THE REPORT OF THE INDEPENDENT REVIEW OF FINRA'S DISPUTE RESOLUTION SERVICES – ARBITRATOR SELECTION PROCESS

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I. INTRODUCTION[1]

The Financial Industry Regulatory Authority ("FINRA")[2] operates the largest securities arbitration forum[3] in the United States.[4] FINRA's Dispute Resolution Services ("DRS") administers this forum to assist investors, brokerage firms, and individual brokers resolve securities and business disputes.[5]

This Report provides an independent review and analysis of allegations raised against DRS regarding its arbitrator selection process in a decision by the Superior Court for Fulton County, Georgia (the "Georgia Court"). This Report also discusses whether any enhancements or improvements to the process may be appropriate.

The allegations stem from an arbitration filed on April 27, 2017 by Brian Leggett and Bryson Holdings, LLC (together, "Claimants" or "Investors"), against Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors, LLC ("Wells Fargo") and Jay Windsor Pickett III ("Pickett" and together, with Wells Fargo, "Respondents"), alleging Respondents caused them to lose more than $1 million (the "Leggett Arbitration").[6] The parties arbitrated their claims from April 2017 to July 2019. At the conclusion of the arbitration, the arbitration panel issued an award denying Claimants' causes of action and awarding Respondents $51,000 in costs, plus fees (the "Award").[7]

On October 30, 2019, Claimants filed a motion to vacate the Award in the Georgia Court.[8] On January 25, 2022, the Honorable Belinda E. Edwards of the Georgia Court granted Claimants' motion to vacate the Award and issued a decision finding, among other things, that Wells Fargo and its counsel, Terry Weiss, Esq. ("Weiss"),[9] manipulated the arbitrator selection process by entering into a secret agreement with FINRA to automatically remove certain arbitrators from any

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1 For privacy purposes, this Report does not disclose the names of certain individuals, except for those identified publicly by name in the Georgia Decision (defined below) or otherwise in the public record. For all other individuals, the Report identifies them anonymously either by using titles or other identifiers (*e.g.*, by their initials).

2 FINRA is the successor to the National Association of Securities Dealers, Inc. ("NASD") as well as the member regulation, enforcement, and arbitration operations of the New York Stock Exchange ("NYSE"). Arbitrations had been performed by both NASD and NYSE's regulation committee until the merger in 2007 that formed FINRA. Each entity had its own set of rules on arbitration procedures. After its creation, FINRA harmonized the prior NYSE and NASD rules.

3 Arbitration is a formal alternative to litigation in which two or more parties select a neutral third party, called an arbitrator, to resolve a dispute. The arbitrator or panel (consisting of three arbitrators) will listen to the arguments set forth by the parties, study the testimonial and/or documentary evidence, and then render a decision, which is called an award. An award is final and binding on the parties.

4 *See* www.finra.org/arbitration-mediation (last visited June 21, 2022).

5 *Id.* The Securities and Exchange Commission ("SEC") has oversight over FINRA, including DRS, and approves rules under which FINRA's arbitration forum operates, after an opportunity for public comment. *See* www.finra.org/arbitration-mediation/overview (last visited June 21, 2022).

6 Statement of Claim, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 17-001077 (Apr. 27, 2017).

7 Award at 4, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 17-01077 (Aug. 1, 2019).

8 Pet. To Vacate Arb. Award, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 2019CV328949 (Ga. Super. Ct., Oct. 30, 2019).

9 Weiss is an experienced securities and FINRA arbitration forum attorney.

arbitrator selection lists where Weiss appeared as counsel (the "Georgia Decision").[10] As evidence, the Court cited a July 13, 2017 letter sent to FINRA (the "July 13, 2017 Letter") during the arbitrator selection process, wherein Weiss stated:

> It was made clear to me verbally that none of the Postell[11] arbitrators would have the opportunity to serve on any one of my cases given the horrific circumstances surrounding the underlying case, the SEC investigation, the publicity and the aftermath.

Shortly thereafter, FINRA's Audit Committee engaged Lowenstein Sandler LLP ("Lowenstein") to conduct an independent review of the findings by the Georgia Court about the arbitrator selection process in the Leggett Arbitration. The Audit Committee also asked Lowenstein to determine generally whether any improvements to the arbitrator selection process were necessary to ensure neutrality and improve DRS's transparency.

Lowenstein conducted its review from February to June 2022. After careful consideration of the evidence obtained during that review, Lowenstein does not believe that there was any agreement between Weiss and FINRA regarding the panels for Weiss's cases. The evidence further demonstrated that FINRA personnel generally adhered to the policies and procedures and that their actions during the Leggett Arbitration were intended to be fair and reasonable at each step. Based on historic and anticipated enhancements that were reviewed by Lowenstein, it is clear that FINRA is continually striving to make the arbitration selection processes more transparent for arbitration participants. Overall, notwithstanding the proposed potential enhancements, DRS is continuing to function as intended – as a neutral forum to assist investors, brokerage firms, and individual brokers in resolving securities and business disputes.

In reaching these conclusions, Lowenstein used the methodology described in Part II of this Report. Part III of the Report focuses on DRS's arbitrator selection process, including the rules, policies, and procedures governing DRS arbitrator selection, and the technology used to generate arbitrator selection lists. To understand the genesis of Weiss's statements in the Leggett Arbitration, Lowenstein reviewed the case with the prior arbitrators that Weiss mentions in the July 13, 2017 Letter, which is discussed in Part IV of this Report. A fulsome discussion of the arbitrator selection process in the Leggett Arbitration is discussed in Part V of this Report. Lowenstein then provides its findings, conclusions and recommendations in Parts VI and VII, respectively.

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[10] Order Granting Mot. to Vacate Arb. Award and Den. Cross Mot. to Confirm Arb. Award at 37, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 2019CV328949 (Ga. Super. Ct., Jan. 25, 2022). On October 30, 2019, Pickett and another Wells Fargo broker applied for an order in the Supreme Court of New York, New York County to confirm the Leggett Arbitration award. On December 13, 2019, the New York court granted the application, confirming the Leggett Arbitration award and ordering the expungement of references to the Leggett Arbitration from the Central Registration Depository ("CRD") records of Pickett and the other Wells Fargo broker. *See* Dec. and Order on Mot., *Pickett v. Financial Industry Regulatory Authority, Inc. (FINRA)*, No. 655718/2019 (Supreme Ct. of N.Y., N.Y. Cty., Dec. 13, 2019).

[11] *See Postell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 09-07121 (the "Postell Arbitration"). As discussed more in-depth *infra*, Weiss represented the respondent in the Postell Arbitration.

II. METHODOLOGY

Lowenstein's investigation was led by Christopher W. Gerold, former Chief of the New Jersey Bureau of Securities and former President of the North American Securities Administrators Association. Lowenstein independently developed and executed the investigative plan.

Over the course of its investigation, Lowenstein conducted twenty-nine interviews, examined more than 150,000 documents and emails, reviewed telephone records, analyzed DRS's arbitrator selection system and algorithm, and listened to audio recordings of relevant arbitration proceedings. With respect to documents, Lowenstein reviewed documents related to the Leggett Arbitration, prior relevant FINRA arbitrations, DRS internal policies and procedures, and arbitrator training materials, among other things. FINRA's email vendor collected and produced emails and attachments across 184 custodial email addresses, which included both former and current FINRA personnel.[12]

Lowenstein's witness interviews included current and former DRS personnel, the parties' attorneys and the arbitration panel in the Leggett Arbitration, and members of an arbitration panel from a prior relevant FINRA arbitration. The current and former DRS personnel that Lowenstein interviewed included administrative personnel who facilitated the Leggett Arbitration, as well as DRS senior management.

Lowenstein also analyzed the Mediation and Arbitration Tracking and Retrieval Interactive Case System ("MATRICS") used by DRS to manage the arbitration forum. During Lowenstein's on-site visit, an experienced DRS product manager demonstrated the functions of MATRICS and how data is entered and stored. Subsequently, Lowenstein analyzed various queries of data to identify relevant arbitrator removals in arbitrations involving specific arbitrators, parties, attorneys, and law firms.

FINRA cooperated with Lowenstein's investigation by making its personnel and representatives available for interviews and producing or facilitating Lowenstein's access to all requested materials. FINRA did not influence the content of this Report or the methodology used in determining these findings.

III. OVERVIEW OF DISPUTE RESOLUTION SERVICES

Within DRS, there are two relevant divisions: the Neutral Management Department ("NM") and Case Administration. NM is responsible for arbitrator applications, training, and record-keeping.[13] Case Administration assists the parties with administrative matters.[14] A

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[12] FINRA previously destroyed some documents pursuant to its standard document retention policies. However, for many emails relevant to this investigation related to the Postell Arbitration (described herein), FINRA retained those emails due to various prior litigation holds. Lowenstein reviewed those emails to the extent they were available and matched the relevant search criteria.

[13] *See* FINRA Dispute Resolution Servs. Neutral Mgmt. Dep't, Administrative Staff Procedures Manual at 3, (April 4, 2022).

[14] FINRA Customer Arbitration: A Step-by-Step Guide, Practical Law Arbitration, Practice Note (West 2022).

Director supervises DRS.[15] The Director performs "all the administrative duties relating to arbitrations" [16] under FINRA's Code of Arbitration Procedures for customer disputes (the "Customer Code").[17] DRS is divided into four regional offices: (1) Northeast Region, (2) West Region, (3) Southeast Region, and (4) Midwest Region.[18] DRS regional offices manage arbitrations within their designated regions.[19] The Leggett Arbitration occurred in the Southeast Region. This Report accordingly focuses on the practices of that region.

DRS offers various types of arbitrations.[20] Under Rule 12401(c), a three-arbitrator panel decides customer claims that exceed $100,000, such as the Leggett Arbitration.[21] Accordingly, this Report focuses on three-arbitrator panel lists and corresponding rules, policies, and procedures.

A. FINRA Rules, Policies, and Procedures

FINRA's Customer Code "applies to any dispute between a customer and a member or associated person of a member firm."[22] The Customer Code is the binding procedural authority in FINRA arbitrations. In addition to the Customer Code, FINRA offers other publicly available information and guidance to arbitration participants on its website, including links to the DRS Party's Reference Guide ("Reference Guide")[23] and the DRS Arbitrator's Guide ("Arbitrator's Guide").[24] The Reference Guide "contains general information about FINRA and the arbitration process."[25] The Arbitrator's Guide "contains general information about FINRA" and "important information about an arbitrator's duties and obligations."[26]

DRS's policies and procedures for DRS personnel are contained in two non-public manuals – the Administrative Staff Procedures Manual for NM personnel (the "NM Manual")[27] and the Dispute Resolution Manual for all DRS personnel. Both are updated periodically.[28] For purposes of this Report, there are two relevant versions of the Dispute Resolution Manual: the April 6, 2017

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15 Customer Code Rule ("Rule") 12100(m).

16 Rule 12103(a).

17 *See* Rule 12000, *et seq*.

18 *See* www.finra.org/sites/default/files/14_0289%201_DR%20Promo%20Brochure.pdf (last visited June 21, 2022).

19 *Id.*

20 FINRA has arbitrations for customer disputes (Rule 12000, *et seq.*) and arbitrations for industry disputes (Rule 13000, *et seq.*). FINRA's arbitrations for customer disputes include: (1) one-arbitrator panel cases where the amount of a claim is $50,000 or less, (Rule 12401(a)); (2) one-arbitrator panel cases where the amount of a claim is between $50,000 but not more than $100,000, (Rule 12401(b)); and (3) three-arbitrator panel claims exceeding $100,000 (Rule 12401(c)).

21 Rule 12401(c).

22 Rule 12101(a); *see also* Rules 12200 & 12201.

23 *See* www.finra.org/sites/default/files/Partys-Reference-Guide.pdf (last visited June 21, 2022).

24 *See* www.finra.org/sites/default/files/arbitrators-ref-guide.pdf (last visited June 21, 2022).

25 *See* www.finra.org/arbitration-mediation/partys-reference-guide (last visited June 21, 2022).

26 *See* www.finra.org/arbitration-mediation/arbitrators-guide (last visited June 21, 2022).

27 NM Manual at 4–5.

28 The Dispute Resolution Manual is maintained electronically on FINRA's intranet and is available to DRS staff. From 2010 to February 2022, there were 207 versions of the Dispute Resolution Manual. Each time a section of the Dispute Resolution Manual was edited, a new version was created.

version (the "April DR Manual")[29] and the February 24, 2022 version (the "DR Manual").[30] The April DR Manual was effective during the arbitrator selection process in the Leggett Arbitration. The DR Manual was in effect during Lowenstein's review.

