AdvisorLAW
REGULATORY REPRESENTATION

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By Electronic Mail (pubcom@finra.org)

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority (FINRA)
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-42: FINRA Requests Comments on Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information

Dear Ms. Asquith,

Thank you for the opportunity to submit these comments on the proposed amendments to the Financial Industry Regulatory Authority ("FINRA") Code of Arbitration Procedure for Customer Disputes, Rule 12000 Series (FINRA Rules 12100 and 12805) and Code of Arbitration Procedure for Industry Disputes, Rule 13000 Series (FINRA Rules 13805 and 13806) (the "Proposed Rules") on behalf of AdvisorLaw, LLC ("AdvisorLaw").

AdvisorLaw assists industry professionals in a variety of regulatory matters, and appreciates FINRA's continuous efforts to improve the financial services industry and protect the public by maintaining administrative, disciplinary and other useful information about registered persons in the Central Registration Depository ("CRD") system and making much of the same information publicly available through the FINRA BrokerCheck ("BrokerCheck") system.

As FINRA is aware, the efficacy of the CRD and BrokerCheck is greatly dependent on the timeliness and accuracy of the information provided therein. Further, to ensure the ongoing integrity of the CRD and BrokerCheck, both systems must continue to provide meaningful information to investors, employers and regulators. We applaud FINRA for the measures it has undertaken over the years to improve these systems, and for providing an avenue whereby inaccurate information may be either corrected through the filing of a BrokerCheck Dispute Form, or in the case of allegations made by customers, by way of expungement pursuant to FINRA Rule 2080.

FINRA has long-held the position that expungement of customer dispute information is an extraordinary measure, but it may be appropriate in certain circumstances. FINRA's historical position regarding expungements demonstrates FINRA's dedication to providing a system that not only protects the public, but one that is also equitable – recognizing the irreparable reputational and economic harm to registered persons who are falsely accused of sales practice violations. We are grateful to FINRA for advancing a well-thought-out proposal in efforts to

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continue the pursuit of integrity and fairness in the CRD and BrokerCheck. In the spirit of partnering with FINRA for the overall improvement of the CRD and BrokerCheck, we offer the following comments for FINRA's consideration regarding the Proposed Rules.

1. Expungement Arbitrator Roster and the Neutral List Selection System ("NLSS")

FINRA's proposal for the establishment of a roster of arbitrators with additional training and specific backgrounds and experiences to hear an associated person's request for expungement of customer dispute information is well aligned with the spirit of the Rules. Such a panel of arbitrators with enhanced expungement training would help improve the overall accuracy and preserve the integrity of the CRD and BrokerCheck by ensuring that only those customer allegations that meet the strict standards of FINRA Rule 2080 receive an arbitration award granting expungement of the allegations.

We also agree with FINRA's proposed requirements regarding additional qualifications of public arbitrators selected for expungement hearings, and ask FINRA to consider strengthening the qualifications to require selected arbitrators meet a minimum of five years' experience with the financial services industry. Requiring all expungement arbitrators to have a minimum of five years' experience with the financial services industry is appropriate considering the complexity of expungement requests in cases involving customer dispute information. Although we support additional training and relevant experience, we caution FINRA to not limit the roster of arbitrators to those who are admitted to practice law. FINRA's existing pool of public arbitrators is made up of very competent and capable arbitrators, many of whom have performed their arbitral duties with great care for several decades.

Finally, FINRA's proposal for the NLSS is reasonable considering the nature of expungement requests in cases involving customer dispute information. We also support Proposed Rules 13806(b)(4), (5) and (6) – allowing for removal of arbitrators for cause, requiring a randomly selected panel of three arbitrators and placing restrictions on the associated person's ability to withdraw the case once the panel has been selected. Proposed Rule 13806(b)(6) will create safeguards, and prevent an associated person from simply withdrawing their case and refiling in hopes of drawing a more favorable pool of randomly selected arbitrators.

2. Three-Person Panel and Unanimous Decision

We are in agreement with FINRA's proposal for a three-person panel; however, we believe the requirement for a unanimous decision of the panel to grant expungement in cases involving customer dispute information places an undue burden on associated persons and chills the traditional notions of fairness and due process. We understand FINRA's position that expungement under Rule 2080 is an extraordinary remedy, but FINRA's own Rules concerning customer disputes allow rulings to be made by a majority of arbitrators. We are unaware of any other system of review that requires such a high bar. This is especially troubling considering the irreparable harm that a meritless complaint causes to an associated person's reputation and career.

3. Changing the Language in Rules 12805 and 13805 from "Grant" to "Recommend"

We appreciate FINRA's inquiry regarding the use of the word "grant" versus "recommend," when referring to expungement awards involving customer dispute information. Using the correct language is especially important when considering that an arbitration panel's decision must be confirmed by a court of competent jurisdiction. To that end, we believe retaining the original language as "grant" is appropriate.

