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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2020 - * 005
Amendment No. (req. for Amendments *)

Filing by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * ☑ Amendment * ☐ Withdrawal ☐

Section 19(b)(2) * ☑ Section 19(b)(3)(A) * ☐ Section 19(b)(3)(B) * ☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule
- ☐ 19b-4(f)(1)
- ☐ 19b-4(f)(2)
- ☐ 19b-4(f)(3)
- ☐ 19b-4(f)(4)
- ☐ 19b-4(f)(5)
- ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * ☐ Section 806(e)(2) * ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document ☐ Exhibit 3 Sent As Paper Document ☐

**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed Rule Change to Amend the FINRA Code of Arbitration Procedure for Customer Disputes and the FINRA Code of Arbitration Procedure for Industry Disputes to Apply Minimum Fees to Requests for Expungement of Customer Dispute Information

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Mignon Last Name * McLemore

Title * Assistant General Counsel

E-mail * mignon.mclemore@finra.org

Telephone * (202) 728-8151 Fax (301) 527-4752

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 02/07/2020

By Patrice Gliniecki

(Name *)

(Title *)

Senior Vice President and Deputy General Counsel

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Patrice Gliniecki,

*Required fields are shown with yellow backgrounds and asterisks.*

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information ***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change ***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies ***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),[1] Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes ("Industry Code") (together, "Codes") to apply minimum fees to requests for expungement of customer dispute information. The proposed rule change would amend Part IX (Fees and Awards) of the Codes to apply minimum filing fees to requests for expungement of customer dispute information, whether the request is made as part of the customer arbitration or the associated person files an expungement request in a separate arbitration ("straight-in request").[2] The proposed rule change would also apply a minimum process fee and member surcharge to straight-in requests, as well as a minimum hearing session fee to expungement-only hearings.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

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1 15 U.S.C. 78s(b)(1).

2 FINRA is separately developing other changes to the current expungement framework, including codifying as rules the Notice to Arbitrators and Parties on Expanded Expungement Guidance ("Guidance"), see https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance, and establishing a roster of arbitrators with additional training and experience from which a panel would be selected to decide straight-in requests and expungement requests in settled customer arbitrations. See Regulatory Notice 17-42 (December 2017).

**2. Procedures of the Self-Regulatory Organization**

The FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 60 days following publication of the Regulatory Notice announcing Commission approval of the proposed rule change.

**3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

(a) Purpose

I. Background and Discussion

A. Customer Dispute Information in the Central Registration Depository

Information regarding customer disputes involving associated persons is contained in the Central Registration Depository ("CRD®") system, the central licensing and registration system used by the U.S. securities industry and its regulators.[3] FINRA operates the CRD system pursuant to policies developed jointly with NASAA. FINRA works with the SEC, NASAA, and other members of the regulatory community to ensure that information submitted and maintained in the CRD system is accurate and complete.

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[3] The concept for CRD was developed by FINRA jointly with the North American Securities Administrators Association ("NASAA"), and NASAA and state regulators play a critical role in its ongoing development and implementation.

In general, the information in the CRD system is submitted by registered securities firms, brokers and regulatory authorities in response to questions on the uniform registration forms.[4] Among other things, these forms collect administrative, regulatory, criminal history, and disciplinary information about brokers, including customer complaints, arbitration claims and court filings made by customers (i.e., "customer dispute information"). FINRA, state and other regulators use this information in connection with their licensing and regulatory activities, and member firms use this information to help them make informed employment decisions.

Pursuant to rules approved by the SEC, FINRA makes specified current CRD information publicly available through BrokerCheck®.[5] BrokerCheck is part of FINRA's ongoing effort to help investors make informed choices about the brokers and broker-dealer firms with which they may conduct business. BrokerCheck maintains information on the approximately 3,600 registered broker-dealer firms and 628,000 registered brokers. BrokerCheck also provides the public with access to information about formerly

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4 The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), Form BR (Uniform Branch Office Registration Form), Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form).

5 There is a limited amount of information in the CRD system that FINRA does not display in BrokerCheck, including personal or confidential information. A detailed description of the information made available through BrokerCheck is available at http://www.finra.org/investors/about-brokercheck.

registered broker-dealer firms and brokers.[6] In 2019 alone, BrokerCheck helped users conduct more than 40 million searches of firms and brokers.

The regulatory framework governing the CRD system and BrokerCheck has long contemplated the possibility of expunging certain customer dispute information from these systems in limited circumstances, such as where the allegations made about the broker are factually impossible or clearly erroneous. The expungement framework seeks to balance the important benefits of disclosing information about customer disputes to regulators and investors with the goal of protecting brokers from the publication of false allegations against them.

A broker can seek expungement of customer dispute information by going through the FINRA arbitration process or directly to court (without first going through arbitration). Regardless of whether expungement of customer dispute information is sought directly through a court or through arbitration, FINRA Rule 2080 (Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System), which was developed in close consultation with representatives of NASAA and state regulators, requires a broker-dealer firm or broker seeking expungement to obtain an order of a court of competent jurisdiction directing such expungement or confirming an award containing expungement relief. FINRA will

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6 Formerly registered brokers, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or may seek to attain other positions of trust with potential investors. BrokerCheck provides information on more than 16,800 formerly registered broker-dealer firms and 567,000 formerly registered brokers. Broker records are available in BrokerCheck for 10 years after a broker leaves the industry, and brokers who are the subject of disciplinary actions and certain other events remain on BrokerCheck permanently.

expunge customer dispute information only after the court orders it to execute the expungement.[7]

B. Current Fee Structure in FINRA Arbitration

Under the Codes, if a customer files a claim in arbitration against an associated person and a firm, the customer is assessed a filing fee based on the claim amount.[8] The firm is assessed a member surcharge and a process fee based on the claim amount.[9] The

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7 FINRA Rule 2080 also requires that firms and brokers seeking a court order or confirmation of the arbitration award containing expungement relief name FINRA as a party, and FINRA will challenge the request in court in appropriate circumstances. FINRA may, however, waive the requirement to name it as a party if it determines that the award containing expungement relief is based on affirmative judicial or arbitral findings that: (1) the claim, allegation or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (3) the claim, allegation, or information is false. In addition, FINRA has sole discretion "under extraordinary circumstances" to waive the requirement if the request for expungement relief and accompanying award are meritorious and expungement would not have a material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements. See FINRA Rule 2080.

8 Customers, associated persons, and other non-members who file a claim, counterclaim, cross claim or third party claim must pay a filing fee. See FINRA Rule 12900(a)(1); see also FINRA Rule 13900(a)(1).

9 A member surcharge is assessed against a member if, for example, the member files an arbitration claim, is named as a respondent in a claim, or employed, at the time the dispute arose, an associated person who is named as a respondent; the amount of the surcharge is based on the amount of the claim. See FINRA Rules 12901(a)(1)(B) and 12901(a)(1)(C) and FINRA Rules 13901(a)(2) and 13901(a)(3).

Further, each member that is a party to an arbitration claim in which more than $25,000 is in dispute, or that is non-monetary or not specified, is required to pay a process fee based on the amount or nature of the claim. If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose is charged the process fee. See FINRA Rules 12903(a) and (b) and FINRA Rules 13903(a) and (b).

member is assessed only one surcharge and one process fee per arbitration.[10] When the associated person answers the claim,[11] the associated person is not assessed a fee if he or she does not add a claim to the answer.[12]

If the parties do not settle the arbitration, the panel will hold at least one hearing to decide the customer arbitration and, at the conclusion of the hearing(s), issue an award. In the award, the panel will allocate the fees incurred by the parties during the arbitration, including each party's portion of the hearing session fees,[13] which are also based on the amount of the customer's claim.[14] If the parties settle, the panel will not issue an award.

(i) Current Fee Structure for Expungement Requests Made during a Customer Arbitration

Currently, even if the associated person's answer to a customer's claim includes a request for expungement, the associated person is not assessed a filing fee. The member, having been assessed the surcharge and process fee for the customer arbitration, will not

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10 Under the Codes, no member is assessed more than a single surcharge or process fee in any arbitration. See FINRA Rules 12901(a)(4) and 12903(b) and FINRA Rules 13901(d) and 13903(b).

11 The respondent must answer the statement of claim within 45 days and may include other claims and remedies requested. See FINRA Rules 12303(a) and (b) and FINRA Rules 13303(a) and (b).

12 For example, an associated person is permitted to file a claim against the claimant requesting relief. Such counterclaim would require the associated person to pay a filing fee. See FINRA Rule 12303(d); see also FINRA Rule 13303(d).

13 Parties are charged hearing session fees for each hearing session, based on the customer's claim amount. In the award, the panel determines the amount of each hearing session fee that each party is required to pay. See FINRA Rules 12902 and 13902.

14 FINRA makes all arbitration awards publicly available. See https://www.finra.org/arbitration-mediation/arbitration-awards.

incur additional charges because of the expungement request. If the customer's claim closes by award after a hearing,[15] the panel will decide the customer's claim and the expungement request (assuming the associated person pursues the request during the arbitration), and allocate the hearing session fees among the parties.

If the customer arbitration does not close by award after a hearing (e.g., settles) and the associated person or requesting party, if it is an on-behalf-of request, continues to pursue the expungement request, the panel from the customer arbitration will hold a separate expungement-only hearing to decide the expungement request.[16] The hearing session fee for the expungement-only hearing will be based on the amount of the customer's claim. Under the Codes, fees for hearing sessions held solely to decide an expungement request must be charged to the party or parties requesting expungement.[17]

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15 The term "hearing" means the hearing on the merits of an arbitration under Rule 12600. See FINRA Rule 12100(o).

16 In 2009, the SEC approved amendments to Forms U4 and U5 to require, among other things, the reporting of allegations of sales practice violations made against unnamed persons. See Securities Exchange Act Release No. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) (Order Approving SR-FINRA-2009-008). Specifically, Forms U4 and U5 were amended to add questions to elicit whether the applicant or registered person, though not named as a respondent or defendant in a customer-initiated arbitration, was either mentioned in or could be reasonably identified from the body of the arbitration claim as a registered person who was involved in one or more of the alleged sales practice violations. A party (typically, the firm) named in a customer arbitration may request expungement on-behalf-of an associated person who is a subject of, but not named in, the arbitration. Such on-behalf-of requests occur in customer-initiated arbitrations only.

17 See FINRA Rules 12805(d) and 13805(d).

(ii) Current Fee Structure for a Straight-In Request

An associated person may request expungement by filing a straight-in request rather than requesting expungement during a customer arbitration. The straight-in request may be filed against a former or current firm or the customer.[18] A claim that does not request a dollar amount is considered a non-monetary or not specified claim ("non-monetary claim") under the Codes. An expungement request is a non-monetary claim; thus, under the Codes, the associated person must pay a $1,575 filing fee, and the member named as a respondent or that employed the associated person at the time the dispute arose must pay a $3,750 process fee.[19] A member named as a respondent or that employed the associated person at the time the dispute arose would also be assessed a surcharge of $1,900.[20] These claims are decided by a three-person panel, unless the parties agree in writing to one arbitrator.[21] Further, the per-hearing session fee for a non-monetary claim is $1,125.

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18 FINRA notes, however, that straight-in requests filed against the customer are rare.

19 See supra note 9. Some associated persons have independent contractor, rather than employment, relationships with their firms. In these circumstances, FINRA assesses applicable member surcharge or process fees against the firm at which the associated person was associated at the time the dispute arose.

20 See supra note 9; see also supra note 10.

21 See FINRA Rules 12401(c) and 13401(c).

(iii) Concerns with Avoidance of the Current Fee Structure for Expungement Requests

As discussed above, an expungement request is a non-monetary claim and parties requesting expungement should pay the fees associated with such requests under the Codes. FINRA is concerned about practices to avoid fees applicable to expungement requests, particularly straight-in requests. For example, FINRA is aware that associated persons who file a straight-in request often add a small monetary claim (typically, one dollar) to the expungement request to reduce the fees assessed against the associated person and qualify for an arbitration heard by a single arbitrator.[22] Further, the small damages claim reduces the member fees that the forum assesses firms when an arbitration claim is filed. Thus, adding a claim for one dollar in a straight-in request against a member firm reduces the fees assessed to the associated person requesting expungement and member firm from $9,475 to $300.[23] Often, the associated person will subsequently drop the claim for one dollar.

