, the double preference that chair-qualified public arbitrators currently receive permitting them to be chosen for the chair list and for non-chair public lists, should be reexamined.³²⁵ On the one hand, public chair-qualified arbitrators have more experience than

321. Transparency is a focused intervention in this article given FINRA's focus on transparency as a means to ensure legitimacy within its forum. See Gross, *The End of Mandatory Securities Arbitration?*, *supra* note 4. Should a forum wish to audit its diversity and inclusion metrics, it may also do so by independent third-party audit without providing the underlying data to the public. While such an intervention would assist the forum in evaluating its own efforts, a private audit lacks the trust creation characteristics that full transparency provides. Professor Cole's recommendation to provide websites outside the arbitration forum with diversity and inclusion audit information may alleviate these concerns. See Cole, *Arbitrator Diversity*, *supra* note 1.

322. See generally La Rue & Symonette, *supra* note 125; Cole, *Arbitrator Diversity*, *supra* note 1.

323. Cole, *Arbitrator Diversity*, *supra* note 1, at 985–90.

324. La Rue & Symonette, *supra* note 125 (describing potential application of *Ray Corollary*).

325. See *supra* section III.C and accompanying notes.

non-chair qualified public arbitrators,³²⁶ and removing those not slated for the public chair list from the potential pool of public arbitrators would remove experienced arbitrators from consideration. On the other hand, removing those arbitrators from consideration for the public, non-chair list would free spaces for newer entrants to the arbitrator pool, increasing their ability to obtain chair qualification and providing diversity of decisionmakers in three arbitrator cases.³²⁷ Though it is currently not possible to determine if the double chair preference is a barrier to newer entrants being named on the public list or obtaining the experiential requirements to serve as chairs in smaller claims, giving experienced arbitrators more opportunities inevitably results in less opportunity for new arbitrators. If FINRA's focus is on ensuring that diverse arbitrators are included, it should eliminate a barrier that limits their opportunity to gain experience.

2. *Providing More Opportunities for Underrepresented Arbitrators to Serve*

FINRA should consider changing the manner in which its arbitrator lists are populated to provide greater opportunities for diverse arbitrators to serve. Such changes could be either voluntary, via agreement between the parties, or mandated by FINRA. AAA, for example, permits parties to arbitration agreements to opt into an arbitrator pool with at least one-third diverse arbitrators.³²⁸ FINRA rules currently provide sufficient flexibility for the parties to come to their own agreement—without any rule changes—to craft an arbitrator list with their preselected percentage of diverse arbitrators.³²⁹ A voluntary option for parties to FINRA proceedings to elect a pool with certain threshold requirements would permit financial services firms to meet the spirit of their recent public statements in support of greater diversity and inclusion.³³⁰ Voluntary options would also permit those investors who value diverse perspectives to obtain them. Agreements to opt into a diverse list only work, however,

326. *Id.*

327. See Mistry, *supra* note 83 (“Increasing the pool of arbitrators may provide greater choice for claimants, encourage better performance among ADR practitioners, and reduce the likelihood of repeat appointments that may disadvantage inexperienced claimants.”).

328. *Roster Diversity & Inclusion*, *supra* note 17 (“The AAA has the ability in its algorithms to provide arbitrator lists to parties that comprise at least 20% diverse panelists where party qualifications are met.”).

329. See FINRA, RULE 12105(a) (2008) (“[I]f the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required.”).

330. See *supra* section II.A.

if all parties to the arbitration agree to deviate from the standard rules.³³¹

Because party preference for the status quo often prevents lawyers from taking risks and opting for new arbitrators or new procedures, it may be necessary to make diverse arbitrator lists the norm rather than a voluntary option.³³² FINRA-wide reworking of arbitrator list selection could ensure that, where the hearing location has sufficient arbitrator pool diversity, a proportion of the public non-chair list would be filled with arbitrators reflecting diverse characteristics, ensuring that the benefits of FINRA's diversification efforts flow to parties with smaller claims.³³³ Such changes have been suggested by La Rue and Symonette as part of their *Ray Corollary Initiative*.³³⁴ Specifically, FINRA could increase inclusion of minority arbitrators by adopting that part of the *Ray Corollary Initiative* "demonstrat[ing] that they have considered persons of color and women—at least 30% of the candidate pool—for appointments as arbitrators . . ." ³³⁵ Cole suggests considering sending arbitrator lists to parties with 40% to 50% of the arbitrators of a diverse background to increase the likelihood that a diverse arbitrator is chosen.³³⁶ Providing parties with lists containing a minimum percentage of diverse arbitrators would increase the chances that such arbitrators are selected to serve.³³⁷

3. *Alternative Paths to Chair Qualification*

Finally, FINRA should consider revisiting the requirements for chair qualification and assess whether obtaining experience on one to two larger cases is essential for an arbitrator to be qualified to hear a smaller claim.

331. FINRA, RULE 12105(a) (2008) (entitled "Agreement of the Parties").

332. La Rue & Symonette, *supra* note 125, at 221–22 (describing lawyer risk aversion and party preference for maintaining status quo).

333. *See id.* at 230–34 (describing how having more minority applicants in employment finalist pool results in greater likelihood of a woman or person of color being hired than when the majority of the finalist pool is white and male).

