

Arbitration of Sexual Assault and Sexual Harassment Claims

FINRA Amends the Code of Arbitration Procedure for Industry Disputes to Align the Code With the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Effective Date: Immediate

Summary

Following the enactment of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (Act), FINRA amended the Code of Arbitration Procedure for Industry Disputes (Code) to align the Code with the Act.¹ Among other things, the amendments permit persons with sexual assault claims and sexual harassment claims to elect not to enforce predispute arbitration agreements in cases that relate to those disputes. The amendments also make a conforming change to FINRA Rule 2263 (Arbitration Disclosure to Associated Persons Signing or Acknowledging Form U4).

The text of the rule change is available as [Attachment A](#).

Questions regarding this *Notice* may be directed to:

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Background & Discussion

The Act was signed into law on March 3, 2022, and took effect immediately.² The Act prohibits mandatory arbitration of sexual assault and sexual harassment claims by permitting persons alleging conduct constituting a sexual assault dispute or sexual harassment dispute to

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Dispute Resolution
- ▶ Employment Agreements
- ▶ Form U4
- ▶ Postdispute Agreements
- ▶ Postdispute Arbitration Agreements
- ▶ Predispute Agreements
- ▶ Predispute Arbitration Agreements
- ▶ Sexual Assault Claims
- ▶ Sexual Harassment Claims
- ▶ Statutory Employment Discrimination Claims

Referenced Rules & Notices

- ▶ FINRA Rule 2263
- ▶ FINRA Rule 13100
- ▶ FINRA Rule 13200
- ▶ FINRA Rule 13201
- ▶ FINRA Rule 13402
- ▶ FINRA Rule 13510
- ▶ FINRA Rule 13802
- ▶ FINRA Rule 13803

elect not to enforce predispute arbitration agreements in cases that relate to those disputes. Specifically, the Act amends Title 9 of the Federal Arbitration Act, 9 U.S.C. 2, by providing in relevant part:

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.³

However, the Act does not prohibit parties from agreeing to arbitrate such claims after a dispute has arisen.⁴ In light of the changes set forth in the Act, FINRA amended its rules to align the rules to the Act and make other conforming changes.

Specifically, FINRA amended Rule 13201 by adding new paragraph (c) to provide that a party alleging a sexual assault claim or sexual harassment claim that has agreed to arbitrate before the dispute arose may elect post dispute not to arbitrate the claim under the Code.⁵ New paragraph (c) also provides that the claim may be arbitrated if the parties have agreed to arbitrate it after the dispute arose. Further, new paragraph (c) provides that sexual assault claims and sexual harassment claims will be administered in the FINRA Dispute Resolution Services arbitration forum (DRS arbitration forum) under FINRA Rule 13802.⁶

In addition, FINRA amended Rule 13803 to address concerns about the possible splitting or “bifurcation” of sexual assault claims and sexual harassment claims from other types of industry disputes that are required to be arbitrated in the DRS arbitration forum.⁷ As a result, if an associated person files a sexual assault claim or sexual harassment claim in court and asserts related claims in the DRS arbitration forum, a respondent who is named in both proceedings may bring a motion to compel the related arbitration claims to the same court proceeding.⁸ If the respondent does so, the respondent *must* assert all related claims it has against the associated person in the same court proceeding.⁹ FINRA Rule 13803 also permits the respondent to compel arbitration of related claims that are subject to mandatory arbitration.¹⁰ This provision applies where the respondent has not exercised its option to combine all claims in court.¹¹

Finally, FINRA amended Rule 2263 to incorporate the language in new FINRA Rule 13201(c) into the written statement a member firm must provide to an associated person regarding the predispute arbitration clause in Form U4. Thus, firms are required to disclose to associated persons that a party alleging a sexual assault or sexual harassment claim that has agreed to arbitrate before the dispute arose may elect post dispute not to arbitrate such a claim under the Code, and that such a claim may be arbitrated if the parties have agreed to arbitrate it after the dispute arose.