Adding a small damages claim also changes the panel composition such that the straight-in request is heard by a single arbitrator rather than a three-person panel.[24]

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22 Whether the claimant specifies damages, and the amount specified, determines the fees assessed in arbitration cases and whether a single arbitrator or a three-person panel will decide the case. See FINRA Rules 12401 and 13401. If the amount of the claim is $50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800. If the amount of the claim is more than $50,000, but less than $100,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless the parties agree in writing to three arbitrators. If the amount of a claim is more than $100,000, exclusive of interest and expenses, or is non-monetary, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

FINRA believes that most expungement requests should be decided by a three-person panel. Expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions and request evidence would help ensure that a complete factual record is developed to support the arbitrators' decision at such expungement hearings.

To help ensure that parties requesting expungement pay the fees intended for such requests under the Codes, that the fees charged when expungement is requested are more consistent, and that more expungement requests are heard by a three-person panel, FINRA is proposing to amend the Codes to apply a minimum filing fee for all expungement requests, irrespective of whether the request is made as part of the customer arbitration or the associated person files a straight-in request, or the requesting party adds a small damages claim. The proposed rule change would also apply a minimum process fee and member surcharge to straight-in requests, as well as a minimum hearing session

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[23] If an associated person files a straight-in request against a member firm, does not add a monetary claim, and assuming one prehearing conference and one hearing session on the merits, the associated person is assessed a filing fee of $1,575 and a hearing session fee of $2,250 ($1,125 for the prehearing conference and $1,125 for the hearing session on the merits). In addition, the respondent member firm is assessed a member surcharge of $1,900 and a process fee of $3,750. If the associated person adds a one dollar claim to the request, assuming one prehearing conference and one hearing session on the merits, the associated person is assessed a filing fee of $50 and a hearing session fee of $100 ($50 for the prehearing conference and $50 for the hearing session on the merits). The member firm is also assessed a member surcharge of $150 but no process fee. See also infra Item 4 (discussing the economic impacts of the proposed rule change).

[24] See supra note 22.

fee to expungement-only hearings held after a customer arbitration[25] or in connection with a straight-in request.[26]

II. Proposed Amendments

A. Proposed Filing Fee

Under the proposed rule change, an associated person, or requesting party if it is an on-behalf-of request,[27] would be required to pay the filing fee for a non-monetary claim for an expungement request made during a customer arbitration[28] or filed as a straight-in request.[29] If the associated person or requesting party adds a monetary claim

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25 For example, under the current expungement process, if the customer arbitration settles, but an associated person seeks to pursue a request for expungement made during the customer arbitration, the panel from the customer arbitration will hold a separate expungement-only hearing to decide the expungement request and issue an award setting forth its decision on the expungement request. Under the proposed rule change, the associated person requesting expungement would be required to pay the minimum hearing session fee for this separate expungement-only hearing.

26 The proposed rule change would apply to all members, including members that are funding portals or have elected to be treated as capital acquisition brokers ("CABs"), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference.

27 See supra note 16.

28 Under the proposed rule change, an associated person who requests expungement of customer dispute information during an industry arbitration would also be required to pay the filing fee for a non-monetary claim. However, these requests are rare.

29 If the requesting party chooses to seek expungement in the customer arbitration, but later determines not to pursue the request and then files a straight-in request for expungement of the same customer dispute information, the requesting party would be required to pay the filing fee applicable to the straight-in request, notwithstanding previous payment of the filing fee applicable to the expungement request during the customer arbitration.

to the expungement request, the filing fee would be the fee for a non-monetary claim or the applicable filing fee based on the claim amount, whichever is greater.[30]

As discussed above, under the Codes, an expungement request that does not include a claim for damages is a non-monetary claim that is currently assessed a $1,575 filing fee and triggers a three-person panel. FINRA believes that all parties requesting expungement should pay the same minimum filing fee, and that parties should not be able to avoid the fee (or a three-person panel) simply by adding a small claim amount.

Accordingly, FINRA is proposing that the filing fee for non-monetary claims would be the minimum filing fee for all expungement requests, and that the minimum filing fee would apply to expungement requests in customer arbitrations as well as to straight-in requests.[31] A request for expungement is a claim that a party is requesting the arbitrators to decide. Under the Codes, if a party files a claim or adds a claim in an answer to a statement of claim, the respondent must pay all required filing fees.[32] As an expungement request is also a claim, the party requesting this relief should also pay a filing fee.

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30 See proposed Rules 12900(a)(3) and 13900(a)(3). An associated person could add a monetary or non-monetary claim to the expungement request. FINRA notes, however, that it is rare that significant dollar claims accompany expungement requests.

31 Under the Codes, the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship. See FINRA Rules 12900(a)(1) and 13900(a)(1). The proposed rule change would make clear this provision applies to expungement requests. Information on how to request an arbitration fee waiver is available at https://www.finra.org/arbitration-mediation/arbitration-fee-waivers. In addition, in the award, the panel may order a party to reimburse another party for all or part of any filing fee paid. See FINRA Rules 12900(d) and 13900(d).

32 See FINRA Rules 12303(d) and 13303(d).

The proposed minimum filing fee is also commensurate with the additional steps that arbitrators should take when deciding an expungement request during a customer arbitration or in connection with a straight-in request. Regardless of whether expungement is decided during a customer arbitration or separately, FINRA Rules 12805 and 13805 require the panel to hold one or more recorded hearing sessions regarding the appropriateness of expungement, to review settlement documents and consider the amount of payments made to any party and any other terms and conditions of the settlement, and to make a determination as to whether any of the Rule 2080 grounds for expungement have been established. In addition, as described in the Guidance, arbitrators have a unique, distinct role when deciding whether to recommend a request to expunge customer dispute information from CRD. Accordingly, the Guidance directs arbitrators to ensure that they have all of the information necessary to make an informed and appropriate recommendation on expungement. The Guidance also directs arbitrators to request any documentary or other evidence they believe is relevant to the expungement request.

B. Proposed Member Surcharge for Straight-in Requests

The proposed rule change would apply a minimum member surcharge when an associated person files a straight-in request against either a customer or a member firm.[33] Under the proposed rule change, if an associated person files a straight-in request against a member firm, that firm would be assessed the member surcharge for a non-monetary

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33 See supra note 9 (discussing the member surcharge under the Codes today).

claim under the Industry Code (currently $1,900).[34] The proposed member surcharge is consistent with what a member firm should pay today for a straight-in request without an additional small monetary claim filed against a member firm.[35]

The proposed rule change would also provide that, for straight-in requests filed against a customer, each member that employed the associated person at the time the customer dispute arose would be assessed the member surcharge for a non-monetary claim under the Customer Code (currently $1,900).[36]

If the associated person adds a separate claim for damages to the straight-in request against the customer or member firm, the member surcharge would be the non-monetary member surcharge or the applicable surcharge under the Codes, whichever is greater. Under the proposal, the surcharge would be due when the Director serves the Claim Notification Letter or the initial statement of claim under the Codes.[37]

C. Proposed Hearing Session Fees

The proposed rule change would apply the hearing session fee for a non-monetary claim heard by three arbitrators to each hearing session in which the sole topic is the

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34 See proposed Rule 13901(c). If the associated person files the straight-in request against another associated person, each firm that employed the respondent associated person at the time the dispute arose would be assessed the member surcharge for a non-monetary claim under the Industry Code. See FINRA Rule 13901(a)(3) and proposed Rule 13901(c).

35 Consistent with how the member surcharge is assessed today, under the proposal, FINRA would not assess a member more than a single surcharge in any arbitration. See also supra note 10.

36 See proposed Rule 12901(a)(3).

37 See proposed Rules 12901(a)(5) and 13901(e).

determination of a request for expungement relief.[38] Thus, the proposed hearing session fee would apply when a customer arbitration does not close by award after a hearing (e.g., settles) and there is a separate hearing session held after the customer arbitration to decide an expungement request that was made during the customer arbitration, and to straight-in requests.[39] If the requesting party adds a monetary claim to the expungement request, the hearing session fee would be the greater of the fee for a non-monetary claim with three arbitrators or the applicable hearing session fee under the Codes based on the claim amount.[40] In addition, consistent with the Codes today, the hearing session fee would be assessed against the party requesting expungement.[41]

D. Proposed Process Fees for Straight-in Requests

The proposed rule change would apply a minimum process fee when an associated person files a straight-in request against either a customer or member firm. Under the proposed rule change, if an associated person files a straight-in request against

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38 FINRA notes that the proposed $1,125 hearing session fee for expungement hearings would apply if a party requests expungement as part of a Simplified Arbitration and no hearings are held to decide the underlying customer claim, regardless of whether a single arbitrator or a panel hears the Simplified Arbitration.

39 See proposed Rules 12900(a)(3) and 13900(a)(3); see also supra note 25. If an associated person requests expungement during a customer arbitration, the customer arbitration closes by award after a hearing, and the arbitrator or panel decides the expungement request during the customer arbitration, the hearing session fee would be based on the amount of the customer's claim.

40 See proposed Rules 12902(a)(5) and 13902(a)(4).

41 See proposed Rules 12902(a)(5) and 13902(a)(4).

a member firm, that firm would be assessed the process fee for a non-monetary claim under the Industry Code (currently $3,750).[42]

The proposed rule change would also clarify that, for straight-in requests filed against a customer, the member that employed the associated person at the time the customer dispute arose would be assessed the process fee for a non-monetary claim under the Customer Code (currently $3,750).[43]

If the associated person adds a separate claim for damages to the straight-in request against the customer or member firm, the process fee would be the non-monetary process fee or the applicable process fee under the Codes, whichever is greater.[44] The proposed process fee is consistent with what member firms should pay today for straight-in requests without an additional small monetary claim filed against a customer or member firm.

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 60 days following publication of the Regulatory Notice announcing Commission approval of the proposed rule change.

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42 See proposed Rule 13903(c). If the associated person files the straight-in request against another associated person, the firm that employed the respondent associated person at the time the dispute arose would be assessed the process fee for a non-monetary claim under the Industry Code. See proposed Rules 13903(b) and 13903(c).

43 See proposed Rule 12903(c).

44 Consistent with how the process fee is assessed today, under the proposal, FINRA would not assess a member more than one process fee in any arbitration. See also supra note 10.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[45] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(5) of the Act,[46] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

The proposed rule change represents an equitable allocation of reasonable dues and fees against those who would either file or be a party to an expungement request, as is currently intended. As an expungement request is a separate relief request that an arbitrator or panel must consider and decide, the filing fees and related member and forum fees should reflect the general complexity of these requests, as well as the time and effort needed to administer, consider and decide them. In addition, the fees should apply consistently to all parties requesting expungement.

The proposed rule change will close gaps in the fee structure that have emerged in the existing expungement process, such as where parties add small dollar claims to their expungement requests to significantly lower the fees associated with expungement requests and to have expungement requests considered and decided by a single arbitrator rather than a three-person panel. The proposed rule change will help ensure that parties

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45 15 U.S.C. 78o-3(b)(6).

46 15 U.S.C. 78o-3(b)(5).

requesting expungement pay the fees intended for such requests under the Codes and that the fees charged when expungement is requested are more consistent, irrespective of whether the request is made as a straight-in request or during an arbitration, or whether damages are included in the request. The proposed rule change should also result in more expungement requests being heard by a three-person panel. A three-person panel will help ensure a complete factual record to support the arbitrators' decision, particularly in straight-in requests that often do not include customer participation and can be complex to resolve.

**4. Self-Regulatory Organization's Statement on Burden on Competition**

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.