B. FINRA Arbitrator Eligibility Requirements and Rosters

DRS maintains three rosters for arbitrator selection: (1) a non-public arbitrator roster; (2) a public arbitrator roster; and (3) a chairperson roster.[31] A non-public arbitrator is an individual who works, or has worked, in the financial industry. A public arbitrator is an individual who has never been employed by the industry, does not provide services to the industry or to parties engaged in securities arbitration and litigation, and does not have immediate family members or co-workers who do so. A chairperson presides over arbitration hearings. Mandatory training and two exams are required before qualifying as an arbitrator.[32] To qualify as a chairperson, an arbitrator must complete additional training and meet other qualification criteria.[33] Currently, FINRA has a total of 8,300 qualified arbitrators.[34] The National Arbitration and Mediation Committee ("NAMC") establishes and maintains these rosters.[35] Potential arbitrators must have "five years of paid work experience and two years of college-level credits."[36]

C. The Computer-Generated List of Potential Arbitrators

As discussed further below, parties in an arbitration rank and strike proposed arbitrators from lists provided to them by DRS. To select the arbitrators for the lists, DRS uses the Neutral List Selection System ("NLSS"), a computer system that randomly generates lists of arbitrators from FINRA's rosters for the selected hearing location.[37] The NLSS is part of MATRICS. The SEC approved the implementation of MATRICS on August 5, 2004.[38] The Customer Code, however, still refers to the NLSS. Lowenstein understands from DRS's Product Management team that DRS has not edited the NLSS since its implementation in 1998.

i. Creation of the NLSS

Based upon Lowenstein's investigation, FINRA has a comprehensive multi-step system for selecting arbitrator-ranking lists that includes both automated and manual steps in an effort to, among other things, avoid conflicts of interest. The NLSS was implemented in 1998, following publication of a public rule approval notice by the SEC (the "SEC Notice"). The SEC Notice stated that the NLSS "will maintain the roster of arbitrators, identify arbitrators as public or non-public, screen arbitrators for conflicts of interest with parties, list arbitrators according to

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29 The April DR Manual was effective as of December 30, 2016.
30 The DR Manual was effective as of May 12, 2020.
31 Rule 12400(b).
32 NM Manual at 159.
33 *See* Rules 12100 and 12400(c).
34 *See* www.finra.org/arbitration-mediation/arbitrator-selection (last visited June 21, 2022).
35 Rule 12102(b).
36 *See* www.finra.org/arbitration-mediation/become-finra-arbitrator (last visited June 21, 2022).
37 Rule 12400(a).
38 *See* Notice to Members, 04-56, 631, 632 (Aug. 5, 2004), https://www.finra.org/sites/default/files/NoticeDocument/p009899.pdf.

geographic hearing sites and, on occasion, by expertise, and consolidate the numerical rankings that parties assign to listed arbitrators."

The SEC Notice identified two types of conflict-of-interest checks that would be undertaken before the parties are sent the arbitrator-ranking list.[39] First, the NLSS would perform an automated conflict check process.[40] Second, DRS staff would review conflicts of interest "manually."[41] DRS personnel "will perform a review based upon information that each arbitrator discloses" to DRS.[42] The notice specifically directed that "[a]fter a review of available information, [DRS][43] may remove an arbitrator based upon such disclosure."[44] The manual review "will avoid limiting the parties' choices later" because DRS personnel "will eliminate arbitrators from a list who would almost certainly be disqualified at a later stage in the proceeding due to a conflict of interest."[45] According to DRS senior managers, the manual review is necessary because the NLSS cannot accurately capture certain data (*e.g.*, familial relationships, unregistered financial affiliate conflicts, etc.).

The Customer Code states that parties will "select their panel through a process of striking and ranking the arbitrators on lists generated by the NLSS."[46] The Customer Code is silent on the manual staff review that occurs before the list is sent to the parties.[47] The Reference Guide and Arbitrator's Guide do not refer to the DRS conducting a manual review for conflicts of interest before sending the list to the parties.[48]

ii. How the NLSS Works

As reflected on FINRA's website, for cases with three arbitrators, the NLSS will generate for consideration by the parties a list of: (A) 10 arbitrators from the FINRA non-public arbitrator roster; (B) 15 arbitrators from the FINRA public arbitrator roster; and (C) 10 public arbitrators from the FINRA chairperson roster.[49]

The NLSS goes through several steps to generate the three lists. First, the NLSS collects data about a case, such as the case name, the panel size, the panel type, etc.[50] Second, the NLSS applies three general filters: (1) a filter to ensure the arbitrator has been qualified by DRS; (2) a filter to ensure the arbitrator is available for the arbitration; and (3) a filter for potential conflicts

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39 Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Selection of Arbitrations Involving Public Customers, 63 Fed. Reg. 40761, 40769 (July 24, 1998).

40 *Id.*

41 *Id.*

42 *Id.*

43 At the time, the National Association of Securities Dealers, Inc.

44 63 Fed. Reg. 40761, 40769 (July 24, 1998).

45 *Id.*

46 Rule 12400(a).

47 *See* Rule 12400.

48 After the events underlying this investigation, FINRA updated its website, which now refers to this manual review process.

49 Rule 12403(a)(1)(A)-(C).

50 *See* Ernst & Young LLP, *Report of Independent Accountants on Applying Agreed-Upon Procedures to the MATRICS System Random Arbitrator Selection Process* (Oct. 16, 2006) ("E&Y Report").

of interest with the parties in the case.[51] Third, the NLSS conducts so-called "passes," where the NLSS combs (or passes) through the entire roster searching for specific criteria.[52] The purpose of these passes is to create so-called "pools" of arbitrators. The type of pool depends on the type of case (*e.g.*, one-arbitrator panel cases, three-arbitrator panel cases, industry arbitration disputes, etc.).

The passes relate generally to the geographic location of the arbitrators and their ability to travel if necessary. For Pass One, the NLSS reviews the entire roster of arbitrators for those near the case location and randomly selects arbitrators from that pass. If necessary, it moves on to Pass Two, and then, if necessary, to Pass Three and so on until the NLSS has the minimum number of arbitrators in each pool.[53]

After the passing process, the "pools" are created as follows: (1) Public Chairperson Pool; (2) Public Arbitrators Pool; and (3) Non-Public Arbitrators Pool. The NLSS doubles the required amount of arbitrators for each pool and runs passes until it has enough. Thus, the Non-Public Arbitrator Pool requires 20 non-public arbitrators; the Public Arbitrator Pool requires 30 public arbitrators; and the Public Chairperson Pool requires 20 public chairperson arbitrators.

After the NLSS creates the pools, it generates sub-lists[54] based on the specific case type.[55] Three-arbitrator customer cases have three sub-lists: a (1) Public Chair Sub-List; (2) Public Sub-List; and (3) Non-Public Sub-List. At this point, DRS personnel manually review each sub-list of arbitrators for any conflicts of interest before the public master list is created and sent to the parties. Below is an internal DRS flow chart summarizing how the NLSS generates its arbitrator lists:

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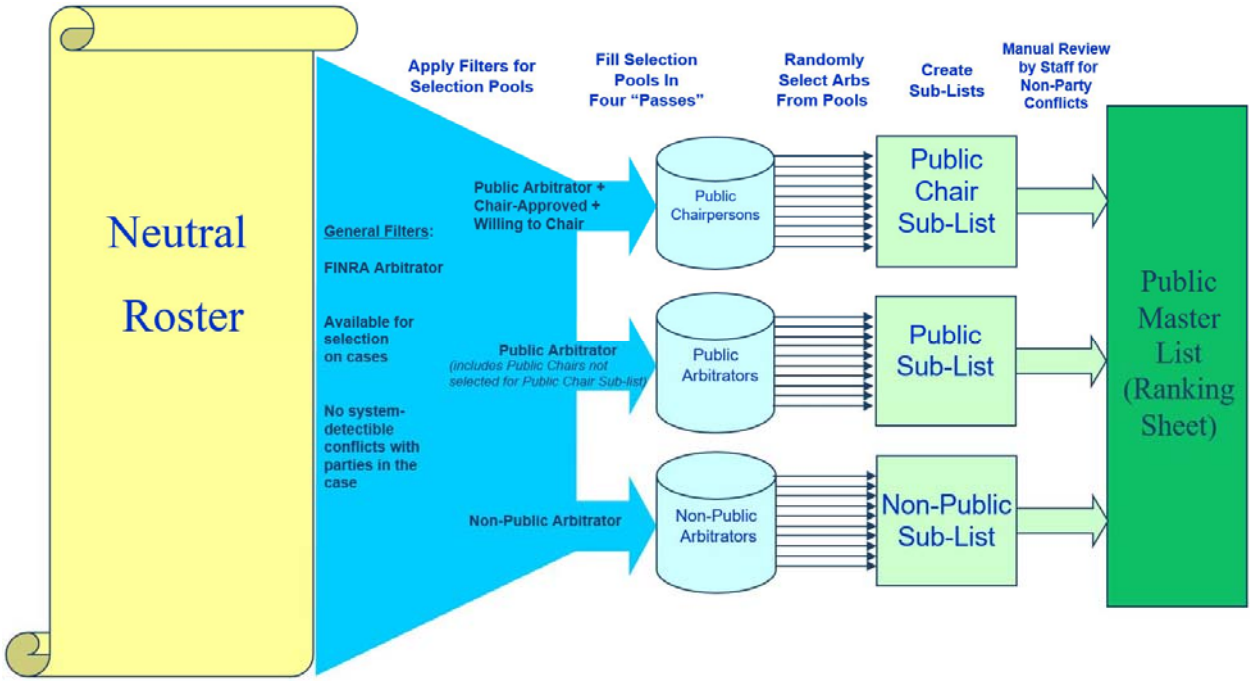
51 E&Y Report at 2.

52 *See* www.finra.org/arbitration-mediation/arbitrator-selection (last visited June 21, 2022).

53 According to DRS's Project Manager, the NLSS technically still runs four passes based on arbitrators' geographic locations and willingness to travel. DRS ceased using an arbitrator's willingness to pay for their own travel as a pass criteria. Instead of rewriting the NLSS's algorithm, the criteria was eliminated in arbitrators' profiles, so the NLSS does not locate any arbitrators in the second pass and moves onto the third pass.

54 E&Y Report at 3.

55 *Id.* at 3.



iii. Ranking and Striking

The Customer Code requires the Director to "send the lists generated by" the NLSS "to all parties at the same time."[56] Along with lists, the parties also receive employment history and additional background information for each arbitrator.[57] The parties rank or strike each arbitrator on each of the lists. Upon receipt of the ranked lists, the Director compares the rankings and appoints the highest-ranked available arbitrator from each of the combined lists.[58] These arbitrators become the panel for the proceeding. In three-arbitrator customer cases, parties have the option to strike all of the non-public arbitrators.[59]

iv. Arbitrator Status in MATRICS

Once an arbitrator's name is placed on any selection list, MATRICS does not allow the arbitrator's name to be removed from the list without the system documenting the removal. This includes changes made during manual staff review for conflicts of interest. During a manual staff review, if the DRS reviewer wants to remove an arbitrator from the list, a pop-out window requires the reviewer to select one of the following drop down designations as a "Status": Not Appointed, Appointed, Contacting, or Dropped. If the reviewer selects "Dropped" or "Not Appointed" from the drop down as a "Status," then DRS personnel must enter additional information.

