

January 6, 2018

BY EMAIL: pubcom@finra.org

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

Re: Regulatory Notice 17-42 – Public Comment

Dear Ms. Asquith:

Thank you for the opportunity to comment on the proposed amendments to FINRA Rules 12805 and 13805.

Herskovits PLLC has an active practice representing broker-dealers and industry professionals in a variety of litigation and regulatory defense matters. As part of that practice, we frequently advocate for financial advisors (FAs) seeking expungement of frivolous customer complaints from CRD.

This comment letter addresses three areas of concern for us: (1) we question the appropriateness of imposing a one-year statute of repose for claims seeking expungement relief; (2) we question the appropriateness of requiring arbitrators to make a factual finding that the customer dispute information “has no investor protection or regulatory value” before awarding expungement; and (3) we question the appropriateness of the burdens placed on FAs under proposed Rule 12805(a)(1).

Proposed Statute of Repose

Proposed Rule 13805(a)(3) requires an FA to seek expungement no more than one-year after FINRA closed the underlying customer arbitration or, with respect to a disclosure that did not arise from an arbitration filing, no more than one-year after the customer complaint was reported to CRD. FINRA’s justification for this limitation period is to ensure that customers can be located and records concerning the underlying event still exist. *See* Regulatory Notice 17-42 at 5. There are many reasons to avoid the implementation of a one-year limitation period.

First, FINRA has no authority to impose any type of statute of limitation or statute of repose on any cause of action. That power rests with legislative bodies. Of course, FINRA can impose time limits on arbitration claims through eligibility rules and has done so with Rules

12206 and 13206.¹ Yet, FINRA's existing eligibility rules expressly permit a party to file a claim in court if an arbitrator deems the claim to be outside the six-year eligibility period. In so doing, FINRA acknowledges that it can close its doors to a particular claimant, but not preclude that claimant from seeking relief in court.

Second, FINRA's justification for imposing a time limitation is one-sided and unfair. FA's, as well, want access to witnesses and documents when defending a customer-initiated arbitration. Yet, FINRA has never demanded that customers file an arbitration claim within one-year of the event giving rise to the claim.

Third, FINRA's concern about document retention seems misplaced. All broker-dealers are required to abide by document retention rules imposed by the SEC and FINRA, which generally mandate the preservation of most records for 3 to 6 years (and many firms preserve documents for longer periods of time). *See generally* 17 CFR § 240.17a-4 and FINRA Rule 4511.

Proposed Finding of Fact by the Arbitrator

Proposed Rule 12805(b)(3) would require an arbitrator to make to make 2 findings of fact when ordering expungement. First, the arbitrator would be required to identify at least one ground for expungement under Rule 2080(b)(1) and, secondly, and more troublingly, the arbitrator would be required to find "that the customer dispute information has no investor protection or regulatory value."

Rule 2080(b)(1) permits expungement awards based on arbitral findings that:

- 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.

The obvious question is this: if an arbitrator makes the requisite findings under Rule 2080(b)(1), what possible "investor protection" or "regulatory value" needs are served by preserving a debunked claim on CRD? Incredibly, under the proposed rule, an arbitrator could find the customer claim to be "factually impossible," and yet still refrain from awarding expungement.

Additionally, we are concerned by the vagueness and ambiguity of the proposed requirement that an arbitrator find "that the customer dispute information has no investor protection or regulatory value." Where is an arbitrator supposed to draw the line under such a vague standard? How is an arbitrator supposed to determine what type of information may be of

¹ It is noteworthy that FINRA imposes no time limitation upon itself in connection with regulatory enforcement matters. In theory, FINRA's enforcement division can bring enforcement actions against any registered entity or person without regard to the passage of time.

“value” to a regulator? Wouldn’t such a vague standard leave open the possibility of wildly inconsistent rulings from one arbitration panel to the next? Furthermore, arbitrators are supposed to be neutrals and they should not be placed in the position of serving as an investor advocate or guardian of regulatory data. Those responsibilities fall squarely on regulators, not arbitrators.

Proposed Rule 12805(a)(1) Places Unnecessary Burdens on FA’s

Proposed Rule 12805(a)(1) would require an FA to initiate a new arbitration if the underlying customer arbitration “closes before the hearings on the merits concludes.” Any such rule would place an extraordinary and unnecessary burden on an FA. FINRA arbitrations are time consuming and expensive endeavors. According to data published by FINRA, the average turnaround time for a FINRA arbitration decision is 16.9 months. *See* <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>. Thus, under the proposed rule, an FA may wait more than a year for his “day in court,” only to be forced to wait another year if the broker-dealer resolved the claim with the customer on the eve of a hearing (when most settlements occur). Apart from a being waste of time and money, FAs will respond to the proposed rule by filing a counterclaim or crossclaim for expungement in the customer arbitration, thus preventing the customer arbitration from closing before a hearing is held on expungement or the FAs other claims for relief.

Proposed Rule 12805(a)(1)(A) is also troubling because it bars an FA from filing an expungement arbitration unless the FA requested expungement in the underlying customer arbitration. This requirement is disconcerting because an FA may be unaware of the important rights he is waiving by failing to file a request for arbitration in the underlying arbitration.

We hope FINRA gives consideration to these comments before proposing any rule amendments to the SEC.

Yours truly,

HERSKOVITS PLLC



Robert L. Herskovits