(a) Regulatory Need

FINRA is aware that parties requesting expungement are not always paying the fees intended for such requests under the Codes, particularly for straight-in requests. In addition, the current fee schedules under the Codes do not ensure that costs to the forum for administering expungement requests are being allocated to the party or parties

requesting expungement and, as applicable, the member firms that employ them. The proposed rule change would help ensure that the fees for expungement requests are assessed, and that the costs borne by the forum to administer expungement requests are allocated, as intended, to those requesting expungement under the Codes.

(b) Economic Baseline

The economic baseline for the proposed rule change includes the provisions under the Codes that address the fees associated with expungement requests in FINRA arbitration. In general, the proposed rule change is expected to affect parties to an expungement request including associated persons and member firms. The proposed rule change may also affect other stakeholders of the forum, and users of customer dispute information contained in the CRD system and displayed through BrokerCheck.[47]

The customer dispute information contained in the CRD system is submitted by registered securities firms and regulatory authorities in response to questions on the uniform registration forms.[48] The information can be valuable to current and prospective customers to learn about the conduct of associated persons.[49] Current and prospective

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47 Other stakeholders of the forum include FINRA, others member firms, and other forum participants. Users of customer dispute information include investors; member firms and other companies in the financial services industry; individuals registered as brokers or seeking employment in the brokerage industry; and FINRA, states, and other regulators.

48 See supra note 4 and accompanying text (discussing the uniform registration forms and the information contained in the CRD system). The information includes matters, which may or may not have been previously adjudicated in FINRA arbitration or a court of competent jurisdiction.

49 Recent academic studies provide evidence that the past disciplinary and other regulatory events associated with a firm or individual can be predictive of similar future events. See Hammad Qureshi and Jonathan Sokobin, Do Investors Have Valuable Information About Brokers? FINRA Office of the Chief Economist

customers may not select or remain with an associated person or a member firm that employs an associated person with a record of customer disputes. Similarly, member firms and other companies in the financial services industry may use the information when making employment decisions.[50] In this manner, the customer dispute information contained in the CRD system (and displayed through BrokerCheck) may negatively affect the business and professional opportunities of associated persons but also provide for customer protections.

Any such negative impact on the business and professional opportunities of associated persons may be appropriate and consistent with investor protection, such as when the customer dispute information has merit. Any such negative impact may be inappropriate, however, such as when the customer dispute information is factually impossible, clearly erroneous, or false. Regardless of the merit, associated persons have incentive to remove customer dispute information from the CRD system and its public display through BrokerCheck.

An associated person or party on behalf of an associated person typically begins the process to remove customer dispute information from the CRD system by filing an expungement request in FINRA arbitration. FINRA is able to identify 5,732 expungement requests of customer dispute information filed from January 2016 through

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Working Paper, (August 2015); see also Mark Egan, Gregor Matvos, and Amit Seru, The Market for Financial Adviser Misconduct, Journal of Political Economy 127, no. 1 (February 2019): 233-295.

50 Customer dispute information submitted to the CRD system may have other uses. For example, associated persons may use information from the CRD system when deciding with whom to do business. FINRA, states, and other regulators also use the information to regulate brokers.

June 2019. More than one expungement request can be filed in a single arbitration, and multiple expungement requests may relate to the same customer complaint if the complaint relates to more than one associated person.

Under the Codes, a claim for expungement is considered a non-monetary claim, generally requiring fees in the middle of the range of potential fees that are assessed based on claim amount, and triggering a three-person panel. As described in more detail above and depending on the method that a party uses to request expungement, however, associated persons and member firms can be assessed fees less than what is intended for non-monetary claims.

Among the 5,732 expungement requests, 2,618 requests (46 percent) were filed during a customer or industry arbitration and 3,114 requests (54 percent) were filed as a straight-in request. The 2,618 expungement requests during a customer or industry arbitration include 2,604 requests during a customer arbitration and 14 requests during an industry arbitration; and the 3,114 straight-in requests include 3,048 requests filed solely against a member firm or against a member firm and a customer, and 66 requests filed solely against a customer. An associated person added a small monetary claim (of less than $1,000) in 2,356 of the 3,114 straight-in requests (76 percent). In general, associated persons did not add a monetary claim for the remaining straight-in requests.

In general, parties filed an increasing number of expungement requests over the sample period. For example, parties filed 1,400 requests in 2016, 1,708 requests in 2017, 1,936 requests in 2018, and 688 requests in the first half of 2019. Similarly, the proportion of straight-in requests also increased over the sample period. For example, associated persons filed 328 straight-in requests in 2016 (23 percent of 1,400), 846

requests in 2017 (50 percent of 1,708), and 1,371 requests in 2018 (71 percent of 1,936). In the first half of 2019, associated persons filed 569 straight-in requests (83 percent of 688).

The proportion of the straight-in requests where the associated person added a small monetary claim (of less than $1,000) has also increased over the sample period. For example, associated persons added a small monetary claim to 179 straight-in requests in 2016 (55 percent of 328), 569 requests in 2017 (67 percent of 846), 1,143 requests in 2018 (83 percent of 1,371), and 465 requests in the first half of 2019 (82 percent of 569). FINRA expects that absent this proposed rule change, associated persons who file straight-in requests will continue to add a small monetary claim to avoid the fees typically assessed for non-monetary claims.

(c) Economic Impact

The proposed rule change would apply the fees associated with non-monetary claims as minimum fees to expungement requests in FINRA arbitration. The fees associated with non-monetary claims are not new and would not change under the proposal. The fees would apply when parties file an expungement request during a customer arbitration, when parties file a rare expungement request during an industry arbitration, and when associated persons file a straight-in request.

Under the proposed rule change, a party that requests expungement during a customer or industry arbitration would be assessed a minimum filing fee of $1,575. Currently, parties requesting expungement during a customer or industry arbitration are not assessed a filing fee in connection with the expungement request.

In addition, under the proposed rule change, if the arbitrator or panel holds a separate expungement-only hearing to decide the expungement request after the customer's arbitration, then the party that requested expungement would be assessed a minimum hearing session fee of $1,125.[51] The proposed minimum hearing session fee may be less than, equal to, or greater than the fees currently assessed for expungement-only hearings held after an arbitration. These current fees depend on the claim amount in the customer arbitration.[52]

If an associated person files a straight-in request against a member firm, assuming one prehearing conference and one hearing session on the merits, then under the proposed rule change, the associated person and a member firm would be assessed minimum fees totaling $9,475. The associated person would be assessed a minimum filing fee of $1,575 and a minimum hearing session fee of $2,250 ($1,125 for the prehearing conference and $1,125 for the hearing session on the merits). In addition, the member

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51 See supra note 25.

52 From January 2016 through June 2019, 314 expungement-only hearings were held after an arbitration. In these instances, the assessed hearing session fee under the proposed rule change for an expungement-only hearing would have been less than (86 cases or 28 percent), equal to (155 cases or 49 percent), or greater than (73 cases or 23 percent) the fee assessed currently for an expungement-only hearing held after an arbitration, depending on the size of the initial claim. Assuming one expungement-only hearing session to consider and decide the expungement request, on average and under the proposed rule change, the party filing an expungement request would be assessed an additional hearing session fee of $54 per arbitration. One expungement-only hearing session is consistent with the median number of hearing sessions (one) associated with the straight-in requests that were filed and closed during the sample period.

firm would be assessed a minimum surcharge of $1,900 and a minimum process fee of $3,750.[53]

In general, these fees are the same as those that are assessed today if the associated person does not add a small monetary claim to the straight-in request against a member firm. Associated persons and member firms, however, may incur significantly lower fees than what is intended for a straight-in request if the associated person adds a small monetary claim (of less than $1,000) to the request. Assuming one prehearing conference and one hearing session on the merits, an associated person and the member firm would currently be assessed fees totaling $300.[54]

The fees associated with a small claim procedure are intended to ensure that the forum is economically feasible for claimants with small claims,[55] and, in general, do not

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53 The assumption of one prehearing conference and one hearing session on the merits is consistent with the median number of prehearing conferences (one) and hearing sessions on the merits (one) associated with straight-in requests that were filed and closed during the sample period. Also, the assumption that one member firm would be assessed a minimum surcharge and process fee is consistent with the median number of member firms (one) that were assessed these fees in a straight-in request that was filed and closed during the sample period.

54 For these requests, the associated person is assessed a filing fee of $50 and a hearing session fee of $100 ($50 for the prehearing conference and $50 for the hearing session on the merits). The member firm is also assessed a member surcharge fee of $150 but no process fee. If instead the associated person files an expungement request solely against the customer, then the parties to the request are assessed fees totaling $150. The associated person is still assessed a filing fee of $50 and a hearing session fee of $100, but the member firm is not assessed a member surcharge or a process fee.

55 Under the Codes, arbitrations involving $50,000 or less, exclusive of interest and expenses, will consist of one arbitrator and the claim is subject to the simplified arbitration procedures. Under these procedures, no hearing is held unless the customer or claimant requests a hearing, and the arbitrator renders an award based on the pleadings and other materials submitted by the parties. See FINRA Rules 12800 and 13800.

cover the specific costs to administer an expungement request, which requires a hearing session and typically involves a prehearing conference. For example, the costs to administer a straight-in request can include chairperson honoraria, travel expenses, conference room rental, and other costs to administer the forum. For the typical straight-in request with one prehearing conference and one hearing session on the merits to consider and decide the request, the chairperson honoraria alone totals $725;[56] yet as discussed above, if the associated person adds a small monetary claim (of less than $1,000) to a straight-in request filed against a member firm, then the parties to the request are assessed fees totaling $300.

The minimum fees that would be assessed under the proposed rule change reflect the application of the fee schedule as intended for a non-monetary claim. The proposed rule change would help ensure that costs to the forum for administering expungement requests are allocated as intended to the party or parties requesting expungement and, as applicable, the member firms that employ them. The costs to the forum include the specific costs to administer the claim as well as the overall attendant costs to administer expungement requests in the forum. Associated persons and member firms that are not assessed the fees for a non-monetary claim experience a benefit in the form of an economic transfer; the costs that were intended to be allocated but not assessed to the party or parties requesting expungement are instead borne by FINRA, other member firms, and other forum participants including other member firms, associated persons, and customers.

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[56] The chairperson honoraria includes $300 for the prehearing conference and $425 for the hearing session on the merits.

In the aggregate, if parties requesting expungement had been assessed the fees applicable to non-monetary claims during the sample period, then a reasonable estimate for the additional fees that would have been assessed is $9.7 million. The $9.7 million includes $2.4 million for the expungement requests during a customer or industry arbitration,[57] and $7.3 million for the straight-in requests where an associated person added a small monetary claim (of less than $1,000).[58] This amount reflects the potential economic transfer over the sample period. The extent of the transfer increased over the sample period with the proportion of straight-in requests where the associated person added a small claim amount.

The proposed rule change may affect some parties more so than others. Some parties, including associated persons and parties who request expungement relief on

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57 From January 2016 through June 2019, there were 1,508 arbitrations that closed during which an expungement request was filed (that was not a straight-in request). If the parties requesting expungement had been assessed the fees applicable to non-monetary claims, the parties requesting expungement would have been assessed additional filing fees totaling $2.4 million (minimum filing fee of $1,575 for each of the 1,508 cases). Although the parties to these expungement requests may also be assessed additional hearing session fees, the additional fees associated with hearing sessions are estimated to be marginal (see supra note 52).