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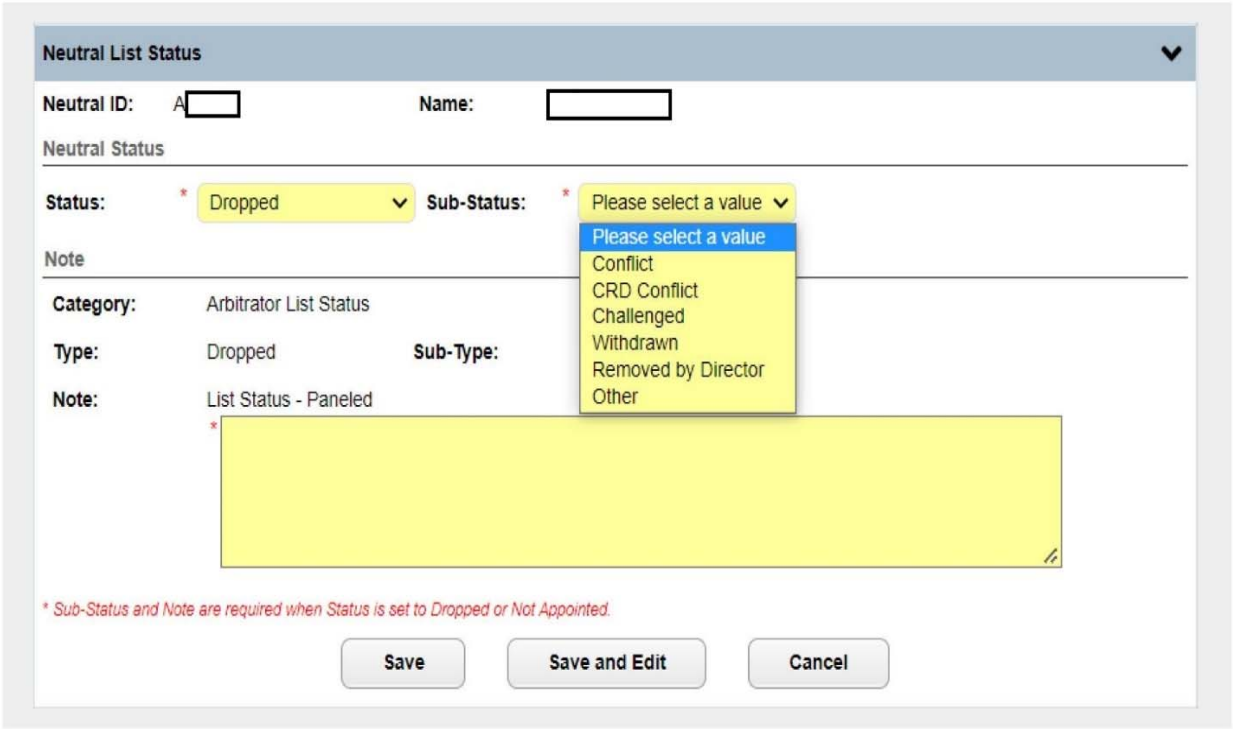
56 Rule 12403(b)(1).
57 *Id.*
58 Rule 12403(e)(1)(A)-(C).
59 Rule 12403(c)(1)(A).

First, DRS personnel must select a sub-status. The sub-status drop down items for "Dropped" are: Conflict, CRD Conflict, Challenged, Withdrawn, Removed by Director, and Other. The sub-status drop down items for "Not Appointed" are: Conflict, Unavailable, Unwilling, Unreachable, and Contacted in error. As an example, below is a picture of the "Dropped" entry screen:



Second, DRS personnel must complete the "Note" field, where the reason for the "Dropped" or "Not Appointed" status must be explained. On the pop-out window, the screen warns: "Sub-Status and Note are required when Status is set to Dropped or Not Appointed." DRS personnel refer to these notes as Drop Notes. When DRS drops an arbitrator before sending the list to the parties, DRS personnel refer to this type of drop as an "Early Drop." If the arbitrator is dropped after DRS sends the list, it is referred to as a "Late Drop." Without completing both the "Sub-Status" and "Note" fields, DRS cannot drop the arbitrator. Accordingly, MATRICS captures every transaction when DRS personnel remove an arbitrator.

vi. The NLSS Procedural Review

On October 16, 2006, Ernst & Young ("E&Y") issued a procedures report related to the MATRICS system and the NLSS algorithm entitled the "Report of Independent Accountants on Applying Agreed-Upon Procedures to the MATRICS System Random Arbitrator Selection Process" ("E&Y Report").[60] The E&Y Report focused on whether "arbitrators are selected in

[60] *See* E&Y Report at 2.

accordance with defined business rules as of October 16, 2006."[61] NASD management at the time identified the following selection criteria for E&Y:

- Selection Criteria 1:
  Regardless of the case type, all arbitrators in every selection pool should meet the following criteria:
  (a.) They must be an "NASD [DRS] Arbitrator";
  (b.) They must be "Available" for selection on cases; and
  (c.) They must have no obvious (to the system) conflicts with any party to the case.
- Selection Criteria 2:
  Selection pool filters are applied to the Neutral Roster once Criteria 1 are all met based on SEC's Code of Arbitration[.][62]
- Selection Criteria 3:
  A random pool management algorithm will be 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.[63]

The E&Y Report did not identify any deviations from procedure or improprieties. The NLSS algorithm has not had an external review since the E&Y Report. According to FINRA's Product Management team, the NLSS algorithm has not changed since the E&Y Report.

vii. Case Notes and Neutral Notes

MATRICS offers at least two other ways for DRS personnel to memorialize information: Case Notes and Neutral Notes. DRS uses Case Notes to document general information about specific arbitrations (*e.g.*, when a motion is received, decisions on a motion, etc.). While the DR Manual requires "detailed" Case Notes in certain instances, it does not provide clear guidance.[64] Based on interviews with DRS personnel, Lowenstein understands that DRS personnel do not consistently use Case Notes. Neutral Notes are notes about a specific DRS arbitrator. They are used to document arbitrators' late recusals and investigations of alleged arbitrator misconduct.[65] Neither the DR Manual, nor the NM Manual, provide guidance on when a Neutral Note should be used instead of a Case Note, or in addition to a Drop Note, or when all three should be used.

D. Rules and Policies Related to Challenges

Rules 12407(a) and 12407(b) govern the authority of the Director to remove arbitrators from an arbitration. Both rules authorize the Director to act on his own initiative or at the request of a party. Both rules are relevant to understand the Leggett Arbitration.

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61 *Id.* at 1.
62 The E&Y Report refers to the SEC Notice as the "SEC's Code of Arbitration."
63 *Id.* at 5.
64 *See, e.g.*, DR Manual at 46, 103.
65 *Id.* at 210-211, 214.

Rule 12407(a) governs the Director's authority to remove an arbitrator before the first hearing session (a "causal challenge"). Rule 12407(a) provides that the Director or his designee "may" remove an arbitrator that is "biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration."[66] Rule 12407(a)(1) provides, in pertinent part, that: [t]he Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration.[67] Rule 12407(a)(1) further instructs that "[t]he interest or bias must be definite and capable of reasonable demonstration, rather than remote or speculative," and that "[c]lose questions regarding challenges to an arbitrator by a customer under this rule will be resolved in favor of the customer."[68]

Rule 12407(b) governs the Director's authority to remove an arbitrator from a panel after the first hearing session begins. Rule 12407(b) provides that, "the Director may remove an arbitrator based *only* on information required to be disclosed under Rule 12405 that was not previously known by the parties."[69] Rule 12407(b) further instructs that "[t]he Director may exercise this authority upon request of a party or on the Director's own initiative," but that "[o]nly the director may exercise the authority" to remove an arbitrator after the first hearing session begins under Rule 12407(b).[70] DRS refers to Rule 12407(b) challenges as Director's Authority to Remove an Arbitrator ("DATR") requests.

In order for DRS to consider a party-initiated causal challenge, the April DR Manual required that FINRA staff obtain comments from all other parties before issuing a ruling.[71] The April DR Manual also required that specific MATRICS-generated letters be sent to the parties notifying the parties whether the causal challenge was granted or denied. These MATRICS-generated form letters are recorded in the MATRICS system and used to populate queries that can later be reviewed in an audit or by management to supervise or review causal challenges. These same instructions do not exist in the April DR Manual for DATRs.

In the case of a denial of a challenge (both causal challenges and DATRs) by DRS, the April DR Manual provided that a party may seek a written explanation, although DRS does not have to grant the request. The April DR Manual did not provide any policies or procedures governing parties' requests for a written explanation where a DATR or causal challenge is granted.[72]

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66 Rule 12407(a).
67 Rule 12407(a)(1).
68 *Id.*
69 Rule 12407(b) (emphasis added).
70 *Id.*
71 April DR Manual at 315-16.
72 *See generally* April DR Manual at 279-82.

IV. POSTELL MATTER

The Postell Arbitration provides important context and information related to the Georgia Decision. Weiss represented Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), and Fred Pinckney ("Pinckney") was an arbitrator. Pinckney is the arbitrator that Weiss challenged off the selection list in the Leggett Arbitration. It is also during the immediate aftermath of the Postell Arbitration that Weiss alleges he had the conversation with DRS referenced in the July 13, 2017 Letter.

A. Postell Arbitration and Weiss's Request to Remove the Postell Arbitrators

On January 5, 2010, counsel for Robert and Joan Postell ("Postell") filed a Statement of Claim with FINRA against Merrill Lynch, alleging breach of contract and breach of fiduciary duty.[73] The Postell Arbitration had a three-arbitrator panel: Ilene Gormly ("Gormly"), who was appointed panel chair, Pinckney, and Daniel Kolber ("Kolber," and, collectively, the "Postell Arbitrators").

The Postell Arbitration hearings occurred between May 3 and May 6, 2011. During the afternoon of May 5, 2011, Weiss called a Merrill Lynch representative as a witness. Before Weiss concluded his examination of the witness, two of the Postell Arbitrators questioned the witness. Gormly asked questions related to information that Weiss had previously represented was not in the record. Following Gormly's questions, Weiss alleged their entire line of questioning had demonstrated bias. He then demanded that the entire panel recuse themselves.[74]

After dialogue between Postell's counsel and Weiss, the Postell Arbitrators consulted with DRS regarding the recusal demand. DRS advised that, if the Postell Arbitrators felt that they "could continue to arbitrate the case in a neutral manner," and if counsel for both parties did not agree that they should be recused, the Postell Arbitrators should finish the hearing. The Postell Arbitrators determined that they could remain unbiased and completed the hearing.

B. The Aftermath of Weiss's Request to Remove the Postell Arbitrators

On May 11, 2011, the then-Deputy Regional Director of the Southeast Region ("Deputy Regional Director") received a call from Weiss detailing his concerns about the Postell Arbitrators' conduct. On May 13, 2011, following the conclusion of the hearing, but prior to the issuance of the award, Weiss submitted a letter to DRS alleging that the Postell Arbitrators had exhibited bias and engaged in misconduct. Weiss's letter alleged that, on the third day of the hearing, the situation with the arbitrators became "so extreme and severe" that he was "forced to interrupt the Panel" and ask that they cease actions that he deemed to be a "tag team inquisition of Merrill Lynch." Weiss's letter went on to explain that, after his oral recusal motion was denied by the Postell Arbitrators, Gormly stated that she was being "verbally abused" by the recusal motion, and Kolber questioned Weiss for raising the challenge when, "as he saw it, [Weiss] had not been listening

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73 Statement of Claim, *Postell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 09-07121 (Jan. 5, 2010).

74 May 5, 2011 Tr. at 155:2-157:8, *Postell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 09-07121.

during witness testimony." Postell's counsel responded to Weiss's complaint letter on the same day, asserting that the Postell Arbitrators were active in asking questions, but not biased.

On May 19, 2011, the Postell Arbitrators issued an award against Merrill Lynch for $520,283 (inclusive of interest and forum fees).[75] On June 20, 2011, Weiss filed a motion to vacate the award on behalf of Merrill Lynch alleging, in part, that the Postell Arbitrators exhibited bias against Weiss by asking inappropriate questions of his witnesses.[76]

C. FINRA's Investigation of the Postell Arbitrators

After receiving Weiss's letter, DRS directed the Deputy Regional Director to investigate the allegations. During the course of her investigation, the Deputy Regional Director listened to digital recordings of the proceedings three times. On June 13, 2011, the Deputy Regional Director memorialized her understanding of the factual circumstances underlying the allegations in the Postell Arbitration and issued a recommendation to DRS senior management.

From her review, the Deputy Regional Director concluded that the instances of misconduct cited by Weiss were accurate. In an email, she indicated that "in [her] 20 plus years with DRS as a case administrator and now Deputy Regional Director, [she had] never experienced such egregious behavior by an arbitration panel." The Deputy Regional Director also indicated that she had discussed the issues with the Southeast Regional Director (the "Regional Director"), and that they both recommended counseling for the Postell Arbitrators. The Deputy Regional Director outlined additional recommendations, including monitoring the Postell Arbitrators in future proceedings.

The next day, June 14, 2011, the Deputy Regional Director forwarded her synopsis and recommendations to the Executive Vice President and Director of DRS ("DRS Director") for his consideration. On June 15, 2011, DRS senior management participated in a conference call to discuss the matter further. Following the internal DRS conference call, and contrary to the Deputy Regional Director's initial recommendation, DRS senior management all agreed to remove the Postell Arbitrators from the FINRA arbitrator roster. That same day, DRS designated the Postell Arbitrators as unavailable for service pending the investigation.