It has long been established that the decisions made in arbitration are final and binding upon the parties, and may not be challenged except for extreme circumstances. The integrity of the arbitration system depends on this very notion, and must be preserved if arbitration is to serve as a viable alternative to the courts. Changing the language of the Rule from the word "grant" to "recommend" may lessen the perceived binding effect of the decision. The arbitration panel needs to be given full authority to hear a case requesting expungement, and make a binding decision. The requirement for post-hearing confirmation by a court of competent jurisdiction should serve as safeguard in those rare instances where a state court finds the harm to the public interest exceeds the binding decision of the panel. If the decision of the arbitration panel is limited to a mere "recommendation," the legitimacy of the arbitration process may be compromised.

FINRA's concerns regarding the post-hearing confirmation process may be easier addressed by way of expanded instruction to the courts, without the need to replace critical language in the rules or the risk of compromising to the authority of the arbitrators.

4. In-Person Appearance for Associated Persons

We find FINRA's Proposed Rules regarding in-person appearance by the associate person seeking expungement of customer dispute information to be unnecessarily burdensome, especially when considering the already high cost to associated persons when requesting expungement of meritless claims against them. The decision whether to hold a hearing telephonically, by video or in-person should be left with the arbitration panel.

5. Bifurcation of Expungement Hearing from the Customer's Claim in Cases Involving Customer Disputes

Current FINRA Rules 12805 and 13805 do not provide any guidance as to how and when an associated person may request expungement of customer dispute information. Therefore, an associated person currently has the option to request expungement during the Underlying Customer Case whether or not the associated person is named, or the request for expungement can come in the form of a separate Rule 2080 hearing. The Proposed Rules provide additional guidelines and clearly define how and when an associated person may seek expungement; however, in doing so the Proposed Rules also create an inherent disparity between expungement requests brought under the Proposed Rule 12805 and 13805.

The disclosure of an alleged sales practice violation can have a crippling effect on an associated person's career – limiting their ability to earn business or seek employment. Such effects, although severe, are appropriate where the customer allegations are accurate. There are, however, many instances where the customer allegations are without merit, and FINRA's Rules pertaining to expungement of such disclosures must provide associated persons with an honest and impartial review process.

a. Access to Special Expungement Arbitrator Roster Under Proposed Rule 13806

FINRA's proposal for the establishment of a Special Expungement Arbitrator Roster is a welcomed step to help preserve the integrity of the CRD and BrokerCheck. As FINRA is well aware, expungement of customer dispute information is an extreme remedy, which is only appropriate pursuant to FINRA Rule 2080 if the claim or allegation is factually impossible, clearly erroneous or false, or if the associated person was not involved in the alleged investment related sales practice violation.

FINRA's Proposed Rules, if implemented, would obligate an associated person who is named in the Underlying Customer Case to request expungement within the underlying case or be prohibited from seeking to expunge the customer dispute information arising from the customer's statement of claim during any subsequent proceeding. Yet doing so means a request for expungement brought within the Underlying Customer Case would not be placed before an arbitration panel comprised of the Special Expungement Arbitrator Roster. This creates an inherent disparity in the effect of the Proposed Rules, and would unfairly prejudice both the Customer and the associated person. In cases where the Customer was genuinely harmed by a sales practice violation, an expungement of the customer dispute information is not appropriate, and a request to have such information expunged should receive the same level of review and consideration by a specially trained arbitration panel as would be the case in other expungement requests pursuant to Proposed Rule 13805. Conversely, where the customer dispute information is without merit and expungement is appropriate pursuant to FINRA Rule 2080, the associated person should also be afforded the same opportunity to be heard before a specially trained arbitration panel. It should also be noted that the same concerns apply where the associated person is not named in the Underlying Customer Case, but a named party requests expungement on behalf of the unnamed person.

To remedy this inherent disparity, FINRA must either prohibit an associated person's request for expungement from being heard in the Underlying Customer Case, or create a mechanism by which such a request is heard by a panel of specially trained arbitrators from Special Expungement Arbitrator Roster. The former is easily achieved through bifurcation of the Underlying Customer Case and expungement cases brought pursuant to FINRA Rule 2080. The latter, however, is somewhat problematic. To allow both the Underlying Customer Case and the request for expungement to proceed within the same case, and avoid the inherent disparities discussed above, FINRA would need to adopt rules requiring that all Underlying Customer Cases where a request for expungement is made be heard by a panel of specially trained arbitrators. The same rules regarding the random selection of the arbitrators via the NLSS would also have

to apply, but doing so would deny all parties in the Underlying Customer Case from the ability to strategically rank or strike specific arbitrators from the panel. Under the latter approach, one disparity is resolved at the expense of creating another. We therefore urge FINRA to consider revising the Proposed Rules and force all FIRNA Rule 2080 expungement hearings to be heard pursuant to Proposed Rule 13805.

b. Potential for Bias Imputed onto Associated Person Due to Actions of Member Firm

The Proposed Rules obligating associated persons to join their request for expungement when named in the Underlying Customer Case may also create an environment where wrongdoing on behalf of the member firm is imputed onto the associated person. This is especially concerning since associated persons are often not represented by independent counsel in such hearings, and when considering the severity of harm to the associated person if a request for expungement is denied unfairly. A bifurcation of the Underlying Customer Case from the expungement request will provide the associated person an opportunity to have their request heard by an impartial panel of specially trained arbitrators.

c. Conflict of Interest Where a Member Firm Requests Expungement on Behalf of an Associated Person Not Named as a Respondent in the Underlying Customer Case

The Proposed Rules, if implemented, will allow a member firm the ability to request expungement on behalf of an associated person who is otherwise not named in the Underlying Customer Case. We respectfully ask FINRA to reconsider this approach and instead prohibit the practice entirely, as there is too great of a potential for conflict of interest in co-representation.