58 From January 2016 through June 2019, there were 1,064 arbitrations that closed in which a straight-in expungement request was filed. Associated persons added a small monetary claim (of less than $1,000) in 797 of the 1,064 cases. Among the 797 arbitrations, 783 were filed against a member firm or a member firm and a customer, and 14 were filed solely against a customer. If parties requesting expungement had been assessed the fees applicable to non-monetary claims, and assuming one prehearing conference and one hearing session on the merits, then the parties to the straight-in requests filed against a member firm (or filed against that member firm and a customer) would have been assessed additional fees totaling $7.2 million ($9,475 less $300 for each of the 783 cases), and the parties to the straight-in requests filed against a customer would have been assessed additional fees totaling $0.1 million ($9,475 less $150 for each of the 14 cases). See supra notes 53 and 54 and accompanying text (discussing the fees that would be assessed under the proposed rule change and that are currently assessed).

behalf of an unnamed person, may be more sensitive to the assessed fees under the proposed rule change or have monetary constraints that may inhibit them from filing an expungement request. They may determine that the cost of seeking expungement is higher than the anticipated benefit and, therefore, not seek expungement relief.[59] Associated persons and parties who request expungement relief on behalf of an unnamed person may also be more sensitive to the fees assessed under the proposed rule change if, given the facts and circumstances of the customer dispute, an arbitrator or panel is less likely to recommend expungement.[60]

Associated persons who would have otherwise expunged customer dispute information that may have or not have merit may experience a loss of business and professional opportunities as a result of the information remaining on the CRD system and its display through BrokerCheck. The loss of business and professional opportunities by one associated person, however, may be the gain of another. Associated persons who may benefit in this regard include those who are less price sensitive and continue to seek

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59 Under the Codes, the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship. See supra note 31.

60 A firm or associated person can also initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. FINRA will challenge these requests in court in appropriate circumstances. From January 2016 through June 2019, the expungement of 123 customer dispute disclosures were sought directly in court. The assessed fees may incent firms or associated persons to initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. The number of firms or associated persons who would instead initiate an expungement proceeding directly in a court of competent jurisdiction is dependent not only on the fees assessed under the proposed rule change, but also the legal fees and other costs a firm or associated person would expect to incur in the different forums to initiate an expungement proceeding. This information is generally not available, and accordingly the potential effect of the proposed rule change on direct-to-court expungement requests is uncertain.

expungement of customer dispute information, and associated persons who do not have similar disclosures.

The proposed rule change may also affect some member firms more so than others. In particular, the fees assessed under the proposed rule change may be more material for small firms or firms with fewer financial resources than for large firms or firms with additional financial resources.[61] Although the fees may be more material to some firms, the fees are the same as those required for a non-monetary claim and do not depend on the size or financial resources of the firm.

Although the proposed rule change may affect some associated persons and member firms more so than others, the proposed rule change will not result in any burden on competition that is not necessary or appropriate. As discussed above, associated persons and member firms that are assessed significantly lower fees for an expungement request than what is intended under the Codes by adding a small damages claim to the expungement request experience a benefit in the form of an economic transfer. Any burden on competition as a result of this proposed rule change, therefore, relates to the removal of this unintended benefit.

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[61] The definition of firm size is based on Article 1 of the FINRA By-Laws. A firm is defined as "small" if it has at least one and no more than 150 registered persons, "mid-size" if it has at least 151 and no more than 499 registered persons, and "large" if it has 500 or more registered persons. In the cases associated with an expungement request filed and closed from January 2016 through June 2019, including expungement requests during a customer or industry arbitration and straight-in requests, 78 percent of the surcharge and process fees were incurred by large firms, 11 percent were incurred by mid-size firms, and 11 percent were incurred by small firms. The large firms incurring member surcharge or process fees had a median excess net capital of $21.7 million in the year prior to the filing of a straight-in request, the mid-size firms had a median excess net capital of $1.6 million, and the small firms had a median excess net capital of more than $334,000.

Finally, the proposed rule change may have other, marginal, economic effects. For example, the proposed minimum filing fee would trigger a three-person panel for all straight-in requests. Associated persons would lose the ability to unilaterally decide the number of arbitrators who would consider and decide the request and, therefore, may increase the number of three-person panels. The impact of this change may be small because parties may still jointly agree to a single arbitrator.

The proposed rule change may also affect the customer dispute disclosures on the CRD system and their public display through BrokerCheck. The disclosures that would have otherwise been expunged would remain, and, depending on the merit of these disclosures, may affect the value of the information describing the conduct of associated persons. The merit of these disclosures is dependent on many factors which are difficult to predict. These factors include the incentive of parties to file an expungement request under the proposed rule change and the merit of the customer disputes that would have otherwise been sought expunged. The effect on the value of the customer dispute information is therefore uncertain.

(d) Alternatives Considered

An alternative to the proposed rule change includes the minimum filing fee of $1,425 for all expungement requests that was proposed in Regulatory Notice 17-42 (December 2017) (discussed in more detail below). Although parties filing an expungement request would pay an additional $100 to file an expungement request under the proposed rule change, the $1,575 filing fee is the filing fee applicable to non-monetary claims. As discussed above, an expungement request is a non-monetary claim under the Codes.

**5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others**

FINRA published Regulatory Notice 17-42 (December 2017) ("Notice") to seek comment on proposed rule changes related to expungement, including the minimum fees discussed in this filing.[62] FINRA received 28 comment letters in response to the Notice that addressed the filing fee, member surcharge, or process fee. A copy of the Notice is attached as Exhibit 2a. A list of the comment letters received in response to the Notice that are applicable to this filing are attached as Exhibit 2b.[63] Copies of the comment letters received in response to the Notice that are applicable to this filing are attached as Exhibit 2c.

In the Notice, FINRA proposed a minimum filing fee of $1,425 for all expungement requests. In addition, FINRA proposed, consistent with the existing provisions under the Codes, to assess a member surcharge and process fee against each member that is named a party or respondent, or that employed the associated person at the time of the events giving rise to the dispute, as applicable. Some commenters supported the proposal and others raised concerns with the proposed fees or with the costs of expungement in general. A summary of the comments and FINRA's responses are discussed below.

Filing Fee

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62 This filing addresses the comments to the Notice that: (i) relate to the proposed fees and (ii) do not address the other proposed changes in the Notice to the expungement framework that are not part of this filing, but are being developed separately from this filing. See supra note 2.

63 All references to commenters are to the comment letters as listed in Exhibit 2b.

NASAA and Public Citizen supported the $1,425 minimum filing fee proposed in the Notice. NASAA stated that "the increased fees would at least in part" offset the significant costs that FINRA and the states incur related to expungement requests, which include both the costs to review and to process expungement requests. Public Citizen stated that the minimum filing fee would be a "limit[] to potential overuse of expungement proceedings." White expressed some support for the proposed minimum filing fee, stating that it may "benefit staff and limit" the "occasional" request for expungement "made years after the underlying event."

Other commenters, including associated persons, member firms, and their industry and legal representatives, opposed the proposed minimum filing fee. Some commenters viewed the proposed minimum filing fee as an additional fee that would be burdensome and discourage associated persons from pursing meritorious expungement claims.[64] For example, SIFMA stated that the filing fee would be an additional fee that the individual would have to pay in addition to the fees in the underlying arbitration. SIFMA also stated that the filing fee could (along with the other fees proposed in the Notice)[65] "have an unfortunate impact of creating a tiered system where only registered representatives and firms that can absorb these additional costs will be able to pursue expungement, regardless of merit." JonesBell and Behr contended that since "presentation of an expungement request by a registered person who is a party to the

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64 See Behr, JonesBell, and SIFMA; see also infra note 66.

65 Some commenters misconstrued the proposed fees discussed in the Notice as allowing the same member firm to be charged two separate member surcharge and process fees in the same arbitration. See infra note 79 and accompanying text.

underlying customer case does not require any additional administrative time or effort, either by FINRA, or by the arbitrators," a purpose of the fee was to "financially punish the associated person for making an expungement request, and to generate additional (but unwarranted) revenue for FINRA." Liebrader stated that the approximately $1,500 filing fee "just to file their claim" was "too high" for both associated persons seeking expungement and claimants in general in comparison to court filing fees, which "are in the $200-$300 range." Several other commenters objected to the proposed minimum filing fee as an increase in the amount of the filing fee[66] or objected to the costs of requesting expungement in general.[67] Some commenters objected to the current costs associated with requesting expungement, which they viewed as too high.[68]

In response to these comments, FINRA declines to reduce or eliminate the proposed minimum filing fee. The $1,425 filing fee proposed in the Notice corresponds

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66 See Baritz, Higgenbotham, James, Janney, Keesal, Saretsky, Speicher, Walter, and Weinerf. One commenter, SEC Investor Advocate, stated that potentially increasing the fees that brokers or firms must pay when requesting expungement, along with other enhancements to the expungement process proposed in the Notice but not addressed in this filing, may cause brokers to seek to avoid the Rule 2080 process entirely, and instead request expungement of their records directly from a court. FINRA notes that a broker can seek expungement by going through the FINRA arbitration process or directly to court (without first going through arbitration). See FINRA Rule 2080; see also supra note 7 (describing the requirement to name FINRA as a party when brokers seek expungement in court).

67 See Deal, Harris, Isola, Rieger, and Smart.

68 See AdvisorLaw, Commonwealth, Di Silvio, Mahoney, and Scrydloff. AdvisorLaw also provided a hyperlink to an online petition that requested signatures to "support a balanced, cost and time effective, expungement process" and that collected associated comments.

to the minimum claim amount tier for a three-person panel to decide an arbitration.[69] As noted above, FINRA believes that most expungement requests should be decided by a three-person panel.[70] In addition, an expungement request without a damages claim is a non-monetary claim under the Codes, which requires a three-person panel and currently requires a filing fee of $1,575. Thus, under the proposed rule change, an associated person, or a requesting party if it is an on-behalf-of request, would be required to pay a $1,575 filing fee for an expungement request made during a customer arbitration or straight-in request.

Associated persons should not be able to reduce the filing fee from the $1,575 owed for a non-monetary claim to $50—and reduce the hearing session fee to $50, the member surcharge to $150 and the process fee to $0—merely by adding a small monetary claim, that the associated person often subsequently drops. Today, persons who do not add a small monetary claim to a straight-in request pay the $1,575 filing fee associated with non-monetary claims. The proposal would ensure that all associated persons who request expungement are subject to the same minimum filing fee.

In addition, as with other non-monetary claims, FINRA incurs costs to process expungement requests. Accordingly, expungement requests should be subject to the same minimum filing fee as other non-monetary claims.

FINRA also declines to revise its proposal to charge the minimum filing fee when expungement is requested, irrespective of whether the request is made in a straight-in

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69 The minimum claim amount tier for a three-person panel and a filing fee of $1,425 is $100,000.01 to $500,000.

70 See supra Item 3.(a)I.B.(iii), "Concerns with Avoidance of the Current Fee Structure for Expungement Requests."

request or in an underlying customer arbitration. FINRA notes that other claims for relief filed by associated persons during a customer arbitration (i.e., counterclaims, cross claims, and third party claims) all result in a separate filing fee, just as they would if the associated person filed the claim in a separate arbitration. FINRA acknowledges that the costs to process straight-in requests and requests made in an underlying customer arbitration may not be identical.[71] However, FINRA believes that the proposed minimum filing fee is commensurate with the additional work that arbitrators should undertake when expungement is requested.[72]

With respect to the concern that the minimum filing fee may prevent associated persons from making meritorious expungement requests, FINRA notes that the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship.[73]

A. Cost Shifting

Some commenters proposed shifting the costs of requesting expungement away from associated persons. Braschi suggested that FINRA provide a mechanism to shift the cost of expungement to customers and their attorneys, and Wellington suggested that FINRA should impose little or no cost if the associated person receives an expungement recommendation. Liebrader stated that FINRA should have its members "shoulder more

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71 See supra note 10 (describing how a second member surcharge and process fee will not be assessed in an arbitration, even if expungement is requested).

72 See supra Item 3.(a)II.A.

73 See supra note 31.

of the cost in this mandatory arbitration forum" and should "provide more relief for Claimants who for financial reasons have trouble coming up with the filing fees."

FINRA believes that the costs associated with expungement requests should generally be shared by the associated persons who are the subject of the customer complaints and arbitrations, and the firms that employ them.[74] In addition, consistent with the current fee structure under the Codes, under the proposed rule change member firms will continue to bear the larger share of the costs of expungement. As with other types of arbitration claims, member firms that are respondents or employed the associated person seeking expungement, not the associated person or customer, pay the majority of the expense of the forum through the member surcharge and process fee. In addition, as noted above, the Director may defer payment of the filing fee for claimants that demonstrate financial hardship.[75]

Member Surcharge and Process Fee

In the Notice, FINRA proposed that when expungement is requested, there would be an assessment of a member surcharge and process fee, consistent with the existing provisions of the Codes,[76] against each member that is named as a party or respondent, or that employed the associated person named as a respondent or party at the time of the

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74 Under the Codes, a panel may order in the award that a party reimburse another party for all or part of any filing fee paid. See supra note 31. In addition, in a customer arbitration, the Director will refund the member surcharge if the panel denies all of the customer's claims against the member or associated person and allocates all hearing session fees against the customer. See FINRA Rule 12901(b)(1).

