ARBITRATION OF INVESTMENT ADVISER DISPUTES IS UNFAIR: HOW RIA ARBITRATION FAILS INVESTORS

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"With 10 times the number of RIAs to broker-dealers, the arbitrations have not gone away, they have gone RIA."[1]

ABSTRACT

Many disputes arising out of retail financial advice are currently resolved through arbitration. The arbitration system for broker-dealers (BDs) is regulated by the Financial Industry Regulatory Authority (FINRA). FINRA is generally predictable for participants. The arbitration landscape looks very different for registered investment advisers (RIAs). There is a tension between efficient arbitration and meaningful access to justice, and RIAs have thus far evaded the more transparent, standardized procedures typically applied to broker-dealers, another kind of financial adviser. Compounding this policy dilemma, there are incomplete data regarding RIA arbitration. What we do know of arbitration between RIAs and their clients suggests that existing practices are unfair, posing serious challenges for both investors (e.g., steep costs, restrictive venue designations) and advisers (e.g., lack of predictability and uniform standards).

This Article advocates for new regulatory interventions to address self-dealing risks when RIAs contract with client-investors, and to ensure a fair forum reminiscent of, or at least comparable to, the protections found in FINRA arbitration for broker-dealers. We describe potential solutions ranging from market-based approaches inspired by FINRA's dispute resolution framework, to SEC-initiated fiduciary interpretations under the Dodd-Frank Wall Street Reform

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1. Michael S. Edmiston, Timothy J. O'Connor & Jeffery Schaff, *Document Discovery in RIA Cases*, 30 PIABA BAR J. 181, 182 (2023).

and Consumer Protection Act (Dodd-Frank) Section 921, to more robust disclosure requirements via amendments to Form ADV. We also propose state-level regulation through the North American Securities Administrators Association (NASAA).

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INTRODUCTION

Imagine you have just trusted an investment adviser with your hard-earned savings. You expect them to guide your portfolio responsibly.[2] But something goes wrong, and you feel you have been treated unfairly. In an ideal world, you would have a clear, straightforward path to seek justice, as well as the choice about whether to arbitrate your claims or to go to court.[3] Unfortunately, for most investors who work with fiduciary advisers, that path isn't straightforward at all, while the outcome is typically unfair.[4]

For decades, financial planning firms have required their customers to resolve disputes through arbitration rather than in the courts. The reality is that mandatory arbitration has become the norm for broker-dealers, one category of financial professional. At least in this setting, there is a system set up by the industry's self-regulatory organization, the Financial Industry Regulatory Authority (FINRA). While it is not perfect and has generated criticisms,[5] it provides relatively predictable rules and procedures.[6]

But if you work with a Registered Investment Adviser (RIA), a different category of regulated financial professional,[7] you will likely

2. *See, e.g.*, Mark Egan, Gregor Matvos & Amit Seru, *The Problem of Good Conduct Among Financial Advisers*, 38 J. ECON. PERSPS. 193, 194–95 (2024).

3. H.R. REP. NO. 111-687, pt. 1, at 50 (2010) ("If arbitration truly offers investors the opportunity to efficiently and fairly settle disputes, then investors will choose that option. But investors should also have the choice to pursue remedies in court . . . .").

4. *Cf.* Mark L. Egan, Gregor Matvos & Amit Seru, *Arbitration with Uninformed Consumers* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25150, 2021) (finding a substantial pro-industry bias in the pool of arbitrators from which an individual consumer has to choose from).

5. *See*, *e.g.*, Laura McNamire, *Self-Regulatory Organization's Role in Promoting Ethical Behavior in Industry*, *in* ROUTLEDGE HANDBOOK OF RISK MANAGEMENT AND THE LAW (Virginia A. Suveiu ed., 2022); Nicole Iannarone, *Structural Barriers to Inclusion in Arbitrator Pools*, 96 WASH. L. REV. 1389, 1403 (2021); Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 383.

6. *See generally* Ralph S. Janvey & Hayden M. Baker, *Investor Fairness in Securities Arbitration: A Perceptional Issue?*, 45 SEC. REG. L.J. 259 (2017) (providing an overview of FINRA rules and procedures); *see also* Matthew C. Turk, *FINRA Arbitration as Financial Regulation*, 77 ALA. L. REV. 389, 405–25 (2025); William B. L. Little, *Fairness is in the Eye of the Beholder*, 60 BAYLOR L. REV. 73, 103 (2008).

7. *See* THOMAS P. LEMKE & GERALD T. LINS, REGULATION OF FINANCIAL PLANNERS § 3:1 (2025), Westlaw SECREGFINP (noting that "federal" regulation makes "financial planners . . . potentially subject to . . . four major regulatory schemes . . . depending on their specific activities" including those applicable to investment advisers and broker-dealers); *see also infra* Part I.A.

find yourself in a murkier world if a dispute arises. RIAs are not required to arbitrate under the broker-dealer rules unless the RIA is a dually registered FINRA member. Furthermore, RIAs are not required to use any particular arbitral forum, so they and their clients lack a predictable and cost-effective option. Instead, arbitration clauses in RIA advisory agreements are all over the map—fragmented, inconsistent, opaque, and often featuring consequences or attributes that do not ensure consistency or reliability.[8] The unfair features of RIA arbitration undermine the confidence of investors and advisers in the arbitral system.

Why does this matter? Arbitration is meant to be a more efficient, private, and cheaper alternative to going to court.[9] In theory, arbitration providers like the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Services (JAMS) should want to develop processes that protect investors and promote fairness. They could be expected to have strong incentives to shift toward a system that is better tailored to the needs of RIA disputes.[10] They should have reason to differentiate themselves by offering rule sets that more closely align with RIA-client relationships.[11] The growing demand for a fairer arbitration process represents a business opportunity for these providers.

In practice, it has not worked out this way. Market forces have so far been insufficient to prompt investor-protective changes. No single, appropriate, and widely accepted rule set exists for RIA disputes. As a result, people who put their faith (and their savings) with RIAs can end up at a disadvantage if a dispute arises. Meanwhile, the status quo is not good for RIAs either as it creates uncertainty in dispute resolution. It also creates a tension between the fiduciary

8. *See infra* Part II.

9. *See* U.S. SECURITIES AND EXCHANGE COMMISSION, *2024 12 10 OIA Investor Advisory Committee Part 01*, at 1:14:15–1:25:32 (YouTube, Dec. 10, 2024) [hereinafter *OIA Investor Advisory Committee*], https://www.youtube.com/watch?v=Kjhjyd6ve4Y (on file with Case Western Reserve Law Review) (prepared statement before the SEC Inv. Advisory Comm. of Robin Traxler, Senior Vice President of Pol'y and Deputy Gen. Counsel for the Fin. Servs. Inst.). *See also, e.g.*, Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 257 (2006); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (noting that arbitration "is usually cheaper and faster than litigation" (quoting H.R. REP. NO. 97-542, at 13 (1982))).

10. *See, e.g.*, Christopher Drahozal & Stephen Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 463–66 (2010); Christopher Drahozal & Keith Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 553–54, 574–75, 580 (2003).

11. *Cf.* Kelli Alces Williams, *Market-Based Innovation in Consumer Protection*, 51 CONN. L. REV. 155, 160 (2019) (acknowledging shifts in regulatory entrepreneurship stemming from business influence).

duties RIAs profess and the dispute resolution mechanisms they impose.

Regulators are starting to pay attention and, we argue, should take on an increasingly important role. In June 2023, staff at the Securities and Exchange Commission (SEC) took a closer empirical look at how often RIAs use mandatory arbitration clauses in their advisory agreements, and what those clauses say. The findings of the staff's report were eye-opening: most RIA agreements had mandatory arbitration clauses that likely would not be allowed under the stricter FINRA standards that apply to broker-dealers.[12]

The SEC staff's findings raise the stakes for reform efforts and provide an essential framework for understanding the scope and implications of mandatory arbitration in the RIA context. Broker-dealer arbitration clauses may be more investor-protective than RIA clauses. Yet this dynamic is at odds with the broader framework that regulates these professions, which imposes heightened duties on RIAs. It is a reminder that, without stronger guidelines, many RIAs can impose clauses that potentially undermine investor rights. To that end, as we think real investor choice is unattainable in the current regulatory climate,[13] a fairer arbitration process is therefore essential for maintaining trust in the financial advisory industry and ensuring that investors have a reliable mechanism for resolving disputes.[14]

In this Article, we argue that arbitration of investor-RIA disputes is systematically unfair—for RIA firms and investors alike—in ways that it is not even for broker-dealer disputes, and that there are several doctrinally straightforward and legally available fixes to this problem. First and most simply, by releasing interpretations of the RIA standard of conduct, as it did in 2019, the SEC could make clear its position about how existing statutory rules and fiduciary duties affect arbitration clauses in advisory agreements. Second, the SEC could undertake more fulsome rulemaking under its statutory authority in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to regulate arbitration agreements for RIAs, including limiting or restricting unfair aspects of arbitration.[15] The SEC has not yet

12. U.S. SEC. & EXCH. COMM'N, RESPONSE TO CONGRESS: MANDATORY ARBITRATION AMONG SEC-REGISTERED INVESTMENT ADVISERS 4–5, 14, 21–22 (2023) [hereinafter SEC REPORT], https://lxrdc.com/wp-content/uploads/2023/06/mandatory-arbitration-among-sec-registered-investment-advisers.pdf [https://perma.cc/PA89-PA5D]; *see also infra* Part II.A.

13. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 n.6, 397 (2024).

14. Iannarone, *supra* note 5, at 1403 ("The perception of fairness has long been a concern in securities arbitration, an essentially mandatory regime designed to ensure systemic trust.").

15. *See infra* text accompanying notes 223–226; *see also* JERRY W. MARKHAM & THOMAS LEE HAZEN, BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAW § 12:14.50 (2025), Westlaw SECBDOP ("Section 921 of

exercised this statutory authority, but could do so to limit or restrict the enforceability of arbitration agreements in these contexts. Finally, as not all RIAs are SEC-registered, state securities regulators under the guidance of the North American Securities Administrators Association (NASAA) might well promote fairness and efficiency in RIA arbitration through their own regulatory policy. This belt-and-suspenders regulatory framework could promote fair arbitration frameworks for RIAs and incentivize providers in ways that potentially drive meaningful reforms in arbitration rules.[16]

To create a system that both addresses investor concerns and remains practical for RIAs, regulators should push arbitration providers to adopt rules that promote fairness and cost structures that do not price investors out of justice. This can be done through a mix of regulatory pressure and the creation of a safe harbor that rewards providers for developing arbitration rules that prioritize investor protection.[17] By encouraging the creation of arbitral rules given the fiduciary duties RIAs owe to their clients, the SEC and other regulators can help restore confidence in dispute resolution for financial advisers.

Part I of this Article details the regulatory framework and highlights a tension between efficient arbitration and meaningful access to justice, revealing why RIAs have thus far evaded the more transparent and standardized procedures typically applied to broker-dealers. Part II explores the incomplete data regarding RIA arbitration and argues that existing options in this area pose serious fairness challenges for both investors (e.g., steep costs, restrictive venue designations) and advisers (e.g., lack of predictability and uniform standards). Part III outlines the need for new regulatory interventions to address self-dealing risks when RIAs contract with clients and to ensure a fair forum reminiscent of, or at least comparable to, the protections found in broker-dealer arbitration. Finally, Part IV describes potential solutions including market-based approaches inspired by FINRA's dispute resolution framework, SEC-initiated fiduciary interpretations under Dodd-Frank Section 921, more robust disclosure requirements via amendments to Form ADV, and state-level regulation.

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the Dodd-Frank Act amended the Securities Exchange Act and the Investment Advisors Act to authorize the SEC to restrict mandatory pre-dispute arbitration agreements between broker-dealers and customers.").

16. *See infra* Part IV.E.

17. *See infra* Part IV.A–D.

I. RESOLVING DISPUTES OVER RETAIL FINANCIAL ADVICE

A. Regulation and Dispute Resolution for Financial Advice

Financial advisers play an important role in helping ordinary people navigate personal finance.[18] Many people are overwhelmed by the complexity and prospects of managing their investments, saving for retirement, and other financial goals. Many investors lack the expertise to effectively manage their own finances.[19] Financial advisers typically bridge this gap by offering tailored advice about wealth accumulation and retirement planning. The availability of competent retail financial advice is important for individuals and households who want to follow what "traditional finance" says about how best to preserve and grow an investment portfolio.[20] Yet adviser-client relationships sometimes deteriorate because of ineptitude, malfeasance, personality conflicts, and bad luck in the market. Significant legal and financial issues can arise, particularly over fiduciary breaches or the recommendation of investments that have since performed poorly.[21]

There are several regulatory frameworks, distinct for RIAs and broker-dealers, that govern how financial advisers operate and the

18. *See* Colleen Honigsberg, Edwin Hu & Robert J. Jackson, *Regulatory Arbitrage and the Persistence of Financial Misconduct*, 74 STAN. L. REV. 737, 744–46 (2022) (collecting evidence of the importance of financial advisers for households).

19. *See, e.g.*, Christine Sgarlata Chung, *The Devil You Know: A Survey Examining How Retail Investors Seek Out & Use Financial Information and Investment Advice*, 37 REV. BANKING & FIN. L. 653, 658–59 (2018). *Cf.* Hans-Martin von Gaudecker, *How Does Household Portfolio Diversification Vary with Financial Literacy and Financial Advice?*, 70 J. FINANCE 489, 505 (2015) ("[T]he largest losses resulting from underdiversification are incurred by those who neither turn to external help with their investments nor have good skills in basic financial-numerical operations and concepts.").

20. Leo Strine, the former Chief Justice of the Delaware Supreme Court, has coined the term "forced capitalists" to refer to the fact that ordinary people are required to participate in stock markets to achieve their financial goals, like saving for retirement or their children's education. Leo Strine, *Toward Common Sense and Common Ground—Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4–5 (2007); *see also* Dorothy S. Lund, *Toward A Fair and Sustainable Corporate Governance System: Reflections on Leo Strine, Jr.'s Writing on Institutional Investors*, 24 U. PA. J. BUS. L. 835, 844 (2022). On implications of the "forced capitalist" paradigm for investment adviser regulation, see James Fallows Tierney, *Retail Investors and Capital Markets Intermediation*, *in* RESEARCH HANDBOOK ON AGENCY AND INTERMEDIATION (Deborah DeMott & Cheng Han Tan, eds., 2026).

21. *2023 Dispute Resolution Statistics*, FINRA, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2023 [https://perma.cc/L4J7-MC96] (last visited Oct. 5, 2025) (describing the top five categories of claim served in 2023 in FINRA arbitration, including breach of fiduciary duty, negligence, failure to supervise, breach of contract, and misrepresentation).

duties they owe their clients. RIAs owe fiduciary duties and are regulated under the Investment Advisers Act of 1940.[22] In contrast, broker-dealers are regulated under the Securities Exchange Act of 1934 (Exchange Act), overseen by FINRA, an industry self-regulatory organization (SRO), and licensed with state regulators.[23] With respect to the recommendations they make to retail customers, broker-dealers operate under a best-interest standard that is not quite a fiduciary standard, but close, requiring that recommendations be suitable for the client and to be free of conflicts.[24] The RIA and broker-dealer approaches also represent different business models.[25]

One reason FINRA looms so large in discussions about investor arbitration is that it serves as the only SRO for broker-dealers in the United States.[26] Pursuant to its mandate under the Exchange Act, FINRA promulgates and enforces rules governing its member firms' activities, including dispute resolution through arbitration.[27] It also administers an arbitration forum for broker-dealers and their clients.[28] FINRA's central role has been further reinforced by decades of jurisprudence that has consistently validated the enforceability of arbitration agreements between investors and financial institutions. Most notable among these is the Supreme Court's 1987 decision in *Shearson/American Express Inc. v. McMahon*, which endorsed securities industry arbitration.[29] Ever since the Supreme Court's decision,

22. SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 193, 284 (1963); Investment Advisers Act of 1940, ch. 686, 54 Stat. 789 (codified as amended at 15 U.S.C. §§ 80b-1 to 80b-21).

23. *Entities We Regulate*, FINRA, https://www.finra.org/about/entities-we-regulate [https://perma.cc/RW6Q-VCY6] (last visited Dec. 28, 2025); *Broker-Dealers*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/divisions-offices/division-trading-markets/broker-dealers [https://perma.cc/22Y2-Y278] (last visited Dec. 28, 2025); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a to 78rr).

24. *See, e.g.*, James Fallows Tierney & Benjamin P. Edwards, *Stockbroker Secrets*, 26 U. PA. J. BUS. L. 793, 802 (2024) ("Both brokers and RIAs are 'financial advisers,' but their business models—and the risks associated with them—look different.").

25. *Cf.* Robinhood Fin. LLC v. Sec'y of Commonwealth, 214 N.E.3d 1058, 1064 (Mass. 2023) (noting how the lines between these business models have blurred).

26. *See* Iannarone, *supra* note 5, at 1402–03.

27. *See* FIN. INDUS. REGUL. AUTH., FINRA DISPUTE RESOLUTION SERVICES PARTY'S REFERENCE GUIDE 4 (2025), https://www.finra.org/sites/default/files/Partys-Reference-Guide.pdf [https://perma.cc/Y5CD-2XAN].

28. *See* Iannarone, *supra* note 5, at 1402–03.

29. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226–27 (1987); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 482–83 (1989).

pre-dispute agreements to arbitrate have frequently been embedded in customer contracts.[30]

Broker-dealer arbitration is straightforward because virtually all broker-dealers are required to join FINRA, and because all brokerage agreements incorporate mandatory arbitration clauses specifying the FINRA forum. FINRA's forum has evolved over the years to include two different sets of rules for customer disputes and for intra-industry disputes.[31] In this respect, the FINRA forum is well-established, with procedures designed to ensure fairness while maintaining the cost and time efficiencies of arbitration.[32]

FINRA administers two main categories of arbitration proceedings: customer and industry. Customer arbitration involves disputes between individual and institutional investors and FINRA-member broker-dealers.[33] In these cases, the rules are generally designed to protect investors by offering streamlined processes and certain disclosure requirements for potential arbitrators. By contrast, industry arbitration addresses disputes between or among member firms and their associated persons (such as broker-dealer employment disagreements or partnership disputes).[34] Although the procedural framework is similar, industry arbitration may involve more specialized industry-focused issues—such as recruitment bonuses, promissory notes, or alleged violations of non-competition agreements—which are typically not part of customer claims.

