

March 14, 2018

The Honorable Elizabeth Warren  
United States Senate  
317 Hart Senate Office Building  
Washington, DC 20510

The Honorable Dianne Feinstein  
United States Senate  
331 Hart Senate Office Building  
Washington, DC 20510

The Honorable Catherine Cortez Masto  
United States Senate  
204 Russell Senate Office Building  
Washington, DC 20510

Dear Senators Warren, Feinstein and Cortez Masto:

This letter is in response to your letter of March 1, 2018, requesting information that the Financial Industry Regulatory Authority (FINRA) may have on the prevalence of sexual harassment within the financial services industry. Thank you for your inquiry. Like you, FINRA believes that harassment of any kind, including sexual harassment, has no place in the work environment.

FINRA's oversight of the broker-dealer industry is based on our statutory mandate and focuses on investor protection and market integrity.<sup>1</sup> With respect to sexual harassment, we recognize the important role of the U.S. Equal Employment Opportunity Commission (EEOC) and its state and local counterparts to address discrimination and harassment issues in the workplace as well as to provide victims with an opportunity for redress.

As noted by your letter, FINRA receives certain limited information regarding intra-industry harassment claims in the broker-dealer industry through regulatory disclosures that are filed by broker-dealers regarding their registered representatives, and through cases brought to the FINRA arbitration forum that involve such claims. In light of the timeframe for our response set forth in your request, we have focused our review on these data sets, as described more fully below.

Because our jurisdiction is limited to the oversight of broker-dealers and the individuals associated with those broker-dealers, FINRA does not have access to data that may provide insight into the scope of sexual harassment issues within the broader financial

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<sup>1</sup> FINRA oversees a specific subset of the greater financial services industry—approximately 3,700 broker-dealers that conduct business with the investing public in the United States, and the approximately 630,000 registered individuals that they collectively employ. These firms and individuals are subject to a comprehensive registration and licensing program maintained by FINRA. Under the supervision of the Securities and Exchange Commission (SEC), FINRA writes rules for these firms and individuals; examines them for, and enforces compliance with, FINRA rules and federal securities laws; provides registered individuals with education and training; and provides educational information to the investing public. In addition, FINRA provides surveillance and regulatory services for equities and options markets, as well as trade reporting and other industry utilities. Separately, FINRA administers a dispute resolution forum for investors and brokerage firms and their associated persons.

services industry, which includes investment advisers, banks, credit unions, insurance companies, futures commission merchants, asset managers (including mutual funds, private equity, and hedge funds) and other financial services providers.<sup>2</sup>

### **Securities Registration and Forms U4 and U5**

As noted above, FINRA's jurisdiction is limited to member broker-dealers and individuals associated with those broker-dealers. Broker-dealers are required to register with FINRA in order to conduct securities transactions and business with the investing public. As part of their registration, these broker-dealers also are required to register and provide certain information on their individual representatives, including their qualifications, employment history, disciplinary history, and customer complaints, as well as certain financial information.<sup>3</sup> FINRA, the SEC, and state securities regulators use this information to examine broker-dealers and their registered representatives for investor protection purposes. FINRA makes a significant portion of this information available to the public through BrokerCheck, which is an online tool designed to help investors make more informed decisions about the individual brokers and broker-dealer firms with which investors may conduct business.<sup>4</sup> Certain states also make information about brokers licensed to do business in their respective states publicly available.<sup>5</sup>

Broker-dealers and their registered individual brokers have different but overlapping requirements for regulatory disclosures, which are made on two Uniform Forms (U4 and U5) developed by FINRA, the SEC, and state securities regulators. The Form U4 is filed by broker-dealer firms, on behalf of their brokers, to register those brokers with FINRA and other relevant regulators. The Form U5 is filed by broker-dealers when terminating the registrations of individual brokers.