75 See supra note 31.

76 See supra notes 9 and 10 and accompanying text.

events giving rise to the dispute, as applicable. Several commenters expressed concerns with this proposal.

A. Assessment Against Firm that Employed Associated Person "At the Time of the Events Giving Rise to the Dispute"

Keesal stated that the proposed assessment of a member surcharge and process fee against the member firm that employed the associated person at the time of the "events giving rise to the dispute" required "further clarification." Keesal stated that parties may contend that multiple events gave rise to a customer claim, during which the associated person may have been employed with multiple member firms.

After considering the comment, FINRA has modified the proposal to assess, consistent with the existing provisions of the Codes, member surcharge and process fees against the member firm that is a party or is named as a respondent, or "that employed the associated person at the time the customer dispute arose."[77] This is the standard that currently triggers an obligation to pay the process fee and member surcharge in FINRA arbitrations.[78]

B. When Expungement is Requested in a Customer Arbitration

SIFMA expressed concern that, when expungement is requested in a customer arbitration, the proposal would result in the assessment of a second member surcharge and process fee against a member firm "in addition to the fees charged in the underlying arbitration." Keesal similarly stated that imposing these fees during the customer arbitration was not justified because the expense of "empaneling and compensating

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77 See supra notes 34 and 42 and accompanying text.

78 See, e.g., FINRA Rules 12901(a)(1)(C) and 13903(b).

arbitrators and administering the case" should be handled as part of the customer arbitration.

FINRA notes that the proposal retains the existing requirement that firms may be assessed only one member surcharge and one process fee in a customer arbitration,[79] and that the proposal does not impact how the member surcharge and process fee are assessed today in a customer arbitration.[80] Accordingly, member firms will not be assessed these fees twice in the same customer arbitration, even if expungement is requested during the arbitration. In addition, in the proposal, FINRA has clarified that the minimum member surcharge and process fee apply only when the associated person files a straight-in request against a member firm or customer.[81]

**6. Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.[82]

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)**

Not applicable.

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79 See supra notes 35 and 44; see also proposed Rules 12901(a)(6), 12903(e), 13901(f), and 13903(e).

80 See supra note 9.

81 See proposed Rules 12901(a)(3), 12903(c), 13901(c), and 13903(c).

82 15 U.S.C 78s(b)(2).

**8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act**

Not applicable.

**10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act**

Not applicable.

**11. Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. Regulatory Notice 17-42 (December 2017).

Exhibit 2b. List of commenters in response to Regulatory Notice 17-42 that are applicable to this filing.

Exhibit 2c. Comment Letters received in response to Regulatory Notice 17-42 that are applicable to this filing.

Exhibit 5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2020-005)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend the FINRA Code of Arbitration Procedure for Customer Disputes and the FINRA Code of Arbitration Procedure for Industry Disputes to Apply Minimum Fees to Requests for Expungement of Customer Dispute Information

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on , Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes ("Industry Code") (together, "Codes") to apply minimum fees to requests for expungement of customer dispute information. The proposed rule change would amend Part IX (Fees and Awards) of the Codes to apply minimum filing fees to requests for expungement of customer dispute information, whether the request is made as part of the

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

customer arbitration or the associated person files an expungement request in a separate arbitration ("straight-in request").[3] The proposed rule change would also apply a minimum process fee and member surcharge to straight-in requests, as well as a minimum hearing session fee to expungement-only hearings.

The text of the proposed rule change is available on FINRA's website at http://www.finra.org, at the principal office of FINRA and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

##### (a) Background and Discussion

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[3] FINRA is separately developing other changes to the current expungement framework, including codifying as rules the Notice to Arbitrators and Parties on Expanded Expungement Guidance ("Guidance"), see https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance, and establishing a roster of arbitrators with additional training and experience from which a panel would be selected to decide straight-in requests and expungement requests in settled customer arbitrations. See Regulatory Notice 17-42 (December 2017).

## I. Customer Dispute Information in the Central Registration Depository

Information regarding customer disputes involving associated persons is contained in the Central Registration Depository ("CRD®") system, the central licensing and registration system used by the U.S. securities industry and its regulators.[4] FINRA operates the CRD system pursuant to policies developed jointly with NASAA. FINRA works with the SEC, NASAA, and other members of the regulatory community to ensure that information submitted and maintained in the CRD system is accurate and complete.

In general, the information in the CRD system is submitted by registered securities firms, brokers and regulatory authorities in response to questions on the uniform registration forms.[5] Among other things, these forms collect administrative, regulatory, criminal history, and disciplinary information about brokers, including customer complaints, arbitration claims and court filings made by customers (i.e., "customer dispute information"). FINRA, state and other regulators use this information in connection with their licensing and regulatory activities, and member firms use this information to help them make informed employment decisions.

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4 The concept for CRD was developed by FINRA jointly with the North American Securities Administrators Association ("NASAA"), and NASAA and state regulators play a critical role in its ongoing development and implementation.

5 The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), Form BR (Uniform Branch Office Registration Form), Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form).

Pursuant to rules approved by the SEC, FINRA makes specified current CRD information publicly available through BrokerCheck®.[6] BrokerCheck is part of FINRA's ongoing effort to help investors make informed choices about the brokers and broker-dealer firms with which they may conduct business. BrokerCheck maintains information on the approximately 3,600 registered broker-dealer firms and 628,000 registered brokers. BrokerCheck also provides the public with access to information about formerly registered broker-dealer firms and brokers.[7] In 2019 alone, BrokerCheck helped users conduct more than 40 million searches of firms and brokers.

The regulatory framework governing the CRD system and BrokerCheck has long contemplated the possibility of expunging certain customer dispute information from these systems in limited circumstances, such as where the allegations made about the broker are factually impossible or clearly erroneous. The expungement framework seeks to balance the important benefits of disclosing information about customer disputes to regulators and investors with the goal of protecting brokers from the publication of false allegations against them.

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6 There is a limited amount of information in the CRD system that FINRA does not display in BrokerCheck, including personal or confidential information. A detailed description of the information made available through BrokerCheck is available at http://www.finra.org/investors/about-brokercheck.

7 Formerly registered brokers, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or may seek to attain other positions of trust with potential investors. BrokerCheck provides information on more than 16,800 formerly registered broker-dealer firms and 567,000 formerly registered brokers. Broker records are available in BrokerCheck for 10 years after a broker leaves the industry, and brokers who are the subject of disciplinary actions and certain other events remain on BrokerCheck permanently.

A broker can seek expungement of customer dispute information by going through the FINRA arbitration process or directly to court (without first going through arbitration). Regardless of whether expungement of customer dispute information is sought directly through a court or through arbitration, FINRA Rule 2080 (Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System), which was developed in close consultation with representatives of NASAA and state regulators, requires a broker-dealer firm or broker seeking expungement to obtain an order of a court of competent jurisdiction directing such expungement or confirming an award containing expungement relief. FINRA will expunge customer dispute information only after the court orders it to execute the expungement.[8]

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[8] FINRA Rule 2080 also requires that firms and brokers seeking a court order or confirmation of the arbitration award containing expungement relief name FINRA as a party, and FINRA will challenge the request in court in appropriate circumstances. FINRA may, however, waive the requirement to name it as a party if it determines that the award containing expungement relief is based on affirmative judicial or arbitral findings that: (1) the claim, allegation or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (3) the claim, allegation, or information is false. In addition, FINRA has sole discretion "under extraordinary circumstances" to waive the requirement if the request for expungement relief and accompanying award are meritorious and expungement would not have a material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements. See FINRA Rule 2080.

## II. Current Fee Structure in FINRA Arbitration

Under the Codes, if a customer files a claim in arbitration against an associated person and a firm, the customer is assessed a filing fee based on the claim amount.[9] The firm is assessed a member surcharge and a process fee based on the claim amount.[10] The member is assessed only one surcharge and one process fee per arbitration.[11] When the

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9 Customers, associated persons, and other non-members who file a claim, counterclaim, cross claim or third party claim must pay a filing fee. See FINRA Rule 12900(a)(1); see also FINRA Rule 13900(a)(1).

10 A member surcharge is assessed against a member if, for example, the member files an arbitration claim, is named as a respondent in a claim, or employed, at the time the dispute arose, an associated person who is named as a respondent; the amount of the surcharge is based on the amount of the claim. See FINRA Rules 12901(a)(1)(B) and 12901(a)(1)(C) and FINRA Rules 13901(a)(2) and 13901(a)(3).

Further, each member that is a party to an arbitration claim in which more than $25,000 is in dispute, or that is non-monetary or not specified, is required to pay a process fee based on the amount or nature of the claim. If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose is charged the process fee. See FINRA Rules 12903(a) and (b) and FINRA Rules 13903(a) and (b).

11 Under the Codes, no member is assessed more than a single surcharge or process fee in any arbitration. See FINRA Rules 12901(a)(4) and 12903(b) and FINRA Rules 13901(d) and 13903(b).

associated person answers the claim,[12] the associated person is not assessed a fee if he or she does not add a claim to the answer.[13]

If the parties do not settle the arbitration, the panel will hold at least one hearing to decide the customer arbitration and, at the conclusion of the hearing(s), issue an award. In the award, the panel will allocate the fees incurred by the parties during the arbitration, including each party's portion of the hearing session fees,[14] which are also based on the amount of the customer's claim.[15] If the parties settle, the panel will not issue an award.

(i) Current Fee Structure for Expungement Requests Made during a Customer Arbitration

Currently, even if the associated person's answer to a customer's claim includes a request for expungement, the associated person is not assessed a filing fee. The member, having been assessed the surcharge and process fee for the customer arbitration, will not incur additional charges because of the expungement request. If the customer's claim

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12 The respondent must answer the statement of claim within 45 days and may include other claims and remedies requested. See FINRA Rules 12303(a) and (b) and FINRA Rules 13303(a) and (b).

13 For example, an associated person is permitted to file a claim against the claimant requesting relief. Such counterclaim would require the associated person to pay a filing fee. See FINRA Rule 12303(d); see also FINRA Rule 13303(d).

14 Parties are charged hearing session fees for each hearing session, based on the customer's claim amount. In the award, the panel determines the amount of each hearing session fee that each party is required to pay. See FINRA Rules 12902 and 13902.

15 FINRA makes all arbitration awards publicly available. See https://www.finra.org/arbitration-mediation/arbitration-awards.

closes by award after a hearing,[16] the panel will decide the customer's claim and the expungement request (assuming the associated person pursues the request during the arbitration), and allocate the hearing session fees among the parties.

If the customer arbitration does not close by award after a hearing (e.g., settles) and the associated person or requesting party, if it is an on-behalf-of request, continues to pursue the expungement request, the panel from the customer arbitration will hold a separate expungement-only hearing to decide the expungement request.[17] The hearing session fee for the expungement-only hearing will be based on the amount of the customer's claim. Under the Codes, fees for hearing sessions held solely to decide an expungement request must be charged to the party or parties requesting expungement.[18]

(ii) Current Fee Structure for a Straight-In Request

An associated person may request expungement by filing a straight-in request rather than requesting expungement during a customer arbitration. The straight-in

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16 The term "hearing" means the hearing on the merits of an arbitration under Rule 12600. See FINRA Rule 12100(o).

