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Via Email and Regular Mail
Ken Andrichik, Esq.
Senior Vice President
FINRA
One Liberty Plaza
New York, New York 10006

Dear Mr. Andrichik:

As a FINRA arbitrator, I would like to contribute comments on the proposed amendments to the Code of Arbitration Procedure relating to requests to expunge customer dispute information as described in Regulatory Notice 17-42.

It is my understanding that the proposed amendments allow an associated person who is named as a party to file a new claim for expungement within one year after the underlying customer case closes in a manner other than by award. Despite the one-year limitation on filing expungement claims after a case closes in a manner other than by award, associated persons and their counsel may decide in many situations that it is strategically advantageous to pursue settlement in the underlying case and subsequently file for expungement with the expectation that a panel unfamiliar with the case may be more inclined to grant the request. In this fashion, the proposed amendments may have the ancillary and arguably salutary effect of increasing incentives to seek settlement. In a subsequent expungement proceeding, however, the panel might need to base its decision primarily on information the associated person provides. By requiring panels to decide whether expungement is appropriate without the benefits of an adversarial proceeding, the proposed amendments may not readily accomplish their purpose in curbing unwarranted orders for expungement.

While I note that the proposed amendments provide that an associated person filing for expungement would be required to name the firm at which he or she was associated at the time of the events giving rise to the customer dispute, it is not clear how this provision promotes the robust proceedings FINRA envisages. For example, if an associated person decides to leave his or her employer prior to the expungement proceeding or is terminated, the firm may have little or no economic incentive to cooperate in an expungement proceeding. It would also be difficult for the panel to elicit potentially

relevant facts bearing on an expungement request where the economic and reputational interests of the associated person and the employer are aligned, including situations in which the associated person's firm assisted in the associated person's defense in the underlying customer dispute.

It is also clear that an aggrieved customer has no economic incentive to participate in an expungement proceeding that occurs only after the underlying case has concluded. A short filing period undoubtedly would tend to improve the reliability of testimony and increase witness availability. On the other hand, imposing a one-year limitation period for associated persons to file a new claim for expungement does not alter the economic disincentive for the customer to participate in a separate expungement proceeding. FINRA understandably seeks to avoid imposing additional costs upon customers. The proposed amendments could have the unfortunate effect of denying an expungement panel the opportunity to hear directly from the aggrieved customer whose participation could help illuminate the context in which the expungement request arises in significant ways. In this respect, the amendments do not comprehensively meet the concerns of critics of expungement who have raised concern about panels that receive only one-sided information in favor of the associated person seeking expungement.

The extent to which limited information may affect the quality of decisionmaking is particularly important given the fact that in a separate expungement proceeding no party would advocate on behalf of the interests of the investing public or the integrity of the regulatory system. While FINRA's rules to not provide a role for a public advocate in customer disputes either, panelists in that context have the benefit of receiving opposing viewpoints and evidence in an adversarial proceeding.

FINRA could ameliorate the possibility that a panel might receive one-sided information in several ways. For example, where an associated person exercises his or her right to seek expungement within one year after the underlying customer dispute closes other than by award, it would be beneficial for FINRA to provide the expungement panel with significant filings from the underlying customer dispute, including the Statement of Claim, the Answer and dispositive motions. The panel might also be permitted the opportunity to review the parties' settlement papers in the underlying customer dispute to examine the amount paid to any party and any other terms and conditions of the settlement as Rule 12805 and Rule 13805 of the FINRA Code of Arbitration Procedure presently requires for requests for expungement relief raised in the underlying customer dispute under Rule 2130. The associated person, the firm and the customer could also be given the right to provide the panel with transcripts of the underlying customer proceeding.

I note further that under the proposed amendments, a customer may appear in person or by phone. To promote customer participation, FINRA should consider requiring the associated member to bear the cost of the customer's attendance if the customer wishes to participate in person. Requiring the associated person to bear the cost of the customer's attendance at the proceeding would encourage customers to participate. It would also reduce the incentive of associated persons to seek expungement requests by increasing

their costs and reduce the number of meritless requests for relief. So, too, would requiring associated persons to present their case in person rather than by phone or videoconference.

By incorporating one of more of these features into the procedures for expungement proceedings, panels would be more likely to have information useful in facilitating their ability to render informed judgments concerning the propriety of expungement.

I am also concerned about the efficacy of referring an expungement request to a special panel regardless of the stage at which the underlying customer case settles. If the underlying case settles early, such as when the panel chair has only considered discovery issues and the panel as a whole has not had an opportunity to delve into the case in detail, it would be sensible to send an expungement request to a specialized panel. At the other end of the spectrum is the case that settles only on the eve of hearings, by which time the panel in the underlying customer dispute would presumably have thoroughly reviewed the parties' prehearing briefs and exhibits. In that circumstance it may well be both efficient and effective in promoting investor protection to require the panel presiding over the underlying customer dispute to decide the expungement request as well.

Turning to the qualifications of the expungement panelists, I note that FINRA proposes to create a roster of public chairpersons who are attorneys with at least five years of litigation or related experience and who have already completed chairperson training. I support the appointment of experienced attorneys to the Expungement Arbitration Roster. Attorneys with litigation training and experience are proficient in identifying legal issues, weighing the relevancy of proffered evidence and judging the credibility of witnesses. The appointment of panelists who possess those qualities will effectuate the purpose of the amendments in promoting the likelihood that expungement requests are granted only where appropriate.

The proposed amendments, however, do not provide a clear legal standard for how expungement arbitrators should evaluate expungement requests. At present, a panel must identify at least one basis for expungement under Rule 2080(b)(1) before granting an associated person's request for relief. The proposal would add a second requirement that the panel make a specific finding that "the customer dispute information contains no investor protection or regulatory value." This new requirement is problematic since many arbitrators who are lawyers have specialties that do not touch upon securities law. Even attorneys who have worked in the securities field may be long retired from the financial industry. Arbitrators who serve on the Expungement Arbitration Roster should therefore receive supplemental training on the proposed new standard to help them fulfill their responsibilities. Because associated persons would still be required to confirm an expungement award in a court of competent jurisdiction l, I suggest that FINRA offer training or instructional materials to judges as well.

I hope these comments are helpful. Please feel free to contact me with any questions.

Sincerely,

DANIEL A. SCHLEIN