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Via e-mail: 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 this opportunity to comment on the proposed amendments (“Proposal”) to the Financial Industry Regulatory Authority (“FINRA”) code of arbitration, rules 12805 and 13805, relating to expungement of customer dispute information on behalf of Janney Montgomery Scott LLC (“Janney”). Janney traces its roots in Philadelphia to 1832 and is one of the oldest full service financial services firms in the country with 116 offices and 779 Financial Advisors.

Janney shares the goal of FINRA to protect investors by facilitating their access to relevant information about their Financial Advisors. Unfortunately, FINRA’s Proposal swings the pendulum past “transparency” toward procedural and equitable imbalance. The Securities Industry and Financial Markets Association (“SIFMA”) will be submitting a detailed comment letter, with which Janney is in agreement. However, given the gravity this issue takes on in context of increasing regulatory reliance on disclosures to drive risk based exam programs, we would like to draw the attention of FINRA to a number of specific concerns.

I. The Central Registration Depository (“CRD”) is Allegation Driven

To appreciate the impact of the Proposal it is crucial to recall that a mere sales practice *allegation* creates a permanent CRD black mark, without any regard for underlying *merit*. We know this conclusively because it is common for arbitrations to result in awards of zero, yet the associated disclosures commonly remain for the duration of a Financial Advisor’s carrier.

In 2010 FINRA expanded access to information on BrokerCheck backward ten years and forward ten additional years after a Financial Advisor leaves the industry. At the time, FINRA acknowledged that baseless complaints exist and responded to industry concerns with assurance that they would “*Formalize the process for current and former brokers to dispute the accuracy of factual information disclosed through BrokerCheck.*” As it eventuated, the process defined in FINRA Rule 8312(e) specifies that any such dispute “*must pertain only to factual information and not to information that is subjective in nature or a matter of interpretation.*” Given nearly



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all sales practice matters are subjective in some measure, the proffered dispute process is a procedural dead end, leaving only expungement to offset meritless allegation disclosures.

More recently FINRA has specifically held out expungement as a remedy to meritless disclosures. Senior investor protection rule 2165, which goes into effect the same day comments to the Proposal are due, permits temporary holds on cash disbursements where there is evidence of exploitation. It is certain that sales practice complaints will be filed by clients in response, resulting in black marks on the records of Financial Advisors who protect their clientele. When asked for a carve out from disclosure obligations in this scenario, FINRA declined, but opined that resolution could be sought *through expungement*. In this case, by seeking to narrow access to expungement FINRA creates a conflict between the protection of seniors and CRD records. Recall that utilization of an account freeze is optional. If this Proposal is approved, there will be firms who decline to place an otherwise warranted hold at the risk of Advisor records.

II. Further Restrictions on Access to Expungement Are Unnecessary

FINRA has stated that the Proposal is based in part on data cited by “critics of expungement.” One vocal critic has been the Public Investors Arbitration Bar Association (“PIABA”). When assessing PIABA’s argument, consider that its members are frequently the source of meritless disclosures and that a routine litigation tactic is to cite disclosures in the past as conclusive evidence of bad acts in the present. In sum, the more disclosures that can be alleged into existence the more likely they are to prevail and consequently, be paid.

To demonstrate that expungement is too easy to attain, PIABA often cites the “approval rate when expungement was requested.” For a timely example of this, see the January 30, 2018 comment letter submitted in response to this Proposal by Maddox Hargett & Caruso, P.C. The author states (emphasis added):

Unfortunately, notwithstanding the fact that expungements have been widely recognized as an "extraordinary" measure with significant "regulatory" and "investor protection" implications, the historical monthly expungement data that I have personally maintained since January 1, 2013 indicates otherwise:

*Between January 1, 2013 and December 31, 2017, expungements were granted in 1,145 out of the 1,974 arbitration proceedings **in which an expungement was requested** which equates to an expungement approval rate of 73.20%.*

Initially, this arithmetic is simply incorrect and would be an approval rate of 58%. More crucially, it entirely misses the point. Per FINRA, between January of 2013 and December of 2017 there were 19,195 arbitration cases closed in the forum. If we accept the figure of 1,145 expungements as accurate, this means it was granted, as a ratio of all FINRA arbitrations, only

5.9% of the time. Even more telling, expungement is also the only realistically available method of removing a sales practice complaint. Between January 2013 and December of 2016, the last full year of data for which 4530(d) complaint reporting is available, 78,654 sales practice complaints were filed. Accepting the figure of 1,145 expungements granted as accurate, related disclosures were removed in *less than 1%* of combined arbitration and sales practice matters.

