SECURITIES ARBITRATION ALERT 2021-19 (5/20/21)

George H. Friedman, Editor-in-Chief

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SQUIBS: IN-DEPTH ANALYSIS

SEC'S CHAIR OPEN TO TAKING ANOTHER LOOK AT REG BI. ***SEC Chairman Gary Gensler said at a May House Financial Services Committee hearing that he was open to evaluating further changes to reg BI.*** We reported in SAA 2021-06 (Feb. 18) that, in somewhat of a surprise, the Department of Labor ("DOL") allowed the Trump-era fiduciary standard Final Rule to roll out as scheduled on **February 16**. A **February 12** DOL Press Release stated: "The U.S. Department of Labor's Employee

Benefits Security Administration has confirmed that 'Improving Investment Advice for Worker & Retirees,' an exemption for investment advice fiduciaries, will go into effect as scheduled on Feb. 16, 2021. In the coming days, the agency will publish related guidance for retirement investors, employee benefit plans and investment advice providers."

Past Comments: Arbitration
We also reported in SAAs 2021-13 (Apr. 5), -10 (Mar. 18), & -08 (Mar. 4), that new SEC Chair **Gary Gensler** said at his **March 2** Senate Banking Committee confirmation hearing that he was "open" to reconsidering the industry's use of binding mandatory arbitration for resolving customer disputes. Although the topic was not addressed in either Chairman **Sherrod Brown's** (D-OH) opening statement or Mr. Gensler's prepared remarks, it came up in an interchange with Sen. **Elizabeth Warren** (D-MA), who asked: "Hypothetically, for example, if Robinhood cheated individual investors, hypothetically, should that company be able to use forced arbitration clauses to avoid getting sued and held accountable?" Mr. Gensler replied: "While arbitration has its place, it's also important that investors – or, in that case, customers – have an avenue to redress their claims in the courts." *Dodd-Frank* section 921 gives the SEC authority to limit or eliminate predispute arbitration agreements or set conditions for their use, but it has not done so.

New Comments: *Reg BI*
The "another look" concept and *Reg BI* merged at a **May 6** House Financial Services Committee hearing. According to several media sources, Rep. **Ann Wagner** (R-MO) asked Mr. Gensler whether any changes were being considered for *Reg BI*. He responded: "I think that it's important that investors actually have brokers take their best interests at heart, and that's what we're going to do through examination and enforcement, guidance ensure that that rule is fully complied with as written…. We're going to vigorously get the most out of Regulation Best Interest, but we're also going to evaluate. If it's not serving the purpose of investors then we will update and freshen that rule as well as other rules because we always have to be evaluating that investors come first, aligned with our three-part mission."
*(ed: *The quotes were taken from May 8* ThinkAdvisor. ***We're not surprised. Your publisher and Editor-in-Chief discussed the fate of the DOL rule and its SEC cousin – Reg BI – in a February 9 feature article,* The Elections are (Finally!) Over: What's in Store for the Arbitration and the Financial Services World*, saying: "My take is that the Democrats believe neither rule goes far enough – including allowing PDAAs – and that Congress and the regulators need to go back to the drawing board. My recommendation is not to toss these regulations, but to build on them" (footnotes omitted).)*
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REMEMBER THE FINRA CASE WHERE THE BROKER CHALLENGED A ZOOM HEARING ORDERED OVER HIS OBJECTION? IT'S BEEN AWARDED. ***The arbitration underlying suit challenging a FINRA Panel's authority to hold a virtual hearing over a broker's objection has been awarded.*** We reported last summer on *Legaspy v. FINRA*, No. 1:20-cv-04700, which was filed **August 11** in the

U.S. District Court for the Northern District of Illinois, alleging breach of contract because the FINRA *Code of Arbitration Procedure* doesn't expressly authorize hearings to be held by videoconference absent party agreement. We monitored the telephonic argument held **August 12**, that included as participants counsel for FINRA, Legaspy, and the other parties in the underlying arbitration. In a thorough 10-page decision issued **August 14**, District Judge **Lefkow** went through each of the Plaintiff's assertions and rejected them. Legaspy appealed immediately to the Seventh Circuit, which in a one-page Order posted the same day declined to issue either a temporary or preliminary injunction or to expedite briefing. Judge **Coney Barrett** was part of the Panel.