17 In 2009, the SEC approved amendments to Forms U4 and U5 to require, among other things, the reporting of allegations of sales practice violations made against unnamed persons. See Securities Exchange Act Release No. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) (Order Approving SR-FINRA-2009-008). Specifically, Forms U4 and U5 were amended to add questions to elicit whether the applicant or registered person, though not named as a respondent or defendant in a customer-initiated arbitration, was either mentioned in or could be reasonably identified from the body of the arbitration claim as a registered person who was involved in one or more of the alleged sales practice violations. A party (typically, the firm) named in a customer arbitration may request expungement on-behalf-of an associated person who is a subject of, but not named in, the arbitration. Such on-behalf-of requests occur in customer-initiated arbitrations only.

18 See FINRA Rules 12805(d) and 13805(d).

request may be filed against a former or current firm or the customer.[19] A claim that does not request a dollar amount is considered a non-monetary or not specified claim ("non-monetary claim") under the Codes. An expungement request is a non-monetary claim; thus, under the Codes, the associated person must pay a $1,575 filing fee, and the member named as a respondent or that employed the associated person at the time the dispute arose must pay a $3,750 process fee.[20] A member named as a respondent or that employed the associated person at the time the dispute arose would also be assessed a surcharge of $1,900.[21] These claims are decided by a three-person panel, unless the parties agree in writing to one arbitrator.[22] Further, the per-hearing session fee for a non-monetary claim is $1,125.

(iii) Concerns with Avoidance of the Current Fee Structure for Expungement Requests

As discussed above, an expungement request is a non-monetary claim and parties requesting expungement should pay the fees associated with such requests under the Codes. FINRA is concerned about practices to avoid fees applicable to expungement requests, particularly straight-in requests. For example, FINRA is aware that associated persons who file a straight-in request often add a small monetary claim (typically, one

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19 FINRA notes, however, that straight-in requests filed against the customer are rare.

20 See supra note 10. Some associated persons have independent contractor, rather than employment, relationships with their firms. In these circumstances, FINRA assesses applicable member surcharge or process fees against the firm at which the associated person was associated at the time the dispute arose.

21 See supra note 10; see also supra note 11.

22 See FINRA Rules 12401(c) and 13401(c).

dollar) to the expungement request to reduce the fees assessed against the associated person and qualify for an arbitration heard by a single arbitrator.[23] Further, the small damages claim reduces the member fees that the forum assesses firms when an arbitration claim is filed. Thus, adding a claim for one dollar in a straight-in request against a member firm reduces the fees assessed to the associated person requesting expungement and member firm from $9,475 to $300.[24] Often, the associated person will subsequently drop the claim for one dollar.

Adding a small damages claim also changes the panel composition such that the straight-in request is heard by a single arbitrator rather than a three-person panel.[25]

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23 Whether the claimant specifies damages, and the amount specified, determines the fees assessed in arbitration cases and whether a single arbitrator or a three-person panel will decide the case. See FINRA Rules 12401 and 13401. If the amount of the claim is $50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800. If the amount of the claim is more than $50,000, but less than $100,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless the parties agree in writing to three arbitrators. If the amount of a claim is more than $100,000, exclusive of interest and expenses, or is non-monetary, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

24 If an associated person files a straight-in request against a member firm, does not add a monetary claim, and assuming one prehearing conference and one hearing session on the merits, the associated person is assessed a filing fee of $1,575 and a hearing session fee of $2,250 ($1,125 for the prehearing conference and $1,125 for the hearing session on the merits). In addition, the respondent member firm is assessed a member surcharge of $1,900 and a process fee of $3,750. If the associated person adds a one dollar claim to the request, assuming one prehearing conference and one hearing session on the merits, the associated person is assessed a filing fee of $50 and a hearing session fee of $100 ($50 for the prehearing conference and $50 for the hearing session on the merits). The member firm is also assessed a member surcharge of $150 but no process fee. See also infra Item II.B. (discussing the economic impacts of the proposed rule change).

25 See supra note 23.

FINRA believes that most expungement requests should be decided by a three-person panel. Expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions and request evidence would help ensure that a complete factual record is developed to support the arbitrators' decision at such expungement hearings.

To help ensure that parties requesting expungement pay the fees intended for such requests under the Codes, that the fees charged when expungement is requested are more consistent, and that more expungement requests are heard by a three-person panel, FINRA is proposing to amend the Codes to apply a minimum filing fee for all expungement requests, irrespective of whether the request is made as part of the customer arbitration or the associated person files a straight-in request, or the requesting party adds a small damages claim. The proposed rule change would also apply a minimum process fee and member surcharge to straight-in requests, as well as a minimum hearing session fee to expungement-only hearings held after a customer arbitration[26] or in connection with a straight-in request.[27]

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26 For example, under the current expungement process, if the customer arbitration settles, but an associated person seeks to pursue a request for expungement made during the customer arbitration, the panel from the customer arbitration will hold a separate expungement-only hearing to decide the expungement request and issue an award setting forth its decision on the expungement request. Under the proposed rule change, the associated person requesting expungement would be required to pay the minimum hearing session fee for this separate expungement-only hearing.

27 The proposed rule change would apply to all members, including members that are funding portals or have elected to be treated as capital acquisition brokers ("CABs"), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference.

(b) Proposed Amendments

I. Proposed Filing Fee

Under the proposed rule change, an associated person, or requesting party if it is an on-behalf-of request,[28] would be required to pay the filing fee for a non-monetary claim for an expungement request made during a customer arbitration[29] or filed as a straight-in request.[30] If the associated person or requesting party adds a monetary claim to the expungement request, the filing fee would be the fee for a non-monetary claim or the applicable filing fee based on the claim amount, whichever is greater.[31]

As discussed above, under the Codes, an expungement request that does not include a claim for damages is a non-monetary claim that is currently assessed a $1,575 filing fee and triggers a three-person panel. FINRA believes that all parties requesting expungement should pay the same minimum filing fee, and that parties should not be able to avoid the fee (or a three-person panel) simply by adding a small claim amount.

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28 See supra note 17.

29 Under the proposed rule change, an associated person who requests expungement of customer dispute information during an industry arbitration would also be required to pay the filing fee for a non-monetary claim. However, these requests are rare.

30 If the requesting party chooses to seek expungement in the customer arbitration, but later determines not to pursue the request and then files a straight-in request for expungement of the same customer dispute information, the requesting party would be required to pay the filing fee applicable to the straight-in request, notwithstanding previous payment of the filing fee applicable to the expungement request during the customer arbitration.

31 See proposed Rules 12900(a)(3) and 13900(a)(3). An associated person could add a monetary or non-monetary claim to the expungement request. FINRA notes, however, that it is rare that significant dollar claims accompany expungement requests.

Accordingly, FINRA is proposing that the filing fee for non-monetary claims would be the minimum filing fee for all expungement requests, and that the minimum filing fee would apply to expungement requests in customer arbitrations as well as to straight-in requests.[32] A request for expungement is a claim that a party is requesting the arbitrators to decide. Under the Codes, if a party files a claim or adds a claim in an answer to a statement of claim, the respondent must pay all required filing fees.[33] As an expungement request is also a claim, the party requesting this relief should also pay a filing fee.

The proposed minimum filing fee is also commensurate with the additional steps that arbitrators should take when deciding an expungement request during a customer arbitration or in connection with a straight-in request. Regardless of whether expungement is decided during a customer arbitration or separately, FINRA Rules 12805 and 13805 require the panel to hold one or more recorded hearing sessions regarding the appropriateness of expungement, to review settlement documents and consider the amount of payments made to any party and any other terms and conditions of the settlement, and to make a determination as to whether any of the Rule 2080 grounds for expungement have been established. In addition, as described in the Guidance,

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32 Under the Codes, the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship. See FINRA Rules 12900(a)(1) and 13900(a)(1). The proposed rule change would make clear this provision applies to expungement requests. Information on how to request an arbitration fee waiver is available at https://www.finra.org/arbitration-mediation/arbitration-fee-waivers. In addition, in the award, the panel may order a party to reimburse another party for all or part of any filing fee paid. See FINRA Rules 12900(d) and 13900(d).

33 See FINRA Rules 12303(d) and 13303(d).

arbitrators have a unique, distinct role when deciding whether to recommend a request to expunge customer dispute information from CRD. Accordingly, the Guidance directs arbitrators to ensure that they have all of the information necessary to make an informed and appropriate recommendation on expungement. The Guidance also directs arbitrators to request any documentary or other evidence they believe is relevant to the expungement request.

## II. Proposed Member Surcharge for Straight-in Requests

The proposed rule change would apply a minimum member surcharge when an associated person files a straight-in request against either a customer or a member firm.[34] Under the proposed rule change, if an associated person files a straight-in request against a member firm, that firm would be assessed the member surcharge for a non-monetary claim under the Industry Code (currently $1,900).[35] The proposed member surcharge is consistent with what a member firm should pay today for a straight-in request without an additional small monetary claim filed against a member firm.[36]

The proposed rule change would also provide that, for straight-in requests filed against a customer, each member that employed the associated person at the time the

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34 See supra note 10 (discussing the member surcharge under the Codes today).

35 See proposed Rule 13901(c). If the associated person files the straight-in request against another associated person, each firm that employed the respondent associated person at the time the dispute arose would be assessed the member surcharge for a non-monetary claim under the Industry Code. See FINRA Rule 13901(a)(3) and proposed Rule 13901(c).

36 Consistent with how the member surcharge is assessed today, under the proposal, FINRA would not assess a member more than a single surcharge in any arbitration. See also supra note 11.

customer dispute arose would be assessed the member surcharge for a non-monetary claim under the Customer Code (currently $1,900).[37]

If the associated person adds a separate claim for damages to the straight-in request against the customer or member firm, the member surcharge would be the non-monetary member surcharge or the applicable surcharge under the Codes, whichever is greater. Under the proposal, the surcharge would be due when the Director serves the Claim Notification Letter or the initial statement of claim under the Codes.[38]

III. Proposed Hearing Session Fees

The proposed rule change would apply the hearing session fee for a non-monetary claim heard by three arbitrators to each hearing session in which the sole topic is the determination of a request for expungement relief.[39] Thus, the proposed hearing session fee would apply when a customer arbitration does not close by award after a hearing (e.g., settles) and there is a separate hearing session held after the customer arbitration to decide an expungement request that was made during the customer arbitration, and to straight-in requests.[40] If the requesting party adds a monetary claim to the expungement

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37 See proposed Rule 12901(a)(3).

38 See proposed Rules 12901(a)(5) and 13901(e).

39 FINRA notes that the proposed $1,125 hearing session fee for expungement hearings would apply if a party requests expungement as part of a Simplified Arbitration and no hearings are held to decide the underlying customer claim, regardless of whether a single arbitrator or a panel hears the Simplified Arbitration.

40 See proposed Rules 12900(a)(3) and 13900(a)(3); see also supra note 26. If an associated person requests expungement during a customer arbitration, the customer arbitration closes by award after a hearing, and the arbitrator or panel decides the expungement request during the customer arbitration, the hearing session fee would be based on the amount of the customer's claim.

request, the hearing session fee would be the greater of the fee for a non-monetary claim with three arbitrators or the applicable hearing session fee under the Codes based on the claim amount.[41] In addition, consistent with the Codes today, the hearing session fee would be assessed against the party requesting expungement.[42]

## IV. Proposed Process Fees for Straight-in Requests

The proposed rule change would apply a minimum process fee when an associated person files a straight-in request against either a customer or member firm. Under the proposed rule change, if an associated person files a straight-in request against a member firm, that firm would be assessed the process fee for a non-monetary claim under the Industry Code (currently $3,750).[43]

The proposed rule change would also clarify that, for straight-in requests filed against a customer, the member that employed the associated person at the time the customer dispute arose would be assessed the process fee for a non-monetary claim under the Customer Code (currently $3,750).[44]

If the associated person adds a separate claim for damages to the straight-in request against the customer or member firm, the process fee would be the non-monetary

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41 See proposed Rules 12902(a)(5) and 13902(a)(4).

42 See proposed Rules 12902(a)(5) and 13902(a)(4).

43 See proposed Rule 13903(c). If the associated person files the straight-in request against another associated person, the firm that employed the respondent associated person at the time the dispute arose would be assessed the process fee for a non-monetary claim under the Industry Code. See proposed Rules 13903(b) and 13903(c).