Between June 16 and June 24, 2011, the Deputy Regional Director prepared a detailed description of her review of the recordings into MATRICS, recommending that FINRA remove the Postell Arbitrators from the roster. Between June 17 and July 6, 2011, DRS senior management, the National Arbitration and Mediation Committee ("NAMC") Chairperson, and the Neutral Roster Subcommittee Chairperson each signed the form to drop the Postell Arbitrators.[77]

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75 Award at 2, *Postell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 09-07121 (May 19, 2011).

76 Pet'r Mot. to Vacate Arb. Award, *Merrill Lynch Fenner & Smith, Inc. v. Est. of Postell*, No. 1:11-CV-1997-WBH (N.D. Ga., June 20, 2011).

77 The NAMC consists of between ten and twenty-five members, and at least 50% of the NAMC must be non-industry members. Rule 12102(a)(1). In addition to maintaining the rosters of neutrals, the NAMC also has the authority to recommend rules, regulations, procedures, and amendments related to arbitration, mediation, and other dispute resolution matters to the Board. Rule 12102(b). The DRS Director must "consult" with the NAMC when the NAMC so requests. Rule 12102(c). The majority of the Neutral Roster Subcommittee ("Subcommittee") of the NAMC are public members and have either approved or rejected all arbitrator

D. FINRA's Removal of Postell Arbitrators

On July 29, 2011, FINRA sent Kolber a letter that stated he was "no longer being listed as an active member of FINRA Dispute Resolution's Roster of Arbitrators and Mediators." Gormly and Pinckney received similar letters.

Several months later, in late-November 2011, the Postell Arbitrators contacted FINRA personnel requesting a meeting. A meeting never occurred. Kolber and Gormly subsequently hired an attorney, who contacted FINRA personnel to request relevant files and ascertain whether DRS had investigated the matter independently. The attorney also sent a complaint to the SEC on Gormly's behalf.

In April 2012, DRS senior management directed the Associate Regional Director for the Southeast Region ("Associate Regional Director") to review the recordings from the Postell Arbitration. After listening to the recordings, he determined that the recordings supported the removal recommendation.

On July 8, 2012, Bloomberg published an article regarding the Postell Arbitration.[78] In the article, Pinckney is quoted, saying "[Weiss] sensed that he was losing the case and repeatedly 'exploded at the panel,' accusing the arbitrators of being biased in their views and rulings against Merrill."[79] Pinckney further detailed the removal of the Postell Arbitrators from FINRA's roster, noting that FINRA executives had denied Kolber's request for a meeting on the issue, and that the letter Gormly sent to the SEC went unanswered.[80] Ultimately, the article suggested that FINRA took action against the Postell Arbitrators because they "had the temerity to find in favor of a customer in a securities arbitration against Merrill Lynch, the nation's largest brokerage and a unit of Bank of America Corp."[81]

On July 12, 2012, Weiss called the Associate Regional Director, and explained that he was contemplating subpoenaing the removal letters that had been sent to the Postell Arbitrators and would call back later in the day. This information was shared with DRS senior management. The Regional Director responded by indicating that he would speak with Weiss and send an email to DRS senior management following the conversation. There is no record of an email ever being sent, and the Regional Director told Lowenstein that he has no recollection of speaking to Weiss.

Following the Bloomberg article, between approximately July 11 and July 24, 2012, DRS senior management listened to the recordings of the Postell Arbitration. Following their review, DRS senior management decided to reinstate the Postell Arbitrators to the roster.

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applications since 2003. *See* https://www.finra.org/arbitration-mediation/neutral-corner-october-2007. Both the chairperson of the NAMC and the chairperson of the Subcommittee must unanimously approve the removal of an arbitrator from the roster. *Id.*

78 William D. Cohan, Opinion, *Wall Street's Captive Arbitrators Strike Again*, Bloomberg (July 8, 2012), www.bloomberg.com/opinion/articles/2012-07-08/wall-street-s-captive-arbitrators-strike-again.

79 *Id.*

80 *Id.*

81 *Id.*

During the course of Lowenstein's review, Lowenstein spoke with six current and former DRS personnel involved with the decision to remove the Postell Arbitrators from the roster. All denied that the award against Merrill Lynch had any bearing on the decision to remove the Postell Arbitrators from the roster. Lowenstein found them all to be credible. None of the emails Lowenstein reviewed were inconsistent with DRS personnel's interview statements.

E. Reinstatement of the Postell Arbitrators

On July 24, 2012, DRS sent letters to each of the Postell Arbitrators notifying them that they had been reinstated to the roster. The letter indicated that "senior management" had reopened the matter and "several members" of senior management had "reached a different conclusion regarding alleged inappropriate conduct" following their review of the recordings of the hearing.

F. Motion to Vacate the Postell Arbitration Award

On June 20, 2011, Weiss, on behalf of Merrill Lynch, filed a motion to vacate the Postell Arbitration award in the United States District Court for the Northern District of Georgia ("Postell Court"), alleging that the Postell Arbitrators had exhibited biased behavior against Merrill Lynch throughout the hearing.[82] Merrill Lynch relied, in part, on the contents of the Bloomberg article in its motion to vacate, arguing that "FINRA's apparent review of the Postell arbitration and removal of these arbitrators from active service bolster the vacatur motion."[83] Ultimately, on October 25, 2012, the Postell Court denied Merrill Lynch's motion to vacate.[84] The Postell Court determined that the allegations regarding "irregularities in the arbitration process that may or may not indicate that the arbitrators prejudged the case or made their decision based on some ill-defined prejudice against Petitioner or in favor of Respondent," were speculative and thus insufficient to establish vacatur.[85]

V. SUMMARY OF LEGGETT ARBITRATION

A. Initiation of the Leggett Arbitration

The Leggett Arbitration started on April 27, 2017, when the Investors filed a Statement of Claim against Wells Fargo alleging, among other things, that Respondents caused more than $1 million in losses.[86] The Statement of Claim alleged that Pickett had breached his fiduciary duty to the Investors by making excessive and overly-risky trades to generate commissions, and Wells Fargo had failed to properly train and supervise. FINRA served Wells Fargo with the Statement of Claim on April 28, 2017. On June 6, 2017, Weiss filed a notice of appearance as counsel for Wells Fargo.

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82 *Merrill Lynch Fenner & Smith, Inc. v. Est. of Postell*, No. 1:11-CV-1997-WBH, 2012 WL 13008641, at *1 (N.D. Ga. Oct. 25, 2012) (discussing Merrill Lynch motion).

83 *Id.* (quoting Merrill Lynch motion).

84 *Id.* at *4–5, 7.

85 *Id.* at *3.

86 *Id.* at *2-7.

B. Generation of Arbitrator List

Consistent with the Rules described above, FINRA generated a list of proposed arbitrators to send to the parties. During the manual staff review of the computer-generated list, DRS removed two arbitrators, R.D. and L.L., on June 20, 2017, before the list was sent to the parties. According to the Drop Notes, R.D. and L.L. were dropped due to a conflict with Wells Fargo – R.D. had an "active cash account," and L.L. owned a "Direct Stock Purchase account." These drops were not shared with the parties. On June 20, 2017, DRS sent an arbitrator selection list of 35 arbitrators, including Pinckney, to the parties. Disclosure reports discussing background information of each arbitrator were also provided.

C. Weiss's Request to Remove Fred Pinckney from the Arbitrator List

On July 10, 2017, four days before the deadline for the parties to submit their arbitrator rankings and strikes, Weiss sent a letter requesting the Director remove Pinckney from the list. Weiss argued that allowing Pinckney to serve as an arbitrator would give rise to "an appearance of potential bias" based on the Postell Arbitration and subsequent motion to vacate.

On July 11, 2017, the Investors responded to Weiss's letter, opposing Pinckney's removal. The Investors argued that, in the Postell Arbitration, the federal court had denied Weiss's motion to vacate and rejected his argument "that the arbitrator exhibited evident partiality or misbehaved."

On July 13, 2017, Weiss sent a second letter to FINRA in support of his request to remove Pinckney. Weiss stated: "it is clear that [Pinckney] has hostile feelings toward me from the *Postell* case," in part because Pinckney was quoted in the July 8, 2012 Bloomberg news article as stating that "Weiss, Merrill's attorney, sensed that he was losing the case and repeatedly 'exploded at the panel,' accusing the arbitrators of being biased in their views and rulings against Merrill." Weiss's letter concluded by stating: "This is in part what FINRA was evaluating when Pinckney was removed from the arbitrator list the last time he came up on one of my cases." Weiss then stated:

> It was made clear to me verbally that none of the *Postell* arbitrators would have the opportunity to serve on any one of my cases given the horrific circumstances surrounding the underlying case, the SEC investigation, and the publicity and the aftermath.

This, again, is the purported verbal agreement central to this Report. Later on July 13, 2017, the Investors submitted a sur-reply letter in which they stated that Weiss's statement about "an unwritten agreement with FINRA preventing the *Postell* arbitrators from serving" in his cases was "extremely troubling." The Investors asked whether there were "other *Postell* arbitrators stri[c]ken from the list provided to me in this case?" and "Does Mr. Weiss have secret agreements with FINRA concerning other arbitrators from other cases?"

D. The Removal of Fred Pinckney

Also on July 13, 2017, the case administrator sent an email to the Regional Director, copying the Associate Regional Director, explaining Weiss's objections: "Respondents made a pre-Panel request that Arbitrator Pinckney be removed from the pool based on interactions between Respondents' counsel Terry Weiss and the Panel during a previous, unrelated FINRA arbitration, in addition to comments Pinckney made to . . . *Bloomberg* subsequent to the arbitration." The email continued: "After reviewing the filings (attached), I recommend that Arbitrator Pinckney be removed from the pool, largely due to the comments he made to media outlets regarding Mr. Weiss[.]" The email stated the case administrator believed a DATR form was unnecessary for this removal because DATR forms were only used "where the Panel is already in place[.]"

At 11:49 AM that day, the Associate Regional Director emailed the case administrator and the Regional Director regarding a form he completed for these types of challenges. The form – an Arbitrator Removal Consideration Form – was different from the DATR form used by FINRA personnel, and specifically asks: "Why is the arbitrator being considered for permanent removal from the roster?" The case administrator never completed this form.

At 12:19 PM that day, the Regional Director responded to the case administrator's email stating: "There is a lot of history here. Litigation threats, past removals and my own litigation. Do not do anything yet." The case administrator responded at 12:58 PM that he would await further instructions. At 4:05 PM, the Regional Director emailed the DRS Director with the subject line stating "call me" and the body of the email stating "if you are around. Thanks." At 9:00 PM, the DRS Director responded to the Regional Director's earlier email, telling the Regional Director to call his cell or that they could speak tomorrow. At 9:27 PM, the Regional Director responded and told the DRS Director he would call him tomorrow. The next morning, July 14, 2017, at 10:59 AM, the Regional Director emailed the case administrator instructing him to remove Pinckney, noting that "[the DRS Director] and I agree."

The DRS Director did not recall the conversation, but agreed it would "make sense" that the Regional Director would reach out to him. The Regional Director stated that he "presumably" spoke with the DRS Director before making a decision because he did not want his supervisor to be surprised to learn of the decision. The Regional Director did not otherwise recall any specifics of the conversation. The Regional Director stated in his interview that he was authorized to decide whether to remove Pinckney, but felt that the DRS Director should know about the matter, especially since it related to the Postell Arbitration and a prior FINRA employee litigation.

The DRS Director and Regional Director agreed to remove Pinckney because of the events of the Postell Arbitration. Both agreed the decision was proper under the Customer Code when asked by Lowenstein. The DRS Director specifically recalled agreeing with the staff recommendation to remove because Pinckney had taken the extraordinary step of going to the press to complain about Weiss. Both denied any other reason for removal.

Later on July 14, 2017, DRS informed the parties by email that it had granted Wells Fargo's request to remove Pinckney. On July 17, 2017, FINRA issued a letter to the parties to that effect.

DRS appointed a new arbitrator from the existing pool for the parties to rank. Neither the email, nor the letter, addresses the Investors' written inquiries about an alleged unwritten agreement. Lowenstein interviewed all of the relevant DRS personnel involved in this decision and none recalled reading about Weiss's alleged "verbal understanding" before the decision to remove was granted.