Another notable aspect of FINRA arbitration, closely watched by investor advocates and regulators, is the expungement process.[35] Under FINRA rules, a broker who has been the subject of a customer dispute may seek an order directing the expungement of the complaint or arbitration award from the Central Registration Depository (CRD) system, an electronic database used by FINRA, the SEC, and state regulators.[36] This process has proven controversial: brokers argue that expungement is necessary to remove unfounded

30. *See* Nicole G. Iannarone, *Small Claims Securities Arbitration*, 26 U. PA. J. BUS. L. 731, 738 (2024).

31. Iannarone, *supra* note 5, at 1430 ("FINRA, for example, is an SRO with more than one arbitral forum—one for the resolution of customer claims and another for the resolution of claims between industry actors.").

32. Jason W. Burge & Lara K. Richards, *Defining "Customer": A Survey of Who Can Demand FINRA Arbitration*, 74 LA. L. REV. 173, 175 & n.6 (2013) ("FINRA altered its own rules to make the forum more attractive to investors.").

33. Tierney & Edwards, *supra* note 24, at 811.

34. *See* Charlotte S. Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1704–05, 1712 (2021).

35. *See, e.g.*, Tierney & Edwards, *supra* note 24, at 818; Colleen Honigsberg & Matthew Jacob, *Deleting Misconduct: The Expungement of BrokerCheck Records*, 139 J. FIN. ECON. 800, 801 (2021).

36. Tierney & Edwards, *supra* note 24, at 807, 818–19.

or meritless allegations that could harm their professional reputation, while critics caution that too-liberal grants of expungement may compromise the integrity of the CRD system and deprive future investors of valuable information about prior customer complaints.[37] The SEC and various state securities regulators have periodically scrutinized expungement practices, underscoring the hard balance that FINRA faces between preserving accurate records and ensuring fairness to registered representatives.[38]

Another distinctive feature of FINRA arbitration is its approach to panel composition.[39] Depending on the size and nature of the claim, a single arbitrator or a panel of three may preside. For most customer disputes above a certain monetary threshold, a three-member panel is convened, comprising a mix of "public" and "industry" arbitrators.[40] Historically, the default arrangement included one industry representative and two public arbitrators, but in response to concerns about potential conflicts of interest and perceived industry bias, FINRA adopted the "all-public panel" option in 2011.[41] This modification allows claimants to strike the industry arbitrator in certain cases, thus enhancing the perception—and potentially the reality—of fairness. Even so, questions persist regarding the qualifications, selection process, and repeat appointments of arbitrators.[42] There remain ongoing debates about whether the forum's structure adequately guards against conflicts or favoritism. Nevertheless, FINRA has clearly attempted to balance the expertise of industry professionals with the imperatives of investor protection.

Even as FINRA dispute resolution has become the most mainstream way that broker-dealers and their clients resolve disputes, no comparable arbitral forum exists for RIAs.[43] This creates inconsistencies in the dispute resolution framework available to investors who work with different kinds of financial advisers.[44] Disputes between

37. *Id.* at 797–98, 832.

38. *Id.* at 816, 846.

39. *See* Iannarone, *supra* note 5, at 1410.

40. *Id.* at 1423.

41. *See* FINRA Regulatory Notice 11-05: Customer Option to Choose an All Public Arbitration Panel in All Cases (Feb. 1, 2011), https://www.finra.org/rules-guidance/notices/11-05 [https://perma.cc/HZ7R-P6M3].

42. *See, e.g.*, Iannarone, *supra* note 5, at 1423–24, 1428.

43. *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 18–19 (2012).

44. *See, e.g.*, Michael S. Edmiston, *Customer Arbitration with Registered Investment Advisors: Problems and Solutions*, 29 PIABA BAR J. 377, 378 (2022) (explaining that the "protections . . . put in place . . . to protect retail investors do not apply when an arbitration claim is brought against an RIA in a non-FINRA forum").

RIAs and clients typically proceed either in private arbitration outside the FINRA forum—if agreed to at all—or in litigation.[45] As demonstrated in Part II and Part III, the lack of a uniform arbitral forum for RIA disputes like FINRA's for broker-dealers raises questions about consistency, fairness, and access to justice.

B. Arbitration and Access to Justice

Arbitration is a widely adopted method for resolving disputes in the financial services industry.[46] Arbitration is often touted for its efficiency, privacy, and cost-effectiveness (for business) compared to traditional litigation, but these attributes are also often what draw criticism.[47] In an ideal world, systemic shortcomings—such as high costs, potential biases, and limited transparency—would militate against the use of arbitration for resolving investor disputes instead of open-court proceedings with robust procedural safeguards. Given the decades-long persistence of the current regulatory environment, where the use of arbitration has not only been approved but effectively mandated for broker-dealers, it appears unlikely that this approach to dispute resolution will be abandoned anytime soon.

If arbitration is going to be a mainstay for broker-dealer disputes, then RIAs should also be held to equally fair and transparent procedures, lest investors receive disparate levels of protection depending on whether their adviser holds a broker-dealer or RIA designation. Though many commentators believe that we ought to rethink mandatory arbitration altogether, the immediate concern should be to ensure that arbitration—wherever it is used—embodies the highest possible standards for all disputes between investors and their financial advisers.

1. Arbitration Generally

Mandatory arbitration has become a cornerstone of dispute resolution for many investor-financial adviser relationships, largely due to predispute arbitration clauses embedded in brokerage

45. *See id.* at 379.

46. Catherine Moore, *The Effect of the Dodd-Frank Act on Arbitration Agreements: A Proposal for Consumer Choice*, 12 PEPP. DISP. RESOL. L.J. 503, 510–11 (2012) ("[W]hile the investment market has expanded, the number of arbitration forums has shrunk to one—FINRA. Thus, there are more consumers signing predispute arbitration agreements and only one forum in which they can settle their disputes." (footnote omitted)).

47. *See, e.g.*, Luke Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249, 250–52 (2018) (FAA's scope and purpose); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–53 (2005) (consent); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3074–83 (2015) (underenforcement of substantive law); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T Mobility v. Concepcion, Walmart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 87, 109, 114–15, 118 (2011).

agreements. Proponents tout arbitration's efficient and streamlined processes. Under the Federal Arbitration Act (FAA), the parties to an arbitration can select the forum and also the procedures for resolving their disputes.[48] By customizing procedures, parties can change the costs and benefits of dispute resolution compared to the litigation default. Yet this system has prompted extensive scholarly debate and litigation, especially in cases involving securities claims. Critics underscore several systemic issues linked to arbitration, including concerns about deterrent costs, inferior outcomes for claimants, the lack of procedural safeguards, the absence of precedent, and the diminishing role of the judiciary in resolving public disputes.[49]

To begin, arbitration can impose prohibitive expenses on claimants, thus deterring valid claims.[50] Although arbitration is often advertised as a less expensive alternative to litigation, fees charged by private arbitration forums may be higher than anticipated.[51] After the Supreme Court began allowing arbitration of federal statutory claims in the 1980s, firms were slow to take up the Court's invitation in consumer contracts.[52] Of those that did, many adopted "draconian" terms, and as a result, by 2001, observers were routinely criticizing arbitration as "unfair."[53] The main criticism was that these terms made arbitration uneconomical for the average claimant.[54] Specifically, consumers would be less likely to bring a small-value claim if required to pay high forum fees, arbitrate in a far-flung location, or pay the firm's fees upon losing.[55] Even the presence of unenforceable terms

48. 9 U.S.C. §§ 2–4; *see* Volt. Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989).

49. *See, e.g.*, Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1611 (2005); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 68 (2015).

50. *See, e.g.*, Edmiston, *supra* note 44, at 380.

51. *See id.* at 381–82, 384–85.

52. *See supra* text accompanying notes 29–30. For discussion of the emergence of class waivers, see Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 395–401; Horton & Chandrasekher, *supra* note 49, at 70–76.

53. Glover, *supra* note 47, at 3067 n.67 (draconian); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 715 (unfair); *see* Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1457–58 (2008) (after early "successes in the Supreme Court," firms "push[ed] the envelope by imposing increasingly burdensome and unexpected terms").

54. *See, e.g.*, Landsman, *supra* note 49, at 1612; Stephen J. Ware, *The Effects of* Gilmer: *Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. DISP. RESOL. 735, 746–48, 750 (2001).

55. Drahozal, *supra* note 53, at 717, 759; *cf.* Steven Shavell, *Suit, Settlement & Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of*

might deter counsel from accepting a case or consumers from pursuing one pro se.[56]

Many courts shared this skepticism about arbitration's fairness and desirability, often declining to enforce these clauses on fairness grounds.[57] Contract designers represented by sophisticated counsel observed these decisions and revised their contracts in a feedback loop that altered term quality. Some in the defense bar advised their clients to avoid "unfair" terms, and instead to adopt clauses that were otherwise cost-neutral.[58] At the same time, many firms revised terms in response to an intervening Supreme Court decision that opened the door to class-wide arbitrations.[59]

So, the goal of "second-generation" arbitration clauses was to avoid the fairness criticism, by substituting the lowest-quality terms with "class waivers" that eliminated aggregate procedures and liability. Simply removing low-quality terms wasn't enough to induce courts to enforce class waivers. By the mid-2000s, many courts were skeptical of second-generation clauses and declined to enforce class waivers for claims that would go unpursued because the cost of individual arbitration exceeded the potential recovery.[60] A small number of contract designers again responded to these challenges by adding high-quality terms that "encourage[d] individual consumers to arbitrate smallbore" claims.[61] "High quality" terms of this sort included subsidies or other provisions to make arbitration seem overall more apparently fair than it is likely to be in most cases; this was likely a driving factor in the

Legal Costs, 11 J. LEGAL STUD. 55, 59, 75 fig. 2 (1982) (comparing the British and American systems and their influence on claims).

56. *See, e.g.*, Charles Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1137 (2010); Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & LAW 83, 85 (1997).

57. Horton & Chandrasekher, *supra* note 49, at 59; *see also* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–95 (2004).

58. Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, *in* PRACTISING L. INST., CONSUMER FINANCIAL SERVICES INSTITUTE (16TH ANNUAL) 253, 268–277 (2011) ("My message to clients: Draft a fair clause!").

59. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003).

60. *See* Myriam Gilles, *Killing them with Kindness: Examining "Consumer Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 830–44 (2012).

61. Horton & Chandrasekher, *supra* note 49, at 74.

Supreme Court's acceptance of the arbitration clause at issue in *Concepcion*.[62]

62. Gilles, *supra* note 60, at 854. For instance, some contracts specified that proceedings will be conducted under arbitration providers' rules governing consumer disputes, which may eliminate, reduce, or delay the consumer's responsibility for their share of filing or arbitrators' fees. *Id.* at 857–58. Other high-quality terms are meant to address additional obstacles, like low expected recovery and attorneys' fees from individualized small-value claims. *Id.* at 856–57. Furthermore, some terms allow consumers to opt out of arbitration within a fixed period after contract acceptance. *See* Norris, *supra* note 47, at 265. These are a cheap way to improve a clause's perceived fairness and reduce the firm's exposure to procedural unconscionability challenges by giving power back to consumers to reject arbitration. *Id.*

Some in the defense bar understood that these high-quality terms were key to convincing courts to let firms use arbitration to avoid class action exposure. According to one account, some attorneys urged firms to adopt provisions "so plainly friendly and fair to consumers that any finding of the clause being 'unconscionable' must be motivated by discrimination against arbitration"—and thus subject to FAA preemption—"rather than a desire to protect substantive and procedural rights." TED FRANK, MANHATTAN INST., CLASS ACTIONS, ARBITRATION, AND CONSUMER RIGHTS: WHY *CONCEPCION* IS A PRO-CONSUMER DECISION 3 (2013), https://media4.manhattan-institute.org/pdf/lpr_16.pdf [https://perma.cc/6UCE-YAAB]. In adopting these provisions, contract designers sought to signal that their arbitration programs were fair and not opportunistic. *Id.* at 2–3. These efforts paid off in 2011, when the Supreme Court in AT&T *Mobility v. Concepcion* required courts to enforce class waivers in arbitration clauses. *See infra* Part I.B.2.

It is puzzling that most arbitration clauses do not have these consumer-friendly features, yet they nonetheless persist in some contracts. This is so even though their presence is not necessary to enforce a class waiver after *Concepcion*. Vernon v. Qwest Commc'ns Int'l, 925 F. Supp. 2d 1185, 1195 (D. Colo. 2013); Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 KAN. L. REV. 403, 437 (2013); *see also, e.g.*, Temple v. Best Rate Holdings LLC, 360 F. Supp. 3d 1289, 1306 (M.D. Fla. 2018). What's more, they have persisted even though they are nonsalient, which contract scholars suggest should become "more pro-seller over time relative to the default rules." Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 257 (2013). In other work, one of us (Tierney) has characterized the puzzling persistence of high-quality nonsalient contract terms as an effort to speak to an audience of policymakers and regulators. *See* James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 NEB. L. REV. 874, 876 (2020). Regulators are sometimes concerned with the quality of contracts, and so may monitor the substance of contracts and pressure contract designers if the terms get too "pro-seller." *Id.* at 883, 890. High-quality nonsalient terms can take on an outsized role in regulatory debates as contract drafters emphasize one apparently pro-consumer contract provision that will go away under regulation. *Id.* at 880. By pairing high- and low-quality non-salient terms, firms may be able to avoid reform attempts if the terms are nonetheless salient to a regulator concerned with the consumer's welfare. *Id.* at 911.

In practice, the mere possibility of steep fees and procedural complexities can chill investors—especially individual retail investors—from pursuing legitimate grievances against their financial advisers and their firms. Some small-value[63] claims are not worth bringing individually and are only brought in aggregate litigation. Thus, when arbitration class action waivers discourage anyone from bringing claims, this may reduce other benefits from class actions, such as deterrence, optimal enforcement of substantive law, and provision of precedent as a public good. Maria Glover captured the prevailing view among scholars and consumer advocates: arbitration paired with class waivers let firms "control the scope of their legal obligations" and "eliminate claims against them."[64]

Besides reducing the incentive to bring claims, another central criticism suggests that arbitration may be systematically less favorable to claimants compared to court litigation.[65] Empirical studies on this issue have produced mixed results, but many scholars have highlighted data indicating that claimants may achieve lower recovery rates in arbitration settings than they would in a judicial forum.[66] Critics also point to the manner in which arbitrators are appointed and selected, raising questions about repeat-player advantages for financial firms.[67] While impartiality rules exist, there is lingering concern that arbitrators, seeking future appointments, may develop pro-industry biases.[68] This perceived vulnerability in arbitration echoes larger apprehensions about a system that functions differently from open-court adversarial processes, potentially placing investors at a disadvantage.

A third frequently raised objection to mandatory arbitration is that it deprives individuals of their traditional "day in court," thereby raising significant questions about procedural justice and due process. Critics contend that arbitration lacks many key procedural safeguards found in litigation, such as broad discovery, uniform rules of

63. Though less obviously so for FINRA claims, most consumer disputes often involve "small-value transaction[s] . . . of a few hundred dollars or less." Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REGUL. 547, 549 & n.9 (2016).

64. Glover, *supra* note 47, at 3076.

65. For discussion of the empirical evidence, see THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 15:16 (2025), Westlaw LAWSECREG (collecting scholarship).

66. *See, e.g.*, Iannarone, *supra* note 30, at 784.

67. *See* Iannarone, *supra* note 5, at 1403–04; Egan et al., *supra* note 4, at 3 ("[F]irms' informational advantages are substantially diminished when a consumer uses an attorney who specializes in arbitration and is a member of the Public Investors Arbitration Bar Association (PIABA).").

68. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 14 (2019).

evidence, and the right to appeal adverse determinations on substantive grounds. Scholars like Judith Resnik have argued that the lack of public oversight, stringent procedural rules, and transparent recordkeeping in arbitration can undermine public confidence in the fairness of the process.[69] In the investor–adviser setting—where specialized knowledge and power imbalances already exist in what should be a fiduciary relationship—the absence of a full judicial process may create the perception, or reality, of unfairness.

Indeed, unlike court judgments, arbitration decisions typically remain confidential and rarely produce written opinions that can serve as legal precedent.[70] This opacity impedes the development of a consistent body of case law, leaving investors, financial advisers, and future litigants without clear guidance on how certain issues might be resolved.[71] Moreover, the secrecy surrounding arbitration proceedings hinders scholarly and public scrutiny, enabling systemic problems—such as potential bias among arbitrators or inequitable outcomes—to go unchecked. From a broader policy perspective, the absence of publicly available precedents also diminishes the educative function of litigation, wherein judicial opinions shape future conduct and standards within the financial industry. This is a significant hurdle to regulatory evolution, transparency, and the uniform enforcement of securities laws.[72]

Finally, there is an overarching concern about the democratic legitimacy of outsourcing dispute resolution to private arbitrators, especially in matters that touch upon public interests such as consumer protection and the regulation of financial markets. Courts have historically served not just as arbiters of private disputes, but also as instruments of public accountability. When disputes shift to private forums, critics warn that the state effectively surrenders its responsibility to uphold and interpret the law in a transparent setting.[73] There are also significant questions about the justifications for enforcing arbitration clauses that strip consumers of rights traditionally

69. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2825–27 (2015).

70. Christopher R. Drahozal, *Arbitration and Rule Production*, 72 CASE W. RSRV. L. REV. 91, 94 (2021); Gilles, *supra* note 52, at 422 (explaining that the "doctrinal development" of securities law "completely stalled in the late [19]80s" with the rise of FINRA arbitration, and that "the 'law' of broker-dealer duties has disappeared into the vortex of FINRA arbitrations").

71. Jonathan Kord Lagemann & Robert V. Cornish Jr., *The Role of Experts in Securities Arbitrations*, 16 AM. J. TRIAL ADVOC. 721, 724 (1993) (arguing that after the Supreme Court's decision blessing securities arbitration in "*McMahon*, the flow of securities law precedent has virtually ceased").