44 See proposed Rule 12903(c).

process fee or the applicable process fee under the Codes, whichever is greater.[45] The proposed process fee is consistent with what member firms should pay today for straight-in requests without an additional small monetary claim filed against a customer or member firm.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 60 days following publication of the Regulatory Notice announcing Commission approval of the proposed rule change.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[46] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(5) of the Act,[47] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

The proposed rule change represents an equitable allocation of reasonable dues and fees against those who would either file or be a party to an expungement request, as

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45 Consistent with how the process fee is assessed today, under the proposal, FINRA would not assess a member more than one process fee in any arbitration. See also supra note 11.

46 15 U.S.C. 78o-3(b)(6).

47 15 U.S.C. 78o-3(b)(5).

is currently intended. As an expungement request is a separate relief request that an arbitrator or panel must consider and decide, the filing fees and related member and forum fees should reflect the general complexity of these requests, as well as the time and effort needed to administer, consider and decide them. In addition, the fees should apply consistently to all parties requesting expungement.

The proposed rule change will close gaps in the fee structure that have emerged in the existing expungement process, such as where parties add small dollar claims to their expungement requests to significantly lower the fees associated with expungement requests and to have expungement requests considered and decided by a single arbitrator rather than a three-person panel. The proposed rule change will help ensure that parties requesting expungement pay the fees intended for such requests under the Codes and that the fees charged when expungement is requested are more consistent, irrespective of whether the request is made as a straight-in request or during an arbitration, or whether damages are included in the request. The proposed rule change should also result in more expungement requests being heard by a three-person panel. A three-person panel will help ensure a complete factual record to support the arbitrators' decision, particularly in straight-in requests that often do not include customer participation and can be complex to resolve.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.

(a) Regulatory Need

FINRA is aware that parties requesting expungement are not always paying the fees intended for such requests under the Codes, particularly for straight-in requests. In addition, the current fee schedules under the Codes do not ensure that costs to the forum for administering expungement requests are being allocated to the party or parties requesting expungement and, as applicable, the member firms that employ them. The proposed rule change would help ensure that the fees for expungement requests are assessed, and that the costs borne by the forum to administer expungement requests are allocated, as intended, to those requesting expungement under the Codes.

(b) Economic Baseline

The economic baseline for the proposed rule change includes the provisions under the Codes that address the fees associated with expungement requests in FINRA arbitration. In general, the proposed rule change is expected to affect parties to an expungement request including associated persons and member firms. The proposed rule

change may also affect other stakeholders of the forum, and users of customer dispute information contained in the CRD system and displayed through BrokerCheck.[48]

The customer dispute information contained in the CRD system is submitted by registered securities firms and regulatory authorities in response to questions on the uniform registration forms.[49] The information can be valuable to current and prospective customers to learn about the conduct of associated persons.[50] Current and prospective customers may not select or remain with an associated person or a member firm that employs an associated person with a record of customer disputes. Similarly, member firms and other companies in the financial services industry may use the information when making employment decisions.[51] In this manner, the customer dispute information contained in the CRD system (and displayed through BrokerCheck) may negatively

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48 Other stakeholders of the forum include FINRA, others member firms, and other forum participants. Users of customer dispute information include investors; member firms and other companies in the financial services industry; individuals registered as brokers or seeking employment in the brokerage industry; and FINRA, states, and other regulators.

49 See supra note 5 and accompanying text (discussing the uniform registration forms and the information contained in the CRD system). The information includes matters, which may or may not have been previously adjudicated in FINRA arbitration or a court of competent jurisdiction.

50 Recent academic studies provide evidence that the past disciplinary and other regulatory events associated with a firm or individual can be predictive of similar future events. See Hammad Qureshi and Jonathan Sokobin, Do Investors Have Valuable Information About Brokers? FINRA Office of the Chief Economist Working Paper, (August 2015); see also Mark Egan, Gregor Matvos, and Amit Seru, The Market for Financial Adviser Misconduct, Journal of Political Economy 127, no. 1 (February 2019): 233-295.

51 Customer dispute information submitted to the CRD system may have other uses. For example, associated persons may use information from the CRD system when deciding with whom to do business. FINRA, states, and other regulators also use the information to regulate brokers.

affect the business and professional opportunities of associated persons but also provide for customer protections.

Any such negative impact on the business and professional opportunities of associated persons may be appropriate and consistent with investor protection, such as when the customer dispute information has merit. Any such negative impact may be inappropriate, however, such as when the customer dispute information is factually impossible, clearly erroneous, or false. Regardless of the merit, associated persons have incentive to remove customer dispute information from the CRD system and its public display through BrokerCheck.

An associated person or party on behalf of an associated person typically begins the process to remove customer dispute information from the CRD system by filing an expungement request in FINRA arbitration. FINRA is able to identify 5,732 expungement requests of customer dispute information filed from January 2016 through June 2019. More than one expungement request can be filed in a single arbitration, and multiple expungement requests may relate to the same customer complaint if the complaint relates to more than one associated person.

Under the Codes, a claim for expungement is considered a non-monetary claim, generally requiring fees in the middle of the range of potential fees that are assessed based on claim amount, and triggering a three-person panel. As described in more detail above and depending on the method that a party uses to request expungement, however, associated persons and member firms can be assessed fees less than what is intended for non-monetary claims.

Among the 5,732 expungement requests, 2,618 requests (46 percent) were filed during a customer or industry arbitration and 3,114 requests (54 percent) were filed as a straight-in request. The 2,618 expungement requests during a customer or industry arbitration include 2,604 requests during a customer arbitration and 14 requests during an industry arbitration; and the 3,114 straight-in requests include 3,048 requests filed solely against a member firm or against a member firm and a customer, and 66 requests filed solely against a customer. An associated person added a small monetary claim (of less than $1,000) in 2,356 of the 3,114 straight-in requests (76 percent). In general, associated persons did not add a monetary claim for the remaining straight-in requests.

In general, parties filed an increasing number of expungement requests over the sample period. For example, parties filed 1,400 requests in 2016, 1,708 requests in 2017, 1,936 requests in 2018, and 688 requests in the first half of 2019. Similarly, the proportion of straight-in requests also increased over the sample period. For example, associated persons filed 328 straight-in requests in 2016 (23 percent of 1,400), 846 requests in 2017 (50 percent of 1,708), and 1,371 requests in 2018 (71 percent of 1,936). In the first half of 2019, associated persons filed 569 straight-in requests (83 percent of 688).

The proportion of the straight-in requests where the associated person added a small monetary claim (of less than $1,000) has also increased over the sample period. For example, associated persons added a small monetary claim to 179 straight-in requests in 2016 (55 percent of 328), 569 requests in 2017 (67 percent of 846), 1,143 requests in 2018 (83 percent of 1,371), and 465 requests in the first half of 2019 (82 percent of 569). FINRA expects that absent this proposed rule change, associated persons who file

straight-in requests will continue to add a small monetary claim to avoid the fees typically assessed for non-monetary claims.

(c) Economic Impact

The proposed rule change would apply the fees associated with non-monetary claims as minimum fees to expungement requests in FINRA arbitration. The fees associated with non-monetary claims are not new and would not change under the proposal. The fees would apply when parties file an expungement request during a customer arbitration, when parties file a rare expungement request during an industry arbitration, and when associated persons file a straight-in request.

Under the proposed rule change, a party that requests expungement during a customer or industry arbitration would be assessed a minimum filing fee of $1,575. Currently, parties requesting expungement during a customer or industry arbitration are not assessed a filing fee in connection with the expungement request.

In addition, under the proposed rule change, if the arbitrator or panel holds a separate expungement-only hearing to decide the expungement request after the customer's arbitration, then the party that requested expungement would be assessed a minimum hearing session fee of $1,125.[52] The proposed minimum hearing session fee may be less than, equal to, or greater than the fees currently assessed for expungement-only hearings held after an arbitration. These current fees depend on the claim amount in the customer arbitration.[53]

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52 See supra note 26.

53 From January 2016 through June 2019, 314 expungement-only hearings were held after an arbitration. In these instances, the assessed hearing session fee under the proposed rule change for an expungement-only hearing would have been less than (86 cases or 28 percent), equal to (155 cases or 49 percent), or greater than

If an associated person files a straight-in request against a member firm, assuming one prehearing conference and one hearing session on the merits, then under the proposed rule change, the associated person and a member firm would be assessed minimum fees totaling $9,475. The associated person would be assessed a minimum filing fee of $1,575 and a minimum hearing session fee of $2,250 ($1,125 for the prehearing conference and $1,125 for the hearing session on the merits). In addition, the member firm would be assessed a minimum surcharge of $1,900 and a minimum process fee of $3,750.[54]

In general, these fees are the same as those that are assessed today if the associated person does not add a small monetary claim to the straight-in request against a member firm. Associated persons and member firms, however, may incur significantly lower fees than what is intended for a straight-in request if the associated person adds a small monetary claim (of less than $1,000) to the request. Assuming one prehearing

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(73 cases or 23 percent) the fee assessed currently for an expungement-only hearing held after an arbitration, depending on the size of the initial claim. Assuming one expungement-only hearing session to consider and decide the expungement request, on average and under the proposed rule change, the party filing an expungement request would be assessed an additional hearing session fee of $54 per arbitration. One expungement-only hearing session is consistent with the median number of hearing sessions (one) associated with the straight-in requests that were filed and closed during the sample period.

[54] The assumption of one prehearing conference and one hearing session on the merits is consistent with the median number of prehearing conferences (one) and hearing sessions on the merits (one) associated with straight-in requests that were filed and closed during the sample period. Also, the assumption that one member firm would be assessed a minimum surcharge and process fee is consistent with the median number of member firms (one) that were assessed these fees in a straight-in request that was filed and closed during the sample period.

conference and one hearing session on the merits, an associated person and the member firm would currently be assessed fees totaling $300.[55]

The fees associated with a small claim procedure are intended to ensure that the forum is economically feasible for claimants with small claims,[56] and, in general, do not cover the specific costs to administer an expungement request, which requires a hearing session and typically involves a prehearing conference. For example, the costs to administer a straight-in request can include chairperson honoraria, travel expenses, conference room rental, and other costs to administer the forum. For the typical straight-in request with one prehearing conference and one hearing session on the merits to consider and decide the request, the chairperson honoraria alone totals $725;[57] yet as discussed above, if the associated person adds a small monetary claim (of less than $1,000) to a straight-in request filed against a member firm, then the parties to the request are assessed fees totaling $300.

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55 For these requests, the associated person is assessed a filing fee of $50 and a hearing session fee of $100 ($50 for the prehearing conference and $50 for the hearing session on the merits). The member firm is also assessed a member surcharge fee of $150 but no process fee. If instead the associated person files an expungement request solely against the customer, then the parties to the request are assessed fees totaling $150. The associated person is still assessed a filing fee of $50 and a hearing session fee of $100, but the member firm is not assessed a member surcharge or a process fee.

56 Under the Codes, arbitrations involving $50,000 or less, exclusive of interest and expenses, will consist of one arbitrator and the claim is subject to the simplified arbitration procedures. Under these procedures, no hearing is held unless the customer or claimant requests a hearing, and the arbitrator renders an award based on the pleadings and other materials submitted by the parties. See FINRA Rules 12800 and 13800.

57 The chairperson honoraria includes $300 for the prehearing conference and $425 for the hearing session on the merits.

The minimum fees that would be assessed under the proposed rule change reflect the application of the fee schedule as intended for a non-monetary claim. The proposed rule change would help ensure that costs to the forum for administering expungement requests are allocated as intended to the party or parties requesting expungement and, as applicable, the member firms that employ them. The costs to the forum include the specific costs to administer the claim as well as the overall attendant costs to administer expungement requests in the forum. Associated persons and member firms that are not assessed the fees for a non-monetary claim experience a benefit in the form of an economic transfer; the costs that were intended to be allocated but not assessed to the party or parties requesting expungement are instead borne by FINRA, other member firms, and other forum participants including other member firms, associated persons, and customers.

