

ATTACHMENT B

Notice to Arbitrators and Parties on Expanded Expungement Guidance

The below guidance is relevant for cases filed before October 16, 2023.

Updated September 2017

FINRA adopted FINRA Rules [12805](#) and [13805](#)¹ to establish procedures that arbitrators must follow before recommending expungement of customer dispute information related to arbitration cases or customer complaints from a broker's Central Registration Depository (CRD[®]) record. The procedures are intended to ensure that expungement occurs only when the arbitrators find and document one of the narrow grounds specified in [Rule 2080](#):

- the claim, allegation or information is factually impossible or clearly erroneous;
- the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
- the claim, allegation or information is false.

Dispute Resolution is publishing the following guidance and reminder for arbitrators when considering expungement requests.

Extraordinary Nature of Expungement Relief

Expungement is an extraordinary remedy that should be recommended only under appropriate circumstances. Customer dispute information should be expunged only when it has no meaningful investor protection or regulatory value. Once information is expunged from the CRD system, it is permanently deleted and thus

no longer available to the investing public, regulators or prospective broker-dealer employers.

Role of Arbitrators in Expungement Cases

Arbitrators have a unique, distinct role when deciding whether to recommend a request to expunge customer dispute information from a broker's CRD record. In making these determinations, arbitrators should consider the importance of maintaining the integrity of the information in the CRD system. Ensuring that CRD information is accurate and meaningful is essential to investors, who may rely on the information when making decisions about brokers with whom they may conduct business; to regulators, who rely on the information to fulfill their regulatory responsibilities; and to prospective broker-dealer employers, who rely on the information when making hiring decisions.

Given this significant role, arbitrators should ensure that they have all of the information necessary to make an informed and appropriate recommendation on expungement. Thus, arbitrators should request any documentary or other evidence they believe is relevant to the expungement request, particularly in cases that settle before an evidentiary hearing or in cases where only the requesting party participates in the expungement hearing.

Importance of Allowing Customers and their Counsel to Participate in the Expungement Hearing

It is important to allow customers and their counsel to participate in the expungement hearing in settled cases if they wish to. Specifically, arbitrators should:

1. Allow the customer and their counsel to appear at the expungement hearing;
2. Allow the customer to testify (telephonically, in person, or other method) at the expungement hearing;
3. Allow counsel for the customer or a pro se customer to introduce documents and evidence at the expungement hearing;

4. Allow counsel for the customer or a pro se customer to cross-examine the broker and other witnesses called by the party seeking expungement; and
5. Allow counsel for the customer or a pro se customer to present opening and closing arguments if the panel allows any party to present such arguments.

Expungement-Only Cases

In some instances, an associated person will file an arbitration claim against a member firm solely for the purpose of seeking expungement, without naming the customer in the underlying dispute as a respondent. To ensure that customers know about the expungement request, arbitrators should order the associated persons to provide a copy of their Statement of Claim to the customer(s) involved in the customer's arbitration case that gave rise to the customer dispute information (underlying arbitration).

It is particularly important to note that without this directive from the arbitrators, the customer(s) may not even be aware that an expungement claim is pending regarding their prior dispute. Additionally, notice provides the customer(s) with the opportunity to advise the arbitrators and parties of their position on the expungement request, which may assist arbitrators in making the appropriate finding under [Rule 2080](#). The position of the customer(s) can be made known in writing or through participation in the expungement hearing, as set forth in 1-5 above (or both).

BrokerCheck Report Review

Arbitrators should ask the broker seeking expungement (or the party seeking expungement on a broker's behalf) to provide a current copy of the BrokerCheck® report. Arbitrators should carefully review the report when considering whether expungement is appropriate. Arbitrators should pay particular attention to the "Disclosure Events" section of the report.