The Rest of the Story
Here's an update: the hearings proceeded as scheduled via Zoom starting **August 17, 2020** for 38 sessions through **February 2021.** The Customers in **November 2020** settled and withdrew their claims against Legaspy and Insight Securities, leaving Pershing as the sole remaining Respondent. The Award in *Anton v. Insight Securities, Inc., Pershing LLC, and Legaspy*, FINRA ID No. 19-00474 (New York, NY, Mar. 25, 2021), denied all claims against Pershing, but sanctioned it $250,000 for discovery abuse. Pershing moved to vacate the sanctions part of the Award on **April 21**, contending that the Arbitrators exceeded their authority under the Federal Arbitration Act and New York's arbitration statute: "Although there was genuine dispute concerning Pershing's compliance -- which prohibits the imposition of sanctions as a matter of law -- it is undisputed that Pershing produced all relevant documents in time for Mr. and Mrs. Nieves to make full use of them at the final hearing. While Mr. and Mrs. Nieves complained that some of Pershing's production should have been made earlier than it was, this timing-based complaint was unfounded and, in any event, would not and does not support a sanction award in the magnitude ordered by the panel." The matter remains pending.
(ed: We had thought an adverse Award might prompt Legaspy to move to vacate on the ground that the FINRA Code of Arbitration Procedure *does not empower Arbitrators to order virtual hearings over a party's objection. This was an option noted by Judge Lefkow when he denied the stay. The settlement made that point moot.)*
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FINDING CUSTOMER ABANDONED ARBITRATION CLAIM, MAJORITY-PUBLIC PANEL DISMISSES CASE WITHOUT PREJUDICE. ***A Majority-Public Panel dismisses the Claimant's case where she repeatedly failed to comply with the Arbitrators' orders.*** Rule 12212 of the *Code of Arbitration Procedure for Customer Disputes* ("*Code*") authorizes Arbitrators to sanction a party for: "failure to comply with any provision in the *Code* or any order of the panel or single arbitrator authorized to act on behalf of the panel." Among the penalties at a Panel's disposal are: evidence preclusion; assessing monetary penalties payable to one or more parties; drawing adverse inferences; assessing postponement and/or forum fees; and assessing attorneys' fees, costs and expenses. Also, industry parties may also be subject to a disciplinary referral at the end of the case. Subsection (c) adds: "The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective."

Claimant Fails Repeatedly to Act
Rule 12212(c) came into play in *Haidukova v. Fidelity Brokerage Services LLC*, FINRA ID No. 20-03388 (Los Angeles, CA Apr. 19, 2021), resulting in the unanimous Majority-Public Panel dismissing the Customer's claim without prejudice. What happened? Claimant failed to appear at the initial and rescheduled prehearing conferences. The Panel then directed Claimant to: "File with FINRA, on or before March 17, 2021, a written statement that she intends to pursue her claims against Respondents; Comply with all orders of this Panel; Comply with all FINRA arbitration rules; and Communicate with FINRA staff as reasonably necessary to ensure an orderly arbitration proceeding, including without limitation, cooperating with respect to the scheduling of prehearing conferences." The Order also warned the Customer that: "failure to comply with this order may subject her to other sanctions up to and potentially including the dismissal of her claims."