Endnotes

1. Securities Exchange Act Release No. 94942 (May 18, 2022), 87 FR 31592 (May 24, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-012).
2. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022). The Act applies with respect to any dispute or claim that arises or accrues on or after the date of enactment of the Act.
3. *See id.* The Act also permits persons alleging conduct constituting a sexual assault dispute or sexual harassment dispute to elect not to enforce predispute joint-action waivers in cases that relate to those disputes. The Act defines “predispute joint-action waiver” as an agreement that “would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.” FINRA rules are consistent with this provision of the Act because FINRA rules provide that class action and statutory collective action claims may not be arbitrated under the Code. *See* FINRA Rule 13204.
4. *See* H.R. Rep. No. 117-234, at 18 (2022) (“The Committee states that pursuant to clause 3(c) (4) of House Rule XIII, H.R. 4445 improves access to justice for survivors of sexual assault and harassment by allowing these parties to elect arbitration after a dispute has arisen”). The Act provides that the applicability of the Act “to an agreement to arbitrate and the validity and enforceability of an agreement to which the Act applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.” *See supra* note 2.
5. *See* FINRA Rule 13201(c). FINRA also amended the title of FINRA Rule 13201 to clarify that the rule also applies to sexual assault claims and sexual harassment claims. In addition, FINRA amended the Code to include definitions of “sexual assault claim” and “sexual harassment claim” that are consistent with the definitions of “sexual assault dispute” and “sexual harassment dispute” in the Act. FINRA Rule 13100(aa) provides that “[t]he term ‘sexual assault claim’ means a claim involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 of the United States Code or similar applicable Tribal or State law, including when the victim lacks capacity to consent.” FINRA Rule 13100(bb) provides that “[t]he term ‘sexual harassment claim’ means a claim relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.” The amendments also removed the reference to “sexual harassment” from the definition of “statutory employment discrimination claim” (SD claim) under the Code. *See* FINRA Rule 13100(dd).
6. Prior to the amendments, sexual assault claims and sexual harassment claims were administered under FINRA Rule 13802 to the extent such claims constituted SD claims. SD claims are also not required to be arbitrated under the Code. *See* FINRA Rule 13201(a)

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(providing that an SD claim is not required to be arbitrated under the Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it either before or after the dispute arose). The amendments added the terms “sexual assault claim” and “sexual harassment claim” to the title of FINRA Rule 13802 and throughout the rule to make explicit that it applies to sexual assault claims and sexual harassment claims. Thus, as amended, FINRA Rule 13802 sets forth requirements for administering SD claims, sexual assault claims and sexual harassment claims in the DRS arbitration forum as to the number of arbitrators on the panel, the composition of the panel, the filing fee, the relief available, and the availability of attorneys’ fees.

7. See FINRA Rule 13200.
8. See FINRA Rule 13803(a). FINRA Rule 13100(y) defines a “related” claim as any claim that arises out of the employment or termination of employment of an associated person.
9. See FINRA Rule 13803(c).
10. See FINRA Rule 13803(f).
11. The amendments added the terms “sexual assault claim” and “sexual harassment claim” to the title of FINRA Rule 13803 and throughout the rule to make explicit that it applies to the coordination of sexual assault and sexual harassment claims filed in court and other related claims that may be filed at the DRS arbitration forum. The amendments to FINRA Rule 13803 make clear that sexual assault claims and sexual harassment claims will be administered consistent with how SD claims are administered under the rule. Similarly, the amendments added the terms “sexual assault claim” and “sexual harassment claim” to other rules in the Code that reference SD claims to ensure that sexual assault and sexual harassment claims are administered consistently with how SD claims are administered in the DRS arbitration forum. See FINRA Rules 13402 (Composition of Arbitration Panels in Cases Not Involving a Claim of Sexual Assault, Sexual Harassment, or Statutory Employment Discrimination); 13510 (Depositions); Part VIII (Simplified Arbitration; Default Proceedings; Sexual Assault Claims, Sexual Harassment Claims, or Statutory Employment Discrimination Claims; and Injunctive Relief).