72. Resnik, *supra* note 69, at 2809, 2816.

73. *Id.* at 2811.

safeguarded by public courts.[74] These critics argue that public confidence in the justice system may erode when binding decisions with far-reaching implications are entrusted to nonpublic forums, ultimately undermining the principle that the rule of law should remain in the hands of democratically accountable institutions.[75]

2. Individual and Aggregate Claims

Many existing consumer arbitration frameworks undermine the ability of claimants to effectively assert their rights, resulting in an imbalance that can favor respondents. Scholars of dispute resolution and access to justice have long debated "forced arbitration" in these related but distinct contexts, such as with credit card agreements or employment disputes.[76] In those other contexts, early unfair arbitration clauses faced significant pressure from the market, plaintiffs' lawyers, and courts.[77] One of the concerns was that the cost of bringing individual claims far exceeds the potential recovery, so no one will rationally bring such claims. Many standard form contracts between firms and individuals require disputes to be resolved in arbitration rather than in court; these often include "class waivers" that prohibit individuals from participating in class or other aggregate proceedings.[78] According to critics, these provisions suppress claims, deprive claimants of compensation, and shift costs of undeterred harm onto consumers or third parties.[79]

Although much of the legislative and scholarly attention has focused on consumers and employees, the role of class waivers in shaping who can get relief has been a live issue for broker-dealer regulation for over a decade. Relevant to our discussion, one of the most significant controversies regarding the availability of class claims

74. *Id.* at 2811–12.

75. Tierney & Edwards, *supra* note 24, at 840.

76. David Horton, *Forced Arbitration in the Fortune 500*, 109 MINN. L. REV. 2165, 2188, 2190 (2025).

77. *See supra* notes 50–58 and accompanying text.

78. *See, e.g.*, Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234–35 (2019); CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) § 1.4.1, at 10 (2015); Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 958, 990 (2014).

79. For representative discussion, see Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1804 (2016); Glover, *supra* note 47, at 3054, 3057; Resnik, *supra* note 47, at 80, 84. *Cf.* Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CIN. L. REV. 573, 600 (2017) ("When contractual relationships do not transfer the costs of misbehavior back to the industry, this incentive to self-police diminishes.").

in the FINRA arbitration forum arose in 2014, when Charles Schwab faced disciplinary action for including in its customer agreements a waiver of the right to bring or participate in class actions. As discussed below, this provision attempted to bar class proceedings within arbitration—a move that ran afoul of FINRA's rules, which historically have prohibited class action waivers in member firm contracts.[80]

The ensuing legal battle occurred amid a broader national debate over class action waivers, fueled by the Supreme Court's pro-arbitration decisions in *AT&T Mobility LLC v. Concepcion* (2011) and *American Express Co. v. Italian Colors Restaurant* (2013).[81] In *Concepcion*, the Court held that state rules invalidating class arbitration waivers were preempted by the FAA.[82] Meanwhile, in *Italian Colors*, the Court upheld class action waivers even where individual arbitration might be cost-prohibitive.[83] Thus, at a federal level, the Court at the time was signaling a strong endorsement of arbitration agreements containing class waivers.

Following *Concepcion*, Schwab amended almost seven million client agreements to include class-action waiver clauses.[84] Yet this was in tension with FINRA rules designed to preserve a path for class actions in the securities arena. Initially a federal court rejected Schwab's challenge as premature for failure to exhaust administrative remedies; meanwhile, a FINRA hearing panel concluded that the waivers violated the rule, but that the rule conflicted with *Concepcion*.[85] The FINRA Board of Governors (its highest appellate body) reversed the hearing decision, holding that the FINRA rule was enforceable notwithstanding *Concepcion*.[86] In connection with the Board's decision, Schwab settled the enforcement action "by consenting to a $500,000 penalty and agreeing not to appeal the decision further."[87] The

80. *See* FINRA Rule 13204; Dep't of Enf't v. Charles Schwab & Co., Complaint No. 2011029760201, 2014 WL 1665738, at *3, *14 (FINRA Bd. of Governors Apr. 24, 2014).

81. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Am. Express Co. v. Italian Colors Rests., 570 U.S. 228 (2013).

82. *Concepcion*, 563 U.S. at 344.

83. *Italian Colors*, 570 U.S. at 234–35. *See also infra* note 202 and accompanying text.

84. Mason Braswell, *Schwab Pays $500,000 to Settle FINRA Dispute over Class Action Waivers*, INV. NEWS (Jan. 21, 2015) https://www.investmentnews.com/regulation-and-legislation/schwab-pays-500000-to-settle-finra-dispute-over-class-action-waivers/57514# [https://perma.cc/2PT2-S545].

85. Dep't of Enf't v. Charles Schwab & Co., Disciplinary Proceeding No. 2011029760201, 2013 WL 1463100, at *1 (FINRA OHO Feb. 21, 2013).

86. *Id.* at *2.

87. Jill I. Gross, *The Final Frontier: Are Class Action Waivers in Broker-Dealer Employment Agreements Enforceable?*, 12 ARB. L. REV. 96, 100 n. 19 (2020);

Schwab case illustrates a unique regulatory wrinkle: while the Court's jurisprudence broadly allows contractual class action waivers, FINRA maintains special authority to regulate how its member firms handle disputes because of its traditional status as a non-governmental entity.[88]

There are other differences besides this structural difference between FINRA arbitration and other kinds of consumer arbitration, including notably the kinds of claims at issue in each category. In the context of the higher-value disputes clients have with financial advisers, arbitration does not always raise the same issues of claim vindication as it does in the context of class-action waivers in claim-suppressing arbitration clauses. RIA disputes often involve high-value claims, which makes them markedly different from the smaller consumer claims that are typically addressed through class actions. Unlike these smaller claims, which might be impractical to pursue on an individual basis, RIA-related disputes involve significant financial stakes and are sometimes economical to bring on an individual basis.[89]

While FINRA prohibits class action waivers, the lack of good data about RIA arbitration makes it hard to know how big of a problem this is for RIA disputes. On June 27, 2023, the SEC staff issued a report, *Mandatory Arbitration Among SEC-registered Investment Advisors*, which noted that 6 percent of RIAs that incorporated mandatory predispute arbitration agreements (PDAAs), included explicit class action waiver provisions in client advisory agreements.[90] In addition to those RIAs with explicit class action waivers, many others included language that

see also Teresa J. Verges, *Opening the Floodgates of Small Customer Claims in FINRA Arbitration:* FINRA v. Charles Schwab & Co., Inc., 15 CARDOZO J. CONFLICT RESOL. 623, 644 (2014).

88. *See, e.g.*, James Fallows Tierney & Benjamin P. Edwards, *FINRA Faces Uphill Battle in Case Challenging Its Enforcement Authority*, CLS BLUE SKY BLOG (Aug. 1, 2023), https://clsbluesky.law.columbia.edu/2023/08/01/finra-faces-uphill-battle-in-case-challenging-its-enforcement-authority [https://perma.cc/UZV9-MCEE]. On the solicitude given to FINRA, see, for example, Tanjutco v. NYLife Sec. LLC, No. 23-CV-4889 (BCM), 2024 WL 4135686, at *12 (S.D.N.Y. Sep. 10, 2024) (noting that there could be no "federal claim" related to "procedural due process" against the SEC for sovereign immunity and FINRA as regulatory immunity arising from FINRA arbitration); Legaspy v. FINRA, No. 20-C-4700, 2020 WL 4696818, at *3 (N.D. Ill. Aug. 13, 2020) (denying preliminary injunction where claimant was "unlikely to succeed on its claim that FINRA has violated the Fifth Amendment" due process rights "by holding a remote hearing," because "FINRA is not a state actor").

89. *See* Nicole Iannarone, *Investor Justice*, 109 MINN. L. REV. 1153, 1201 (2025) (noting that "*small* claims" in FINRA arbitration would have an "average claim size of $37,521.24" (emphasis added)).

90. *See* SEC REPORT, *supra* note 12, at 18.

might "lead a client to believe incorrectly that the client had waived" various rights.[91]

It is not clear how many cases could be brought on a classwide basis but are not being brought now. The kinds of disputes brought against broker-dealers in the FINRA forum—and against RIAs—often include allegations about unsuitable investment recommendations, breach of fiduciary duty, churning, unauthorized trading, and misrepresentations or omissions of material facts. In many instances, the harm alleged is individualized, centering on unique facts like the investor's risk profile or the specific products recommended.[92] These claims do not always lend themselves to mass action, because they are not suitable for class certification under Federal Rule of Civil Procedure 23.[93] However, claims that focus on a particular product may be more appropriate for mass action. Classable claims typically require common questions of law or fact to predominate and for a representative plaintiff's claims to be typical of the class.[94] Meanwhile, the personalized nature of many investor disputes can undermine both predominance and typicality.

II. EXISTING ARBITRATION OPTIONS FOR RIA CLAIMS

Despite growing evidence that many RIAs compel their clients to sign PDAAs, reliably assessing the fairness of these agreements remains challenging. Unlike broker-dealer arbitration, which is administered by FINRA and the results of which are documented through its CRD system, no centralized database exists for RIA arbitration. This information gap is exacerbated by the confidential nature of most proceedings and the patchwork of private arbitration forums in use. Lacking systematic data collection, regulators and investors alike struggle to evaluate the scope and impact of restrictive provisions—such as venue selection, fee-shifting, and damage limitations—that can deter claimants from effectively pursuing claims.[95] This evidentiary shortfall helps explain why attempts to address abusive RIA arbitration clauses through either regulation or market-driven reforms have thus far proven elusive.

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91. *Id.* at 19; *see also id.* at 18 (Some agreements stated "[P]arties . . . are giving up the right to sue each other *in court,* including the right to a trial by jury . . . ." (emphasis added)).

92. *See 2024 Dispute Resolution Statistics*, FINRA, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2024 [https://perma.cc/G78X-KRU9] (last visited Oct. 4, 2025).

93. FED. R. CIV. P. 23(a)(2).

94. *See id.* at (a)(3) (requiring a showing of "typical[ity]"); *id.* at 23(b)(3) (requiring a showing that common questions predominate over individualized ones).

95. *See* SEC REPORT, *supra* note 12, at 4.

In response to these concerns, in 2023, the SEC exercised its enhanced authority under Section 921(b) of the Dodd-Frank Act to investigate the prevalence and content of arbitration provisions used by RIAs.[96] In response to investor advocates voicing concerns about the proliferation of abusive PDAAs in advisory agreements to the detriment of retail investors, the House Committee on Appropriations had directed the SEC to study mandatory arbitration in RIA advisory agreements.[97] The SEC staff's June 2023 report analyzed a sample of RIA advisory agreements to quantify how frequently RIAs incorporate restrictive PDAAs in their contracts with retail investors.[98] The staff report found that a majority of RIAs employ contractual provisions that would be prohibited under FINRA arbitration rules for broker-dealers, including fee-shifting clauses, foreign venue clauses, hedge clauses, and class-action waivers.[99] After discussing the findings, this Article returns in Part III to address implications for regulatory reform that would help improve the fairness of RIA arbitration.

A. Incomplete Evidence Hampers Transparency About and Regulation of RIA Arbitration

To begin, the issues associated with RIA arbitration remain difficult to quantify because of a lack of data and transparency around RIA dispute resolution. As observed by Michael Edmiston, the former president of securities plaintiffs' bar association PIABA, we can tell general trends from data about the number of FINRA members and registered persons and the number of claims filed, but we cannot do the same for RIA claims.[100] Lack of transparency is enabled by the absence of a single uniform platform and, we suspect, the multiplicity of private arbitration regimes governing most RIA disputes today. Unlike the broker-dealer industry, which is heavily regulated and required to report detailed arbitration data through FINRA, the RIA space lacks a comparable system for collecting and disseminating this

96. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921(b), 124 Stat. 1376, 1841 (2010) (codified as amended at 15 U.S.C. § 80b-5(f)).

97. *See* H.R. REP. NO. 117-393, at 104 (2022).

98. SEC REPORT, *supra* note 12, at 4.

99. *Id.* at 4 (estimating 61% of RIAs included a PDAA in their advisory agreements). The FINRA Code of Arbitration for Consumer Disputes governs all disputes involving customers and their brokers and requires or prohibits the usage of certain terms in the brokerage agreements. *See* FINRA Rule 12101(a). FINRA Code prohibits usage of class action waivers under Rule 12204(a), prohibits language that limits a party's ability to file "any claim" in arbitration under Rule 2268(d)(2), and prohibits language that limits the ability of arbitrators to make "any award" under Rule 2268(d)(4).

100. Edmiston, *supra* note 44, at 382, 386.

information.[101] The current leave-it-to-the-market approach means that disclosures are likely to be underproduced for reasons internal to arbitration.[102] Without a centralized, consistent source of data, it is challenging for regulators, policymakers, and investor advocates to gauge the successes and failures of the RIA arbitration process. This gap makes it difficult to develop targeted reforms that would improve fairness and accountability in the system. Meanwhile, investors are disadvantaged in RIA relationships compared to broker-dealers with respect to the accessibility of information about conduct giving rise to prior arbitration proceedings.

By contrast, there are significant existing disclosure requirements for broker-dealer arbitrations.[103] Public disclosures about regulatory misconduct tracked by FINRA and reported publicly through the BrokerCheck website, as well as databases of the awards in FINRA customer cases, make available reports of a broker-dealer's arbitration history and arbitration awards.[104]

These reports are not available in a comparable way for RIAs that do not have disclosure obligations (if they are not dual registered firms). In many cases, there is no basis for a private arbitration provider to report the award, even if the parties did not agree to keep it confidential; these providers typically lack jurisdiction over investor claims after a judgment has been rendered and damages have been awarded. Given the fragmented nature of the RIA market and the absence of a reporting mandate like FINRA's for broker-dealers, the data currently available is incomplete and potentially unrepresentative of the broader market. Disputes over unpaid awards, or efforts to vacate or confirm awards, might well be litigated and come to light. But in the main, unpaid RIA arbitration awards are not publicly available.[105] Without a comprehensive data set, efforts to develop evidence-based policy solutions will remain hampered, leaving the arbitration process under-scrutinized and potentially unfair to RIAs,

101. *Id.* ("There are no similar reported statistics for RIA arbitration cases. No regulator is tracking and no provider is reporting any statistics for RIA arbitration cases.").

102. RIA advisory agreements in fact often limit dissemination of information regarding client arbitration or arbitration awards by including confidentiality provisions in advisory agreements that prohibit the parties or the arbitrator from disclosing information about the arbitration after it ends. SEC REPORT, *supra* note 12, at 20.

103. Nicole Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 NEV. L.J.F. 1, 2 (2020).

104. Nicole G. Iannarone, *A Model for Post-Pandemic Remote Arbitration*, 52 STETSON L. REV. 393, 437–38 (2023).

105. Edmiston, *supra* note 44, at 382, 386; *see also* AM. ARB. ASS'N, CONSUMER ARBITRATION RULES AND MEDIATION PROCEDURES, at R-42 (2025) [hereinafter AAA CONSUMER RULES], https://www.adr.org/media/yawntdvs/2025_consumer_arbitration_rules.pdf [https://perma.cc/53EB-B3Q7].

their clients, and investors at large. In Part III.B, we address some potential reforms to Form ADV that would address this concern.

There is an additional concern with relying on the notion that the market will police itself based on adequate information and full disclosure: it rarely works as hoped. Securities law is designed in part to help investors gather and evaluate relevant information about potential financial advisers. In economic terms, this function as often described as reducing "search costs."[106] When an investor wants to hire a financial adviser, the investor should ideally be able to compare multiple advisers' fees, track records, and complaint histories—all attributes relevant to the quality of the advice to be received—with relative ease. In many markets, people comparison shop based on certain salient attributes about the products or services—price, quality, and so on.[107] Yet when arbitration agreements and other critical details (like past arbitration claims or awards against the adviser) remain undisclosed or difficult to locate, an investor cannot meaningfully compare how RIAs have responded to disputes in the past.[108] The lack of transparency undercuts the basic premise that investors should be able to shop around for the best advisory services based on complete information—including how fairly claims against the RIA will be resolved under the rules that it has selected in its agreement.

From an economic perspective, if retail investors are not using this information to choose or reject advisers, the market's "weeding out" function does not operate well.[109] Under the logic of an ideal market, people would seek out advisers with fair arbitration procedures and avoid those with burdensome or biased clauses, thus driving the worst practices out of the industry. But in reality, most investors only discover these arbitration clauses after a dispute occurs.

There may be a small group of investors, sometimes called in the literature "informed" or "discerning" customers on the margin, who do pay close attention to features that other consumers overlook—such as warranties or specialized contract provisions.[110] If too few

106. *See* Tierney & Edwards, *supra* note 24, at 807.

107. *Cf.* Tierney, *supra* note 60, at 880–83.

108. *See* Tierney & Edwards, *supra* note 24, at 808.

109. *See* Holger Spamann, *Indirect Investor Protection: The Investment Ecosystem and Its Legal Underpinnings*, 14 J. LEGAL ANALYSIS 17, 18, 31–32 (2022) (noting that market forces will protect uninformed investors only to the extent that there are informed investors whose self-interested behavior has that emergent consequence). *See generally* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012) (demonstrating that firms compete on salient attributes, and that non-salient terms are not disciplined by competition).

110. *See, e.g.*, Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929,

customers scrutinize these attributes, then neither disclosure nor competition can spark meaningful market change, leaving less-informed customers unprotected.[111] As a result, without solid disclosure and transparency, investors cannot accurately gauge the risk or inconvenience that an RIA's arbitration terms might pose—reducing the market "pressure" on RIAs to adopt more consumer-friendly terms.

Recognizing the importance of addressing this information gap, the SEC's Investor Advocate analyzed the problem quantitatively, aiming to identify trends and patterns in RIA arbitration cases.[112] The SEC staff's analysis, which we turn to next, is an important step toward understanding how arbitration functions for RIA disputes and what reforms might be necessary to protect investors.

B. Existing Arbitration Options for RIA Claims are Largely Undesirable

1. Unfairness to Claimant-Investors

The inconsistent sets of rules currently governing disputes of RIA arbitration claims create a system of claims that discourages and diminishes claims against RIAs, making it difficult for investors to seek redress for wrongdoing. Complex procedural requirements, high costs, and the unpredictability of whether consumer or commercial rules will apply create uncertainty for claimants.

a. High Costs and Upfront Fees

One major criticism of arbitration is that the costs of pursuing and vindicating a claim may exceed the value of the claim. The situation for RIAs can be contrasted with that of broker-dealers, who are required to use FINRA's arbitration forum where the industry subsidizes a large portion of fees.[113] In initiating arbitration against a broker-dealer, claimants do not face the same cost structures that many clients of RIAs face. Under FINRA's rules for customer disputes, arbitration administrative fees are capped at $2,300, with additional arbitrator compensation, also subject to regulation, paid at the conclusion of the proceeding, and usually less expensive than other forums.[114]

929–30 (2020). For the classic defense that an informed minority can discipline contract designers, see Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 634 (1979).