E. Parties' Arbitrator Rankings

On July 25, 2017 and July 27, 2017, the Investors and Wells Fargo submitted their ranking forms. The Investors and Wells Fargo each ranked arbitrator Kenneth Canfield ("Canfield") as 1 and 3, respectively; Robert Lestina ("Lestina") as 3 and 2, respectively; and Scott Schweber ("Schweber") as 2 and 6, respectively. The parties ranked the other arbitrators lower and the non-public list was stricken. FINRA appointed Canfield, Lestina, and Schweber to the arbitration panel, with Lestina to serve as the panel's Chair.

F. Investors' Amended Statement of Claim

On July 31, 2017, the Investors filed an Amended Statement of Claim ("Amended Claim"). The Amended Claim included new allegations concerning a Wells Fargo data breach. The Amended Claim also stated that Weiss had "disclosed a secret agreement" between FINRA and himself pertaining to the pool of arbitrators in his cases, that the Investors had inquired about this, and that "FINRA provided no response to these inquiries."[87] The Amended Claim continued: "To date, neither [Wells Fargo], FINRA, or its chosen counsel have rebutted the assertion that certain potential arbitrators are precluded by FINRA from serving on any cases in which [Wells Fargo's] counsel i[s] involved."[88]

On August 9, 2017, after receiving the Amended Claims, Lestina emailed Canfield, Schweber, and the FINRA case administrator, asking for guidance on the allegations concerning Pinckney's removal as set forth in the Investors' Amended Claim. Based on Lowenstein's review, it appears that none of the DRS personnel understood the significance of the July 13, 2017 Letter or the Investors' written inquiries about the alleged "secret agreement" until at least August 10, 2017, after Lestina's inquiry.

G. FINRA and Weiss's Response to the Allegations of a "Secret Agreement"

On August 10, 2017, the case administrator forwarded Lestina's email to the Associate Regional Director and the Regional Director. Four days later, the Regional Director emailed the DRS Director about responding to the Investors' questions about unwritten agreements with FINRA. Specifically, he said that he was "unaware or failed to recognize Claimant's request in … their sur-reply …. Claimant has also amended their Statement of Claim to include an allegation about the removal of Pinckney …. The chair is also questioning this[.]" On August 17, 2017, the case administrator emailed the Regional Director, copying the Associate Regional Director with a draft email to send to the parties about the alleged secret agreement. The Regional Director asked

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87 Am. Statement of Claim, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 17-001077 (July 31, 2017).

88 *Id.*

the case administrator to "[g]o back and look at [Investors' counsel's] reply in the Pinckney motion, I would rather reference that as that is where he pointed the questions to FINRA. I think he also references drops of the other arbs that were involved in the Postell matter."

On August 18, 2017, the Regional Director edited the draft email, and then the case administrator emailed the parties. The email stated that "no such agreement exists or has ever existed" and that, "[f]or both of [the Investors'] questions, the answer is no." That same day, Weiss wrote an email to the case administrator and Investors' counsel stating he "did not respond to the unauthorized 'sur-reply' of the other side on this issue because I had felt that I had addressed all issues in my prior letters and that my sur-reply did not add anything that was not said previously." He stated, however, that now that the Investors had amended their Statement of Claim to mention an alleged secret agreement, he "wanted to add a couple of points." Weiss stated that: "The quoted language of 'unwritten agreement with FINRA,' while attributed to me, is not something I ever said and is not something I wrote." He stated that "there was no 'secret agreement' between [him] and FINRA either, and [he has] never said or suggested that such an agreement existed."

H. Wells Fargo's Answer to the Investors' Amended Claim

On August 25, 2017, Wells Fargo filed its answer to the Investors' Amended Claim.[89] Wells Fargo denied all of the allegations in the Amended Claim and denied all liability. Wells Fargo's answer specifically denied that there was impropriety in the arbitrator selection process, stating that the Investors' counsel "misrepresented the statements to [Wells Fargo's counsel]" and that FINRA had already responded and denied the allegations of impropriety.[90]

I. The Removal of Kenneth Canfield

Also on August 25, 2017, Weiss wrote a letter to the case administrator requesting that FINRA remove Canfield from the panel pursuant to FINRA Rule 12407. The letter stated that Wells Fargo learned that Canfield's law firm – of which Canfield is a named partner – filed a lawsuit against Wells Fargo after the parties ranked the list of arbitrators. On August 29, 2017, the case administrator informed the parties that FINRA believed a shortened briefing schedule was appropriate because the parties had an in-person hearing conference ("IPHC") scheduled for September 6, 2017.

Investors' counsel opposed the motion in a letter dated August 30, 2017, arguing that it was speculative to conclude Canfield had any interest in the outcome of his firm's lawsuit. Wells Fargo filed a reply on August 31, 2017, reiterating its original argument and asking that, if FINRA removed Canfield, FINRA provide the parties with a "short list" for choosing the new arbitrator.

After receiving the parties' briefs, on September 1, 2017, the case administrator recommended to the Regional Director by email to remove Canfield under Rule 12407(a)(1) because the scenario "could make it reasonable to infer that arbitrator Canfield is 'biased, lacks

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89 *See* Answer to Am. Statement of Claim, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 17-001077 (Aug. 25, 2017).

90 *Id.*

impartiality, or has a direct or indirect interest in the outcome of the arbitration,' even though no *actual* conflict exists." In a subsequent email also dated September 1, 2017, the Regional Director responded to the case administrator:

> I read all the filings and your email below. I agree on removal. Please fill out DATR form and send to [the Vice President of DRS].[91] If [the Vice President of DRS] agrees, please have arb replaced so the IPHC can proceed next Tuesday. Terry Weiss requested a short list, but we would not offer a shortlist in these circumstances (very early in the process and there are remaining ranked arbitrators available).

Later that day, the case administrator emailed the Vice President of DRS attaching a DATR form and stating "[the Regional Director] and I recommended removal of Arbitrator Canfield." The Vice President of DRS then emailed the Associate Director of DRS asking the Associate Director of DRS to "let me know your recommendation." The Associate Director of DRS replied to the Vice President of DRS that he also recommended removing Arbitrator Canfield "because as a partner in a small law firm with an existing case against a party in the arbitration, he has an 'interest' that justified removal." The Vice President of DRS then emailed the case administrator and the Regional Director, and copied the DRS Director, stating that he too agreed with removing Canfield because Canfield's "law firm is currently in litigation against Wells Fargo" and "this lawsuit was not known to the parties before the arbitrator rankings – it was filed thereafter." The Vice President of DRS's email continued, "please consider this email as my final sign off/decision on the removal motion a[s] acting Director of Arbitration." That same day, DRS notified the parties that FINRA had granted the challenge against Canfield and that FINRA would email the parties once FINRA replaced Canfield and provide the parties with the new arbitrator's disclosure report.

J. Replacement by Short List

Based on the combined rankings on the selection lists, the next highest-ranking arbitrator was W.M. On September 1, 2017, the same day Canfield was removed, DRS personnel tried contacting W.M., but could not reach him. Because the IPHC in the case was scheduled for September 6, 2017, DRS personnel selected "Not Appointed" as the arbitrator's status and stated in a Drop Note that, "[d]ue to imminent hearings in this matter, [W.M. was] dropped as unreachable after one attempt." The next highest-ranking arbitrator was A.W. DRS personnel spoke with A.W. that same day (September 1, 2017), and A.W. agreed to replace Canfield. Later that day, DRS personnel informed the parties that "[t]he replacement arbitrator is [A.W.]," and sent the disclosure report for A.W.

Later that day, Wells Fargo's counsel informed the case administrator that the parties had since stipulated to using DRS's "short list" option for selecting Canfield's replacement. DRS asked the parties whether they agreed to use ranked arbitrators remaining on the original list for purposes of the short list. Wells Fargo responded, copying Claimants' counsel, objecting to

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[91] The DRS Director was out of town and had delegated his authority, in compliance with Rule 12103(a), to the Vice President of DRS.

reusing arbitrators remaining on the original list. There is no record of Claimants objecting to using a new list. DRS used the NLSS to randomly generate a list of three new potential arbitrators.

Due to Hurricane Irma, DRS did not send a letter to the parties, providing the short list of three potential arbitrators (Charles White, L.F., and F.M.) until October 2, 2017. The letter notified the parties that they had until October 9, 2017 to rank and strike the short list of arbitrators. The Investors struck L.F. Wells Fargo struck F.M. This left Charles White as the only remaining arbitrator. On October 9, 2017, DRS advised the parties that Canfield would be replaced by Charles White ("White" and, collectively with Lestina and Schweber, the "Panel" or "Leggett Arbitrators").

On the case details page for the Leggett Arbitration, DRS personnel noted that White is a panelist, and his status is "Completed Service." Unlike the case details page, DRS personnel noted in the case list section that White is "Not Appointed" and his sub-status is listed as "Unavailable." There was no explanation for the difference. Both entries are entered manually by DRS personnel selecting a status from a drop down menu.

K. The Leggett Hearing and Award

The parties in the Leggett Arbitration arbitrated their dispute in DRS from April 2017 to July 2019 with multiple in-person hearings occurring from September 24 to 27, 2018 and then from June 24 to June 28, 2019. The Panel issued its award on August 1, 2019. The Panel denied the Investors' claims in their entirety. The Panel found Leggett liable and ordered him to pay Wells Fargo $51,000, which represented the costs Wells Fargo incurred in connection with the matter, plus fees.

L. The Georgia Case

On October 30, 2019, the Investors asked the Georgia Court to vacate the Award.[92] Wells Fargo objected and moved to confirm the Award. The Georgia Court held a hearing on both motions on November 9, 2021. During that hearing, Weiss affirmed that there was no secret agreement with FINRA personnel:

> There was no agreement at all; there was nothing like that. I had had—this goes back years prior to this. I had had a conversation with FINRA about—FINRA had asked me what had happened in that case. The name of the case was [Postell] versus Merrill Lynch. And FINRA had asked me what had happened in that case, and because there were accusations that these arbitrators were screaming and yelling at witnesses and whatnot. And they asked me about that, and I said, look, if I get any of these three arbitrators on a future case, I have a right to strike them, of course, which I will do, if necessary. But I would prefer not to do that because it wouldn't

[92] *See* Pet. To Vacate Arb. Award at 1-2, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 2019CV328949 (Ga. Super. Ct., Oct. 30, 2019).

be fair to put somebody on a panel that you already know, or present somebody [you] already know is bias[ed] against one of the lawyers.[93]

On January 25, 2022, the Georgia Court granted the Investors' motion and vacated the Award.[94] On February 23, 2022, Wells Fargo filed a notice of appeal to the Georgia Court of Appeals ("Court of Appeals").[95] On June 9, 2022, the Court of Appeals heard oral argument. As of the date of this Report, a decision is pending.

VI. FINDINGS

A. The Removal of Pinckney and the Alleged Secret Agreement

The primary question in this investigation was whether Weiss had an agreement with FINRA to automatically remove certain arbitrators from arbitrator selection lists in his matters. After careful consideration of the evidence obtained during the investigation, Lowenstein does not believe that there was any agreement between Weiss and FINRA regarding the panels for Weiss's cases. The only evidence that such an agreement existed was the July 13, 2017 Letter, which Weiss emphatically disclaimed meant that there was a secret agreement during the course of this investigation and in other forums.

All current and former FINRA personnel who could conceivably have been a part of such an agreement were interviewed and denied the agreement's existence, noting that it would be contrary to DRS's culture of neutrality. Lowenstein found these witnesses all to be credible. Likewise, no documentary evidence – including any emails or other material – suggested in any way that such an agreement existed. Further, analysis of the arbitrator selection data from MATRICS proved that none of the Postell Arbitrators were improperly removed during the manual review process or any other time by DRS.

Lowenstein exhausted all investigative avenues to determine whether anyone at DRS had entered into such a verbal understanding with Weiss. Lowenstein reviewed the Georgia Court transcripts and documents, reviewed FINRA documents and emails, interviewed current and former FINRA personnel, interviewed Weiss, reviewed telephone records, and spoke with attorneys representing Wells Fargo. Furthermore, Lowenstein analyzed queries from the MATRICS system to determine whether any of the Postell Arbitrators had been removed from any arbitration lists involving Weiss, a law firm where Weiss was employed, Wells Fargo, or Merrill Lynch. Finally, Lowenstein assessed – notwithstanding any alleged agreement – whether the removal of Pinckney was appropriate pursuant to the Customer Code and the DR Manual. The results of those efforts are set forth below.

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93 Nov. 9, 2021 Tr. at 54: 24-55:18, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 2019CV328949 (Ga. Super. Ct.).