The registration system for the investment adviser industry, the Investment Adviser Registration Depository (IARD), uses the same Form U4 and U5 templates to fulfill the regulatory registration requirements applicable to investment adviser representatives. The information obtained through these forms and maintained in the IARD system is the property of the SEC and state securities regulators and therefore is not included in this response.

Information regarding potential sexual harassment in the workplace generally is not solicited on the Forms U4 or U5, as the forms focus on information specific to

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<sup>2</sup> As noted above, FINRA oversees approximately 630,000 registered individuals. According to the U.S. Bureau of Labor Statistics there are over six million people employed in the financial services industry. See U.S. Department of Labor, Bureau of Labor Statistics, "Industries at a Glance: Finance and Insurance: NAICS 52" available at <https://www.bls.gov/iag/tgs/iag52.htm>.

<sup>3</sup> FINRA rules exempt certain individuals from these registration requirements, including individuals whose functions are solely and exclusively clerical or ministerial or those who are not actively engaged in the investment banking or securities business. See NASD Rule 1060 for details on individuals exempt from registration requirements, available at [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3591](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3591).

<sup>4</sup> The type and amount of information that FINRA collects that is released to the public is governed by FINRA Rule 8312 (FINRA BrokerCheck Disclosure), available at [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3891](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3891).

<sup>5</sup> State regulators may differ on what information is released because each state is governed by its own public records laws. Further, most states only provide information about brokers licensed by that state.

investment-related and investor protection matters.<sup>6</sup> The Form U4 includes a question (14J) that requests information on a termination if the reason for termination is investment-related.<sup>7</sup> Similarly, Form U5 also includes a question (7F) that requests information for investment-related terminations.<sup>8</sup> Notwithstanding the investment-related focus of these questions, FINRA staff analyzed responses to them on the Forms U4 and U5 for approximately 16,000 investment-related termination disclosures that were filed during the years 2010 – 2018 to determine whether those disclosures included any references to harassment of any kind. Based on this analysis, it appears that 14 of these investment-related termination disclosures included references to workplace harassment, including one<sup>9</sup> that may be related to sexual harassment.<sup>10</sup>

In addition to investment-related termination disclosures, Form U5 requires that broker-dealers indicate the type of termination based on five options (voluntary, deceased, discharged, permitted to resign, and other) and in some cases also requires a narrative explaining the reason for termination (Section 3).<sup>11</sup> FINRA staff performed an analysis of such termination narratives included on Form U5 filings for persons terminated for the years 2010 – 2018 to identify references to workplace harassment. The staff found that of the 1.1 million Form U5s filed in that timeframe, approximately 326,000 contained a termination explanation. Of the entries that included an explanation, it appears that 35 terminations included references to workplace harassment of any kind, including three terminations that appear to reference sexual harassment.<sup>12</sup> The remaining 32 terminations referenced general harassment or discrimination policies that could cover other types of misconduct.<sup>13</sup>

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<sup>6</sup> The information on individual broker registrations found on Forms U4 and U5, including criminal disclosures and termination disclosures, generally focus on information specific to investment-related matters and disclosures for use by financial regulators. For example, misdemeanors that are reportable on the Uniform Forms include matters related to investments or an investment-related business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses. Similarly, termination disclosures generally elicit information if the reason for termination is investment-related (e.g., the termination occurred after allegations were made accusing the individual of violating investment-related rules).

<sup>7</sup> Question 14J of Form U4 asks whether the individual ever voluntarily resigned, was discharged, or permitted to resign after allegations were made that accused the individual of: (1) violating investment-related statutes, regulations, rules, or industry standards of conduct; (2) fraud or the wrongful taking of property; or (3) failure to supervise in connection with investment-related statutes, regulations, rules, or industry standards of conduct.

<sup>8</sup> Question 7F of Form U5 asks whether the individual ever voluntarily resigned, was discharged, or permitted to resign after allegations were made that accused the individual of: (1) violating investment-related statutes, regulations, rules, or industry standards of conduct; (2) fraud or the wrongful taking of property; or (3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct.