111. Tierney, *supra* note 60, at 882–83.

112. *See* SEC REPORT, *supra* note 12, at 4.

113. *See* FINRA Rule 13200(a).

114. *See* SEC REPORT, *supra* note 12, at 23.

Other private forums can have significantly higher fees, tending to increase the cost of initiating arbitration against the RIA. The selection of arbitration rules may also require investor claimants to deposit a substantial portion of arbitration fees upfront.[115] Such fees include administrative fees as well as non-administrative fees based on arbitrator compensation estimates and expenses.[116]

Administrative fees alone can run high, depending on the designated forum rules and the size of the claim. Consider the example of AAA's commercial rules. A panel of three arbitrators would require the claimant to pay at least $4,825 upon filing and a final fee of $4,175, in advance of the first hearing in the case.[117] Under the same rules, non-administrative fees, consisting of arbitrator's fees, are split between the claimant and respondent and must be deposited upfront. This significantly increases the financial burden on the claimant-investor. As an illustration, a claimant-investor can easily expect to pay in excess of $32,000 before an evidentiary hearing, which can represent half of an average arbitrator's fee alone for five days of hearings and three days of pre-hearing and post-hearing work.[118] Compounding the issue of prohibitively high arbitrator fees, some RIAs dictate the number and type of arbitrators in advisory agreements, leaving the investor no choice but to pay significant fees upfront.[119] Combined, the upfront administrative fees and deposits based on the arbitrator's fee estimate can run in the tens of thousands and dissuade a claimant from bringing a viable claim against the RIA.[120] Furthermore, if the RIA refuses to pay its share of the forum

115. *See, e.g.*, AM. ARB. ASS'N, CONSUMER MASS ARBITRATION AND MEDIATION FEE SCHEDULE (2024) [hereinafter AAA CONSUMER FEE SCHEDULE], https://www.adr.org/media/jixnnllx/consumer_mass_arbitration_and_mediation_fee_schedule.pdf [https://perma.cc/H7CF-V272].

116. *See id.* Non-administrative fees consist of arbitrator's compensation and expenses, and other costs such as hearing room rental. The private arbitrators' fees are the largest part of non-administrative fees and may be set by the arbitrators themselves.

117. *See* AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES ADMINISTRATIVE FEE SCHEDULE 1 (2025) [hereinafter AAA COMMERCIAL FEE SCHEDULE], https://www.adr.org/media/pfubh1we/2025_commercial-arbitration-fee-schedule.pdf [https://perma.cc/FF8P-GEMD].

118. *See* Edmiston, *supra* note 44, at 380.

119. *See* SEC REPORT, *supra* note 12, at 20 ("A significant number of agreements dictated the type and/or number of arbitrator. For instance, the agreements might require the arbitrator panel to consist of three arbitrators, and/or to contain at least one arbitrator affiliated with the securities industry.").

120. *See* Christine Lazaro & Michael S. Edmiston, *Costly Forced Arbitration Against RIAs Harms Investors*, FIN. PLAN.: WEALTH THINK (Jan. 14, 2022, at 10:02 ET), https://www.financial-planning.com/opinion/costly-forced-arbitration-against-rias-harms-investors [https://perma.cc/84ZN-9987] (reporting story of an investor who had to advance $30,000 to the designated forum to initiate arbitration against an RIA for misconduct).

fees, the investor will have to incur the full cost of arbitration or have the case dismissed by the forum.[121]

The costs discussed so far are reasonably foreseeable at the outset of arbitration. However, claimant-investors may incur other substantial costs before their claims can be heard on the merits. Unforeseen arbitration costs may result from inconsistencies in how the forum handles disputes over preliminary questions, such as choice of arbitration rules.[122] For instance, AAA applies its Consumer Arbitration Rules in a number of circumstances including when "the arbitration agreement is within a consumer agreement" and even when the consumer agreement specifies a different set of rules than the Consumer Arbitration Rules.[123] AAA often determines that RIA advisory agreements with retail clients fall under the forum's definition of consumer contracts and applies the Consumer rules, even if the advisory agreement invokes the AAA Commercial Rules.[124] However, if a party disagrees, AAA's procedural rules allow the party to challenge the decision, ultimately leaving it at the discretion of the arbitrator.[125]

The choice between the Commercial and Consumer rules has significant consequences for the parties as well as the arbitrator's compensation. Under the Commercial rules, claimant-investors incur higher, potentially cost-prohibitive fees, while respondent-RIAs avoid incurring the full costs of arbitration mandated under the Consumer rules.[126] In addition, under these rules the arbitrator can charge his or her own fees unrestricted by the $2,500 daily cap applicable under the

121. *See* Edmiston, *supra* note 44, at 380.

122. *See, e.g.*, Hagan v. Park Miller LLC, No. 20-CV-06818-CRB, 2022 WL 17650539 (N.D. Cal. Dec. 13, 2022).

123. AAA CONSUMER RULES, *supra* note 105, at R-1.

124. *See id.* (defining a consumer agreement as "an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use").

125. *See id.* (reserving to the AAA the discretion whether to "apply the[] [Consumer Arbitration] Rules," but noting that in the case either party files a timely jurisdictional objection, "the arbitrator shall have the authority to make the final decision on which AAA rules will apply").

126. *Compare id.* at R-12(f), R-52, M-15, M-16 (requiring under the Consumer rules that the business makes the deposits), *and* AAA CONSUMER FEE SCHEDULE, *supra* note 115, *with* AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2022) [hereinafter AAA COMMERCIAL RULES], https://www.adr.org/media/qielmf0g/2025_commercialrules_web.pdf [https://perma.cc/KQ93-J3UH], *and* AAA COMMERCIAL FEE SCHEDULE, *supra* note 117.

Consumer rules. This may influence the arbitrator's decision on the choice of forum rules.[127]

Other arbitration rules, including fee shifting provisions and provisions limiting claims and damages, are deployed in RIA advisory agreements.[128] While these provisions may not add to the upfront costs of arbitration borne by the claimant, they tend to further deter investor claims by making it appear to the claimant that the limited benefits of arbitrating a claim may be outweighed by the potential costs. For example, an investor who has already suffered losses in the value of her investments with an RIA may be deterred from bringing a claim against her adviser if the Advisory Agreement includes a fee shifting provision. By bringing a claim against the adviser, she may risk suffering additional losses if she loses, in which case she would have to reimburse the adviser for arbitration costs such as attorney fees, which could also be significant.

b. Venue Designation

Besides upfront arbitration fees, a claimant may incur additional expenses of travel and accommodation at a distant arbitration venue. RIAs frequently designate the arbitration venue in advisory agreements.[129] Venue designation provisions often specify a particular venue or a venue "wherever the adviser is located" irrespective of wherever the claimant lives.[130] The effect is to impose additional travel and lodging costs on claimants, adding to the overall costs of arbitration such that pursuing the claim may ultimately be economically impractical. In comparison, a broker-dealer client by default can choose to arbitrate at a venue closest to the client's residence at the time the transactions took place.[131]

127. *See* Edmiston, *supra* note 44, at 386.

128. According to the SEC staff, among the Advisory Agreements studied in the report, 5% of RIAs used provisions mandating that claims be filed within a timeframe specified by the RIA, irrespective of the statute of limitations applicable to the claims, 11% precluded claimant awards for punitive, exemplary and consequential damages, and 18% of agreements shift attorney's fees, costs and expenses to the prevailing party in an arbitration. SEC REPORT, *supra* note 12, at 19, 22.

129. *See id.* at 5 (finding that 60% of the agreements studied in the report designated an arbitration venue, out of which nearly all (97%) did "not consider the client's location or place of business").

130. *See id.*

131. FINRA Rule 12213 ("Generally, the Director will select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute . . . .").

c. Investor Expectations Around Restrictive and Non-Standard Rules Governing RIA Arbitration

The client-adviser relationship is inherently imbalanced, with the RIA holding a position of relative power and expertise. It is this position that gives rise to the fiduciary relationship. Indeed, a client has often engaged the RIA precisely because the client lacks the sophistication or time to manage the client's financial affairs fully on the client's own. And, as noted in the next Subpart, clients will typically be unaware of the arbitration rules that the RIA has selected for them. This disparity in bargaining power and sophistication will typically allow RIAs to dictate the terms of the arbitration agreement, including potentially unfair provisions.[132] Investors often lack the leverage to negotiate these terms or the ability to decline the agreement without foregoing the RIA's services—and may be hampered, for reasons to which we turn below, from effectively searching for other competitors. Restrictive terms that disadvantage investors, which would be prohibited in FINRA-governed broker-dealer arbitration agreements, include class action waivers, limitations on claims and damages, foreign venue clauses, and so on.[133]

The lack of an existing set of standards for arbitration in RIA advisory agreements means that there is no minimum set of standards against which claimants can set their expectations with respect to their rights and obligations in the event of a dispute with the adviser. The SEC report is demonstrative of the wide range of disparity in the availability of procedural tools to claimants resulting from the current arbitration regime where RIAs can select from a variety of restrictive PDAA provisions, many of which are not permissive under FINRA arbitration rules. The lack of a set of standards leads to lack of foreseeability of outcomes, which in turn may discourage a claimant from bringing any claim; because arbitration can be cost-prohibitive, and because a claimant may be unable to assess the strength of the claim with any measure of confidence, the claimant may choose to not to arbitrate at all.[134]

132. *See* Glenn Koch, *Forced Arbitration's 'Chilling Effect' on RIA Customer Complaints*, PIABA (Dec. 16, 2024), https://piaba.org/forced-arbitrations-chilling-effect-on-ria-customer-complaints/ [https://perma.cc/P2Z9-Q6Q4].

133. *See id.* (stating that FINRA-governed BD arbitration agreements include limitations on claims and damages); *see also* FINRA Regulatory Notice 21-16: FINRA Reminds Members About Requirements When Using Predispute Arbitration Agreements for Customer Accounts (Apr. 21, 2021), https://www.finra.org/rules-guidance/notices/21-16 [https://perma.cc/35U8-ETE9] (stating that FINRA-governed BD arbitration agreements include class action waivers).

134. *See* Koch, *supra* note 132.

2. Unfairness to Respondents

Many proponents of arbitration argue that arbitration is more consistent, faster, and less costly than litigation.[135] However, these attributes do not characterize RIA arbitrations, to the chagrin of the industry that requires them. For example, the American Arbitration Association (AAA) is one of the major providers of arbitration services in this space.[136] As noted above, it offers two sets of rules, one for consumer disputes and another for commercial disputes. These two sets of rules may be chosen by contracting parties. However, AAA will determine whether RIA arbitration falls under the AAA Consumer rules or Commercial rules based on its interpretation of the rules without regard for the parties' contractual provision.[137] A party may challenge AAA's decision but cannot do so until an arbitrator is appointed.[138] This outcome is problematic for respondents because it creates inconsistency in the cost of the arbitration, in how arbitrators are appointed, and because it provides no clarity as to what set of rules may apply once a claim is brought. The lack of transparency regarding which set of arbitration rules applies to disputes involving RIAs introduces significant uncertainty for respondents. Unlike the relatively clear standards in the FINRA forum for broker-dealers, the decision to apply consumer or commercial rules in RIA disputes is left to the discretion of first AAA and then the arbitrators, often after the dispute has already commenced.

Respondents who select the AAA Commercial Rules often encounter uncertainty when defending individual claims. Despite contractual provisions specifying the application of the Commercial rules, the AAA often administers disputes involving individual investors under the Consumer arbitration rules instead.[139] In those circumstances, respondents are typically responsible for the bulk of the arbitration fees, paying all but the individual claimant's share (a

135. Ware, *supra* note 9, at 287.

136. *Arbitrating a Registered Investment Advisor at the American Arbitration Association and JAMS*, KAUFMANN GILDIN & ROBBINS LLP, https://www.securitieslosses.com/blog/2024/10/arbitrating-a-registered-investment-advisor-at-the-american-arbitration-association-and-jams/ [https://perma.cc/ZRB7-Z8Z7] (last visited Sep. 25, 2025).

137. *See* AAA CONSUMER RULES, *supra* note 105, at R-1. AAA defines a consumer agreement as "an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable . . . in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use." *Id.* at R-1(b).

138. *Id.* at R-1(d) ("If [the consumer and the business] want to make changes [to these Rules] after the arbitrator is appointed, any changes may be made only with the approval of the arbitrator.").

139. *See* AAA COMMERCIAL RULES, *supra* note 126, at R-1.

relatively small filing fee of approximately $225).[140] Compounding this unpredictability is the arbitrator's discretion to overrule the AAA's initial determination, thereby returning the dispute to the commercial rules after proceedings have begun under the consumer rules.[141]

The choice between consumer and commercial arbitration rules can have significant implications for the financial burdens placed on both claimants and respondents. Under AAA consumer rules, respondents typically bear the bulk of the costs.[142] In contrast, commercial rules often require a more equal cost-sharing arrangement between the parties. This discrepancy can create situations where respondents—usually RIAs—are saddled with unexpected financial obligations that they may not have foreseen when entering into the arbitration agreement. Claimants may find themselves facing higher costs under commercial rules, which could deter them from pursuing valid claims. The unpredictability of these financial burdens can disrupt the expectations of both parties. Moreover, the procedural differences between the two sets of rules—such as fee structures and evidentiary requirements—can significantly impact the outcome of disputes, raising concerns about whether AAA rules offer a viable mechanism of consistent dispute resolution in the securities context.[143]

In addition to creating uncertainty around fees, the varying rule sets impose markedly different processes for appointing arbitrators. Under the Consumer rules, the AAA itself selects the arbitrator,[144] a practice that generally decreases predictability (and thus impedes settlement). By contrast, under the Commercial Arbitration Rules,

140. *Cf.* Jonathan Sheldon, *Using the AAA's Rules to Defeat Arbitration Requirements*, NAT'L CONSUMER L. CTR. (June 5, 2025), https://library.nclc.org/article/using-aaas-rules-defeat-arbitration-requirements [https://perma.cc/V7LH-LHLT].

141. *See* AAA COMMERCIAL RULES, *supra* note 126, at R-2(d)(ii).

142. *See* ANDREW J. PINCUS, ARCHIS A. PARASHARAMI, KEVIN RANLETT & CARMEN LONGORIA-GREEN, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, MASS ARBITRATION SHAKEDOWN: COERCING UNJUSTIFIED SETTLEMENTS 9 (2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf [https://perma.cc/9MYA-EVGS] ("Under the rules of both the AAA and JAMS, which are the most widely used consumer and employee arbitration administrators, the company pays the entire cost of the arbitration except for a small filing fee, which is usually less than or equal to court filing fees."); *see also* Myriam Gilles, *Arbitration's Unraveling*, 172 U. PA. L. REV. 1063, 1100 (2024).

143. *Compare* AAA COMMERCIAL FEE SCHEDULE, *supra* note 117, *with* AAA CONSUMER FEE SCHEDULE, *supra* note 115 (comparing the difference in required fees depending on selection of the Consumer or Commercial rules); *Compare* AAA COMMERCIAL RULES, *supra* note 126, at R-35, R-36, *with* AAA CONSUMER RULES, *supra* note 105, at R-32, R-33 (comparing the different evidentiary standards between the two sets of rules).

144. AAA CONSUMER RULES, *supra* note 105, at R-15.

each party participates in the selection of the arbitrator,[145] affording them greater input and a heightened sense of procedural fairness. The shifting between consumer and commercial rules, however, jeopardizes this procedural clarity. It not only produces inconsistencies in the allocation of costs—where the respondent may unexpectedly bear substantial financial burdens—but also leads to changes in how the arbitrator is chosen. A case that commences under the consumer rules, and therefore vests arbitrator selection with the AAA, can be reclassified mid-process if the arbitrator determines that the commercial rules should apply.[146] The result is that respondents may not be able to reliably anticipate either the financial obligations they may incur or their role in arbitrator selection, ultimately undermining the predictability that contractual provisions are intended to secure.[147]

Although FINRA's arbitration system is well-established for broker-dealer disputes, it has significant limitations when it comes to handling claims involving RIAs. FINRA's arbitration forum is designed around the broker-dealer relationship and the specific regulatory framework that governs it, meaning that its rules, arbitrators, and procedures have not yet been developed in the same manner with respect to the kinds of claims that might be asserted against RIAs under the Advisers Act.[148] Meanwhile, FINRA's jurisdiction does not extend to RIA disputes unless a broker-dealer is involved, such as perhaps because the firm is dually registered as an RIA and a broker-dealer.[149] The fact that FINRA is inaccessible for pure RIA disputes leaves investors and advisers in the RIA space without access to a consistent, industry-standard arbitral forum. This gap highlights the broader regulatory challenge of providing a specialized and equitable arbitration system for all sectors of the financial services industry.[150]

145. *See* AAA COMMERCIAL RULES, *supra* note 126, at R-15(a).

146. AAA CONSUMER RULES, *supra* note 105, at R-1, R-3.

147. *See* Gilles, *supra* note 142, at 1067, 1106–07, 1110.

148. SEC REPORT, *supra* note 12, at 20–22; Investment Advisers Act of 1940, ch. 686, § 206, 54 Stat. 789, 852 (codified as amended at 15 U.S.C. § 80b-6).

149. *Guidance on Disputes Between Investors and Investment Advisers That Are Not FINRA Members*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/guidance-disputes-between-investors-and-investment-advisers-are-not-finra-members [https://perma.cc/YB7H-CYHA] (last visited Oct. 15, 2025).

150. *See, e.g.*, Richard A. Bales & Mark B. Gerano, *Determining the Proper Standard for Invalidating Arbitration Agreements Based on High Prohibitive Costs: A Discussion on the Varying Applications of the Case-by-Case Rule*, 14 TRANSACTIONS: TENN. J. BUS. L. 57, 61 (2012).