Dismissal as a Sanction
None of the above took place, prompting a successful, unopposed Rule 12212 Motion to dismiss by Respondents. Explained the Panel: "[T]he Panel admonished Claimant that failure to comply with this order may subject her to sanctions up to and potentially including the dismissal of her claims. On March 11, 2021, Fidelity Brokerage and Fidelity Investments filed a statement asserting that they had received no communication from Claimant and intended to file a motion to dismiss pursuant to Rule 12212 of the Code of Arbitration Procedure …. Claimant failed to file the required written statement by the March 17, 2021 deadline given in the Panel's order from February 17, 2021. On March 18, 2021, Fidelity Brokerage and Fidelity Investments filed a motion to dismiss pursuant to Rule 12212 of the Code. Claimant did not file a response to the motion."
(ed: Strange case but correct outcome, we think. This Panel seems to have bent over backwards to give the Claimant a chance to pursue her claims.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SCOTUS GRANTS, DENIES *CERTIORARI* IN TWO ARBITRATION-CENTRIC CASES. The Supreme Court on **May 17** issued a split decision in two arbitration-related cases previously covered in the *Alert*, granting *Certiorari* in one but denying it in the other. We will cover both cases in detail in the next *Alert,* but we wanted to get the basics to our readers now. The Court will review *Badgerow v. Walters*, 975 F.3d 469 (5th Cir. 2020), a case we analyzed in SAA 2020-36 (Sep. 23). In the underlying case, the Fifth Circuit held that the District Court was correct when it applied the "look-through" standard to determine that it could remove a state court action to vacate an Award. SCOTUS, however, declined to grant *Cert.* in *Seldin v. Estate of Silverman*, 305 Neb. 185 (Mar. 6, 2020), covered previously in SAA 2020-11 (Mar. 18). There, a unanimous Nebraska Supreme Court held that an arbitration Award cannot be challenged under the Federal Arbitration Act based on public policy violations.
(ed: Badgerow, *No. 20-1143 is on p. 2 of the Order List;* Selden, *No. 20-895, is on p. 3.)*
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AWARD VACATED WHERE ARBITRATOR ENGAGED IN *EX PARTE* COMMUNICATIONS DISPARAGING *PRO SE* PARTY. ADR provider training stresses that arbitrators should avoid *ex parte* interactions with arbitration participants, such as counsel or parties. This admonishment extends to breaks at hearings, as demonstrated by *Grabowski v. Kaiser Foundation Health Plan, Inc.*, D076968 (Cal. Ct. App. Apr. 19, 2021) (unpublished). This is one of those cases where we let the Opinion speak for itself: "The ex parte communication between the arbitrator and Kaiser's counsel was recorded by Grabowski's mother as part of her effort to document the arbitration hearing. The audio recording reveals comments by the arbitrator making light of Grabowski's self-representation and her inability, in the arbitrator's view, to effectively represent herself. The arbitrator volunteered these comments to Kaiser's counsel, ex parte, and they shared a hearty laugh about Grabowski's perceived shortcomings as an advocate…. A neutral arbitrator has a continuing duty to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the neutral arbitrator would be able to be impartial. The arbitrator's ex parte communication with Kaiser's counsel certainly qualifies. Because the arbitrator was aware of this communication and did not disclose it to Grabowski, the award must be vacated. (§ 1286.2, subd. (a)(6)(A).)"
*(ed: *The interchange was accidentally recorded. **Notice that the challenge was based, not solely on arbitrator bias, but also on failure to disclose the communication? ***An Alert h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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PDAA ENFORCED DESPITE LACK OF MUTUALITY. Although the predispute arbitration agreement ("PDAA") and other parts of the parties' construction contract were not identical in terms of actions each party could take to enforce its rights, the PDAA was nonetheless enforceable, the Court holds unanimously in *Keeling v. Preferred Poultry Supply, LLC*, No. SD36713 (Mo. Ct. App. Mar. 26, 2021). After finding it had jurisdiction under both Missouri's arbitration statute and the Federal Arbitration Act ("FAA") to review the Trial Court's failure to stay litigation and compel arbitration, the Court turned to the lack of mutuality issue: "This is not a case where the agreement to arbitrate lacks consideration because it is subject to unilateral change or a return promise is effectively illusory…. This case is similar to *Eaton* [*v. CMH Homes, Inc.*, 461 S.W.3d 426, 431 (Mo. banc 2015)], in which a construction contract governed by the FAA provided that the parties would arbitrate disputes but reserved to the contractor the option to pursue some remedies outside of arbitration, including foreclosure or enforcement of the security agreement. Although the obligation to arbitrate was not identical, the arbitration agreement was not invalid because the contract as a whole was supported by consideration on both sides: the contractor agreed to provide a building and the buyer agreed to pay a set price for the building. *Eaton*, 461 S.W.3d at 434. The same could be said in this case."
(ed: Seems right, and consistent with other cases we've seen.)
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PROSKAUER, COLUMBIA UNIVERSITY LAW SCHOOL, TO HOST FREE ANNUAL INTERNATIONAL ARBITRATION LECTURE LATER THIS MONTH. The Proskauer firm, Columbia University School of Law's Center for International Commercial and Investment Arbitration Law, the ICC International Court of Arbitration®, and the United States Council for International Business will be hosting the 2021 *Proskauer Lecture on International Arbitration* on Wednesday, **May 26** from 6:00 to 7:00 p.m. Eastern. The sole presenter, **Chiann Bao**, is "an internationally recognized arbitrator with almost 20 years of experience working in Hong Kong, New York and London and is a member of Arbitration Chambers.… Among other things, Chiann currently serves as a vice president of the ICC International Court of Arbitration® and is the chair of the ICC Commission Task Force on Arbitration and ADR." Her lecture is titled: Iura *Novit Arbiter: Truth or Fiction?* CLE credit is available.
*(ed: Registration is free and is done on online. **We assume this event is virtual.)*
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FORMER AAA PRESIDENT BILL SLATE RETIRES FROM DISPUTE RESOLUTION DATA, LLC. Former AAA President **William K. ("Bill") Slate** has retired from Dispute Resolution Data, LLC ("DRD"), a firm he chaired and co-founded six years ago, a **May 6** email announced. As described on the DRD Website, Mr. Slate: "led AAA/ICDR for 19 years, and he has served as both an arbitrator and a mediator. For 12 years he was a member of the UNCITRAL Arbitration Working Group. He founded CAMCA (the Commercial Arbitration and Mediation Center for the Americas) and has been a Visiting Senior Fellow in Negotiation, Mediation and Arbitration at Duke University Law School, and a visiting professor at Seton Hall University Law School, University of Richmond Law School, Virginia Union University, and Virginia Commonwealth University." Mr. Slate was previously an executive in the federal and state court systems, and holds a Juris Doctor Degree from the University of Richmond Law School, and an MBA Degree from the Wharton School of the University of Pennsylvania. There is no word yet on a replacement. Well-wishers are encouraged to send Bill a note at bill.slate@disputeresolutiondata.com.
*(ed: *DRD: "has established the first and only global database pertaining to international commercial arbitration and mediation dispositions. With its signature investor, Joe Mansueto, founder of Morningstar, DRD has developed a robust database for data collection and reporting. New data is added continuously as cases are closed." **The* Alert's *publisher and Editor-in-Chief George Friedman, who reported to Mr. Slate during his tenure at the AAA, said: "Bill is a consummate professional and an ADR pro. It was a pleasure being his colleague and I wish him well as he embarks on this new journey.")*
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NYSBA TO CONDUCT SECURITIES ARBITRATION WEBINAR IN JUNE. The New York State Bar Association ("NYSBA" will be conducting a Webinar, *FINRA Arbitration: Advice From the Experts,* on Tuesday, **June 15** from 1:00 to 5:30 pm Eastern. The program will: "introduce practitioners and neutrals to the FINRA Dispute Resolution Forum, focusing on arbitration…. [and] will include an overview of the