94 *See* Order Granting Mot. to Vacate Arb. Award and Denying Cross Mot. to Confirm Arb. Award at 24-37, *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 2019CV328949 (Ga. Super. Ct., Fulton Cnty., Jan. 25, 2022).

95 *See* Notice of Appeal, No. A22A1149 (Ct. App. Ga., Feb. 23, 2022).

i. The Weiss Interview

On April 28, 2022, Lowenstein interviewed Weiss. When asked about the statement in his July 13, 2017 Letter, Weiss stated that there was no secret agreement. Weiss explained that, after the news article was published in July 2012, he called to give a courtesy "heads up" to FINRA that if any of the three arbitrators appeared on one of his lists in a future matter, he would utilize the tools available to him to ensure they did not make it to one of his panels. He represented he told the FINRA employee he would first try to exercise a challenge pursuant to Rule 12407 and argue that the arbitrators were biased toward him based on the Postell Arbitration and the events that followed, and that if this challenge was not granted, he would use his strikes to strike the arbitrators from the list. Weiss said that the FINRA employee acknowledged what he said. When Lowenstein asked Weiss to clarify what he meant by the FINRA employee "acknowledging" Weiss's statements, Weiss explained that the FINRA person stated that this was not an unreasonable use of a Rule 12407 challenge. Later in the interview, Weiss stated that the employee responded to his statements about his plans to use a Rule 12407 challenge by saying "yes, you can do that."

Weiss described the person with whom he spoke as a male, "director level" person, but said he could not remember the man's name or specifically who it was. Weiss acknowledged that he has previously spoken with the current Southeast Regional Director, and he also thinks he has previously spoken with former and current DRS senior management. He stated, however, that he believes that a conversation with current DRS senior management would have been "more recently." He said it would have been someone at the level of evaluating director challenges. He later clarified that he had an idea of who it might be, but that he did not want to guess. He stated that he does not think anything would help him remember. When Lowenstein asked if he had a recent conversation where he specifically named any current or former FINRA personnel, Weiss said he did not know, despite (as described below) providing Wells Fargo's outside counsel specific names of FINRA personnel with whom he had the conversation referenced in his July 13, 2017 Letter. When asked further about the phrasing of the Letter, he explained it was an "advocacy piece."

ii. Wells Fargo's Proffer and Additional Information

Lowenstein contacted Wells Fargo, through its current outside counsel, to request its cooperation in this investigation. Wells Fargo declined to waive the attorney-client privilege, but agreed to discuss information through its outside counsel related to statements Weiss may have made related to the alleged "secret agreement." Wells Fargo agreed to allow its attorneys to speak on its behalf (proffer) and provide any other non-privileged information it had in its possession.

Wells Fargo's outside counsel informed Lowenstein that, in a conversation with Weiss during the week of March 28, 2022, Weiss told them that his statements in the July 13, 2017 Letter referred to a conversation he had with a former DRS senior manager years ago concerning the Postell Arbitrators. Wells Fargo's outside counsel later informed Lowenstein that Weiss corrected his prior statements to them, changing the individual from the former DRS senior manager to another DRS senior manager, who is still currently employed by DRS. Wells Fargo's outside counsel stated that Weiss's statements to them were not necessarily inconsistent with what Weiss stated during his interview with Lowenstein, which Wells Fargo's outside counsel attended. Wells

Fargo's outside counsel stated that, based on their discussions with Weiss, they were unsure of when the alleged conversation between Weiss and FINRA occurred.

According to Wells Fargo's outside counsel, before Weiss made a challenge to remove Pinckney from the Leggett Arbitration in July 2017, Wells Fargo's in-house attorneys were not aware of, and did not have any discussions with Weiss about the Postell Arbitration, the Postell Arbitrators, or any issues Weiss may have had with those arbitrators. Wells Fargo's outside counsel also stated that Wells Fargo, more generally, had no communications with Weiss regarding the Postell Arbitration or Postell Arbitrators.

According to Wells Fargo's outside counsel, during the Leggett Arbitration, Wells Fargo's in-house attorneys received Weiss's proposed arbitrator rankings from Weiss's colleague on July 10, 2017 via email. Pinckney was on this list of potential arbitrators. Wells Fargo's outside counsel represented that Wells Fargo was not aware of any communications at that time concerning any of the Postell Arbitrators, what occurred in the Postell Arbitration, or any discussions or agreements with FINRA about those arbitrators. With respect to Weiss's letter briefs filed on July 10 and July 13, 2017, seeking Pinckney's removal from the arbitrator list, Wells Fargo's outside counsel further represented that Wells Fargo found no evidence that a draft of either of Weiss's letters was sent to Wells Fargo before they were filed. Wells Fargo also found no non-privileged communications concerning the removal of Pinckney from the arbitrator list.

Wells Fargo's outside counsel represented that Wells Fargo had conducted significant due diligence by reviewing emails and other evidence to locate any information suggesting that anyone at Wells Fargo knew anything about the alleged agreement between Weiss and FINRA concerning the Postell Arbitrators. According to Wells Fargo's outside counsel, Wells Fargo found nothing to indicate anyone at Wells Fargo knew about, participated in, authorized, or otherwise agreed to any agreement of any kind concerning the arbitrators from the Postell Arbitration. Wells Fargo's outside counsel further stated that Pinckney had appeared on two arbitration lists since 2012 in which Wells Fargo was a party, and that Wells Fargo had ranked him both times.

iii. Additional Statements Made by Weiss

In addition to the above statements, Weiss made two additional representations regarding the July 13, 2017 Letter. First, in the August 18, 2017 email to Claimant's counsel, which copied DRS, Weiss denied the existence of a secret agreement. Second, during the November 9, 2021 oral arguments on the motion to vacate the arbitration award in the Georgia Court, Weiss explained to the court what he meant by that statement in his July 13, 2017 Letter. Weiss stated that, "it was my understanding that based on [Pinckney's] prejudice against me personally, because of this prior Merrill Lynch situation, that he would not be on any subsequent panel[.]" When the court asked what he meant by "understanding," Weiss stated that "there was no agreement at all." He explained that had a conversation with FINRA after the Postell Arbitration, where FINRA asked what happened during the Postell Arbitration, and Weiss stated that "if I get any of these three arbitrators on a future case, I have a right to strike them, of course, which I will do if necessary." He stated he "would prefer not to do that because it wouldn't be fair to put somebody on a panel that you already know, or present somebody who [you] already know is bias[ed] against one of the lawyers."

iv. Interviews with Current and Former FINRA Personnel

Based on Weiss's description of the individual he spoke with and the time period described to Lowenstein (July 2012) during his interview, Lowenstein asked additional questions of the male DRS senior management members (both current and former) and senior management in the Southeast Region. One of the employees stated that he was unsure whether Weiss ever approached him concerning the Postell Arbitration, but that the employee likely spoke to Weiss as it "typically happens" when counsel seeks review of a FINRA staff decision. Another employee stated that he does not specifically recall speaking to Weiss in July 2012, but that it is possible he did. Finally, the last employee stated that he has never met Weiss nor spoken to him. All denied having any verbal agreement with Weiss or knowledge of any verbal agreement. Lowenstein found them all to be credible.

v. Telephone Records

As part of its review, Lowenstein requested and received telephone records from FINRA for certain DRS senior management. FINRA could only provide telephone records back to September 4, 2014 (outside the time period identified by Weiss during his interview with Lowenstein: July 2012).[96] Nevertheless, Lowenstein reviewed the records to determine the frequency of any communications between DRS senior management and Weiss. The telephone records only indicated one call between the DRS Director and Weiss. It occurred on April 25, 2016. The call lasted for 8.27 minutes. The DRS Director did not remember the call. On the same date as this call, however, Weiss sent an email to the DRS Director and other FINRA personnel, along with opposing counsel, about an arbitration: *William Joseph King vs. J.P. Morgan Securities, LLC* (Case ID 16-00167) (the "King Arbitration"). The email related to the alleged improper service of process of Weiss's client in that case. This matter is discussed in greater detail below.

vi. The King Arbitration

On January 19, 2016, claimants filed a Statement of Claim in the King Arbitration. DRS served J.P. Morgan Securities, LLC ("J.P. Morgan") with the Statement of Claim on January 21, 2016. On February 22, 2016, J.P. Morgan notified FINRA that it had a new Chief Compliance Officer ("CCO"). However, DRS had sent the service letter before receiving the contact information for the new CCO. The letter specified J.P. Morgan's answer was due on March 11, 2016. J.P. Morgan failed to answer.

On March 18, 2016, DRS sent J.P. Morgan a letter concerning its failure to respond. The same day, DRS notified claimant's counsel that the arbitrator ranking lists were available through the online portal. DRS appears to have sent a similar notice to J.P. Morgan by mail. The notice specified that the parties' ranking lists were due by April 7, 2016. On March 25, 2016, DRS sent claimant's counsel and J.P. Morgan a reminder to submit the arbitrator ranking lists. The reminder letter noted that failure to timely submit the arbitrator ranking lists would be deemed an acceptance

[96] The telephone records provided by FINRA only included office telephone records, not cell phone records. Relevant individuals previously elected to use their own smart devices, as is permissible.

of "all arbitrators on the lists." Claimants submitted a timely ranking list, and Kolber was appointed to the panel. FINRA Rules do not distinguish between DRS creating a panel if both parties submit a ranked list, or when only one of the parties submits a list.

At some point, J.P. Morgan realized that it might not be receiving arbitration notices. On April 11, 2016, J.P. Morgan emailed DRS requesting a list of all arbitrations filed against it from December 2015 through the email date. DRS provided the list to J.P. Morgan on April 13, 2016. The list included the King Arbitration. On April 14, 2016, J.P. Morgan requested that DRS provide it with all correspondence and pleadings for two arbitrations, including the King Arbitration. DRS provided J.P. Morgan with the relevant correspondence and pleadings on the same day. On April 15, 2016, J.P. Morgan advised DRS that: (1) they had received the Statement of Claim for the first time on April 14, 2016, (2) the service letter had incorrectly been addressed to the former CCO, and (3) they were requesting an extension of time to respond to the Statement of Claim and arbitrator selection process. On April 19, 2016, DRS denied J.P. Morgan's request for an extension of time to respond, stating that "a review of this matter indicates that the Statement of Claim and list of potential arbitrators were sent to [J.P. Morgan's] headquarters and were not returned by the U.S. Postal Service."

On April 20, 2016, Weiss entered a notice of appearance on behalf of J.P. Morgan. On April 21, 2016, Weiss emailed DRS, including a case administrator, and copying opposing counsel, disputing that service was proper. Weiss also requested an extension of time to respond and additional information concerning the service. The same day, DRS responded to Weiss with copies of the service letter, along with other pertinent information. DRS indicated that they were treating Weiss's April 21, 2016 email as "a motion to reconsider our previous decision to deny Respondent's request for an extension of time to respond to the Statement of Claim and arbitrator selection process," and requested that claimant submit a response to the motion by May 9, 2016.

On April 25, 2016, Weiss emailed the DRS Director, copying opposing counsel and other DRS personnel, further elaborating on the alleged issues with improper service for three arbitrations in which J.P. Morgan was a party. Weiss also wrote: "on a related note, we also have a separate issue as to one of the appointed arbitrators, Daniel Kolber, which we can address if it becomes necessary to do so. But it is appropriate to wait until your review of this situation is completed before we raise that more specifically." As stated above, the same day, telephone records indicate that Weiss and the DRS Director had an eight-minute telephone conversation. The DRS Director did not remember the call when asked by Lowenstein. Weiss recalled speaking with the DRS Director regarding the service issue, but had no recollection of speaking with him regarding Kolber.

On May 3, 2016, Weiss emailed DRS indicating that claimants agreed not to argue that the answer would be filed late. In a series of emails the next day, claimant's counsel responded that the agreement was contingent on scheduling a hearing in December, and he had not seen the supporting document related to the service of the answer. DRS provided the documents to claimant's counsel. DRS then confirmed in emails that it had provided the requested documents to claimant's counsel and that DRS had spoken with claimant's counsel, who would not be submitting a response to Weiss's motion for reconsideration before the Director ruled on the issue. Weiss's motion for reconsideration was unopposed by claimants (*i.e.* uncontested).

On May 4, 2016, FINRA notified the parties that "the Director has granted Respondent an extension until May 12, 2016 to submit its Statement of Answer and completed arbitrator ranking form." The notification further explained:

> We realize that the parties have been able to view through the DR Portal the arbitrators previously appointed to this matter based on [c]laimant's submitted ranking form. Under the circumstances, if [c]laimant would prefer that the parties be provided with a new list of potential arbitrators, [c]laimant must notify FINRA by close of business on May 9, 2016. FINRA will then send the parties a new list of arbitrators and set a new deadline for both parties for 20 days from the date that the new list is sent.