JAMS, another prominent arbitration provider, has also not shown up to the task of offering a fair forum for investor disputes.[151]

Consider the statement of Robin Traxler, Senior Vice President and Deputy General Counsel of the Financial Services Institute (FSI), before the SEC Investor Advisory Committee in connection with the study of RIA arbitration.[152] Traxler noted that in the broker-dealer context, arbitration has offered a more efficient, cost-effective, and investor-friendly avenue for dispute resolution than litigation. But her statement acknowledged that even though many of its member firms are dual registered (broker-dealer and RIA), FSI had better data about FINRA than about RIA-specific arbitration.[153] Traxler's acknowledgment of minimal data on the frequency and outcomes of arbitration in the RIA context underscores a critical transparency gap. For policymakers and stakeholders to evaluate the fairness of mandatory arbitration clauses, more robust information regarding RIA arbitration procedures and case results is necessary. What's more, FSI's positive experience with FINRA arbitration for broker-dealers may offer a blueprint for designing or improving arbitration systems specifically tailored to RIAs.

III. CLAIM-SUPPRESSING ARBITRATION AND SECURITIES LAW

A. Contracting with Clients Creates Opportunities for Self-Dealing

Fiduciary relationships impose heightened duties, including a requirement that the fiduciary act in the beneficiary's best interest and not put its own interest first. A prominent debate in fiduciary theory has flourished in recent decades about the extent to which these heightened duties can be adjusted or waived by contract.[154] This debate is most prominent in corporate law, specifically regarding the duties of corporate managers and directors, and other situations (like unincorporated entity contracting) that may permit certain fiduciary

151. *Cf., e.g.*, Parada v. Superior Court, 176 Cal. App. 4th 1554, 1580–82 (2009). For a discussion of AAA and JAMS rules, see Kristen M. Blankley, *Lying, Stealing, and Cheating: The Role of Arbitrators as Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 476–77 (2014). For a positive perspective of JAMS from the defense bar, see Alan Wolper, *JAMS v. FINRA Arbitrations . . . And the Winner is JAMS*, UBGREENSFELDER: BROKER-DEALER L. CORNER (May 27, 2021), https://www.bdlawcorner.com/2021/05/jams-vs-finra-arbitrations-and-the-winner-is-jams/ [https://perma.cc/RA55-25U9].

152. *OIA Investor Advisory Committee*, *supra* note 9, at 32:19–32:47.

153. *Id.* at 1:15:32–1:20:46.

154. *See* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 2–4 (1990); Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 76–77 (2004) (describing the "principal debate attending fiduciary duties" since about 1980 as being about contractarianism).

obligations to be adjusted or altered contractually.[155] Certain states, like Delaware, have also taken decidedly contractarian approaches.[156]

By contrast with Delaware law, the federal securities laws are non-contractarian.[157] The Advisers Act has several statutory provisions that form an important basis for the non-contractarian approach. To begin with, many duties are not waivable under the federal securities laws, including some under the Advisers Act applicable to RIAs.[158] Even when waivable, the securities laws require that contractual modification be accompanied by "full and fair" disclosure and truly informed consent.[159] Accordingly under the contractarian approach, if the contract terms are not adequately disclosed, are confusing, or unfairly limit a beneficiary's rights without informed consent, those contract provisions could be treated as an *ineffective* contractual waivers.[160]

Other approaches to fiduciary duty suggest that while certain conflicts may be cured by full and fair disclosure, followed by informed consent, there is still a baseline requirement of fairness below which a fiduciary cannot contractually tailor its duties.[161] This is why, for instance, even Delaware law does not allow for the waiver or

155. *See, e.g.*, Jonathan G. Rohr, *Freedom of Contract and the Publicly Traded Uncorporation*, 14 N.Y.U. J.L. & BUS. 247, 252, 259 (2017).

156. William W. Clayton, *High-End Bargaining Problems*, 75 VAND. L. REV. 703, 717–18 (2022).

157. *Id.* at 720 (noting that "federal securities laws are not usually thought of as being heavily contractarian" even in the context of private ordering by sophisticated institutional investors). *See* Samuel Nadler, *Federal Fiduciary Duties and Private Equity: The Search for Workable Standards*, 2018 COLUM. BUS. L. REV. 254, 264 ("[T]he glaring difference between federal fiduciary duties and fiduciary duties under Delaware law is that the latter can be waived or modified by express agreement of the parties.").

158. *See* Anita K. Krug, *Downstream Securities Regulation*, 94 B.U. L. REV. 1589, 1624 n.193, 1630 (2014); LEMKE & LINS, *supra* note 7, § 3:75. On the duties relevant here, see Bakas v. Ameriprise Fin. Servs., Inc., 651 F. Supp. 2d 997, 1001 (D. Minn. 2009) (concluding that an old SEC interpretive release was no longer "good law" after decades of intervening Supreme Court decisions, where the circa-1950 release had suggested that the right to choose court over arbitration was one of these non-waivable rights).

159. SEC v. Cap. Gains Rsch. Bureau Inc., 375 U.S. 180, 194 (1963). *See* THOMAS P. LEMKE & GERALD T. LINS, REGULATION OF INVESTMENT ADVISERS § 2:33 (2025), Westlaw SECREGINA; James Fallows Tierney, *Reg BI+: Algorithmic Conflicts in Financial Advice*, 2024 MICH. ST. L. REV. 947, 968.

160. LEMKE & LINS, *supra* note 159, §§ 2:3, 2:33.

161. *E.g.*, Brief of Amicus Curiae Professor James Tierney in Support of Neither Party at 8, Doelger v. JPMorgan Chase Bank, No. 24-2000 (1st Cir. June 6, 2025) [hereinafter Tierney Br.] ("In practice, however, even the contractarian approach recognizes a floor of fairness below which a fiduciary cannot waive its duties." (citing Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 VILL. L. REV. 701, 711 (2010))).

exculpation of breaches of the duty of loyalty.[162] If the clauses are fundamentally unfair—unreasonably shifting risk, reducing the other party's rights to seek redress, or imposing hidden costs or risks—then the relationship's fiduciary nature demands that the modification of duties not disadvantage the principal.[163] If the fiduciary includes terms in a contract that unreasonably favor the fiduciary's interests at the expense of the beneficiary, even if superficially disclosed, this can itself be seen as undermining core fiduciary duties—or perhaps even as itself a violation of the duty of loyalty, as we will see momentarily.

Consider the principles of fiduciary duty arising from the law of agency, which dictates that agents owe a duty of loyalty to their principals, refraining from self-dealing and conflicts of interest that harm the principal's interests.[164] Suppose the agent proposes a contractual clause allowing the agent to engage in certain side transactions that might benefit the agent personally at the principal's expense. The agent's duty of loyalty requires the agent to provide a full and fair disclosure of the nature of the potential conflict, its risks to the principal, and the potential benefits to the agent.[165] If the principal voluntarily consents after receiving a clear and comprehensible explanation of all material facts, the modification may be enforceable.[166] If the disclosure is inadequate or the principal's consent is not truly informed, the waiver will not stand.

These principles of fiduciary law help inform the law applicable to RIAs under the Advisers Act. RIAs must place their clients' interests first, particularly in managing conflicts of interest. An investment advisory contract might include terms outlining how the adviser can receive compensation from third parties for product recommendations (e.g., revenue sharing). The Advisers Act fiduciary duties require full, frank disclosure of such arrangements, detailing the nature of the adviser's conflicts, how they could affect recommendations, and any resulting costs or benefits to the client.[167] Merely stating "we may receive fees from third parties" in fine print is

162. *See* DEL. CODE ANN. tit. 8, § 102(b)(7); Stone v. Ritter, 911 A.2d 362, 367 (Del. 2006).

163. Norb Vonnegut, *Should Fiduciary Advisers Swear Off Mandatory Arbitration?*, WALL ST. J. (Mar. 8, 2016, at 09:47 ET), https://www.wsj.com/articles/should-fiduciary-advisers-swear-off-mandatory-arbitration-1457448422 [https://perma.cc/N99Y-SKE6].

164. RESTATEMENT (THIRD) OF AGENCY § 8.01 (A.L.I. 2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

165. *Id.* § 8.11 (imposing a duty on agents to disclose material facts to the principal).

166. *Id.* § 8.06 (providing that a principal's informed consent may excuse an agent's breach of fiduciary duty).

167. *See* SEC v. Cap. Gains Rsch. Bureau Inc., 375 U.S. 180, 191–92, 194 (1963).

insufficient.[168] If the client agrees to these arrangements after receiving a clear and honest explanation, the adviser may proceed without breaching the duty of loyalty. As one leading treatise on investment adviser regulation notes, "an adviser's fiduciary duty follows the contours of the client relationship and the adviser and its clients may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent."[169] Yet as to contractual ordering, the SEC and courts have repeatedly emphasized that mere boilerplate disclosures or complex disclaimers embedded deep in lengthy advisory contracts do not suffice to transform an inherently unfair arrangement into a permissible one.[170]

Not every RIA that includes an arbitration clause is acting in bad faith, as many are following standard industry practice. Nor is the self-dealing concern about subjective intent. There is instead a structural conflict: the RIA is the sole drafter of the advisory agreement, operating in a fiduciary relationship, and the terms it selects disproportionately benefit itself. That conflict is what fiduciary law is designed to police—it encompasses but does not require bad faith. In addition, this Article's objection is not to mandatory arbitration by RIAs per se. The proposed safe harbor in Part IV makes this clear: an RIA that selects FINRA's forum or an equivalent rule set meeting minimum fairness standards is acting consistently with its fiduciary duties. The problem is arbitration on terms that the fiduciary would not select if it were genuinely putting the client's interest first.

Taken together, these fiduciary principles govern an agent's negotiation of terms they are offering in a contract to a beneficiary. The adviser's role as a fiduciary means that any term shifting undue risk from adviser to client—like a mandatory arbitration clause severely limiting the client's legal remedies—may be inherently suspect if it appears designed to benefit the adviser at the client's expense. Even if disclosed, the adviser's willingness to present a skewed term runs counter to the spirit of loyalty: attempts to insert unfair, self-serving terms signal that the fiduciary is prioritizing its own gain over the client's best interest.

B. Fair Arbitration in a Fair Forum

As Part III.A demonstrated, one-sided arbitration agreements that favor the RIA's interests over its client's interests, in a manner not

168. *See, e.g.*, Cadaret, Grant & Co., Exchange Act Release No. 100691, 2024 WL 3791464, at *3 (Aug. 12, 2024) (finding that RIA firm violated the antifraud provisions of the Advisers Act by disclosing that it "'may' receive compensation" from a source "while it did in fact receive this compensation").

169. LEMKE & LINS, *supra* note 159, § 2:33.40 (quoting Fiduciary Interpretation reaffirming advisers' disclosure-based fiduciary duty).

170. *Cf.* Kenneth R. Ward, Exchange Act Release No. 47535, 2003 WL 1447865, at *10 n.42 (Mar. 19, 2003) (finding that partial or misleading disclosures did not excuse an adviser's failure to act fairly toward clients).

conducive to full and fair disclosure, can potentially violate the duty of loyalty under the Advisers Act. This principle—that contracting can impermissibly put the fiduciary's interests first—extends directly to claim-deterring arbitration clauses. By adopting arbitration clauses in their advisory agreements that impose significant procedural obstacles to dispute resolution, RIAs may be effectively prioritizing their own interests—namely, minimizing litigation risk—over the interests of their clients. Unfair arbitration clauses in RIA contracts can deter legitimate claims, leaving clients without a meaningful avenue to hold advisers accountable. Part III.B first discusses the law governing so-called hedge clause provisions in advisory contracts and then explains how this framework applies to RIA arbitration agreements.

1. Hedge Clauses in RIA Agreements

RIAs' statutory obligations support the notion that claim-suppressing arbitration clauses are inconsistent with fiduciary duty. Advisers Act Sections 206 and 215 together prohibit the use of hedge clauses, which are contract provisions that seek to limit an adviser's liability in advance of a potential claim.[171] The theory behind this prohibition is that such clauses are inconsistent with an adviser's non-waivable duties under the securities laws, including its fiduciary duties of loyalty.[172]

The main concern with hedge clauses is that they will operate to distract clients from the legal realities.[173] The unwaivable nature of

171. *See* Investment Advisers Act of 1940, ch. 686, § 206(1)–(2), 54 Stat. 789, 852 (codified as amended at 15 U.S.C. § 80b-6) (making it unlawful for an investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client" and/or to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client"); § 215(a), 54. Stat. at 856 ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void."); *see also* Francis J. Facciolo, *Do I Have a Bridge for You: Fiduciary Duties and Investment Advice*, 17 U. PA. J. BUS. L. 101, 133–47 (2014) (describing and defining a hedge clause).

172. *See* Jason Wallace, *Improper Hedge Clauses Remain a Problem in Adviser Contracts*, 17 WG&L ACCT. & COMPLIANCE ALERT, no. 194, Oct. 2023, at 1, 2–3, 2023 WL 6558289.

173. *See* Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248, 84 Fed. Reg. 33669, 33672 n.31 (July 12, 2019) (explaining that a hedge clause used with retail clients "generally is likely to mislead [them] into not exercising their legal rights, in violation of the antifraud provisions, even where the agreement otherwise specifies that the client may continue to retain its non-waivable rights"); Facciolo, *supra* note 171, at 133–47 (citing Heitman Cap. Mgmt. LLC, SEC No-Action Letter, 2007 WL 789073 (Feb. 12, 2007)) (describing history of hedge clause regulation, including of the SEC's various positions in no-action letters and interpretive releases); Kathryn Hastings, *Keeping Whistleblowers Quiet: Addressing Employer Agreements to Discourage Whistleblowing*, 90 TUL. L. REV. 495, 523–25 (2015)

duties under the securities laws means retail investors may be misled in falsely believing that their contract prevents them from pursuing a cause of action that is actually non-waivable. As one of us has written, "[t]he concern for misleading clients is the flip side of the obligation to obtain informed consent to a conflict of interest between the fiduciary and client."[174]

In 2019, in connection with the Regulation Best Interest (Reg BI) rulemaking package applicable to broker-dealers, the SEC also issued a final interpretive release interpreting the standard of conduct applicable to RIAs that included discussion of the prohibition against hedge clauses.[175] In that interpretation, the SEC articulated an important limit in the contractual alteration of fiduciary relationships: "an adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement."[176]

With that context, the SEC explained that hedge clauses may mislead clients into thinking they had waived non-waivable rights. It described the validity of a hedge clause as a "facts and circumstances" inquiry that depended on a client's "sophistication":

> [T]here are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be consistent with those antifraud provisions, where the hedge clause purports to relieve the adviser from liability for conduct as to which

(describing history of SEC no-action letters on hedge clauses from the 1950s to the 2010s and explaining the development of the SEC's "position that such clauses would mislead an unsophisticated client").

174. Tierney Br., *supra* note 161, at 10.

175. Standard of Conduct for Investment Advisers, 84 Fed. Reg. at 33669, 33672 n.31; *see* Anderson v. Edward D. Jones & Co., No. 2:18-CV-00714, 2024 WL 4120941, *13 n.2 (E.D. Cal. Sep. 9, 2024) (characterizing the release as an interpretive guidance that "does not have the force of law").

176. Standard of Conduct for Investment Advisers, 84 Fed. Reg. at 33672. The parties may tailor the "scope of the relationship" by contract, such as the "functions the adviser, as agent, has agreed to assume for the client, its principal." *Id.* at 33671, 33681 (comparing "an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client" to "an adviser to a[] . . . private fund, where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity"). On the general rules that permit shaping a fiduciary relationship's scope by agreement, see, for example, RESTATEMENT (THIRD) OF AGENCY §§ 1.01, 8.01 cmt. c (A.L.I. 2006); RESTATEMENT (SECOND) OF AGENCY ch. 13, topic 1, intro. note (1958) (A.L.I., amended 2024); LEMKE & LINS, *supra* note 159, § 2:33.40. But scope-alteration is different from substance-alteration. Within the "agreed-upon scope of the relationship . . . . the relationship in all cases remains that of a fiduciary to the client," and as a result the "adviser's federal fiduciary duty may not be waived." Standard of Conduct for Investment Advisers, 84 Fed. Reg. at 33671–72.

> the client has a non-waivable cause of action against the adviser provided by state or federal law.[177]

Because fiduciary duties under the securities laws are themselves not waivable, hedge clauses are potentially dangerous to unsophisticated investors because they can be deterred from pursuing causes of action that they retain by law notwithstanding any unenforceable contract terms to the contrary. To that end, there is a significant body of "research on how ordinary people use contract suggest[ing] that the mere presence of unenforceable contract terms itself shapes people's behavior."[178]

Consider an SEC settled administrative enforcement action from 2022 that helps illustrate how the hedge clause prohibition works.[179] In *Comprehensive Capital Mgmt.*,[180] the SEC settled claims that it included a hedge clause in its retail advisory agreements.[181] There were two sets of contract clauses at issue, before and after the SEC's 2019 interpretation regarding the RIA standard of conduct. The enforcement order concluded that both violated Section 206(2) of the Advisers Act—mainly for reasons that a retail investor might be "misle[d] . . . into not exercising their legal rights."[182]

As for the first provision, which purported to waive "all claims" and liability for "any act", the SEC concluded that this was likely to mislead clients into thinking they could not bring claims "of gross negligence on the part of the investment adviser, willful misconduct,

177. Standard of Conduct for Investment Advisers, 84 Fed. Reg. at 33672 n.31.

178. Tierney Br., *supra* note 161, at 12–13; *see also* Evan Starr, J.J. Prescott & Normal Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633, 665 (2020); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1066 (2019). *Cf.* Tess Wilkinson-Ryan, David Hoffman & Emily Campbell, *Expecting Specific Performance*, 98 N.Y.U. L. REV. 1633, 1667 (2023) (summarizing experimental evidence that many people believe the remedy for breach of contract will be specific performance, even "where the law seems not to give it").

179. On the SEC's use of non-precedential settled enforcement actions, see Scott H. Kimpel, *Staying in Compliance with the SEC's Latest Rules and Regulations in a Rapidly Changing Environment*, *in* SEC COMPLIANCE BEST PRACTICES, 2016 WL 159374, at *10 (2016 ed.); Joseph John VanCook, Exchange Act Release No. 61039A, 2009 WL 4026291, at *19 (Nov. 20, 2009) (explaining limits on the use of settled cases as administrative precedent).

180. Comprehensive Cap. Mgmt., Inc., Investment Advisers Act Release No. IA-5943, 2022 WL 103533 (Jan. 11, 2022).

181. *Id.* at *1 (explaining that the case resolved claims that the RIA's "advisory agreements included liability disclaimer language, commonly referred to as a hedge clause, which could lead a client to believe incorrectly that the client had waived a non-waivable cause of action against the adviser" under the securities laws).