334. *Id.* at 239 (describing the *Ray Corollary Initiative*); *see also* Mistry, *supra* note 83 ("[P]racticitioners could aim to consider at least 30 percent diverse candidates in selecting a panel."). Citing the Ray Corollary Initiative, the International Institute for Conflict Prevention & Resolution aims for 30% of its panels to be diverse. *See National Task Force on Diversity: Diversity Commitment*, CPR https://www.cpradr.org/programs/committees/diversity-task-force-adr/index/_res/id=Attachments/index=0/Diversity%20Pledge%202020.pdf [<https://perma.cc/CS7C-YR3P>] ("To facilitate the selection of diverse neutrals, we will endeavor to include diverse neutrals on any slate of candidates we are asked to provide to the parties, to provide a slate that is made up of at least 30% diverse candidates; and when given the opportunity to make a default appointment, to appoint at least 30% diverse neutrals." (footnote omitted)).

335. La Rue & Symonette, *supra* note 125, at 245.

336. Cole, *Arbitrator Diversity*, *supra* note 1, at 987.

337. *Id.* (describing why mandated percentages of diverse arbitrators increase chances for underrepresented arbitrators to be appointed).

At the time chair qualification rules were proposed, it was understood that the chair qualification requirement would be difficult for arbitrators to obtain,³³⁸ though FINRA did not assess how parties' request for a chair in larger cases would impact smaller, less complicated claims.³³⁹ Identifying the characteristics that FINRA hopes those overseeing smaller claims to have while presiding over the cases and identifying other opportunities for pursuing them—from mock arbitration proceedings to shadowing an experienced arbitrator—may better serve investors with smaller claims.³⁴⁰ In the FINRA forum, participating in an initial prehearing conference (IPHC) in a larger case may provide an arbitrator sufficient experience to oversee a Simplified Arbitration proceeding.³⁴¹ Alternative paths to chair qualification would permit new arbitrators more opportunities to gain the experience to serve as chair and deepen the diversity of the public, chair-qualified arbitrator pool. Increasing the diversity of the public, chair-qualified arbitrator pool would benefit the investors whose trust in the FINRA arbitral forum is most crucial—investors with smaller claims.

Transparency and rule interventions work in tandem. Increased transparency and changes to selection and qualification rules work together to eliminate barriers preventing true inclusion. Without more complete information, it is not possible to determine where barriers to inclusion may exist in FINRA arbitrator selection, and without changes to the selection and qualification rules, it is not possible to eliminate barriers to inclusion that have been identified through the study of transparent information. Subsequent transparency will permit study of the impact of rule changes and whether more remains to be done.

338. See Notice of Filing of Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 78,729, 81 Fed. Reg. 61,288 (Sept. 6, 2016); Order Approving Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 79,455, 81 Fed. Reg. 88,720 (Dec. 8, 2016).

339. Notice of Filing of Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 78,729, 81 Fed. Reg. 61,288 (Sept. 6, 2016); Order Approving Proposed Rule Change Amending Code of Arbitration Procedure for Customer Disputes and Industry Disputes Relating to Broadening Chairperson Eligibility, Exchange Act Release No. 79,455, 81 Fed. Reg. 88,720 (Dec. 8, 2016). It is not always the case that a smaller dollar amount claim means that a case is less complicated. See, e.g., Iannarone, *supra* note 309, at 1 (“Our clients are regular people who have ‘small’ claims—\$100,000 or less. Many of our cases are \$50,000 or less, qualifying them for simplified arbitration, yet those matters are anything but simple.”).

340. See, e.g., La Rue & Symonette, *supra* note 125, at 223 (“Many experienced arbitrators sometimes have the new person ‘shadow write’, write a second award on the same matter in order to have the experienced arbitrator review and critique the novice’s analysis and drafting skills.”).

341. FINRA, RULE 12500 (2018) (describing initial prehearing conference and matters considered therein).

CONCLUSION

This Article has used the FINRA forum as a case study for examining diversity and inclusion efforts in an arbitration forum with more transparency than most. In so doing, it identified the importance of diversity and inclusion to ensuring the forum's legitimacy and how rules put into place to professionalize the arbitrator corps may prevent new, and more diverse, arbitrators from serving. Experiential requirements for arbitrator service, put into place at the request of litigants, are structural barriers that make it difficult for new entrants into one arbitrator pool to preside over smaller claims. Though the potential for such a result was recognized when the requirements were put into place, their impact in practice had not previously been examined. Selection processes preferencing the most-experienced arbitrators likewise limit diversification and inclusion efforts. Study of FINRA's public data indicates that while it has taken meaningful steps to diversify the arbitrator pool, virtually none of the newly recruited arbitrators subsequently preside over claims involving smaller dollar amounts. The study results illustrate the limits of current transparency and the necessity of additional information to fully evaluate whether arbitrator selection practices and diversity endeavors result in inclusion. In addition, the findings provide an additional lens from which to evaluate rulemaking intended to improve the arbitration process to ensure that changes intended to improve one aspect of the process do not decrease gains in another. The rules related to arbitrator qualification and selection must be reevaluated in order to ensure diversity efforts result in measurable inclusion. Arbitration forums committed to diversity and inclusion must take steps to increase transparency to ensure that inclusion aims are subject to third-party study and analysis and eliminate barriers to inclusion identified by such inquiry.