J. P. Morgan submitted its answer to the Statement of Claim on May 6, 2016. On May 9, 2016, claimants submitted a request for a new arbitrator list. DRS generated a new arbitrator list the same day. The new list was sent to the parties the next day. Kolber did not appear on this newly-generated list, which would not have been expected since it was a newly-created list by MATRICS. The parties submitted their rankings to FINRA on May 31, 2016.

FINRA Rule 12207 permits the Director to extend the time period to file an answer for "good cause." The Director also has "discretionary authority" to make "any decision that is consistent with the purposes of the Code to facilitate the appointment of arbitrators and the resolution of arbitration.[97] The Director appears to have exercised his authority in the King Arbitration by granting the uncontested motion for reconsideration and permitting the claimants to decide whether the respondents should rank the original list, knowing that respondents had seen the results of claimants' ranking, or allowing the claimants to request a new list entirely.

vii. MATRICS Datasets

Lowenstein obtained and analyzed MATRICS datasets from 2010 to April 2022 to determine if there was any evidence that Postell Arbitrators had been improperly removed from any cases involving Weiss, Merrill Lynch, Wells Fargo, and firms where Weiss was employed. Lowenstein included Merrill Lynch because it was the respondent in the Postell Arbitration and Wells Fargo because it was the respondent in the Leggett Arbitration. Based on the analysis of the MATRICS datasets, the data corroborated that there was no secret agreement to remove the Postell Arbitrators from the arbitrator selection lists.

As mentioned above, MATRICS captures every removal of an arbitrator during the list generation and selection process. The datasets that Lowenstein analyzed included: (1) every Drop Note for the Postell Arbitrators; (2) all arbitrations where a Postell Arbitrator was appointed to the panel, struck by the parties, not appointed, or dropped from a list, regardless of whether it occurred before the list was sent to the parties (Early Drop) or after (Late Drop); (3) all arbitrations where Weiss represented a party; (4) all arbitrations where a law firm that employed Weiss represented

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[97] Rule 12408.

a party but Weiss was not identified as an attorney of record; (5) all arbitrations where Merrill Lynch was a party; and (6) all arbitrations where Wells Fargo was a party.[98]

For purposes of this analysis, Lowenstein examined the date the Drop Note was entered versus the date of the "printed list" to determine Early and Late Drops. A "printed list" is a list that is sent to the parties. If, after the parties receive a list, but before they rank or strike arbitrators, they agree to remove an arbitrator or the arbitrator is removed by the Director, DRS personnel will terminate the old list, drop the removed arbitrator(s), and then reprint with the remaining arbitrators for the new list. The NLSS will populate the replacement arbitrator for the new list. In MATRICS, this process will appear as though FINRA removed the arbitrator as an Early Drop. So, in certain instances, there may be times where the parties agreed to drop an arbitrator before the printed list date for the new list, which will be identified as an Early Drop. There may also be times, as in the Leggett Arbitration, where the Director drops an arbitrator (Pinckney) after the list is printed, but before the parties rank and strike; the list is terminated; a new list is generated; and the drop appears as an Early Drop because of this process.

[98] "Not Appointed" status encompasses Drop Notes (also referred to as List Notes) where an arbitrator has a recorded status of "Not Appointed." "Printed" status means an arbitrator was on a selection list sent to the parties for ranking, but DRS staff never consolidated the selection list, typically because the parties settled the matter before ranking arbitrators. "Panel Candidate" status means an arbitrator was on the consolidated list of arbitrators after the parties submitted their rankings, but that the arbitrator was not ranked high enough to be selected to the panel. "Dropped" means DRS dropped the arbitrator (either as an Early or Late Drop) for a conflict of interest under the manual staff review, a conflict of interest or bias discovered by the parties with the parties' consent, or a grant of a causal challenge or DATR.

a. Overview of Removals of Postell Arbitrators in All Cases

From 2010 to April 2022, the Postell Arbitrators appeared on 669 unique lists in 564 unique arbitrations.[99] The below chart summarizes what occurred each time the Postell Arbitrator appeared on a list:

	Gormly[100]	**Kolber[101]**	**Pinckney[102]**
Unique Lists	**428**	**180**	**77**
Unique Arbitrations	**367**	**154**	**58**
Appointed	47	9	1
Struck	177	125	45
Not Appointed	128	13	9
Dropped	15	7	3
Early Drops	**10**	**5**	**2**
Conflict Early Drop	6	0	0
Unavailability Early Drop	2	0	0
Administrative Early Drop	2	0	0
ARS Early Drop	0	2	0
Party Agreement Early Drop	0	3	1
Dropped by Director	0	0	1

1. Gormly Appearances

Gormly appeared on 428 unique selection lists in 367 unique arbitrations,[103] being appointed forty-seven times, struck 177 times, Not Appointed 128 times, and Dropped fifteen times. Of the fifteen Dropped statuses, Gormly was unavailable or unresponsive five times; had a conflict six times;[104] and was Dropped for administrative reasons four times.

Of the fifteen Dropped statuses, ten were Early Drops. Six of the ten Drop Notes indicate Gormly had a conflict. Two of the ten Drop Notes indicate that Gormly had told FINRA she was unavailable. One of the four Drop Notes indicates that FINRA personnel had inadvertently

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99 FINRA may generate more than one selection list in a single arbitration proceeding. Lowenstein uses the phrase "unique list" to refer to one list in one arbitration, but there may be more than one "unique selection list" in any given "unique arbitration." The phrase "unique arbitration" refers to one arbitration proceeding. For purposes of this Report, Lowenstein only counted a Dropped arbitrator once for each unique arbitration, not each unique list.

100 Gormly has moved to another region, but remains a FINRA arbitrator.

101 Kolber continued to serve as a FINRA arbitrator through 2020.

102 As of 2017, Pinckney is no longer a FINRA arbitrator.

103 The aggregate unique selection lists among the three Postell Arbitrators totals 685, sixteen more than the 669 set forth in Section VI(A)(vii)(a) above, as the Postell Arbitrators appeared on the same unique selection lists sixteen times. Likewise, the aggregate unique arbitrations among the three Postell Arbitrators totals 579, fifteen more than set forth in Section VI(A)(vii)(a) above. This is because two or more Postell Arbitrators appeared on a selection list in the same arbitration fifteen times.

104 For example, in DRS Case ID 16-03039, the List Member Notes state, "Ilene Gormly has an account with claimant Wells Fargo."

extended the list.[105] And, the final Drop Note states that Gormly had to be Dropped to add the chair qualified arbitrators from the original list.

2. Kolber Appearances

Kolber appeared on 180 unique selection lists in 154 unique arbitrations, being appointed nine times, struck 125 times, Not Appointed thirteen times, and Dropped seven times. Of the seven Dropped statuses, two were due to Kolber being unavailable or unresponsive; two were due to a conflict; and three were because the parties agreed to drop him.

Of the seven Dropped statuses, five were Early Drops. Two of the five Drop Notes related to "ARS case procedures." "ARS" case procedures refer to Auction Rate Securities cases where FINRA had a special arbitration process that is outside of the scope of this Report.[106] The other three Early Drops were a result of the parties' agreement to remove him from the original list.

3. Pinckney Appearances

Pinckney appeared on seventy-seven unique selection lists in fifty-eight unique arbitrations, being appointed once, struck forty-five times, Not Appointed nine times, and Dropped three times. Of the three Dropped statuses, two were due to removal by the director, and one was because the parties agreed to drop Pinckney. Of the three Dropped statuses, two were Early Drops. One of the Drop Notes for an Early Drop states that Pinckney was Dropped per the parties' agreement, while the other Drop Note states that Pinckney was removed by the Director in the Leggett Arbitration.

b. Postell Arbitrators and Weiss Matters

From 2010 to April 2022, Weiss appeared in forty-two arbitrations in DRS. Below is a chart showing each time that a Postell Arbitrator appeared on an arbitrator selection list in a Weiss arbitration after the Postell Arbitration:

	Gormly	**Kolber**	**Pinckney**
Weiss Selection Lists	**0**	**2**	**3**
Struck from Weiss Selection List	0	1	0
Dropped from Weiss Selection List	0	1	3

[105] When an arbitrator must be replaced, an "extended-list appointment" occurs when there are no names remaining on an arbitrator selection list because the parties have either struck all of the arbitrators or no mutually acceptable arbitrator is able to serve. *See* FINRA Regulatory Notice 10-37, *Increase in Number of Arbitrators Available for Review When Parties Choose Arbitration Panels* (effective Sept. 27, 2010), available at www.finra.org/rules-guidance/notices/10-37 (last visited June 21, 2022). The phrase "extend the list" refers to FINRA using the NLSS to extend an arbitrator list "by randomly selecting an additional arbitrator to complete the panel." *Id.*

[106] *See* www.finra.org/media-center/news-releases/2008/finra-creates-process-arbitrations-involving-auction-rate-securities (last visited June 21, 2022).

Accordingly, there were only five instances in four arbitrations where a Postell Arbitrator appeared on a selection list for an arbitration where Weiss represented a party: (i) Pinckney and Kolber in *Rita Prati Danese v. Merrill Lynch Pierce Fenner & Smith Inc., Henry A. Tullis, Jr., and Bruce Douglas, et al.* (Case ID 10-01467) (the "Danese Arbitration"); (ii) Kolber in the King Arbitration (discussed above); (iii) Pinckney in the *Carey C. Steger As Executrix for the Estate of Donald Ross Campbell v. Merrill Lynch Pierce Fenner & Smith, Inc.* (Case ID 10-03818) (the "Campbell Arbitration"); and (iv) Pinckney in the Leggett Arbitration.

In the Danese Arbitration, both Kolber and Pinckney appeared on the arbitrator selection list. The parties struck Kolber during the rank and strike process. The parties selected Pinckney as an arbitrator. On June 27, 2011, approximately one month after the issuance of the Postell award, Weiss submitted a request to remove Pinckney from the Danese Arbitration panel. It was a causal challenge because it occurred before the first hearing session pursuant to Rule 12407(a).[107] Weiss asserted that, because Merrill Lynch filed a motion to vacate the Postell Arbitration award in federal court on June 20, 2011, which accused Pinckney of violating federal law, FINRA rules, and American Bar Association standards of conduct, Pinckney's removal was required due to an appearance of potential bias. On June 28, 2011, claimant's counsel submitted a response, and on June 29, 2011, Weiss submitted a reply. By this time, DRS had already completed its initial investigation into the Postell Arbitrators, including Pinckney, and had made the decision to remove him from the roster. On July 1, 2011, the Director granted the removal of Pinckney from the arbitration panel, with the case notes reflecting: "Ranked arb removed by Director pursuant to Respondent's Request that the Director remove arb."

On August 27, 2010, claimants in the Campbell Arbitration filed a Statement of Claim. Pinckney appeared on the arbitrator selection list, but the parties agreed to strike him in December 2010, prior to the Postell Arbitration hearing dates and issuance of the award.

c. Postell Arbitrators and Merrill Lynch

From 2010 to April 2022, the Postell Arbitrators appeared on twenty-six unique Merrill Lynch selection lists in twenty-four unique arbitrations. Below is a chart of that data. Of those twenty-four arbitrations, FINRA personnel did not drop any of the Postell Arbitrators before the parties received the computer-generated selection lists. There were no Early Drops. As discussed above, a Postell Arbitrator was removed by a Director as a Late Drop in the Danese Arbitration. In the remaining twenty-five unique Merrill Lynch selection lists, the Postell Arbitrators were either struck by the parties, unavailable, or Not Appointed.

