

## Center for Clinical Programs

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### VIA EMAIL to [pubcom@finra.org](mailto:pubcom@finra.org)

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

Re: Comments Concerning FINRA Regulatory Notice 17-42  
Expungement Process of an Associated Person

To whom it may concern:

Thank you for the opportunity to comment on Regulatory Notice 17-42 and its proposed changes to the expungement process. We work in the Georgia State College of Law's Investor Advocacy Clinic where we represent small investors who cannot afford legal representation. Because we work closely with investors, we understand how essential complete and accurate BrokerCheck records are. Investors rely upon this information to choose a financial professional, and they can be harmed when records are incorrect or incomplete. Our clients do not bring their claims lightly and are shocked when a well-founded claim draws a request for expungement, suggesting that their concerns are without merit.

We submit this comment in support of the proposal with some modifications. First, the one-year limitation period permits fair and equal investor participation in the process. Second, the heightened qualifications for the expungement arbitrator roster will result in reliable and informed decisions. Third, the in-person or videoconference requirement will ensure that decisions are based on the merits and involve all parties. Finally, we support language revisions to clarify the expungement process.

#### **A. The One-Year Limitation Period Facilitates Investor Participation.**

An associated person should bring any expungement within one year of the closing of the underlying customer case, as suggested in the proposal.<sup>1</sup> The one-year limitation ensures that relevant evidence is available and increases investors' ability to participate. Moreover, one year is more than a sufficient time in which to bring expungement proceedings for true error or fraud. Absent a reasonable time limit, associated persons could strategically wait years until witnesses and documents are no longer available. A one-year time limit on expungement claims balances

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<sup>1</sup> See FINRA, REGULATORY NOTICE 17-42, EXPUNGEMENT OF CUSTOMER DISPUTE INFORMATION 5 (2017) ("For the expungement request to be considered after the Underlying Customer Case closes other than by award, the associated person would be required to file the request within one year after FINRA closes the Underlying Customer Case, provided the expungement request is not barred.")

the interests of investors with those of associated persons by continuing to formalize the expungement process and ensuring fair resolutions.

**B. The Heightened Qualifications for the Expungement Arbitrator Roster Will More Result in Reliable and Informed Decisions.**

We support the requirement of additional qualifications for an arbitrator to be included on the Expungement Arbitrator Roster. Arbitrators experienced in securities, administrative law, or litigation will have the background necessary to engage in thorough deliberation over the details of an expungement request. Expungement requests are extraordinary in that there are very narrow grounds upon which they should be granted. Creating a roster with diverse backgrounds and a wealth of legal and securities knowledge will equip the panel with the necessary tools to provide the high-level scrutiny required for an expungement hearing.

We also support the proposition that the panel's decision be unanimous.<sup>2</sup> When an investor receives a positive outcome in a hearing, whether through award or settlement, he feels vindicated, satisfied that the wrong has been corrected. However, when the associated person still is able to expunge the issue from his CRD, the investor is essentially labeled a liar. Allowing a simple majority of the panel to remove the complaint from the associated person's record where the associated person or firm still had to pay a claim should require additional scrutiny. The requirement of a unanimous decision will ensure that scrutiny is present.

**C. The In-Person or Videoconference Requirement Makes It More Difficult for an Associated Person to Receive a One-Sided Decision.**

We support requiring an associated person who seeks expungement to appear personally at the hearing, whether the process takes place as part of the underlying case or not.<sup>3</sup> An expungement is a significant prize to an associated person, and as such the associated person should be required to attend a hearing in person to demonstrate their commitment to that prize. The permanent removal of customer complaints from an associated person's record allows the associated person to continue operating as if the complaint had never occurred. The magnitude of such a reward should mandate that an associated person appear in person at an expungement hearing. Accordingly, we believe that the option for an associated person to appear by videoconference should be permitted, if at all, in those simplified cases where a hearing did not take place.<sup>4</sup>

Additionally, we support bifurcating expungement requests from the merits of all customer cases. Doing so will facilitate an independent and thorough expungement hearing overseen by a

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<sup>2</sup> See FINRA, REGULATORY NOTICE 17-42, EXPUNGEMENT OF CUSTOMER DISPUTE INFORMATION 9 (2017) ("The proposed amendments would require that the panel agree unanimously to grant expungement . . .").

<sup>3</sup> *Id.* at 11 (" . . . FINRA believes that as the associated person is requesting the permanent removal of information from CRD, the associated person should be available in person to present his or her case and respond to questions from the panel.").

<sup>4</sup> Not all simplified arbitrations proceed only on the papers. A hearing may be held in a simplified arbitration upon the customer's request. FINRA R. 12800(c)(1). In any such cases, an associated person seeking an expungement should appear in person, with the expungement process mirroring the underlying proceeding. In those cases where the customer does not seek a hearing, holding the entire customer proceeding hostage to an in-person hearing requirement for the expungement request does not advance justice and should not be permitted.

separate, qualified panel. Separating expungement requests from customer cases will make the expungement process more rigorous and require a greater commitment by the associated person while maintaining the integrity of the CRD. At the same time, it will allow the merits to proceed more expeditiously. We recommend that this change be coupled with additional notifications to the investor about the expungement hearing to incentivize his or her participation in such hearings.

For expungement requests related to non-simplified cases, we support limiting the request to one opportunity during a bifurcated portion of the underlying case. Once an expungement request is made in the underlying case, a separate panel selected from the Expungement Arbitrator Roster should decide whether the request will be granted.

#### **D. FINRA Should Clarify the Expungement Process.**

In response to Question 1, we recommend clarifying the language regarding how information is expunged and by whom. As the notice describes, Rules 12805 and 13805 currently suggest that the arbitration panel can grant an expungement, when only a court can do so. Changing the language to “recommend” rather than “grant” will better describe the role of the panel versus the court in arbitration proceedings. This clarification should assist courts and parties in understanding the court’s role.

#### **Conclusion**

In conclusion, from our vantage point of working with aggrieved investors, we support changes to the expungement process to ensure that BrokerCheck remains a valuable resource and investors are treated fairly. An expungement should be limited to extraordinary circumstances, and adding requirements such as the one-year limitation, in-person hearings, and specially-qualified panels will ensure that expungement is granted only in cases where it is appropriate.

Thank you for this opportunity to share our comments to ensure the expungement process is not abused and regular investors have access to complete and correct information concerning their financial adviser.

Best regards,

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\*All student interns in the Investor Advocacy Clinic, including these signatories, perform all work under the Georgia Student Practice Rule contained in Rules 91-95 of the Rules of the Supreme Court of Georgia as registered law students under the supervision of a licensed Georgia attorney.