182. *Id.* at *5.

and fraud."[183] In examinations with the firm, the SEC concluded "there was no evidence this non-waiver disclosure would be comprehended by retail clients," and so the order concluded that "the hedge clause violated Section 206(2) of the Advisers Act."[184]

After the SEC's 2019 interpretation, CCM changed its provision so as to "purport[] to relieve CCM from liability for conduct as to which the client has a non-waivable cause of action."[185] The SEC's settled order concluded that this second provision was likewise "inconsistent with an adviser's fiduciary duty and [the SEC's] statement because it may mislead CCM's retail clients into not exercising their legal rights."[186] The settled order also faulted CCM for making an "inaccurate statement of the liability standards under the federal securities laws as they apply to investment advisers."[187]

The CCM enforcement action involved a liability-waiver clause, not an arbitration clause with burdensome procedural features. While the SEC has not, to our knowledge, ever treated an arbitration clause itself as a hedge clause, the prohibition is not limited to provisions that facially disclaim liability. It reaches provisions that mislead clients into not exercising their legal rights. The operative test is thus about effect on client behavior, not the form of the clause. A provision that makes it prohibitively expensive to bring a claim is just as effective at causing a client not to exercise legal rights as one that tells the client those rights don't exist. Even if no SEC enforcement action has yet treated an arbitration clause per se as a hedge clause, the logic of the SEC's existing position points in that direction, and that step is both doctrinally sound and practically necessary.

2. Claim-Suppressing Arbitration as a Hedge Clause

A claim-suppressing arbitration provision functions as a hedge clause by creating practical barriers that discourage clients from pursuing legitimate claims against their advisers. While these provisions may not purport explicitly to waive liability like traditional hedge clauses, they achieve similar results through indirect means. For example, an arbitration clause that requires clients to bear prohibitive upfront costs, submit to complex procedural requirements, or accept limitations on discovery effectively raises the threshold for bringing claims to levels that many retail investors cannot meet. The practical effect mirrors that of an express liability waiver: clients with valid grievances are deterred from seeking

183. *Id.* at *4.

184. *Id.*

185. *Id.* at *5.

186. *Id.*

187. *Id.*

redress, leaving advisers insulated from accountability for conduct that would otherwise expose them to liability under securities laws.[188]

The misleading nature of these provisions becomes apparent when considered alongside clients' reasonable expectations and understanding of their legal rights. Retail investors may reasonably believe that signing an advisory agreement with arbitration provisions simply means disputes will be resolved in a different forum, not that their ability to obtain meaningful relief will be substantially compromised. When arbitration clauses include fee-shifting provisions, damage caps, or other one-sided terms that favor the adviser, clients may unknowingly surrender practical access to remedies for non-waivable claims involving fraud, gross negligence, or breach of fiduciary duty. This misunderstanding is precisely what the hedge clause prohibition seeks to prevent—the inadvertent surrender of statutory protections through contract terms that clients do not fully comprehend.[189]

Under this approach, arbitration clauses that deter claims violate the spirit, if not the letter, of the Advisers Act's prohibition on hedge clauses, as they function to reduce an adviser's accountability to clients. The treatment of claim-suppressing arbitration provisions for RIAs should be at least as rigorous as that of broker-dealers. As Black and Gross argued, there may be "no remedy for investors with small holdings" without "a class-wide remedy," making a "class action waiver" in a brokerage agreement "the equivalent of a surrender of investor protections prohibited by the anti-waiver provisions" of the Exchange Act.[190]

The inclusion of unfair arbitration clauses in advisory agreements also raises potential conflicts with the broader statutory framework governing RIAs. The advisory relationship inherently creates agency costs, or the costs that arise from having others act on our behalf. One-sided contract terms that limit the RIA's liability or restrict the client's ability to seek redress exacerbate these agency costs by reducing the RIA's incentives to act in the client's best interest. For instance, a hedge clause that deters a client from bringing a claim has the effect of shielding the RIA from liability for a number of "non-waivable" claims or causes of action. This is inconsistent with the federal securities laws' statutory policy of non-contractarianism.[191]

188. *See, e.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.").

189. *See* Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248, 84 Fed. Reg. 33669, 33672 n.31 (July 12, 2019).

190. Black & Gross, *supra* note 43, at 45.

191. *See* Standard of Conduct for Investment Advisers, 84 Fed. Reg. at 33672 & n.31.

Perhaps just as troubling from a wider, social perspective, the deterrent effect of such provisions extends beyond individual cases to undermine the broader regulatory framework that depends on private enforcement to protect investor rights. When arbitration clauses systematically discourage the filing of claims, they reduce the likelihood that advisers will face consequences for misconduct, thereby weakening the incentive structure that securities laws create to promote compliance.[192] Hedge clauses that deter claims diminish the RIA's incentive to exercise due care as it faces fewer consequences for its actions. This is the flip side of the argument about limited liability and the behavior-shaping effects of tort liability.[193] Arbitration clauses that limit clients' ability to pursue claims—through cost-prohibitive rules, complex procedural requirements, or uncertainty over which rules apply—may undermine a regulatory framework that relies on litigation (and its threat) to preserve the rights of investors. As Elizabeth Thornburg has observed with respect to tort liability more broadly, "arbitration clauses that provide slanted processes or limited remedies undermine the efficiency goal of personal injury law," for arbitration can be imposed in ways that "reduce the anticipated cost of" the contract designer's "accidents significantly, and thereby decrease the deterrent effect of tort law."[194] Provisions that deter claiming can create a structural imbalance, where advisers are shielded from liability in ways that conflict with both statutory protections and the fiduciary obligations that are central to the advisory relationship.

This is particularly problematic in the RIA context, where the fiduciary relationship creates heightened duties of care and loyalty.[195] By embedding claim-suppressing features in mandatory arbitration provisions, advisers can effectively shield themselves from the full scope of their fiduciary obligations while maintaining the appearance

192. The very fact that RIA arbitration data is unavailable is a consequence of the opacity that claim-suppressing clauses produce. *See supra* Part II.A. The absence of evidence about claim-filing rates is not evidence of the absence of the problem; it is itself a symptom of the structural deficiency this Article identifies. Given the prevalence of problematic terms and the concrete costs under commercial rules versus under FINRA's rules, *see supra* Part II.B.1.a, it would be surprising if they did not deter claims. Basic rational-actor assumptions predict deterrence even without claim-level data.

193. *See, e.g.*, Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1074 (1991). *Cf.* W. Jonathan Cardi, Randall D. Penfield & Albert H. Yoon, *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. EMPIRICAL LEGAL STUD. 567, 592 (2012) ("[C]ertainty of sanctions plays a strong role in their effectiveness as a deterrent—the more certain the sanctions, the stronger their deterrent effect, and vice versa.").

194. Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 271 (2004).

195. *See supra* Part III.A.

of providing alternative dispute resolution rather than eliminating meaningful recourse altogether.[196]

In our view, understanding fiduciary law this way allows for the consideration of the agency costs we just addressed, in addition to two additional factors. One factor is asymmetric information; RIAs possess specialized knowledge and expertise that clients may lack. This gives them an advantage in drafting contract terms, as clients may not fully understand the implications of contracts or the disadvantages of various provisions. One-sided contract terms exploit this information asymmetry by embedding provisions that benefit the RIA at the client's expense, without the client's informed consent. Provisions deployed in RIA PDAA clauses such as mandatory RIA-selected venues, claim limitations and damage limitations, fee shifting agreements, and class action waiver provisions tend to prioritize the interests of the RIA over the retail investor's interests.[197]

There are at least two forms of information asymmetry here. One asymmetry is about the arbitration clause's existence; this is addressable through disclosure and targeted by Form ADV reforms discussed in Part IV.D. The second asymmetry is about the clause's practical implications, which fiduciary law is uniquely suited to address: even a disclosed clause can mislead if the client lacks the sophistication to understand what it meansz[198] The 2019 Fiduciary Interpretation's "facts and circumstances" inquiry, keyed to client "sophistication," already reflects this distinction.[199] The economic argument connects directly to the doctrinal framework.

Aside from information symmetry, a second factor is about what economists call "price elasticity of demand," or the extent to which people alter the amount of legal services they consume in response to changes in price.[200] Demand for dispute resolution, particularly for individual investors, is elastic insofar as demand is inversely *responsive to cost*: the access-to-justice literature on filing fees and claims rates supports the intuitive notion that, as the cost of pursuing a claim

196. David S. Schwartz *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 242 (2012).

197. *See supra* Part II.B.

198. *See supra* notes 173–177.

199. *See* Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248, 84 Fed. Reg. 33669, 33672 n.31 (July 12, 2019). Sophisticated institutional clients may be able to evaluate and negotiate terms, whereas a retail client relies on the fiduciary relationship precisely because of the expertise/sophistication gap.

200. *See, e.g.*, William Josten, *The Law Firm Pricing Conundrum in 2023*, THOMSON REUTERS: F. (Feb. 2, 2024), https://www.thomsonreuters.com/en-us/posts/legal/forum-law-firm-pricing-conundrum/ [https://perma.cc/TVL6-DLF7]; Eric Forister, *Price Elasticity of Demand and Why It Is Relevant to Your Case*, ECONONE: BLOG (Aug. 28, 2025), https://econone.com/resources/blogs/price-elasticity-of-demand-and-its-relevance [https://perma.cc/484G-T2KA].

increases, the demand for resolution decreases.[201] One-sided contract terms that increase the cost of dispute resolution for the client effectively deter them from bringing claims even when they have legitimate grievances.

Taken together, this suggests a compelling principles-based fiduciary theory: when RIAs use their superior knowledge and bargaining power to impose one-sided contracts that limit their liability, increase the cost of dispute resolution, or restrict clients' legal options, they are acting inconsistently with the duty of loyalty. We would propose an explitit two-part test for when an arbitration clause is an impermissible hedge clause: functional equivalence and departure from a recognized fairness benchmark. The first element would ask whether the clause, alone or in combination with other terms, raises the effective cost of bringing a claim to a level where a reasonable retail investor with a meritorious claim of the size typically at issue in RIA disputes would believe they cannot pursue those claims, regardless of the legal realities. The second element would ask whether the clause includes terms that would be prohibited in FINRA broker-dealer arbitration. To be certain, this proposed test is not suggesting that deviations from perfect investor-friendliness are unlawfully claim-suppressive. Rather, it recognizes that provisions prohibited in the closest regulatory analogue, which in combination deter claiming by retail investors, cross the line. While some marginal cases will be difficult, the core categories of unfairness described in Part II.B make many cases not close calls.

We end this Subpart with a brief discussion of how this theory's viability, which depends on enforcement context; this variation is a feature of the Article's multi-layered reform proposal. There are at least three postures: (1) SEC enforcement under Section 206(2), which avoids FAA preemption because it is federal-on-federal;[202] (2) SEC

201. *See*, *e.g.*, Michael Abramowicz, *Law's Cost Disease*, 52 FLA. ST. U. L. REV. 205, 255–57 (2025) (discussing the relationship between the cost of dispute resolution and the "volume" of demand for it).

202. *Concepcion* and *Italian Colors* are FAA preemption cases addressing whether state contract law (unconscionability) or federal substantive law (antitrust) can invalidate arbitration clauses. This Article's argument operates on a different plane. *Italian Colors* disapproved a court-created gloss on the antitrust laws that would have prohibited arbitration where it impedes the effective vindication of federal statutes by making it "not worth the expense involved in proving a statutory remedy." 570 U.S. 228, 237 (2013). By contrast, this Article's approach draws on federal securities-specific fiduciary duties under the Advisers Act, a separate federal statute with its own anti-waiver provisions. The FAA preempts state law that singles out arbitration for disfavored treatment; it does not preempt other federal statutes that impose independent obligations on contracting parties. Dodd-Frank Section 921 makes this especially clear by expressly authorizing the SEC to prohibit, condition, or limit arbitration agreements. *See infra* Part IV.C. To connect this statutory argument back to fiduciary-duty theory, because the Advisers

rulemaking under Dodd-Frank Section 921, where the fiduciary duty analysis provides the "public interest" finding the statute requires; and (3) private litigation, which is the most vulnerable to preemption but can invoke the Advisers Act's anti-waiver and anti-fraud provisions as an independent federal basis. The third of these enforcement postures is most uncertain, and this Article's strongest deployment is in the first two contexts—which is where the reform proposals are directed.

C. Harmonizing Standards of Fairness for RIA and BD Arbitrations

One of the major debates in securities law in the last few years has involved the harmonization of standards of conduct for broker-dealers and RIAs. We believe that this larger project also entails making the standards for arbitration applicable to RIAs at least as far as those applicable to broker-dealer arbitrations in FINRA.

A fairer arbitration forum for RIA disputes would need to incorporate several key attributes to ensure fair and equitable treatment for claimants and respondents alike. The first element is transparency; parties must have a clear understanding of the rules, procedures, and potential outcomes of the arbitration process before entering into any arbitration agreement. This transparency includes clear guidelines on which set of rules applies, as well as upfront disclosure of the costs associated with arbitration.

Additionally, a fair forum would need to ensure cost-sharing mechanisms that prevent one party, often the claimant, from bearing disproportionate financial burdens. AAA, for example, recognizes the prejudice of imbalanced financial burdens in its Consumer Rules. Under the AAA Consumer Rules, the claimant only pays an initial filing fee of approximately $225, which the respondent responsible for the remaining arbitration costs.[203] FINRA also makes the industry supplement a large portion of the forum.[204]

To balance the interests of both claimants and respondents, a fair arbitration forum could be structured to mitigate the power imbalances that often arise in such disputes. One proposal is to adopt a hybrid cost-sharing model that accounts for the financial imbalance between investors and the industry. For individual claims,

Act imposes non-waivable fiduciary obligations that Congress has independently authorized the SEC to enforce, the fiduciary-duty analysis is not a repackaged unconscionability or "effective vindication" argument subject to FAA preemption—it is the application of a separate federal statutory scheme. *Italian Colors* itself acknowledged that a "contrary congressional command" could "overrid[e]" the FAA. 570 U.S. at 233. Dodd-Frank Section 921 is as clear a statement of that intent as exists in federal law.

203. Sheldon, *supra* note 140.

204. *See* FIN. INDUS. REGUL. AUTH., BY-LAWS OF THE CORPORATION, at sched. A, § 1(a) (2025), https://www.finra.org/rules-guidance/rulebooks/corporate-organization/section-1-member-regulatory-fees [https://perma.cc/87NM-J98B].

respondents—typically the RIAs—would bear a much larger share of the costs, reflecting their professional responsibility and fiduciary obligations. For intra-industry disputes, the costs could be more evenly distributed, incentivizing both parties to carefully evaluate their positions without deterring legitimate claims or creating excessive burdens.

Moreover, clear procedural safeguards, such as allowing presumptively discoverable items, would ensure that both sides have equal access to a fair process. Such a forum would also need to emphasize streamlined processes, reducing unnecessary delays while preserving fairness in the presentation of evidence and arguments, to maintain efficiency without sacrificing impartiality.

While broker-dealers and RIAs are different regulatory animals, it does not follow from the fact that RIAs owe fiduciary duties that these duties already provide sufficient protection—or that layering FINRA-style procedural requirements on top would be duplicative. Fiduciary duty is a substantive standard, and fair arbitration rules are procedural infrastructure for enforcing that standard. If procedural obstacles to bringing fiduciary-duty claims are severe enough, the heightened substantive duty (and the liability that flows from breaches) become illusory. The argument is not that RIA protections should merely match FINRA's; rather, the floor for RIA arbitration should be at least as high as FINRA's floor, because the underlying duties are at least as demanding. The safe-harbor proposal in Part IV contemplates that competing providers might develop rule sets exceeding FINRA's protections. Harmonization thus reflects a non-regression principle: investors should not receive worse procedural protections when disputes arise merely because their adviser is registered as an RIA rather than as a broker-dealer.

IV. REGULATORY INTERVENTIONS TO PROMOTE FAIR RIA ARBITRATION

A. The FINRA Example and the Regulation-Backstopped Market-Based Approach

There's a stark contrast between FINRA's approach to dispute resolution and the more fragmented system for RIA arbitration. This difference creates meaningful implications for investor protection and raises concerns about a "race to the bottom."[205] Comparing these

205. *See* Bartley A. Brennan, *Current Developments Surrounding the Business Judgment Rule: A Race to the Bottom Theory of Corporate Law Revived*, 12 WHITTIER L. REV. 299, 303 (1991). *See also* text accompanying *infra* note 215.

approaches might inform the development of a specialized arbitration forum for RIAs.[206]

One insight from FINRA's experience is the importance of creating incentives for private innovation in arbitration rules. FINRA's forum has evolved over time to address both industry needs and consumer protection. FINRA's rules around arbitrator selection, transparency, and the cost structure of proceedings generally reflect a mix of industry-oriented concerns and investor protection concerns.[207] A similar approach could be taken in the RIA space by encouraging private arbitration providers to develop innovative rule sets that reflect the fiduciary responsibilities of advisers, incentivizing the creation of forums that both protect investors and promote accountability. Theories of aligning private innovation with the public interest suggest that arbitration providers should have incentives to create solutions that are both market-responsive and socially beneficial.[208]

A market-driven approach to developing fair arbitration rules, if effective, could be one way to promote access to fair arbitration that caters to the needs of claimants and respondents in these disputes. This might well encourage competition among arbitration providers, such as JAMS, AAA, and FINRA, to develop rule sets that promote investor protection while preserving whatever might be the efficiency benefits of arbitration.

But it was not market competition that constrained FINRA to offer an investor-protective rule set. FINRA resulted from the merger of its predecessor, the National Association of Securities Dealers (NASD), and the enforcement and arbitration functions of the various stock exchanges.[209] As the sole registered national securities association and the primary SRO for broker-dealers, FINRA has historically required arbitration in its own forum.[210] A consequence of mandatory

206. FINRA has its own well-documented critics—concerns about arbitrator bias, repeat-player effects, expungement controversies, and limited appellate review. *See* sources cited *supra* note 5. This Article sees the FINRA rules as a floor rather than an aspiration; a truly reformed RIA arbitration system might eventually exceed FINRA's protections, particularly given RIAs' heightened fiduciary duties.

207. Peter Giovine, *Arbitration and FINRA's Customer Code: A Tailored Approach to When a Forum Selection Clause May Supersede FINRA Rule 12200*, 91 FORDHAM L. REV. 993, 1030–31 (2022).