<sup>9</sup> The termination referenced issues associated with “the employee’s conduct of a sexual nature with a coworker.”

<sup>10</sup> FINRA staff’s review of Forms U4 and U5 was based on searching for keywords related to workplace harassment, including discrimination and sexual harassment. The staff then reviewed responses to the relevant Form U4 and U5 questions for all the records identified by these keyword searches, to confirm these records referenced workplace harassment. The staff notes that keyword searches are subject to typical limitations of text-based analysis and may not necessarily capture all instances of behavior that would be considered workplace harassment. For example, keyword searches cannot identify instances where the termination description may use language that does not specifically reference workplace harassment or related words (e.g., a firm may report workplace harassment as conduct in violation of firm standards).

<sup>11</sup> Depending on the type of termination, a broker-dealer may or may not be required also to provide a termination explanation. Specifically, broker-dealers are required to provide an explanation only if a termination is characterized as “discharged,” “permitted to resign,” or “other.” Broker-dealers may, but are not required to, provide an explanation for terminations described as “deceased” or “voluntary.”

<sup>12</sup> Two of these 35 terminations were also identified via an affirmative response to question 7F.

<sup>13</sup> This analysis is also based on keyword searches. See footnote 10 for a description and limitations of this approach.

We note that, in addition to the other limitations on the Forms U4 and U5 data described herein, in preparing their narrative disclosures firms may be taking into account employment, labor, or defamation laws such that their disclosures do not include explicit allegations of discrimination or harassment.

If the reason for termination for a registered person is investment-related (*i.e.*, reported on question 14J on Form U4 or in response to Form U5 question 7F), FINRA discloses that information to the public via BrokerCheck. If the reason for termination is not investment-related (*i.e.*, not required to be reported in response to question 14J on Form U4 or in response to Form U5 question 7F), FINRA does not disclose the information to the public. However, this information is accessible by the SEC and state securities regulators that use the regulatory information maintained by FINRA and by broker-dealers that employ the individual.

### **FINRA Arbitration Forum**

FINRA operates the largest securities arbitration forum in the United States to assist in the resolution of monetary and business disputes involving investors, securities firms, and individual brokers.<sup>14</sup> FINRA's primary role in the arbitration process is to administer a forum where cases can be brought in a neutral, efficient, and fair manner. In its capacity as a neutral administrator of the forum, FINRA does not have any input into the outcome of arbitrations.

All rules related to the FINRA arbitration program have been filed with and approved by the SEC, after publication in the Federal Register and a finding by the SEC that such rules are in the public interest.<sup>15</sup> The SEC regularly examines FINRA's arbitration forum. In addition, FINRA has periodically undertaken to enhance the operation of the program, informed by input from external stakeholders.<sup>16</sup>

Depending on the amount of damages being sought, disputes in the arbitration forum are heard by either a panel of three arbitrators, or by a single arbitrator. Broker-dealers pay for most costs, and FINRA waives fees for investors experiencing financial hardship. The average turnaround time across all arbitration cases is 15 months.

FINRA maintains a roster of more than 7,300 arbitrators, conducts a comprehensive pre-approval background check on all arbitrator applicants, and provides training and continuing education for arbitrators. In addition, FINRA actively recruits minority and

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<sup>14</sup> During the past 10 years alone, FINRA's arbitration forum has helped resolve over 46,000 intra-industry and customer disputes through arbitration. Information regarding FINRA's arbitration program is available at <http://www.finra.org/arbitration-and-mediation>.

<sup>15</sup> Prior to filing a proposed rule change with the SEC, FINRA typically seeks public comment on the rule proposal through issuance of the proposal and a request for comment in a *Regulatory Notice*. Thus, there is an opportunity for public comment on a FINRA rule proposal prior to filing of the proposal with the SEC and another opportunity for comment once the SEC publishes the proposal in the *Federal Register*. Certain limited types of proposed rule changes take effect upon filing with the SEC.