In cases involving customer disputes with the member firm, counsel for the member firm is obligated to represent the best interest of their client. Yet those interests are rarely aligned with the interests of the associated person, and therefore there is inherent conflict. This conflict is heightened further by the fact that counsel for the member firm may have a considerable monetary incentive for maintaining a healthy relationship with the member firm – since counsel most likely represents the member firm regularly. The concern for such conflict of interest is so great in the legal community that Rule 1.7(a)(2) of the Model Rules of Professional Conduct (as well as most, if not all, state rules pertaining to professional conduct) prohibit co-representation of parties where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Rule 1.8(b) of the Model Rules of Professional Conduct also state that "a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent." The starting point in this rule is the consideration that counsel should not use any information relating to the representation of a client to the client's disadvantage. The rule creates a caveat where the client has given informed consent; however, we question the authenticity of such informed consent in cases where the associated person is currently employed by the member firm and likely has incentive to remain employed and in good standing. Further, such "consent" may be compromised in the likely scenario where the member

firm is providing financial assistance for the legal representation, as the associated person may agree under financial duress. The potential for financial duress, and the compromise of representation due to conflict is enough of a concern that the Model Rules of Professional Conduct specifically address the issue in Rule 1.8(f) stating: "A lawyer shall not accept compensation for representing a client from one other than the client." Rule 1.8(f) does provide some exceptions; however, when considering the disproportionate allegiance that counsel may have to the member firm as well as other ethical considerations, we believe a conflict of interest is simply unavoidable.

6. Time Limitation Period for Associated Persons to Expunge Customer Dispute Information

The Proposed Rules require that an associated person seek expungement of the customer dispute information relating to a costumer complaint within one year of the member firm initially reporting the customer complaint if the complaint does not result in an arbitration claim, or within one year after the Underlying Customer Case closes either through a binding decision of the arbitrators or settlement between the parties. In support of the Proposed Rules, FINRA represents that given the length of time currently between the initial complaint or the case closure, and filing of the request for expungement, the customers and relevant documentation cannot be located.

We respectfully challenge the Proposed Rules, and draw FINRA's attention to its own Rule 4511, which requires members to preserve books and records for a minimum of six years. We also note that while this is the absolute minimum retention period, many member firms retain books and records for far longer periods, and some simply do not destroy any books and records regardless of time passed. Barring an exceedingly rare circumstance (*e.g.*, the collapse of Tower 7 World Trade Center in the September 11 attacks), it is highly unlikely that relevant documents will not be available for at least the minimum required retention period.

When considering the fact that all of the relevant documentation is readily available during the requisite six-year retention period, and the availability of numerous online public records, an associated person's counsel or FINRA should have no difficulty locating the customers. In the seven hundred plus customer dispute disclosures that we have brought before FINRA for expungement, finding the customer has very rarely been an issue. The more common scenario, in fact, is that once the customer is reached they show little to no interest in opposing the associated person's request for expungement – often citing one of three reasons for their lack of interest: (a) they never intended their complaint against the associated person; (b) they have since been made whole or the perceived loss of value in their investment at the time of the complaint resulted from volatility in the market and their investments have since recouped; or (c) they are not interested in participating unless there is a monetary incentive.

Based on the above, we urge FINRA to reconsider the one-year period in the Proposed Rules, and instead allow associated persons six years in which to bring a case for expungement pursuant to FINRA Rule 2080. Further, in the Proposed Rules, FINRA suggests reducing the time period from one year to six months in all cases where the customer case closes on or prior

to the effective date of the Proposed Rules. Yet FINRA offers no support for this proposed six-month time frame, which not only appears to be completely arbitrary but also plainly creates an unjustifiable distinction between cases that close prior to the rules and those that close after. We therefore ask FINRA to consider either grandfathering all cases that close prior to the effective date of the Proposed Rules without any time limit, or in the alternative, apply the same time limitation to those cases as the ones that close after the effective date of the Proposed Rules.

7. Incorporation of Public Petition

To ensure a fair representation of industry person's regarding these Proposed Rules, we circulated an online petition and wish to incorporate all signatories and comments here. The online petition may be found here: https://www.ipetitions.com/petition/fighting-for-a-balanced-finra-expungement-process#comments

Once again, AdvisorLaw thanks you for the opportunity to submit these comments. If there is any further information or other assistance that we may be able to provide, or if there are any questions we may be able to answer, please contact me at armin@advisorlawyer.com or 720-549-2880.

Respectfully,

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