Parties Making Second Requests for Expungement

When an arbitration panel or a court has issued an award or decision denying a broker's expungement request, the broker may not request expungement in another arbitration case. Therefore, arbitrators should ask a party requesting expungement whether an arbitration panel or a court previously denied expungement of the customer dispute information at issue. If there has been a prior denial, the arbitration panel must deny the expungement request and contact FINRA staff for assistance.

Requests for Expungement Prior to the Conclusion of the Underlying Arbitration

A broker may not file a request for expungement of customer dispute information arising from an underlying customer arbitration until the underlying customer arbitration has concluded. This means, for example, that if a firm requests expungement on behalf of an unnamed broker during an arbitration filed by a customer, the broker may not file a separate request to expunge the same customer dispute information in a new case while the underlying customer arbitration is ongoing. In another example of a prohibited practice, the broker may not file an expungement request in a separate, expungement-only case while the underlying customer arbitration is ongoing, even if neither the broker nor the firm requests expungement of the customer dispute information in the underlying customer arbitration.

FINRA Rules [12203\(a\)](#) and [13203\(a\)](#) permit the Director of the Office of Dispute Resolution (Director) only to decline the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. To ensure that the underlying customer arbitration is resolved before any subsequent request to expunge customer dispute information from the underlying customer arbitration is considered, the Director will deny the forum as to the second expungement-only case. The Director has determined that it would be inappropriate to allow a request for expungement to proceed before the underlying customer arbitration has been resolved because the expungement request would be premature. Denying the forum for the second expungement-only

case will prevent inconsistent results, ensure that the forum operates efficiently, and protect the accuracy of information contained in CRD and disseminated through Brokercheck.²

Importance of Providing an Explanation for Recommending Expungement

FINRA Rules [12805](#) and [13805](#) require arbitrators to provide a written explanation of the reasons for finding that one or more of the [Rule 2080](#) grounds for expungement apply to the facts of the case before them. Arbitrators recommending expungement should ensure that the explanation is complete and is not solely a recitation of one of the Rule 2080 grounds or language provided in the expungement request. Specifically, arbitrators should identify in the award the reason(s) for and any specific documentary or other evidence relied on in recommending expungement.

Settlement Payments and Prohibited Conditions Relating to Expungement of Customer Dispute Information

Arbitrators should consider whether the party seeking expungement contributed to the settlement. In addition, arbitrators should inquire and fully consider whether a party conditioned a settlement of the arbitration upon agreement not to oppose the request for expungement in cases in which the investor does not participate in the expungement hearing or the requesting party states that an investor has indicated that he or she will not oppose the expungement request.

Effective July 30, 2014 [FINRA Rule 2081](#)³ prohibits firms and registered representatives from conditioning settlement of a customer dispute on—or otherwise compensating a customer for—the customer's agreement to consent to, or not to oppose, the firm's or representative's request to expunge such information from CRD. Arbitrators who learn of such prohibited conditions should review FINRA's information relating to [Disciplinary Referrals—FINRA](#).

Conclusion

In summary, arbitrators have a unique, distinct role in ensuring that customer dispute information is expunged from the CRD system only when it has no meaningful investor protection or regulatory value. In addition to the standards outlined in FINRA Rules [2080](#), [2081](#), [12805](#) and [13805](#), arbitrators should consider the guidance in this notice when considering expungement requests.

1. FINRA Rules [12805](#) and [13805](#) state that in order to grant expungement of customer dispute information under [Rule 2080](#), the panel must:
 - a. Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule 12800 even if a customer did not request a hearing on the merits;
 - b. In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement;
 - c. Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case; and
 - d. Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.
2. See FINRA Rules [12408](#) and [13412](#) (stating that the Director may exercise discretionary authority and make any decision that is consistent with the purposes of the Code to facilitate the appointment of arbitrators and the resolution of arbitrations).
3. [FINRA Rule 2081](#) states that no member or associated person shall condition or seek to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer's agreement to consent to, or not to oppose, the member's or associated person's request to expunge such customer dispute information from the CRD system.