

February 5, 2018

Financial Industry Regulatory Authority
Attn: Marcia E. Asquith
Office of the Corporate Secretary
1735 K Street NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-42

Dear Ms. Asquith:

Please accept this public comment to FINRA's Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information. I am an attorney who has represented clients seeking expungement of customer dispute information from their CRD and BrokerCheck Reports. I have firsthand knowledge of the difficult position these associated persons often find themselves in, and the already uphill battle they face to ensure their BrokerCheck Report accurately reflects their record, provides sufficient investor protection, and has regulatory value. The proposed amendments would render this process even more cumbersome, timely, and difficult for these clients – clients who do merit this “extraordinary measure” of customer dispute expungement.

I would like to provide you with a few real examples of client cases I have handled:

- 1) One client was erroneously named in a dispute that was actually meant for his father. The father and son had the same names, and the customer mistakenly named the son instead of the father. This matter went on the son's record, despite the subsequent discovery that he had been mis-named.
- 2) One client provided sound investment advice to his customer, given the customer's stated investment objectives and risk tolerance. However, unbeknownst to our client or to many other brokers and broker-dealer firms, the company that issued this particular note, and its executives, were engaging in securities fraud, misconduct, running a Ponzi scheme, and selling unregistered securities. The company's executives later pleaded guilty to numerous securities fraud allegations and the company soon went bankrupt. As such, the customer had no remedy with the company and filed a complaint against our client and our client's firm, in an effort to recoup some of the money lost. This matter went on our client's record, despite that he had no involvement in the securities fraud allegations and had justifiably relied on the performance of the company at the time the recommendations were made to the customer.
- 3) One client provided sound investment advice to his customer, given the customer's stated investment objectives and risk tolerance. The customer invested in a Limited Partnership. However, years later, the tax code was amended, which negatively affected the customer's investment in the Limited Partnership. As the customer certainly could not file a complaint against the IRS, the customer filed a complaint against our client.

- 4) One client provided sound investment advice to his customer (a married couple), given the customer's stated investment objectives and risk tolerance. Auction Rate Securities (ARS) were highly successful at that time and our client recommended the customer purchase ARS. The couple later divorced, with each receiving half of the ARS purchases pursuant to the divorce arrangement. The wife subsequently transferred her accounts to another firm, and our client was no longer her broker. The ARS market later failed as a result of the 2008 financial crisis. Although our client's firm offered to repurchase ARS from many affected customers, the wife was not eligible for repurchase under the firm's repurchase terms because she was no longer a customer. She filed a complaint against our client in an effort to force the firm to repurchase her ARS.
- 5) One client provided sound investment advice to his customer, given the customer's stated investment objectives and risk tolerance. The customer invested in a Real Estate Investment Trust (REIT). At the time of the customer's investment, general industry practice was to use the offering price of REIT securities as the per share estimated value during the offering period. The offering price generally remained constant on a customer's account statements during the entire offering period, even though fees had actually reduced investors' principal and value of the underlying assets may have decreased. In order to address this concern, in January 2015, the SEC approved a rule change to require inclusion in customer account statements a per share estimated value for a REIT. The rule change mandated disclosure of the "net investment" amount on customer account statements. Despite our client's efforts to explain the effects of this rule change on the customer's statements, the customer did not understand and perceived that her REIT had dropped in price per share. She subsequently filed a complaint against our client.

These are merely a few examples of the hundreds of brokers who have had to spend thousands of dollars in an effort to expunge matters from their public BrokerCheck Reports that never should have been on their reports in the first place. Each of these clients certainly had an extraordinary circumstance warranting expungement. FINRA now proposes to make an already burdensome and costly back-end expungement process even more burdensome and costly. It does so without easing the front-end reporting obligations that force these disclosures onto BrokerCheck Reports. Firms' compliance departments are inclined to over-report customer disputes because firms are not willing to take the risk in not reporting these matters.

Proposed Requirement That an Associated Person Seek Expungement Within One Year. FINRA proposes to impose a one-year statute of limitations upon an associated person seeking expungement of a customer dispute that did not result in an arbitration claim. There seems to be no reason for this requirement, other than to further restrict an associated person's ability to expunge matters from BrokerCheck. In fact, the requirement seems to fly in the face of FINRA's desire for BrokerCheck to provide accurate investor protection and regulatory value. If FINRA is concerned with investors having accurate information regarding associated persons, and providing associated persons with expungement remedy for extraordinary circumstances, such as those outlined above, this time limit should not be imposed. When a member firm "initially" reports a customer complaint on an associated person's CRD, the member firm has not even had time to investigate or resolve the complaint. Member firms do – and should – conduct thorough investigations into customer complaints. These investigations and the resolution of the complaint can often take months, up to a year. It would be impossible for the associated person to begin the expungement process while the complaint is still being investigated. Furthermore,

the associated person must have the funds available to pay for the costly process of expungement. The associated person may not have those funds immediately available, and may need more time to file for expungement. Finally, in many cases, an associated person has left a member firm and a complaint is subsequently filed after the associated person's departure. In those cases, the member firm and the associated person are not in close communication and there is an even greater lag time before the associated person becomes aware of the disclosure. For all of these reasons, a one-year time limit is unnecessary, unfair, and not practical. It appears to fly in the face of the intent of BrokerCheck.

Proposed Requirement That a Three-Person Panel Hear Expungement Requests. FINRA arbitrators are well-equipped to read Statements of Claim, review evidence, hear testimony, and apply FINRA Rule 2080(b)(1) to the facts of an expungement request. Certainly, if the proposed rule to create a roster of arbitrators with additional qualifications to decide expungement requests is passed, a single arbitrator with these special qualifications will be more than qualified to make a determination as to expungement. Imposing a burden of having three "specially qualified" arbitrators hear a single expungement case would be unnecessarily burdensome to all involved, and provides no additional value to the process. Even criminal proceedings presided over by a single judge are less onerous than what is being proposed by this rule change. Having to coordinate the schedules of three arbitrators will delay the proceedings and will impose unnecessarily high additional arbitration costs on all parties involved. Seemingly, this proposed requirement is also creating a proposed increase in arbitration cost, as reflected in the proposed minimum filing fee of \$1,425. Associated persons spend thousands of dollars to expunge frivolous matters from their records. The process should be less burdensome, not more burdensome, and there is no value in having three "specially qualified" arbitrators review the case, doing the job of what a single "specially qualified" arbitrator with tailored training to hear expungement matters can do.

Conclusion. In sum, there are a number of reasons why a customer may file a false, frivolous, or erroneous complaint against an associated person. Associated persons cannot control who files a complaint, why they file a complaint, and what resolution the member firm chooses. Furthermore, associated persons cannot control the reporting of these complaints on BrokerCheck. Associated persons often have done everything right for their clients and will now have an even more difficult (and costly) time being able to have a report that consistently reflects that. I urge FINRA to reconsider these additional restrictions being placed on associated persons, which will have huge ramifications for them and their livelihood, and to keep the ultimate goal of investor protection in mind.

Respectfully,



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