process, a look at common claims and defenses, a discussion of important documents, and the roles of neutrals within the forum." The event boasts an impressive 16-member faculty, including securities arbitration luminaries such as: **Sandra Grannum** (Faegre Drinker); **Christine Lazaro** (St. John's Law School); **David Robbins** (Kaufmann Gildin & Robbins LLP); and **James Yellen**, as well as FINRA staff **Rick Berry** and **Nicole Haynes**. CLE credit is available.
(ed: Registration, which is done via the program Webpage, ranges from $100 for Dispute Resolution Section members to $175 for NYSBA non-members.)
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AAA TO HOLD A SERIES OF FREE HEALTHCARE ADR WEBINARS. The American Arbitration Association will be hosting a series of six free Webinars that constitute its annual *Healthcare ADR Conference*, starting **May 19**. The Webinars have: "a common theme -- thoughts from seasoned healthcare arbitrators. Understanding how arbitrators view different aspects of the process will better enable both inside and outside counsel to effectively, economically, and efficiently shape and present their cases." The individual sessions are (all times are 2:00 to 3:30 p.m. Eastern): *Pointers on Drafting ADR Clauses into Healthcare Contracts* (**May 19**); *You've Been Served: Considerations at the Outset to Maximize the Benefits of Arbitration* (**June 30**); *The Healthcare Arbitration Preliminary Hearing* (**August 11**); *Presenting an Efficient Case for In-Person or Virtual Hearings for Healthcare Arbitrations* (**September 15**); *The Healthcare Arbitration Award* (**October 20**); and *Appellate Remedies for Healthcare Arbitrations* (**December 8**).
*(ed: *Questions? Contact Michelle Skipper at 704-643-8605 or SkipperM@adr.org. **To register for the series contact Sarah Clayton at ClaytonS@adr.org or register via the Website for individual Webinars.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***UBS Financial Services Inc. v. Ass'n de Empleados del Estado*, No. 20-1237 (1st Cir. May 7, 2021)**: The unanimous Court rejected an "evident partiality" challenge asserted under Federal Arbitration Act ("FAA") section 10(a)(2), based on the Arbitrator's failure to make certain disclosures. Of particular interest is this part: "As an initial matter, it is doubtful that FINRA would disqualify an arbitrator based on a failure to disclose the sort of attenuated, insubstantial relationships at issue here…. But even if [Arbitrator] Osimetha ran afoul of the forum's disclosure rule, this is not a basis to vacate the arbitration award. While the forum's rules can help inform the evident partiality analysis, they do not have the force of law." (*ed: The Award was rendered in June 2015; so much for speedy conflict resolution!)*

