

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-42, December 6, 2017
Comments on Proposed Rule Changes Regarding Expungement of Customer Dispute Information

Dear Ms. Asquith:

I am a FINRA public arbitrator. I have been a Chairperson and sole arbitrator in expungement arbitration proceedings in numerous customer and industry cases. My experience has included expungement proceedings following evidentiary proceedings, as well as stand-alone expungement proceedings. I am a practicing lawyer.

I share the viewpoint that arbitrators are not infrequently disadvantaged in hearing a customer expungement case when the arbitrator or panel has not had the benefit of additional information beyond the initial pleadings. When the customer settles the claim in advance of the evidentiary hearing and there has been no motion practice nor discovery conference, even the Chairperson has no knowledge besides the initial pleadings. Complicating this, the claimant may after settlement, send a one-line objection to the expungement request, and decline to participate directly, or through counsel, in the expungement proceeding. The panel or arbitrator must decide based upon the record of the expungement hearing only created by the broker seeking expungement, particularly when the notional past or current firm Respondent does not oppose the expungement. While the arbitrator or panel will challenge the broker's allegation of compliance with one of the 2080 standards, in the absence of the customer's involvement, this often done in a vacuum. For economic reasons, the customer generally does not appear or have his or her counsel file a brief or statement supporting the objection to the expungement. If the customer chooses to object it would be helpful if it was mandated that the customer participate in the hearing or file a substantive statement or brief opposing expungement. I don't see the proposed Rule changes under Regulatory Notice 17-42 making this a condition of customer objection to expungement. The proposed Rule changes, in my view, will not solve the problem that the Regulatory Notice aims to correct.

With regard to the specific proposals I offer a few general comments.

I. A. As a general matter, I have found that expungement is pled when the broker is a named party in the underlying action and is aware of it. On occasion I have seen a request made years after the underlying event, but the customer usually has long lost interest, if the customer can be located. Rule enhancement through time limitation and fees as expressed in the proposed Rule changes may benefit staff and limit these occasional issues but in my view, they do not address the stated purpose for this Regulatory Notice. As an arbitrator this is not a major concern. I leave to other commentators whether one-year is an appropriate time period.

I.B. Unnamed Persons: As an arbitrator I tend to see these matters in a separate expungement proceeding brought after the conclusion of the underlying dispute. Intervention is a strategic decision for counsel, although the expungement proceeding might change if the broker is a named party, and if

the customer ultimately participates in the expungement proceeding. The latter being the more relevant point.

II. Telephonic Hearing Session: Although I have a conceptual preference that aligns with live or video-conference hearings, I recognize that the latter may not be available and telephonic might be acceptable in limited circumstances. I believe arbitrators can make this determination and the Rule should not limit their flexibility to do so.

Unanimity and Additional Findings: I think both of these changes are harmful.

While there is a high bar for granting expungement, given that the hearing can often occur without evidence from the customer, the “unanimity” would still be based upon a limited record. Unanimity creates a veto power. It can cut both ways. Persuasion based upon majority decision is a better vehicle. Unanimity will create inefficiency if the panel deadlocks and will not improve the basis for the award.

Imposing the vague standard (“2) find that the customer dispute information has no investor protection or regulatory value”) on arbitrators would encourage the use of experts in expungement hearings who could testify on the record as to compliance with such standards. Given the potential of little information beyond the initial pleadings, it would be hard for arbitrators (or an expert) to make such a finding.

III.

Selection of the Panel: Notwithstanding that I would meet the proposed experience standards, I don’t think they are necessary. I have had panels composed of those who would qualify. Some have been well-qualified and diligent, and others less so. I think a capable non-lawyer could handle an expungement proceeding. I don’t think a separate Roster is needed. Oddly, litigation is listed as an experience skill, but not arbitration.

I previously commented on proposed changes repeated in III.B. and C.

IV. Simplified Arbitration.

I think it best that the arbitrator hearing the underlying claim hear the expungement request, if the broker was a named party. If unnamed, the same panel should hear the expungement arbitration if available, and only if not, should new arbitrators be substituted. The panel should, upon its request, have selected documents or testimony from the underlying proceeding made available to it in the separate expungement arbitration of an unnamed person.

Respectfully submitted,

Brooks White, Esq.
FINRA Arbitrator

Dated: January 15, 2018