	Gormly	**Kolber**	**Pinckney**
Merrill Lynch Selection Lists	**5**	**16**	**5**
Appointed in ML	1	2	1
Not Appointed in ML	2	3	1
Struck in ML	2	11	3

[107] Rule 12407(a).

d. Postell Arbitrators and Wells Fargo

From 2010 to April 2022, the Postell Arbitrators appeared on forty-six unique Wells Fargo selection lists in thirty-five unique arbitrations. Below is a chart of that data. Of those thirty-five arbitrations, DRS did not drop any of the Postell Arbitrators before the parties received the computer-generated selection list. There were no Early Drops. Following the parties' receipt of the arbitrator selection lists, a Postell Arbitrator was removed by a Director as a Late Drop in one arbitration – the Leggett Arbitration. In all thirty-four of the other arbitrations, the Postell Arbitrators were struck by the parties, unavailable, Not Appointed, or Dropped due to unavailability, conflicts, and in one instance, to add back the chair-qualified arbitrators from an original selection list.[108]

	Gormly	**Kolber**	**Pinckney**
Wells Fargo Selection Lists	**32**	**0**	**5**
Appointed in WF	2	0	0
Not Appointed in WF	11	0	2
Struck in WF	14	0	2
Dropped in WF	5	0	0
Removed by Director in WF	0	0	1

e. Postell Arbitrators and Firms Where Weiss Worked

The Postell Arbitrators appeared on twelve unique selection lists in twelve unique arbitrations where a law firm, while employing Weiss, represented a party (excluding arbitrations where Weiss was the attorney of record). Below is chart of that data. None of the Postell Arbitrators were removed as Early Drops.

	Gormly	**Kolber**	**Pinckney**
Weiss-Firm Arbitration Selection Lists	**2**	**6**	**3**
Struck	2	4	3
Appointed	0	1	0
Generated in Error	0	1	0

B. FINRA's Procedures Related to the Pinckney Motion to Remove

As discussed above, after receiving the parties' submissions related to Weiss's challenge to remove Pinckney in the Leggett Arbitration, FINRA forwarded the parties' documents to the Regional Director and eventually to the DRS Director. However, for casual challenges, there was no requirement that the challenge be decided by the Director. When Lowenstein interviewed the

[108] Kolber did not appear on any of the Wells Fargo selection lists because he had a disclosed conflict with Wells Fargo.

DRS personnel involved with the Pinckney challenge, they uniformly agreed that it was their understanding they should provide the challenge to their supervisor or the Regional Director for their determination. The April DR Manual stated that "most challenges are decided by regional staff, as the designee of the Director." The April DR Manual did not specifically identify the appropriate DRS individual within the region.

In at least one region, a chart governing delegation of duties was created and used for various arbitrator challenges. The Southeast Region did not utilize such a chart. In the Leggett Arbitration, given the Director's discretion to remove an arbitrator under Rule 12407(a)(1), the Director could appropriately make the final decision to remove Pinckney and did.

DRS personnel followed some, but not all, policies in the April DR Manual for the Pinckney removal. DRS personnel changed Pinckney's status in MATRICS to "Dropped" and added a Drop Note explaining that he had been removed by the Director. But, DRS used and sent the incorrect form letter to the parties to inform them of the removal. MATRICS records the resolution of DATRs and causal challenges through the use of different "LC" codes. Pursuant to the April DR Manual, DRS was required to send a MATRICS-generated LC54B letter to the parties to notify them of the grant of a causal challenge.[109] Instead, DRS used a form LC08Y letter to inform the parties of the removal. This oversight can (and did) impact the data associated with arbitrators' removals in MATRICS. It did not, however, impact the parties. According to multiple DRS personnel, until recently, the "LC08Y" code and corresponding letter was used for all grants of DATRs and causal challenges before the arbitration panel was appointed, even though the policies and procedures provided different codes for those actions.

Following the Georgia Decision, DRS implemented enhancements to address its causal challenge procedures. The Director must now decide all causal challenges, and DRS sends a list to FINRA's Chief Legal Officer every month to evaluate the challenges. DRS personnel now must also complete a standardized form. Further, DRS changed the DR Manual to reflect each LC code that should be used for each decision, so DRS personnel have a uniform, consistent way of using the form letters. DRS also added in more guidance on Drop Note entries to the DR Manual. In at least one instance, however, in an interview conducted after the implementation of these changes, the DRS member was unaware of the changes. This demonstrates that training for these changes to the DR Manual could be enhanced.

C. Canfield Removal

As stated above, after the three-arbitrator panel was chosen but before the evidentiary hearing began in the Leggett Arbitration, Weiss filed a motion requesting that Canfield be removed from the panel pursuant to Rule 12407. DRS granted the motion.

Lowenstein reviewed DRS's decision of Weiss's motion to determine whether it was consistent with FINRA Rules and the April DR Manual. Lowenstein determined that DRS deviated from the appropriate DRS procedures by treating Weiss's motion as a DATR pursuant to FINRA Rule 12407(b), instead of a causal challenge pursuant to FINRA Rule 12407(a)(1).

[109] April DR Manual at 315-16.

Lowenstein also determined that DRS would have reached the same outcome if it treated the motion as a causal challenge.

A DATR motion is used only after the first hearing session begins. At the time of Weiss's motion to remove Canfield, the first hearing session had not yet occurred. Nevertheless, DRS evaluated the motion under the DATR standard by considering whether the new information learned about Canfield – the fact that his law firm had recently filed a lawsuit against Wells Fargo – was known to the parties before they submitted their arbitrator rankings. Instead, FINRA staff only needed to consider whether it was reasonable to infer that the arbitrator would be biased, lack impartiality, or have a direct or indirect interest in the outcome of the arbitration.

As part of its investigation, Lowenstein interviewed the DRS personnel who handled Weiss's motion to remove Canfield. After being shown their email correspondence regarding the handling of the motion, multiple DRS personnel either acknowledged that they should not have treated Weiss's motion as a DATR or stated they were unsure whether it should have been treated as a DATR. Multiple DRS personnel also stated that the difference between a DATR and a causal challenge is inconsequential. One DRS personnel stated that, when DRS evaluates a DATR motion, it requires a higher standard than when evaluating a causal challenge, so if DRS granted the motion applying the DATR standard, it also would have granted the challenge applying the causal challenge standard.

Lowenstein determined that, had DRS properly treated this motion as a causal challenge under Rule 12407(a)(1), it still would have granted the motion. When conferring internally about whether to grant the motion, even though multiple DRS personnel applied the Rule 12407(b) standard, DRS also discussed the Rule 12407(a)(1) standard and found that the scenario could make it reasonable to infer that Canfield was biased, lacked impartiality, or had a direct or indirect interest in the outcome of the arbitration. Based on the Customer Code and April DR Manual, this does not appear to have been an unreasonable decision. DRS based this determination on the fact that Canfield was a partner in a law firm interested in the success of its case against Wells Fargo. In other words, even though DRS incorrectly applied the higher Rule 12407(b) standard, it also applied the Rule 12407(a)(1) standard properly, so the error was immaterial to the decision.

D. Ambiguities in the DR Manual

During the course of its investigation, Lowenstein determined that there were several ambiguities in the DR Manual during the time period in question that have either already been addressed or are under consideration for modification.

First, if a proposed arbitrator was an "account holder" with an institution that was a party in the arbitration, the DR Manual requires that arbitrator be removed from the selection list. In the Southeast Region, the DR Manual guidance on "account holder" conflicts was interpreted broadly to mean any type of account, including bank accounts. In other regions, "account holder" was interpreted narrowly to mean securities accounts only. FINRA has already implemented enhancements to clarify this section of the DR Manual.

Further, prior to 2015, each DRS Regional Director would send the Vice President of DRS a Drop Notes report memorandum every quarter, which would have required the DRS Regional Director to review the Drop Notes. In 2015, DRS senior management determined that it was unnecessary for the DRS Regional Directors to send the reports to senior management. An email was sent to the DRS Regional Directors directing them to cease sending the reports. As a result, many of the DRS Regional Directors misunderstood senior managements' directive and ceased reviewing the Drop Notes reports.

The DR Manual is also unclear on who has the responsibility to conduct the manual conflict review prior to sending the arbitrator list to the parties. In some regions, the case specialists are responsible for conducting the manual conflict review, while in other regions, it may be the case coordinator's responsibility. This had no impact on the selection process in the Leggett Arbitration.

VII. CONCLUSIONS AND RECOMMENDATIONS

After careful consideration of the evidence obtained during the investigation, Lowenstein does not believe that there was any agreement between Weiss and FINRA regarding the panels for Weiss's cases. All current and former FINRA personnel who could conceivably have been a part of such an agreement were interviewed and denied the agreement's existence, noting that it would be contrary to DRS's culture of neutrality. Lowenstein found them all to be credible. Likewise, no documentary evidence – including any emails or other material – suggested in any way that such an agreement existed. Nonetheless, through this investigation, Lowenstein identified a series of potential improvements to the FINRA arbitrator selection process intended to increase transparency and ensure neutrality in the work undertaken by DRS.

The evidence further demonstrated that FINRA personnel generally adhered to the policies and procedures and that their actions during the Leggett Arbitration were intended to be fair and reasonable at each step. Based on historic and anticipated enhancements that were reviewed by Lowenstein, it is clear that FINRA is continually striving to make the arbitration processes more transparent and uniform for arbitration participants. Overall, notwithstanding the proposed potential enhancements, DRS is continuing to function as intended – as a neutral forum to assist investors, brokerage firms, and individual brokers in resolving securities and business disputes.

- **The DR Manual Should Be Updated**

In order to reflect the neutrality of the DRS forum, and to further promote uniformity and consistency among the different DRS regions, DRS should consider amending the DRS Manual to include or clarify the following:

  - A Code of Neutrality to codify the standards that DRS personnel are expected to maintain in their interactions with DRS participants and execution of their job duties;

  - The DRS job title that is responsible for each of the procedures identified in the DR Manual;

- The duties and responsibilities of DRS managers and supervisors to ensure that the DR Manual is being followed, including the types of audits and reviews that should be completed and how often;

- Clearly identify the job title or, if it is the Director, his or her designee, that has authority to provide final approval when a decision is required (*e.g.*, causal challenges);

- The information, including the expected level of specificity, that should be entered into MATRICS when required by the DR Manual (*e.g.*, Drop Notes, Case Notes, and Neutral Notes).

- **Ongoing Mandatory Training for DRS Personnel**

In order to ensure neutrality, and promote uniformity and consistency among different DRS regions, DRS should consider implementing an ongoing mandatory training for DRS personnel regarding the DR Manual and interacting with DRS participants. Such training could address topics, such as:

- Commonly misunderstood rules, policies or procedures in the DR Manual (*e.g.*, the differences between a causal challenge and a DATR);

- Entering notes into MATRICS (*e.g.*, Drop Notes, Case Notes, and Neutral Notes);

- Interacting with DRS participants and how to respond to difficult questions, comments or situations;

- Updates, changes or enhancements to the DR Manual.

- **FINRA Rules Should Reflect the Manual Review**

In order to improve transparency, FINRA should amend Rule 12400 to specifically state that prior to sending the arbitrator list to the parties, NM shall conduct a manual review for conflicts of interest. Despite FINRA's disclosure of the manual review for conflicts of interest in its July 30, 1998 SEC Notice and its discussion in the SEC's approval order,[110] it would be clearer to DRS participants if it was also included in the Rules.

- **Consistency among FINRA Rules, Publicly Available DRS Documents, and the DRS Manual**

In order to improve transparency, FINRA should consider adopting a procedure whereby future changes to FINRA Rules, interpretations, and guidance in the DR Manual are timely and

[110] 63 Fed. Reg. 40761, 40769 (July 30, 1998).

uniformly reflected in its publicly-available documents. This would ensure that the FINRA Rules and the DR Manual are consistent with FINRA's publicly-available documents.

- **Written Explanations for Denials and Approvals of Causal Challenges and DATRs**

In order to improve transparency, DRS should consider amending its policies to require a written explanation whenever a causal challenge or DATR is granted or denied, if a written explanation is requested by either party. Currently, DRS provides that "under certain circumstances, we will provide parties with a written explanation of the decision to deny either a challenge for cause or a [DATR]."[111] The DR Manual does not provide a party with the option to make a similar request if FINRA grants a causal challenge or DATR.

- **Conduct an External Procedural Review of the NLSS**

DRS has not had an external procedural review of the NLSS algorithm since the E&Y Report in 2006. Significant developments in technology may warrant a new and deeper procedural review of the NLSS algorithm to determine if FINRA's current technology is still the most effective means in creating random, computer-generated arbitrator lists for the arbitrator participants.

- **FINRA Rules Should Reference MATRICS, not the NLSS**

In order to improve transparency, FINRA should amend its Rules to refer to MATRICS instead of the NLSS. On August 5, 2004, the SEC approved an amendment to Rule 10314 to implement MATRICS.[112] As noted in the related NASD Notice to Members 04-56, MATRICS replaced the NLSS. Despite MATRICS replacing the NLSS, the Customer Code still refers to the NLSS.

111 *See* DR Manual at 201.

112 *See* www.finra.org/sites/default/files/NoticeDocument/p009899.pdf.