***Vital Pharmaceuticals, d/b/a VPX Sports v. Pepsico, Inc*., No. 20-CIV-62415-RAR (S.D. Fla. Dec. 21, 2020)**: "Here, the Court finds that the threshold procedural requirements for enforcement of an arbitral award under Section 9 of the FAA are satisfied. First, Pepsi filed the Motion seeking confirmation of the [AAA] Emergency Arbitrator's Order the day after it was granted -- clearly within the one-year requirement

of Section 9. Second, the Court has a basis for jurisdiction independent of the FAA -- diversity jurisdiction under 28 U.S.C. § 1332 -- because the parties are citizens of different states and the amount in controversy exceeds $75,000.... Third, the Emergency Arbitrator's Order granting equitable relief to Pepsi is sufficiently final to be confirmed under the FAA. Despite its interim nature, the Emergency Arbitrator's award 'is a preliminary injunction, and confirmation of the injunction is necessary to make final relief meaningful.'"

***Underhill v. Voya Financial*, FINRA ID No. 20-02006 (Phoenix, AZ, Mar. 26, 2021)**: An Arbitrator explains in detail why he has decided to deny a broker's request for expungement of two customer complaints from appearing on his CRD record, finding that the broker failed to carry his burden of proof as required by FINRA Rule 2080: "It was apparent from Mr. S's testimony as well from Claimant's own testimony that the REIT was comprised of almost random, far flung properties in some half dozen states. By implication, Claimant, through counsel, defended his diligence by claiming that the random scattered nature of the properties comprising the REIT made it impossible to be fully informed about all the properties. The Arbitrator concurs. As such, Claimant was basically recommending and selling a 'black hole' that paid him 7% commission up front. If it was impossible to diligently research all of the underlying properties comprising the REIT, then Claimant should not have recommended that investment to Mr. and Mrs. S." (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com.*)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Baily, Simon, *A New Day for Arbitration in Mississippi*, The Mississippi Lawyer p. 7 (Spring 2021): "The Mississippi Supreme Court's decision in *Carrick v. Turner ex rel. Walley* has the potential to expand arbitration in Mississippi. The case announces a standard for evaluating the validity of arbitration clauses that is more arbitration-friendly than even federal law. In response, Mississippi lawyers should carefully evaluate the arbitrability of their clients' disputes in view of arbitration's real costs and benefits, rather than on instinct."

