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February 5, 2018

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, NW
Washington, DC 20006-1506
Via email to: pubcom@finra.org

Re: Regulatory Notice 17-42, Expungement of Customer Dispute Information

Dear Ms. Asquith:

On behalf of Public Citizen, a non-profit membership organization with more than 400,000 members and supporters nationwide, we write to thank the Financial Industry Regulatory Authority (FINRA) for proposing changes to its rules to better protect investors.¹ We welcome the opportunity to comment on this important notice.

I. Overview

Public Citizen strongly opposes the use of forced arbitration clauses, which use fine-print “take-it-or-leave it” agreements to deprive people of their day in court when they are harmed by violations of the law. Instead, these agreements force people into secretive arbitration proceedings with no right to appeal if arbitrators ignore the facts or law. When forced arbitration clauses are combined with class action bans, neither judges nor arbitrators can assess or remedy the full scope of systemic wrongdoing that affects multiple victims. FINRA’s funding source from the very industry that it regulates results in the potential for public perception of bias. Therefore, expungements should be rare, if not altogether prohibited.² Thus, our suggested

¹ *Regulatory Notice 17-42 Expungement of Customer Dispute Information* FINANCIAL INDUSTRY REGULATORY AUTHORITY. (viewed on February 5, 2018).

² Susan Antilla, *The Unbelievable Story of One Broker and Her Firm Fighting to Clean Her Tarnished Record*, THE STREET (June 21, 2016), <https://www.thestreet.com/story/13613109/1/the-unbelievable-story-of-one-broker-and-her-firm-fighting-to-clean-her-tarnished-record.html>.

improvements to strengthen the proposal should in no way suggest that we agree with the use of forced arbitration or with the use of expungement of customer dispute information.

II. Support for Stronger Standard for Expunging Customer Dispute Information

Access to accurate information through the Central Registration Depository (CRD) is critical because of the public's limited access to information about FINRA's oversight of its arbitration program.³ As investor consumer advocate, Public Citizen supports FINRA's BrokerCheck and other public disclosures that help investors make an informed choice about investment advisors. A reliable database is critical for investor confidence, especially in light of a self-policing industry that suffers from a negative public reputation.⁴ As such, the issue of expungements must be addressed with care.

FINRA notes that its "long-held position [is] that expungement of customer dispute information is an extraordinary measure."⁵ We agree that expunging customer dispute information should be rare, if not disallowed, since access to information about previous disputes is a critical factor that investors weigh when deciding on an investment firm.

Overuse of expungement would not only limit critical transparency, it would decrease the CRD's utility as a reliable tool for investors. The proposed amendments would, among other things, increase the bar for expungement by requiring the associated person who is seeking an expungement to appear at the expungement hearing, place a one-year limitation period on the ability to request an expungement, mandate that a three-person panel of arbitrators unanimously agree that expungement is appropriate, and specify a minimum filing fee for expungement requests.

We agree with these limits to potential overuse of expungement proceedings as they raise the already high bar that is set by FINRA for granting expungements.⁶ Moreover, new provisions aimed at providing opportunities for the original customer who filed the complaint at issue to participate in a request for expungement will help make the process less likely to be one-sided. Therefore, we believe that these proposed amendments will better protect investors, insure greater confidence in the process, and foster transparency. Though these amendments would provide an improvement to the status quo, we urge FINRA to strengthen the proposed amendments in several important ways.

³ See, e.g., *Public Investors Arbitration Bar Ass'n v. SEC*, 930 F. Supp. 2d 55 (D.D.C. 2013).

⁴ Emily Ekins, *Wall Street vs. The Regulators*, CATO INSTITUTE (February 5, 2015), <https://www.cato.org/survey-reports/wall-street-vs-regulators-public-attitudes-banks-financial-regulation-consumer/>.

⁵ *Regulatory Notice 17-42 Expungement of Customer Dispute Information* FINANCIAL INDUSTRY REGULATORY AUTHORITY. https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-42.pdf#page=3 (viewed February 5, 2018).

⁶ See generally FINRA rule 2080, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=8468 (viewed February 5, 2018).

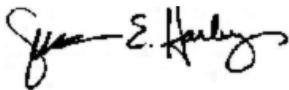
III. Suggested Changes to Strengthen Proposed Amendments

The requirement that arbitrators write a brief explanation of expungement decisions should be strengthened to require those explanations to be made public in order to enhance transparency and public integrity in the system.⁷ Moreover, we agree that arbitrators chosen to serve on the Expungement Arbitrator Roster should be randomly selected. To enhance public confidence in the arbitration system, at least one FINRA employee should be a member of every three-person panel that considers an expungement request. Any FINRA staff on a panel, however, should be required to meet the same qualifications as other expungement panel arbitrators.

While we appreciate that these proposed amendments will strengthen current FINRA rules, arbitration is only valuable when both parties willingly agree to arbitrate, after a dispute arises. Therefore, we will continue to advocate for commonsense legislation such as the Investor Choice Act of 2017 that prohibits forced arbitration in the securities market.

We welcome the opportunity to discuss these suggestions in greater detail.

Sincerely,



Susan Harley
Deputy Director
Public Citizen
Congress Watch Division



Remington A. Gregg
Counsel for Civil Justice and Consumer Rights
Public Citizen
Congress Watch Division

⁷ FINRA rule 12805, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7229 (viewed February 5, 2018).