Consider a parallel of what PIABA is attempting to argue. The Cleveland Browns were undefeated against the Tampa Bay Buccaneers in 2015, a stratospheric win rate of 100%. Unfortunately for their fans, that tortured logic doesn't mean Cleveland victories are common. In fact, the Browns lost their other fifteen games that season to go one and fifteen, a win percentage of .0625. So arbitrations since 2013 ending with an expungement are already less common than a Browns win. Once complaints are included, they become rarer still.

FINRA has already offered sufficient rulemaking and guidance around the expungement process to ensure legitimate consumer protection or regulatory interests. With expungements resulting in a minute percentage of all matters, it is a sufficiently "extraordinary" remedy.

III. Expungement Awards Must Not Require a Unanimous Panel Decision

All current FINRA arbitration panel decisions are based on a majority finding, whereas the Proposal would require unanimity. Taken to logical conclusion, this requires FINRA to have determined that the barrier to expungement should be higher than the standard required for the same panel to Order a multi-million-dollar award or refer a Financial Advisor directly to Enforcement. There does not appear to be any articulated justification for a paradigm that makes a material award more easily attainable than the removal of a meritless CRD filing.

IV. Expungement Awards Must Not Be Subject to a One Year Limitation Period

As with the Proposed unanimous decision criteria, there appears to be no basis for subjecting expungement to a one-year limitation. Recall that FINRA rules 12504 and 13504 already provide a six-year eligibility period. There appears to be no regulatory benefit in shortening the expungement eligibility period by five years to offset the potential harm to a Financial Advisor unnecessarily carrying the burden of a meritless disclosure.

V. Requiring a Finding of No Investor Protection or Regulatory Value is Conflicted

In order to grant an expungement, the Proposal requires the Panel unanimously reach two potentially conflicting findings. First, the Panel must find that the disclosure is "factually impossible or clearly erroneous," the "registered person was not involved" or "the claim, allegation or information is false."



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Second, the Panel must find that the “dispute information has no investor protection or regulatory value.” It is difficult to imagine a scenario where a disclosure might concern a claim that meets one of the initial three criteria, yet still has a valid investor protection or regulatory value. What can be anticipated is that at least one of three Panel members concludes that FINRA believes all disclosures have regulatory value, regardless of merit, thereby making expungement a de facto impossibility.

It must also be noted that this evaluation places arbitration panelists in the role of FINRA in determining “regulatory value.” Arbitrators are, by definition, neutral and should not be asked to reach this subjective determination. Recall that *guidance* to this effect was already promulgated in September of 2017 in a Notice to Arbitrators.

VI. The Proposed Filing Fees and Requirement to Name Employers as Arbitration Respondents Are Unwarranted

The Proposal calls for a filing fee of at least \$1,425 dollars and, where a case is closed by any method other than award, Financial Advisors must name their employer as Respondent. A firm so named would be assessed a member fee in turn. There is no regulatory justification for this set of policies other than generating another set of burdens, this time transparently monetary. Placement of financial stumbling blocks in the path of removing meritless disclosures, a request made in less than 1% of sales practice matters, could be justified only by a grave investor protection deficiency. No such deficiency has been evidenced.

Again, Janney concurs that investor access to relevant complaint and arbitration history is a vital component of consumer and market protection. However, those seeking to make expungement more difficult have already succeeded to a more than adequate degree. Arguments to the contrary fail to either recognize how rare expungement is or offer a regulatory gap that calls out for redress at the expense of due process. As FINRA continues to increase its reliance on ascertaining who a “recidivist” actually is, FINRA should share the goal of removing meritless disclosure records that harm market confidence by confusing investors and obscuring the actual bad actors.

Best Regards,

W. Alan Smith
Deputy General Counsel