***UBS's Appeal to Vacate $11-Mln Finra Award Faces Uphill Battle: Lawyers*, Advisor Hub (May 7, 2021)**: "UBS Wealth Management USA faces stiff odds with its appeal of an Illinois state court ruling denying its request to vacate an $11 million arbitration award, according to lawyers who are not involved in the case but typically represent brokerage firms. The case ties back to a December 2019 award, which was the largest employee arbitration penalty of the year and that UBS has hotly contested. The arbitration panel issued the award to … a former UBS regional compliance officer in Chicago, whom the wirehouse fired in 2018, based on his allegations UBS defamed him with the language it put on his U5 form filed with the Central Registration Depository."

***SEC's Reg BI Could be Modified, Gensler Tells Lawmakers*, ThinkAdvisor (May 8, 2021)**: "Securities and Exchange Commission Chairman Gary Gensler said Thursday that while the agency plans to 'vigorously get the most' out of Regulation Best Interest, the

agency will 'constantly evaluate' how the rule is serving investors and it could be modified." (*ed: See our coverage elsewhere in this* Alert.)

***SEC Awards $22 Million to Two Whistleblowers*, www.sec.gov (May 10, 2021)**: "The Securities and Exchange Commission today announced awards totaling approximately $22 million to two whistleblowers whose information and assistance were of crucial importance to successful SEC enforcement actions brought against a financial services firm. The first whistleblower received an award of $18 million, while the second whistleblower received a $4 million award. The larger award was in recognition of the fact that, among other things, the first whistleblower was the initial source of the investigation while the second whistleblower submitted information much later after the investigation was already underway."

***The Tide Rises: Will Biden's Blue Wave Wash Away Mandatory Arbitration?* Bressler, Amery & Ross, P.C. Blog (May 10, 2021)**: "Congressional rumblings about outlawing mandatory arbitration clauses are relatively common, but they have not been successful. Ever since a hard-won battle in the 1980s, the industry has been calling the shots about where investors could plead their case and the predictable efforts to change that have gone nowhere. This time around, things may be a little different."

***UBS Hit With $4.8 Million Arb Award in Puerto Rico Bond Case*, Advisor Hub (May 14, 2021)**: "A divided arbitration panel ordered UBS Financial Services to pay two individuals and a holding company nearly $4.8 million over the sale of Puerto Rico bonds and closed-end funds, the latest in a long string of awards tied to sales made as the U.S. territory in 2013 headed toward the equivalent of municipal bankruptcy. In addition to asserting the breach of contract and fiduciary duty claims typical in such cases, the claimants alleged in their July 2019 complaint that their UBS brokers made 'unauthorized use of lines of credit and margin' to purchase additional Puerto Rican securities in their accounts, according to a Financial Industry Regulatory Authority arbitration award finalized Thursday."

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DID YOU KNOW?

AAA FOUNDATION, TOO, ISSUES GRANTS FOCUSED ON ADR. The *Alert*'s readers and followers know that the FINRA Investor Ed Foundation sometimes awards grants focused on ADR, such as awarding seed money to establish securities arbitration clinics. But did you know that the American Arbitration Association has a foundation and that it sometimes issues ADR-related grants? In fact, the AAA-ICDR Foundation, which was created in **2015**, has awarded more than $2.8 million since its inception. In **April**, it announced grants of $655,732 to: "support programs addressing COVID-19 and racial injustice."

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