208. *Cf.* Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORN. L. REV. 1123, 1137 (1996).

209. *See, e.g.*, Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 159–69, 181 (2008) (describing formation of FINRA and its arbitration forum).

210. *See, e.g.*, *id.* at 153 & n.6 (noting that essentially all broker-dealers are "required by statute to become a member"); Giovine, *supra* note 207, at 997–98.

arbitration in FINRA is greater regulatory attention to the fairness of that arbitration forum. With FINRA rules subject to review by the SEC staff under the Exchange Act Section 19(b) rulemaking process, there is at least the possibility of a public-interest backstop to ensure that the rules being produced aren't biased against investors.[211]

On the flip side, observers might be skeptical that market-oriented solutions will generate the same investor-protective results. Arbitration providers compete in the market for arbitral services, including the market for placing their forum in forum-selection or arbitration provisions.[212] Fairness to investors and RIAs is not necessarily a marketable feature of arbitration rulesets provided off-the-shelf by arbitration providers. That is largely because the investors are not the ones picking the arbitration provider in the clause, which is typically drafted by the RIA's lawyers; firms compete for the party selecting the product rather than the ultimate beneficiary.[213] And if the RIA is not concerned with presenting a veneer of fairness to investors, then it may be more likely to pick the rules that benefit the RIA at the expense of the investor, because there is no market pressure to select rule sets that are fairer to investors.[214] This creates the risk of what scholars call a "race to the bottom," offering rules that overly favor the side that has discretion to pick the set of rules.[215] So while we are not excessively optimistic, it is possible that a market-based solution could succeed—so long as there mechanisms

211. *See* Securities Exchange Act of 1934, ch. 404, § 19(b), 48 Stat. 881, 898 (codified as amended at 15 U.S.C. § 78s(b)); James Fallows Tierney, *Overseeing Private Rulemaking: Evidence from SEC Review of SRO Rules*, 27 U. PA. J. BUS. L. 589, 593 (2025).

212. *See* Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1132–33 (2014).

213. *Id.* at 1148. *See also* Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 579 (2015) (describing the phenomenon whereby "intermediaries seek[] to maximize fees by favoring institutional arrangements that entail ongoing reliance on the intermediaries' services"); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 889–91 (2013) (supporting the idea that competition occurs at the intermediary level); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 1013 (2003) (noting that platform design favors the "seller" side when buyers are "captive" and required to use the platform). *Cf.* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 193–94 (1997) (observing that because of how arbitration providers compete for future business, providers may favor firms as repeat players).

214. *See* Tierney & Edwards, *supra* note 24, at 858 & n.287.

215. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1134 (2011) (citing ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 33, 109–13 (2009)); *see also* Marotta-Wurgler & Taylor, *supra* note 60, at 257.

to reward arbitration providers for rule sets that are fair, transparent, and aligned with RIA fiduciary duties.[216]

JAMS, AAA, and FINRA should each strive to develop their respective sets of arbitration rules to reflect the unique nature of RIA disputes and the fiduciary obligations that advisers owe to their clients. We propose that these forums adopt rules that ensure transparency in procedural costs, fair cost-sharing structures, and impartial arbitrator selection. Procedural safeguards—such as allowing limited discovery and requiring clear standards for the applicability of a fair and clear set of arbitration rules—should be incorporated to minimize unpredictability and unfair outcomes.

B. Enforceable Interpretation on the Fiduciary Duties Related to Arbitration Clauses

Another approach could involve a repeat of what the SEC did in 2019 in interpreting the standard of care for RIAs, expanding this to address arbitration provisions. In the same 2019 rulemaking package that resulted in Reg BI, the SEC also released interpretive guidance clarifying the breadth and implications of an RIA's fiduciary obligations. As noted above, that "Fiduciary Interpretation" included discussion of "hedge clauses" that sought to limit or waive an adviser's liability.[217] By analogy, a similar interpretation today could expressly state that certain venue clauses, one-way fee-shifting provisions, or outright limitations on clients' ability to sue all violate an RIA's fiduciary duty of loyalty and care. Such interpretive guidance would carry authority as a formal statement of the SEC's views, and would alert advisers that including these provisions is presumptively incompatible with their fiduciary responsibilities.

Opting for this form of guidance, however, entails a set of advantages and tradeoffs distinct from more formal rulemaking under Dodd-Frank statutory authority. On one hand, the SEC can typically issue interpretive guidance more swiftly than it can undertake the full APA notice-and-comment process required for a new rule. On the other hand, it is only a statement of the agency's views, and it is unclear how a court would treat an interpretive release along

216. Contemplating that a safe harbor would create the right incentive structure for the same market that has failed, *see infra* Part IV.C.3, we do not suggest that the safe harbor we propose will change the dynamic when the underlying selection problem nonetheless still exists. The market-based approach works in combination with the regulatory backstop, because non-safe-harbor clauses face enforcement risk, not because the market independently corrects.

217. *See* Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248, 84 Fed. Reg. 33669, 33672 n.31 (July 12, 2019); *see also supra* text accompanying notes 173–177.

the lines we have proposed.[218] What is more, these kinds of interpretive statements sometimes only go so far, especially in light of the SEC's preference to remain vague and treat the legal analysis as a facts-and-circumstances inquiry.[219]

A fiduciary-duty analysis like that set out in Part III could also itself be a powerful basis for enforcement, as the SEC could—based on this statutory interpretation—bring actions under Section 206(2) using the hedge-clause theory without new rulemaking. Part III's doctrinal theory thus relates to Part IV's regulatory proposals insofar as it provides both an independent basis for SEC enforcement and a legal foundation for the proposals in this Part III. While the SEC could enforce existing hedge-clause prohibitions against claim-suppressive arbitration clauses, a likely stronger foundation for regulatory enforcement would involve doing so while also issuing guidance.

C. SEC's Statutory Power Under Dodd-Frank Section 921

Congress has already authorized the SEC to take action to promote fair arbitration for RIA disputes. In Dodd-Frank Section 921, Congress authorized the agency to regulate or even prohibit the use of mandatory arbitration agreements in the securities industry.[220] It did so in "response to congressional concern that mandatory pre-dispute arbitration agreements were unfair to investors."[221] This provision was specifically designed to address concerns that arbitration clauses, when used improperly, can deprive investors of meaningful recourse in disputes with financial service providers.[222] Though the SEC has not yet exercised its full authority under

218. *In re* Alphabet, Inc. Sec. Litig., 1 F.4th 687, 700 (9th Cir. 2021) (declining to decide on the level of "deference . . . interpretive guidance may merit," and concluding nonetheless that "an SEC interpretive release can 'shed further light' on regulatory disclosure requirements . . . [and] can provide 'the judgments about the way the real world works' that 'are precisely the kind that agencies are better equipped to make than are courts'" (citation omitted) (first quoting *In re* NVIDIA Corp. Sec. Litig., 768 F.3d 1046, 1055 (9th Cir. 2014); and then quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651 (1990))). On more recent interpretive approaches, see *infra* Part IV.C.2.

219. *See* Standard of Conduct for Investment Advisers, 84 Fed. Reg. at 33670, 33678.

220. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. §§ 78o(o), 80b-5(f)).

221. *Putting Investors First: Reviewing Proposals to Hold Executives Accountable*: *Hearing Before the Subcomm. on Inv. Prot., Entrepreneurship & Cap. Mkts. of the H. Comm. on Fin. Servs.*, 116th Cong. 68 (2019) [hereinafter *Putting Investors First*] (statement of Melanie Senter Lubin, Maryland Sec. Comm'r, Bd. Member, N. Am. Sec. Adm'rs Ass'n); *see* H.R. REP. NO. 111-687, pt. 1, at 50 (2010).

222. Black & Gross, *supra* note 43, at 23 & n.149.

Section 921, in our view, the SEC's intervention could provide an important impetus for regulatory consistency in how arbitration agreements are structured and applied within the RIA space.

Dodd-Frank Section 921(b) amended Advisers Act Section 205.[223] It did so by extending explicit authority to regulate mandatory pre-dispute arbitration for customers or clients of any investment adviser:

> (f) AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.—The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.[224]

Dodd-Frank Section 921 specifically addresses concerns that pre-dispute arbitration agreements were "unfair to the investors."[225] Although the SEC has this authority, it has not yet exercised it to conduct rulemaking relating to the growing RIA PDAA problem.[226] Congress's grant of statutory authority in Section 921 provides ample basis for the SEC to regulate mandatory PDAAs between customers or clients and their RIAs. This authority allows the SEC to address concerns that such agreements may disadvantage investors by directing them into unsuitable arbitration forums like JAMS and AAA. By being able to condition or limit the use of these agreements, the SEC can ensure that investors access equitable avenues for redress, thereby reinforcing the fiduciary duty of financial professionals to act in their clients' best interests.

1. Prohibiting, Conditioning, and Limiting Arbitration Agreements

Dodd-Frank Section 921 and Advisers Act Section 205(f) empower the SEC to prohibit, or impose conditions or limitations on, such arbitration agreements if it deems these measures to be in the public interest and for the protection of investors.[227] Congress authorized the SEC to take two different courses with respect to PDAAs, and at least so far that authority has not yet been repealed.[228]

223. Dodd-Frank Act § 921(b), 124 Stat. at 1841.

224. *Id.*; *see also* Pezza v. Invs. Cap. Corp., 767 F. Supp. 2d 225, 229 (D. Mass. 2011).

225. S. REP. NO. 111-176, at 110 (2010).

226. *See Putting Investors First*, *supra* note 221.

227. Dodd-Frank Act § 921(b), 124 Stat. at 1841; 15 U.S.C. § 80b–5.

228. *See infra* notes 262–264 and accompanying text.

To begin with, Congress expressly authorized the SEC to prohibit these PDAAs. As a result, this complements, and is not constrained by, the FAA. That statute generally promotes the enforceability of arbitration agreements and preempts conflicting state laws.[229] As the Court has explained, the FAA evinces a clear federal statutory policy favoring arbitration, so when "Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history.'"[230] In recent years the Court has "rejected every . . . effort to date" to identify these sorts of "conflicts between the Arbitration Act and other federal statutes."[231]

Yet Advisers Act Section 205(f)'s specific authorization for the SEC to regulate these agreements introduces a potential exception to this preemption. As an objective matter, the textual authority to "prohibit" arbitration is about as strong a basis as one can get for deducing Congress's intent to permit the SEC to limit waiver of a judicial forum for these claims.[232]

As Congress has authorized the SEC to prohibit arbitration, that power should also be understood to give meaning to the parallel authority to place "conditions or limitations" on arbitration agreements instead. The authority to prohibit it entirely includes the lesser power to place conditions. The "best" reading of the statute is that this lesser power also reflects the "intent to limit waiver of a judicial forum" contemplated in the Court's doctrine. Although that power is limited by other law, the choice to intervene in the baseline pro-arbitration framework means that Dodd-Frank should be read to displace the FAA, not the other way around.[233] As securities arbitration scholars Barbara Black and Jill Gross have exhaustively documented, various provisions of the Exchange Act already "impliedly repeal the FAA," including the provisions added in Dodd-Frank authorizing the

229. Black & Gross, *supra* note 43, at 11–12.

230. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987) (alteration in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

231. Cedeno v. Sasson, 100 F.4th 386, 408 (2d Cir. 2024) (Menashi, J., dissenting) (quoting Epic Sys. Corp. v. Lewis, 584 U.S. 497, 516 (2018)).

232. But of course, as discussed below, just because Congress has explicitly and directly authorized the SEC to prohibit arbitration does not mean the current federal courts will uphold that authorization or any regulation flowing from it. *See infra* notes 250–252 and accompanying text.

233. The black-letter rule is that where a statute "cannot be harmonized" with the FAA, there must be a "manifest" and "clearly expressed congressional intention" that the statute supersede the FAA. Steines v. Westgate Palace, LLC, 113 F.4th 1335, 1343 (11th Cir. 2024) (finding that the FAA was superseded by another statute); *Epic Sys. Corp.*, 584 U.S. at 510.

SEC to "ban PDAAs altogether."[234] Similarly, as the arbitration scholar David Noll observed several years ago, the Dodd-Frank Section 921 authority that Congress delegated to the SEC "post-date[s] the FAA and [is] more specific than it," so Commission rules enacted under this authority would supersede the FAA's broad mandate.[235]

Taking this idea seriously would mean that the SEC could require various measures designed to enhance fairness and transparency in the arbitration process as a "condition" or "limit" on the use of that arbitration agreement. A regulation might provide that arbitration agreements are conditionally enforceable—only if they meet certain criteria or conditions of fairness. For instance, the SEC might condition arbitration such that clauses must be written in plain language that is easily understood by retail investors, ensuring that they are fully informed of their rights and the implications of agreeing to arbitration. Or a "limit" might focus on an outer boundary, taking the form of a prohibition on the use of arbitration clauses that do not meet or exceed some identified threshold of fairness.

One specific proposal for SEC intervention would align with the SEC's existing regulatory framework for RIAs, which is triggered by assets under management (AUM).[236] Under an AUM-based approach, RIAs who are SEC-registered because they have sufficient AUM could be required to adopt specific arbitration rules that safeguard fairness for both claimants and respondents.[237] The SEC might place conditions on the use of arbitration by RIAs, requiring for instance that rules setting filing and other fees that are not so high that they deter the filing of claims.

Conditions or limitations could also pertain to specific arbitral procedures. The specific arbitration rules that the SEC could mandate should draw from principles of fairness, transparency, and impartiality, as articulated elsewhere in this Article. These rules would include mandatory disclosure of arbitration procedures and associated costs at the time contracts are signed, ensuring that clients fully understand the process they may enter into. In addition, the SEC could condition arbitration on the rules offering robust pre-hearing discovery, and equal opportunities for both parties to present their case. Likewise, the SEC could limit arbitration agreements that either on their face, or through the selection of a particular arbitration

234. Black & Gross, *supra* note 43 at 37.

235. David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 710 (2018) (explaining that Dodd-Frank Section 921 "qualif[ies] the FAA for the same reasons that statutes that expressly address the enforceability of specific arbitration agreements do so").

236. For the $100 million AUM threshold to be SEC-registration-eligible, see 15 U.S.C. § 80b-3a(a)(1); 17 C.F.R. § 275.203A-1(a)(1) (2025).

237. 15 U.S.C. § 80b-5(f).

provider's rules, permit the waiver of class, collective, or consolidated treatment.

This is only a sample of the large number of other ways that FINRA's investor-protective rule set could be adapted for the RIA context. Cost-sharing arrangements would be structured to prevent claimants from bearing disproportionate financial burdens, particularly in smaller claims where the power imbalance between investors and RIAs is most pronounced. Arbitrator selection would prioritize individuals with expertise in financial regulation and fiduciary duties, ensuring that disputes are decided by those with relevant knowledge. Procedural fairness would also require limited but meaningful discovery rights and a clear, predictable set of rules—addressing the ambiguity currently seen with AAA's consumer versus commercial rules—that would apply to all arbitration cases involving RIAs with substantial AUM.

A final potential condition could help promote oversight and transparency through disclosure and reporting requirements. The SEC could condition the use of PDAAs on the selection of arbitration forums that publicly disclose their decisions and reasoning, creating a body of precedent that can guide future disputes and enhance public trust in the arbitration process.[238] This would also give the SEC the ability to specifically address erroneous legal conclusions in future releases. The SEC could even limit the types of claims that can be subject to PDAAs, allowing certain disputes—particularly those involving significant allegations of fraud or misconduct—to be resolved in court instead. We talk about this more with respect to reform of Form ADV in Part IV.D below.

2. Congress's Delegation in Section 916 Might Survive *Loper Bright*

It is impossible to discuss the SEC's statutory authority, and make predictions about how statutes will be interpreted, without discussing the Court—and how its recent caselaw impacts the SEC and securities regulation more broadly (including FINRA).[239] The trend of recent Court cases reflects a deep hostility to the administrative state and to

238. *See* Jill I. Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 HARV. NEGOT. L. REV. 185, 202 (2019) (explaining how a lack of clarity in the status quo arbitration process makes arbitration outcomes unpredictable); *see also supra* text accompanying notes 70–75 (precedent and democratic legitimacy).

239. On the broader political and regulatory climate, see Anna Romberg & Julia Haglind, *Compliance in Transition: Navigating Political & Regulatory Turbulence*, CORP. COMPLIANCE INSIGHTS (Feb. 14, 2025), https://www.corporatecomplianceinsights.com/compliance-transition-navigating-political-regulatory-turbulence/ [https://perma.cc/9PM4-TY62].

the SEC's programs in particular.[240] Recent Court decisions like *Loper Bright Enterprises v. Raimondo*,[241] which curbed *Chevron* deference, create significant uncertainty about how a court will interpret the statutory grant of authority and the SEC's regulatory position here.

The SEC's ability to interpret and enforce its statutory authority under Dodd-Frank Section 921 is certain to face challenges in a post-*Chevron* deference legal landscape. *Chevron* deference historically allowed courts to defer to an agency's reasonable interpretation of ambiguous statutes within its purview.[242] With *Chevron* deference now weakened, courts will no longer automatically uphold the SEC's reasonable (and thus previously permissible) interpretations of ambiguous statutory language under *Chevron* step 2.[243] Though the implications remain to be worked out, the SEC and staff are certain to face a higher burden in justifying regulatory action through robust legal reasoning and comprehensive evidence, potentially complicating efforts to implement new regulations.[244]

Beyond this shift, Congress has already authorized the SEC to act in ways that do not require *Chevron* deference. To spell out this argument, consider first what the Court said in *Loper Bright* about statutes like Dodd-Frank Section 921 that delegate discretionary authority to the SEC. In *Loper Bright*, the Court noted that deference is not the same as discretion, and a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion."[245] The Court noted that some statutes "empower an agency . . . to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'"[246] Even though a court's role generally is to interpret the law, where "the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court" is to "identify and respect such delegations of authority, police the outer statutory boundaries of those

240. *See, e.g.*, James Fallows Tierney, Jarkesy's *Stakes for the SEC*, 74 DUKE L.J. 1851, 1890 (2025); Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 757 (2022); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 34 (2017).

241. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024).

242. *Id.* at 396–97 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

243. James Tierney, *How* Loper Bright *and the End to the* Chevron *Doctrine Impact the SEC*, PROMARKET (Sep. 9, 2024), https://www.promarket.org/2024/09/09/how-loper-bright-and-the-end-to-the-chevron-doctrine-impact-the-sec/ [https://perma.cc/Q6SF-3J5V].

