

Regulatory Notice 17-42

FINRA Requests Comment on Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information

I served as Chair of the FINRA Dispute Resolution Task Force that was formed in June 2014 to consider possible enhancements to FINRA's arbitration and mediation forum, in order to ensure that the forum meets the evolving needs of participants. I am also a Chair-qualified public arbitrator who has participated in many arbitration cases, including expungement hearings. I submit these comments in my individual capacity, to provide background on the task force's recommendations on expungement and to express my personal support for the proposed amendments set forth in Regulatory Notice 17-42.

The task force set forth 51 recommendations in its final report, released in December 2015, including three important recommendations relating to expungement. During its deliberations, the task force was advised that FINRA and NASAA were in the process of discussions with regard to the expungement process, and consideration was being given to converting the process into a regulatory procedure. The task force took no position on whether a regulatory approach should eventually replace the current expungement process. Because of uncertainty about the ultimate outcome of the NASAA/FINRA discussions, the task force gave serious consideration to the creation of a special arbitration panel consisting of specially trained arbitrators to decide requests for expungement. Specifically, the task force recommended (1) the creation of a pool of trained, experienced arbitrators to conduct expungement hearings in settled cases and in all cases where claimants did not name the associated person as a respondent. The task force also recommended (2) development of enhanced arbitrator training with regard to the expungement process, including clearer guidance on the Rule 2080 grounds for expungement, which would be required of all chairpersons who conduct expungement hearings, and (3) review of procedures for notifying state regulators of expungement requests.

I support FINRA's proposed amendment to establish a roster of public arbitrators with additional qualifications (Expungement Arbitrator Roster) to decide expungement requests filed against a firm under the Industry Code, because it is similar to the task force's recommendation (1). In addition, I am pleased that FINRA recognizes the need for enhanced expungement training and commits to "create training for these arbitrators, which would emphasize that, if there is no party opposing the associated person's request for expungement relief, the panel would need to review more proactively the request and documentation and, if necessary, ask questions and for more information, before making a decision" (note 38). The task force's recommendation (2) would also extend required enhanced arbitrator training to chairpersons who conduct expungement hearings in cases decided after a hearing. The task force was of the view that, in all cases involving expungement, enhanced arbitrator training was of great importance. Because of the importance of maintaining the integrity of the CRD system, only information that is demonstrably unfounded, and thus of no investor protection or regulatory value, should be expunged.

Regulatory Notice 17-42 specifically asked for comment on certain aspects of the proposed amendment:

1. I agree that the rule should be amended from “grant” to “recommend” expungement, to reflect more accurately the process and the consequences of the arbitration panel’s decision. Simply stated, the arbitration panel does not “grant” expungement, as its decision must be confirmed by a court, and FINRA has the authority to oppose confirmation.

4. I strongly support the proposed amendment to require unanimous consent for panel decisions to recommend expungement. The existence of a customer’s complaint—regardless of its merits—is an accurate reflection of the historical record, so a strong argument can be made that expungement should rarely, if ever, be granted. Yet there has long been a tension between the importance of accurate historical information and the harm that can result to an associated person if a customer’s complaint is unfounded. Requiring unanimous consent to recommend expungement is an appropriate way to balance these competing tensions. It is similar to the rationale for other decisions that require unanimous consent (motions to dismiss, eligibility rule motions): these are decisions that involve an integral part of the arbitration process. It serves as an assurance that all members of the panel have found that one of the grounds of Rule 2080(b)(1) is present and that there is no investor protection or regulatory value to the complaint, allegation or information. As a chair, I strive for unanimity on all important decisions, and it is my understanding that this is the practice of many experienced chairs. Because of the importance of the integrity of the CRD system, I believe the benefit of assuring the integrity of the CRD system greatly exceeds the cost that in a divided decision an associated person will not be granted expungement.

(5) and (10) I support the proposed amendment to establish a one-year limitation period for filing expungement requests both in cases where the expungement request was not decided during the underlying customer case and in cases where the customer dispute information has not resulted in an underlying customer case within one year of the member firm initially reporting the customer complaint to CRD. It can be difficult for a panel to determine whether one of the grounds of Rule 2080(b)(1) exists without the investor’s testimony. With the passage of time it becomes less likely that investors will be available and willing to testify in a proceeding in which they have no financial stake. A one-year limitations period should allow for sufficient time for an associated person to file an expungement request.

(6) I strongly support requiring the associated person to testify in person; if that is not practical, then testimony via video conferencing may be acceptable. I have participated in expungement hearings where the associated person testified in person and in expungement hearings where the associated person testified via telephone. Based on my experience, telephonic testimony is not an adequate substitute when issues of intent and credibility are involved, as is typically the case in expungement hearings. The arbitration panel needs to look the associated person in the eye and observe the person’s demeanor.

(8) I do not oppose the proposed requirement that arbitrators on the Experienced Arbitrator Roster are attorneys with five years' experience in a relevant discipline, but the cost of these additional qualifications is that there will likely be fewer eligible arbitrators. The requirement of completed enhanced expungement training in lieu of additional qualifications may allow for more eligible arbitrators.

Thank you for providing the opportunity to comment on these proposed amendments.

Barbara Black

Professor of Law, University of Cincinnati College of Law (Retired)

Feb. 5, 2018