<sup>16</sup> Most recently, FINRA formed a Dispute Resolution Task Force in 2014 to suggest strategies to enhance the transparency, impartiality, and efficiency of FINRA's securities dispute resolution forum for all participants. See *Final Report and Recommendations of the FINRA Dispute Resolution Task Force*, December 2015, available at [www.finra.org/sites/default/files/Final-DRtask-force-report.pdf](http://www.finra.org/sites/default/files/Final-DRtask-force-report.pdf).

female arbitrators, and publishes data on the diversity of the arbitrator pool on the FINRA website.<sup>17</sup>

FINRA publishes detailed arbitration statistics on its website, including the number of cases filed and their respective outcomes.<sup>18</sup> All arbitration awards are made publicly available.<sup>19</sup> The award provides the names of the parties, the arbitrators, the allegations, the date and location of the hearing, and the arbitrators' ruling.

For the 2010 to 2018 time period, FINRA staff reviewed intra-industry arbitration cases (i.e., for these purposes, cases between a broker and her or his employer) alleging employment discrimination of any kind based on a number of criteria, including national origin, race, sexual orientation, age, gender, retaliation, and sexual harassment. Following is a breakdown of the number of these cases filed by year: 55 for 2010, 38 for 2011, 70 for 2012, 63 for 2013, 62 for 2014, 58 for 2015, 67 for 2016, 42 for 2017, and four cases for 2018 as of February 2, 2018, which totals 459 cases over the period examined.<sup>20</sup> A total of 11,100 arbitration cases were filed from 2010 through February 2, 2018, between firms or between brokers and their firms. Thus, approximately 4% of the industry cases during this period alleged employment discrimination.

We further reviewed this set of cases for claims of sexual harassment. Following is a breakdown of cases where allegations of sexual harassment or situations that may be considered sexual harassment were noted: 14 for 2010, 10 for 2011, 12 for 2012, 4 for 2013, 3 for 2014, 8 for 2015, 9 for 2016, 8 for 2017, and zero cases for 2018 as of February 2, 2018, which totals 68 cases over the period examined. Accordingly, approximately 0.6% of all intra-industry cases during that period appear to have sexual harassment allegations noted.

Under FINRA rules, individual brokers are not required to arbitrate a claim alleging employment discrimination in violation of a statute—including allegations of sexual harassment—unless all parties to the dispute specifically agreed to arbitrate it, either before or after the dispute arose (by signing a private arbitration agreement separate from the Form U4).<sup>21</sup> In the absence of an agreement to arbitrate a statutory employment discrimination claim at FINRA, the individual broker can pursue these claims in a court of competent jurisdiction or as otherwise specified by federal and state law. As a result, we

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<sup>17</sup> See <http://www.finra.org/arbitration-and-mediation/diversity-andfinra-arbitrator-recruitment>.

<sup>18</sup> See <http://www.finra.org/arbitration-and-mediation/disputeresolution-statistics>.

<sup>19</sup> See <http://www.finra.org/arbitration-and-mediation/arbitrationawards>.

<sup>20</sup> FINRA staff's review of arbitration cases was based on searching for keywords related to workplace harassment, including discrimination and sexual harassment. The staff then reviewed relevant case files identified by these keyword searches, to confirm these cases referenced workplace harassment. The staff notes that keyword searches are subject to typical limitations of text-based analysis and may not necessarily capture all instances of cases that include claims of workplace harassment. For example, keyword searches cannot identify instances where the descriptive language used in case documents does not specifically reference workplace harassment or related words. FINRA staff also reviewed cases with structured data delineating employment discrimination claims including claims of sexual harassment. In addition, FINRA staff reviewed cases in which a statutory employment arbitrator list was generated.