244. *Id.*

245. *Loper Bright Enters.*, 603 U.S. at 394.

246. *Id.* at 395 (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).

delegations, and ensure that agencies exercise their discretion consistent with the APA."[247]

If *Loper Bright* is taken at face value, there is a possibility that the SEC will continue to have room to act on its delegated authority to regulate arbitration agreements in the public interest and for the protection of investors. Section 921 directly authorizes the SEC to "prohibit, or impose conditions or limitations on the use of" arbitration agreements "if it finds" they "are in the public interest and for the protection of investors."[248] This statutory language aligns closely with the Court's contemplation of public interest-focused regulations, suggesting that the SEC might still receive some level of deference in crafting arbitration rules—especially when acting to protect investors. This kind of authority is like the phrase "appropriate and necessary," which the Court in *Loper Bright* suggested was a signal that Congress wanted to "leave[] agencies with flexibility."[249] Efforts to regulate arbitration agreements fit within the statute's exception, designed to let the agency fill up the details. Assuming the courts are serious about recognizing this exception, the SEC's rulemaking under Section 921 may remain robust, even in a post-*Chevron* environment, as long as it is tied clearly to its investor protection mandate.

Still, this argument is premised on taking *Loper Bright* seriously—that there exist SEC programs under Dodd-Frank authority that can pass muster in our federal courts today.[250] This raises an alternative possibility—that, no matter how robust the reasoning or comprehensive the evidence, courts hostile to regulation in the public interest might still find a way to rule against a rule prohibiting, conditioning, or limiting the use of RIA arbitration agreements. From a legal realist perspective, the current composition of the Supreme Court and influential circuits like the Fifth Circuit, which lean conservative, are likely to present challenges for the SEC's regulatory initiatives absent changes to the composition or structure of the judiciary.[251] Conservative courts tend to favor limited government intervention and may scrutinize Commission regulations more rigorously, especially those perceived as expanding agency authority or imposing significant

247. *Id.* at 395, 404. The majority further explained that courts should "not defer to an agency interpretation of the law simply because a statute is ambiguous," where "a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Id.* at 413.

248. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. §§ 78o(o), 80b-5(f)).

249. *Loper Bright Enters.*, 603 U.S. at 395 & n.6.

250. *See infra* Part IV.E.

251. *See, e.g.*, Tierney, *supra* note 240, at 1864, 1889–90.

burdens on industry participants. These courts might be less inclined to support expansive interpretations of the Dodd-Frank Act.[252]

3. Proposed Regulatory Intervention

The SEC's long history of promoting fairness in the use of PDAAs for broker-dealers predates the Dodd-Frank-era authority to condition or limit those PDAAs. But the consequence of this long history is that there is already an arbitration forum—FINRA dispute resolution—that has evolved in an investor-friendly direction and that would be a showcase example of an investment arbitral forum meeting the required standards of fairness. The SEC should adopt minimum fairness standards so as to encourage the use of this forum or to encourage other arbitration providers to adopt similarly consumer-friendly rules.

Designing a regulatory system to ensure minimum standards of fairness in arbitration for retail investors would involve establishing clear and comprehensive guidelines that arbitral forums must meet to be deemed compliant. A regulation might have six operative components:

1. The definition of an "arbitration provider" would be the forum or individual selected in a pre-dispute arbitration agreement between a registered investment adviser and its client, while the definition of a client would be similar to that in Reg BI—one who uses advisory services for household purposes.
2. The "arbitration condition" would provide that an RIA may not adopt or enforce a PDAA in a written customer agreement with a retail customer, unless the PDAA on its face or through the selection of arbitration-provider rules meets certain standards of minimum fairness.
3. The "minimum fairness standards" could themselves involve any number of substantive requirements, such as low filing fees, robust pre-hearing discovery, no class waivers, fair forum selection provisions, and the like.
4. The "safe harbor" would provide that certain dispute resolution forum rule sets meet the minimum fairness standards.

252. *See, e.g.*, Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 606 (2022) ("Congress, federal regulators, and SROs should prepare for the entirely foreseeable risk that courts will soon significantly interfere in the SRO model."); Kyle Langvardt & James Fallows Tierney, *On "Confetti Regulation": The Wrong Way to Regulate Gamified Investing*, 131 YALE L.J.F. 717, 733 (2022) (noting that given other recent changes in doctrine, it "would be unwise" for the SEC "to expect [the same] solicitude" or "wide[] constitutional berth" it has received in the past on judicial review).

5. Outside the safe harbor, the SEC could provide staff guidance on which arbitration providers have rules meeting the fairness standards.
6. Any PDAA that unreasonably suppresses the client's vindication of their nonwaivable legal rights could be deemed not to meet the "arbitration condition." A hedge clause provision could add a deterrent angle, deeming such provisions to be not just invalid but a violation of the RIA's fiduciary duties.

A regulation structured this way would encourage RIAs to select investor-protective rule sets. FINRA has a natural first-mover advantage in this respect that nonetheless has produced a surprisingly high quality rule set. FINRA's forum is generally recognized as being fairer and more effective than other forums for securities disputes. An important reason is that the rules of SROs like FINRA are subject to the SEC's review and disapproval if they do not meet the purposes of the Exchange Act.[253] By contrast, there is no preexisting statutory or regulatory structure to accommodate the oversight of non-SRO arbitration providers' rules. By designing regulatory requirements that mirror the standards of the FINRA arbitration forum, it's possible to promote fairness and trust by linking "appropriate" arbitration clauses to those that have been at least minimally reviewed by the SEC.

Providing for a safe harbor would also provide a strong positive incentive for arbitral forums to adopt or adhere to investor-protective rule sets. Initially, the "safe harbor" would include FINRA, but over time providers could be expected to develop more investor-protective rule sets to compete for the "safe harbor" business. For example, AAA or JAMS might adopt rules for RIA arbitration that provide equivalent protections to FINRA's rules. The use of the FINRA forum as a safe harbor would incentivize other arbitral forums to adopt similar standards so they, too, could be added to the safe harbor list. This would create a more consistent and equitable system of arbitration for retail investors.

D. Amendments to Form ADV to Promote Disclosure

Remember we mentioned above the lack of data about RIA arbitrations and awards.[254] This knowledge gap obstructs search (comparison shopping) by clients as well as the study of the industry. To address this data shortfall, the SEC should amend its Form ADV disclosure requirements to mandate that RIAs report arbitration proceedings, like the existing obligations for broker-dealers under FINRA.

253. *See* Tierney & Edwards, *supra* note 24, at 838–40.

254. *See supra* Part II.A.

By requiring RIAs to disclose details about arbitration claims—including the nature of the dispute, the amount in controversy, and the outcome—the SEC could build a more robust data set that allows for meaningful analysis of arbitration trends. This would provide valuable insights into the types of disputes that arise in the advisory space and how they are resolved, helping regulators better understand investor protection issues and assess the fairness of arbitration processes.[255] Expanding these disclosure requirements would promote transparency and accountability, aligning the RIA sector more closely with the disclosure norms already applied to broker-dealers.

E. The Regulatory Landscape

We cannot end this Article without acknowledging the broader regulatory landscape.[256] Under prevailing political circumstances—with Republican control of the Presidency, Congress, and the judiciary—the regulatory outlook raises questions about whether comprehensive reforms for RIA arbitration would garner enough political support at the SEC, in Congress, or among the courts. The apparent priority of cutting back regulatory burdens to business, rather than expanding investor protections, introduces a certain level of skepticism about the near-term viability of significant new rules or novel enforcement measures.[257] Even if reform initiatives can be couched in terms of investor fairness and market stability, they must navigate a political environment where deregulation, not additional oversight, tends to be the favored course.

Complicating matters further are the deregulatory signals coming from the SEC in the second Trump administration. While the SEC possesses statutory authority to address the issues outlined above, the current leadership appears more inclined to reduce compliance burdens than to propose sweeping new regulations—particularly

255. *Cf. OIA Investor Advisory Committee*, *supra* note 9, at 1:19:54–1:21:24.

256. Romberg & Haglind, *supra* note 239; *cf.* Jeff Rosen, *The Regulatory Pendulum*, NAT'L AFFS., Fall 2024, at 61, 70.

257. *See, e.g.*, Andrew Ramonas, *The 'I Love Lucy' Effect, and Why Gensler's SEC Checkout Matters*, BLOOMBERG LAW (Jan. 9, 2025, at 05:00 ET), https://news.bloomberglaw.com/esg/the-i-love-lucy-effect-and-why-genslers-sec-checkout-matters [https://perma.cc/5RSC-E2GF] (reporting that, in the Trump administration, "the SEC is expected to bring back lighter regulation with fewer restrictions on companies that seek investors' money under Trump's pick to lead the SEC, Paul Atkins, who has called [former SEC Chair Gary] Gensler's rulemaking [agenda] 'very much overreaching'"); Martina Barash, *SEC Expected to Focus on Fraud Enforcement Fundamentals in 2025*, BLOOMBERG LAW (Jan. 3, 2025, at 05:00 ET), https://news.bloomberglaw.com/litigation/sec-expected-to-focus-on-fraud-enforcement-fundamentals-in-2025 [https://perma.cc/K3GE-V84V].

those that might be perceived as hampering financial services.[258] If enough stakeholders continue to voice concerns about the fundamental fairness of arbitration agreements, there might be room for compromises that promote a better arbitration process for the RIA industry and for investors alike.

Yet in securities regulation, industry groups have been mounting coordinated challenges to FINRA's exclusive jurisdiction over broker-dealer disputes. This industry pushback manifests through multiple channels, including direct litigation challenging FINRA's regulatory authority and the SEC's enabling oversight.[259] For instance, the Securities Industry and Financial Markets Association (SIFMA) has formally contested FINRA's authority to maintain sole arbitration jurisdiction for disputes exceeding a dollar-amount threshold, marking a significant escalation in the ongoing debate over mandatory arbitration frameworks in securities disputes.[260] Other litigation challenges fundamentally the question whether FINRA has exceeded its statutory mandate by establishing itself as the exclusive forum for securities arbitration, arguing that such monopolistic control violates principles of fair dispute resolution and due process.[261]

Concurrent with these judicial challenges, legislative efforts have emerged seeking to curtail regulatory agencies' unused doctrine powers. Some of these efforts specifically target the arbitration framework that currently governs securities disputes.[262] Proposed House legislation aims to repeal broad regulatory authorities that enable agencies like FINRA to maintain exclusive jurisdiction over industry disputes.[263] Other draft legislation would repeal the

258. *See, e.g.*, Tom Zanki, *Trump 2.0 Signals Shift Toward Capital Markets Deregulation*, LAW360 UK (Jan. 1, 2025, at 08:01 ET), https://www.law360.co.uk/articles/2274156/trump-2-0-signals-shift-toward-capital-markets-deregulation [https://perma.cc/W4T5-76HG].

259. *See, e.g.*, Brief of Petitioner-Appellant at 24, Thrivent Fin. for Lutherans v. SEC, No. 25-1047 (D.C. Cir. July 16, 2025), 2025 WL 2097573; Katryna Perera, *Thrivent Challenges SEC Over FINRA Arbitration Rules*, LAW360 (July 17, 2025, at 21:09 ET), https://www.law360.com/articles/2366058/thrivent-challenges-sec-over-finra-arbitration-rules [https://perma.cc/V8LD-DNW3].

260. *See* Letter from Sec. Indus. & Fin. Mkt. Ass'n to Robert L.D. Colby, Exec. Vice President & Chief L. Off., Fin. Indus. Regul. Auth. (July 11, 2025), https://www.sifma.org/resources/submissions/letters/recommendations-for-finra-arbitration/ [https://perma.cc/3D7K-H3GU]; Letter from Pub. Invs. Advoc. Bar Ass'n to Robert L.D. Colby, Exec. Vice President & Chief L. Off., Fin. Indus. Regul. Auth. (Aug. 5, 2025), https://piaba.org/comment-letter-response-to-sifma-recommendations-for-finra-arbitration/ [https://perma.cc/8S9T-24V7].

261. Brief of Petitioner-Appellant, *supra* note 259, at 1–3.

262. *See Dodd-Frank Turns 15: Lessons Learned and the Road Ahead: Hearing Before the H. Comm. on Fin. Servs.*, 119th Cong. (2025).

263. H.R. 2689, 119th Cong. (2025).

provisions of Dodd-Frank Section 921, which authorizes the regulatory intervention discussed in this Article, on the grounds that it has not yet been used.[264] This legislative approach suggests a comprehensive strategy to limit regulatory oversight through both judicial and congressional channels.

The industry's objective appears to be the establishment of *firm* choice mechanisms in arbitration selection, contrasting sharply with investor advocates' preference for *investor* choice mechanisms.[265] This fundamental disagreement reflects deeper tensions about power dynamics in securities dispute resolution, with firms seeking greater control over forum selection while investor advocates argue for expanded claimant options. The current system's mandatory arbitration requirements already limit investor options compared to traditional litigation venues.

From a regulatory policy perspective, these developments represent a concerning shift toward reducing investor protections in favor of industry convenience. The implementation of these initiatives, occurring within months of recent electoral changes, demonstrates the volatility of financial regulation in response to political transitions. This shift illustrates how quickly regulatory momentum can change direction, with agencies and advocacy organizations forced to defend existing protections rather than advancing new investor safeguards. The implications for securities law practice are significant, as reduced regulatory oversight may paradoxically increase the volume of arbitration claims as investor protections diminish. Legal practitioners focused on investor protection find themselves in the unusual position of advocating for regulatory frameworks that may ultimately reduce their own caseloads, highlighting the tension between short-term professional interests and long-term market integrity objectives.

F. NASAA Rule for RIAs Not Covered by the SEC

Not all RIAs face federal regulation. Those RIAs with under $100 million in assets under management may be in the jurisdiction of the state securities regulators, who together coordinate through the North American Securities Administrators Association (NASAA).[266] A model arbitration rule developed by NASAA for these RIAs would help address fairness concerns for smaller advisers and their clients,

264. H. COMM. ON FIN. SERVS., 119TH CONG., BILL TO AMEND THE SECURITIES EXCHANGE ACT (Discussion Draft 2025), https://docs.house.gov/meetings/BA/BA00/20250715/118488/BILLS-119pih-amendstheSecuritiesExchange.pdf [https://perma.cc/WT5Z-JH53].

265. *Cf.* Moore, *supra* note 46, at 518–19.

266. *See Investment Advisors*, N. AM. SEC. ADM'RS. ASS'N, https://www.nasaa.org/industry-resources/investment-advisers/ [https://perma.cc/5RRZ-A5WW] (last visited Oct. 15, 2025).

without imposing the burdens of SEC-level regulation. Such a rule could create a consistent framework for arbitration agreements that reflects the unique needs of smaller firms, where resources and legal sophistication may vary widely. A well-crafted model rule could in this way align investor protections and the operational realities of smaller firms. To facilitate this, a model rule could include language like the following:

> All arbitration agreements entered into by RIAs with less than $100 million in assets under management must:
>
> 1. at the time of agreement, disclose the costs and procedures involved in arbitration, as well as any existing arbitration awards, regardless of expungement;
> 2. provide for an equitable cost-sharing structure, ensuring that neither party bears disproportionate financial burdens;
> 3. allow for limited discovery as necessary to promote fairness in resolving disputes;
> 4. require that the forum be at a location convenient to the investor;
> 5. prohibit one-way fee shifting provisions;
> 6. prohibit the use of hedge clauses; and
> 7. not include provisions that serve to limit or waive the fiduciary obligations of the RIA as defined by applicable law.

This language would promote a fair, accessible arbitration process while preserving the rights of both clients and RIAs.

However, the FAA presents a significant obstacle to such a rule. The FAA preempts state laws that attempt to impose undue limitations on arbitration.[267] Dodd-Frank did not empower the states directly to restrict arbitration agreements, so Section 921 arguably does not change the FAA with respect to non-SEC rules. As a result, the arguments about exemptions from the FAA discussed in the last section probably do not apply here.[268] Our proposed model rule's prohibition of one-way fee-shifting provisions, for instance, could be vulnerable to FAA-preemption challenges under *Concepcion*. Our proposed state requirements are best understood as generally applicable fiduciary-duty rules arising from federal securities law rather than arbitration-specific prohibitions that might run afoul of the FAA. If state-level rules are applications of state fiduciary-duty law, and thus do not single out arbitration for disfavored treatment.[269] Understood

267. Black & Gross, *supra* note 43, at 11–13.

268. *Cf.* Jevne v. Superior Court, 111 P.3d 954, 962 (Cal. 2005).

269. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (explaining that FAA preemption doctrine extends beyond prohibiting certain claims from

holistically, the NASAA route faces more serious legal obstacles that the SEC route does not.

To mitigate the risk of FAA preemption, a NASAA model rule would have to be designed to work within the FAA framework rather than fit within an exemption to it. A rule like this should avoid outright bans on arbitration, other provisions that might be construed as undermining the enforceability of arbitration agreements. Instead, it could focus on ensuring that arbitration agreements comply with disclosure, fairness, and fiduciary duty standards that are consistent with broader regulatory goals.

CONCLUSION

Existing arbitration processes for RIA disputes unduly disadvantage investors while also generating unpredictability for adviser-respondents. Without a centralized, transparent forum akin to the structure provided by FINRA for broker-dealers, RIA arbitration will too often burden claimants with high costs, restrictive venue clauses, and procedural complexities that undermine meaningful redress. At the same time, respondents also face substantial uncertainties about rule application and arbitrator selection. Addressing these systemic shortcomings is important to ensuring that retail investors have fair avenues to resolve disputes with their advisers.

The SEC has several tools at its disposal to remedy these disparities. By issuing interpretive guidance clarifying that certain contractual provisions violate the RIA fiduciary duty, using its statutory authority under Dodd-Frank Section 921 to regulate or even prohibit mandatory arbitration clauses, and enhancing transparency through amendments to Form ADV, the SEC could reshape the landscape for RIA arbitration. Additionally, state-level action by NASAA can further strengthen oversight for smaller advisers. Implemented in tandem, these measures would help harmonize the arbitration environment between RIAs and broker-dealers, better protect both investors and advisers, and reinforce the principle that the market for financial advice functions best when administered through fair and effective dispute resolution mechanisms.

arbitration, to include "generally applicable" rules "alleged to have been applied in a fashion that disfavors arbitration").