<sup>21</sup> See FINRA Rule 13201 (Statutory Employment Discrimination Claims and Disputes Arising Under a Whistleblower Statute that Prohibits the Use of Predispute Arbitration Agreements), available at [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4204](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4204) and FINRA Rule 13802 (Statutory Employment Discrimination Claims), available at [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4284](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4284).

do not believe that our arbitration data is necessarily indicative of the prevalence of discrimination in the financial industry.

If the parties agree to arbitrate a statutory employment discrimination claim, FINRA will administer the claim under FINRA Rule 13802. That rule defines the special rules for arbitration claims of statutory employment discrimination, including claims of sexual harassment. Rule 13802 also provides for special qualifications for the single arbitrator (or for the chair of a three-member panel) that ensure substantial familiarity with employment law. Panels can award any relief that would have been available in court under the law. Also, if the claim is subject to a private predispute arbitration agreement, there is a limit (\$200) on the filing fees and hearing session fees to be paid by a current or former individual broker. All other filing fees and hearing session fees (over the \$200 limit) are the responsibility of the broker-dealer firm.

With regard to the cases identified above brought in the FINRA arbitration forum alleging employment discrimination, including sexual harassment, 103 of them closed by an award or stipulated award. We found no instances in which a FINRA-registered broker-dealer failed to pay monetary damages in connection with an arbitration award related to workplace harassment, including sexual harassment.<sup>22</sup>

### **Additional Information**

In addition to the Forms U4 and U5 disclosures and the arbitration data described above, FINRA may from time to time receive information regarding discrimination and harassment issues in the course of its ongoing operations and oversight of the broker-dealer industry. For example, FINRA's Office of the Ombudsman on occasion receives inquiries from individuals alleging discrimination in their respective places of work. Upon receiving inquiries of this nature and depending upon specific circumstances, the Ombudsman's staff directs those individuals to the EEOC and the U.S. Department of Labor, which have the authority to investigate charges of discrimination and harassment against employers, to file their formal complaints. FINRA staff will continue to consider other potential sources of information FINRA may have and advise your offices if we identify any information that we believe would enable a more reliable estimate of the prevalence of sexual harassment in the broker-dealer industry.

Given the limitations of the Forms U4 and U5 disclosure data and the limited number of arbitration cases involving claims of sexual harassment, FINRA would urge caution in the use of this data to extrapolate the prevalence of sexual harassment at broker-dealers or to assess cross-sectional differences across firms or variations over time in the prevalence of sexual harassment. As noted above, FINRA recognizes the importance of

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<sup>22</sup> While a motion to vacate is pending, the award payment obligation is stayed and the award is therefore not classified as unpaid. Two arbitration awards involving claims of discrimination are subject to pending motions to vacate. In one case, a broker asserted various claims against her former broker-dealer firm including defamation, wrongful termination, and breach of contract, as well as an allegation of age-based disparate treatment. In the award, the arbitrators ordered the broker-dealer firm to pay the broker damages in the amount of \$878,712. The firm subsequently filed a motion to vacate in court which is currently pending. In another case, a broker alleged wrongful termination against his former broker-dealer in violation of the Family and Medical Leave Act. In the award, the arbitrators ordered the broker-dealer to pay the broker damages in the amount of \$512,833. The firm subsequently filed a motion to vacate in court which is currently pending.

the EEOC and its state and local counterparts as the primary overseers of harassment and discrimination in the workplace. As these regulators may be receiving complaints from employees nationwide, including from across the financial services industry, it is possible that these important regulators might have additional information, data and statistics regarding the prevalence of sexual harassment in the financial services industry.

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I hope this information is helpful to you. In addition, FINRA plans to brief your staff by the requested date of March 16, 2018. If you have any questions in the meantime, please feel free to contact me at (202) 728-8425. Your staff may also reach out to Greg Dean of the FINRA Office of Government Affairs at (202) 728-8217.

Sincerely,

A handwritten signature in black ink that reads "Robert W. Cook". The signature is written in a cursive, flowing style.

Robert W. Cook  
President and CEO