In the aggregate, if parties requesting expungement had been assessed the fees applicable to non-monetary claims during the sample period, then a reasonable estimate for the additional fees that would have been assessed is $9.7 million. The $9.7 million includes $2.4 million for the expungement requests during a customer or industry arbitration,[58] and $7.3 million for the straight-in requests where an associated person

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58 From January 2016 through June 2019, there were 1,508 arbitrations that closed during which an expungement request was filed (that was not a straight-in request). If the parties requesting expungement had been assessed the fees applicable to non-monetary claims, the parties requesting expungement would have been assessed additional filing fees totaling $2.4 million (minimum filing fee of $1,575 for each of the 1,508 cases). Although the parties to these expungement requests may also be assessed additional hearing session fees, the additional fees associated with hearing sessions are estimated to be marginal (see supra note 53).

added a small monetary claim (of less than $1,000).[59] This amount reflects the potential economic transfer over the sample period. The extent of the transfer increased over the sample period with the proportion of straight-in requests where the associated person added a small claim amount.

The proposed rule change may affect some parties more so than others. Some parties, including associated persons and parties who request expungement relief on behalf of an unnamed person, may be more sensitive to the assessed fees under the proposed rule change or have monetary constraints that may inhibit them from filing an expungement request. They may determine that the cost of seeking expungement is higher than the anticipated benefit and, therefore, not seek expungement relief.[60] Associated persons and parties who request expungement relief on behalf of an unnamed person may also be more sensitive to the fees assessed under the proposed rule change if,

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59 From January 2016 through June 2019, there were 1,064 arbitrations that closed in which a straight-in expungement request was filed. Associated persons added a small monetary claim (of less than $1,000) in 797 of the 1,064 cases. Among the 797 arbitrations, 783 were filed against a member firm or a member firm and a customer, and 14 were filed solely against a customer. If parties requesting expungement had been assessed the fees applicable to non-monetary claims, and assuming one prehearing conference and one hearing session on the merits, then the parties to the straight-in requests filed against a member firm (or filed against that member firm and a customer) would have been assessed additional fees totaling $7.2 million ($9,475 less $300 for each of the 783 cases), and the parties to the straight-in requests filed against a customer would have been assessed additional fees totaling $0.1 million ($9,475 less $150 for each of the 14 cases). See supra notes 54 and 55 and accompanying text (discussing the fees that would be assessed under the proposed rule change and that are currently assessed).

60 Under the Codes, the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship. See supra note 3232.

given the facts and circumstances of the customer dispute, an arbitrator or panel is less likely to recommend expungement.[61]

Associated persons who would have otherwise expunged customer dispute information that may have or not have merit may experience a loss of business and professional opportunities as a result of the information remaining on the CRD system and its display through BrokerCheck. The loss of business and professional opportunities by one associated person, however, may be the gain of another. Associated persons who may benefit in this regard include those who are less price sensitive and continue to seek expungement of customer dispute information, and associated persons who do not have similar disclosures.

The proposed rule change may also affect some member firms more so than others. In particular, the fees assessed under the proposed rule change may be more material for small firms or firms with fewer financial resources than for large firms or firms with additional financial resources.[62] Although the fees may be more material to

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61 A firm or associated person can also initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. FINRA will challenge these requests in court in appropriate circumstances. From January 2016 through June 2019, the expungement of 123 customer dispute disclosures were sought directly in court. The assessed fees may incent firms or associated persons to initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. The number of firms or associated persons who would instead initiate an expungement proceeding directly in a court of competent jurisdiction is dependent not only on the fees assessed under the proposed rule change, but also the legal fees and other costs a firm or associated person would expect to incur in the different forums to initiate an expungement proceeding. This information is generally not available, and accordingly the potential effect of the proposed rule change on direct-to-court expungement requests is uncertain.

62 The definition of firm size is based on Article 1 of the FINRA By-Laws. A firm is defined as "small" if it has at least one and no more than 150 registered persons, "mid-size" if it has at least 151 and no more than 499 registered persons,

some firms, the fees are the same as those required for a non-monetary claim and do not depend on the size or financial resources of the firm.

Although the proposed rule change may affect some associated persons and member firms more so than others, the proposed rule change will not result in any burden on competition that is not necessary or appropriate. As discussed above, associated persons and member firms that are assessed significantly lower fees for an expungement request than what is intended under the Codes by adding a small damages claim to the expungement request experience a benefit in the form of an economic transfer. Any burden on competition as a result of this proposed rule change, therefore, relates to the removal of this unintended benefit.

Finally, the proposed rule change may have other, marginal, economic effects. For example, the proposed minimum filing fee would trigger a three-person panel for all straight-in requests. Associated persons would lose the ability to unilaterally decide the number of arbitrators who would consider and decide the request and, therefore, may increase the number of three-person panels. The impact of this change may be small because parties may still jointly agree to a single arbitrator.

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and "large" if it has 500 or more registered persons. In the cases associated with an expungement request filed and closed from January 2016 through June 2019, including expungement requests during a customer or industry arbitration and straight-in requests, 78 percent of the surcharge and process fees were incurred by large firms, 11 percent were incurred by mid-size firms, and 11 percent were incurred by small firms. The large firms incurring member surcharge or process fees had a median excess net capital of $21.7 million in the year prior to the filing of a straight-in request, the mid-size firms had a median excess net capital of $1.6 million, and the small firms had a median excess net capital of more than $334,000.

The proposed rule change may also affect the customer dispute disclosures on the CRD system and their public display through BrokerCheck. The disclosures that would have otherwise been expunged would remain, and, depending on the merit of these disclosures, may affect the value of the information describing the conduct of associated persons. The merit of these disclosures is dependent on many factors which are difficult to predict. These factors include the incentive of parties to file an expungement request under the proposed rule change and the merit of the customer disputes that would have otherwise been sought expunged. The effect on the value of the customer dispute information is therefore uncertain.

(d) Alternatives Considered

An alternative to the proposed rule change includes the minimum filing fee of $1,425 for all expungement requests that was proposed in Regulatory Notice 17-42 (December 2017) (discussed in more detail below). Although parties filing an expungement request would pay an additional $100 to file an expungement request under the proposed rule change, the $1,575 filing fee is the filing fee applicable to non-monetary claims. As discussed above, an expungement request is a non-monetary claim under the Codes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

FINRA published Regulatory Notice 17-42 (December 2017) ("Notice") to seek comment on proposed rule changes related to expungement, including the minimum fees discussed in this filing.[63] FINRA received 28 comment letters in response to the Notice

[63] This filing addresses the comments to the Notice that: (i) relate to the proposed fees and (ii) do not address the other proposed changes in the Notice to the

that addressed the filing fee, member surcharge, or process fee. A copy of the Notice is attached as Exhibit 2a. A list of the comment letters received in response to the Notice that are applicable to this filing are attached as Exhibit 2b.[64] Copies of the comment letters received in response to the Notice that are applicable to this filing are attached as Exhibit 2c.

In the Notice, FINRA proposed a minimum filing fee of $1,425 for all expungement requests. In addition, FINRA proposed, consistent with the existing provisions under the Codes, to assess a member surcharge and process fee against each member that is named a party or respondent, or that employed the associated person at the time of the events giving rise to the dispute, as applicable. Some commenters supported the proposal and others raised concerns with the proposed fees or with the costs of expungement in general. A summary of the comments and FINRA's responses are discussed below.

Filing Fee

NASAA and Public Citizen supported the $1,425 minimum filing fee proposed in the Notice. NASAA stated that "the increased fees would at least in part" offset the significant costs that FINRA and the states incur related to expungement requests, which include both the costs to review and to process expungement requests. Public Citizen stated that the minimum filing fee would be a "limit[] to potential overuse of expungement proceedings." White expressed some support for the proposed minimum

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expungement framework that are not part of this filing, but are being developed separately from this filing. See supra note 3.

64 All references to commenters are to the comment letters as listed in Exhibit 2b.

filing fee, stating that it may "benefit staff and limit" the "occasional" request for expungement "made years after the underlying event."

Other commenters, including associated persons, member firms, and their industry and legal representatives, opposed the proposed minimum filing fee. Some commenters viewed the proposed minimum filing fee as an additional fee that would be burdensome and discourage associated persons from pursing meritorious expungement claims.[65] For example, SIFMA stated that the filing fee would be an additional fee that the individual would have to pay in addition to the fees in the underlying arbitration. SIFMA also stated that the filing fee could (along with the other fees proposed in the Notice)[66] "have an unfortunate impact of creating a tiered system where only registered representatives and firms that can absorb these additional costs will be able to pursue expungement, regardless of merit." JonesBell and Behr contended that since "presentation of an expungement request by a registered person who is a party to the underlying customer case does not require any additional administrative time or effort, either by FINRA, or by the arbitrators," a purpose of the fee was to "financially punish the associated person for making an expungement request, and to generate additional (but unwarranted) revenue for FINRA." Liebrader stated that the approximately $1,500 filing fee "just to file their claim" was "too high" for both associated persons seeking expungement and claimants in general in comparison to court filing fees, which "are in

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65 See Behr, JonesBell, and SIFMA; see also infra note 67.

66 Some commenters misconstrued the proposed fees discussed in the Notice as allowing the same member firm to be charged two separate member surcharge and process fees in the same arbitration. See infra note 80 and accompanying text.

the $200-$300 range." Several other commenters objected to the proposed minimum filing fee as an increase in the amount of the filing fee[67] or objected to the costs of requesting expungement in general.[68] Some commenters objected to the current costs associated with requesting expungement, which they viewed as too high.[69]

In response to these comments, FINRA declines to reduce or eliminate the proposed minimum filing fee. The $1,425 filing fee proposed in the Notice corresponds to the minimum claim amount tier for a three-person panel to decide an arbitration.[70] As noted above, FINRA believes that most expungement requests should be decided by a three-person panel.[71] In addition, an expungement request without a damages claim is a non-monetary claim under the Codes, which requires a three-person panel and currently requires a filing fee of $1,575. Thus, under the proposed rule change, an associated

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67 See Baritz, Higgenbotham, James, Janney, Keesal, Saretsky, Speicher, Walter, and Weinerf. One commenter, SEC Investor Advocate, stated that potentially increasing the fees that brokers or firms must pay when requesting expungement, along with other enhancements to the expungement process proposed in the Notice but not addressed in this filing, may cause brokers to seek to avoid the Rule 2080 process entirely, and instead request expungement of their records directly from a court. FINRA notes that a broker can seek expungement by going through the FINRA arbitration process or directly to court (without first going through arbitration). See FINRA Rule 2080; see also supra note 8 (describing the requirement to name FINRA as a party when brokers seek expungement in court).

68 See Deal, Harris, Isola, Rieger, and Smart.

69 See AdvisorLaw, Commonwealth, Di Silvio, Mahoney, and Scrydloff. AdvisorLaw also provided a hyperlink to an online petition that requested signatures to "support a balanced, cost and time effective, expungement process" and that collected associated comments.

70 The minimum claim amount tier for a three-person panel and a filing fee of $1,425 is $100,000.01 to $500,000.

71 See supra Item II.A.1.(a)II.(iii), "Concerns with Avoidance of the Current Fee Structure for Expungement Requests."

person, or a requesting party if it is an on-behalf-of request, would be required to pay a $1,575 filing fee for an expungement request made during a customer arbitration or straight-in request.

Associated persons should not be able to reduce the filing fee from the $1,575 owed for a non-monetary claim to $50—and reduce the hearing session fee to $50, the member surcharge to $150 and the process fee to $0—merely by adding a small monetary claim, that the associated person often subsequently drops. Today, persons who do not add a small monetary claim to a straight-in request pay the $1,575 filing fee associated with non-monetary claims. The proposal would ensure that all associated persons who request expungement are subject to the same minimum filing fee.

In addition, as with other non-monetary claims, FINRA incurs costs to process expungement requests. Accordingly, expungement requests should be subject to the same minimum filing fee as other non-monetary claims.

FINRA also declines to revise its proposal to charge the minimum filing fee when expungement is requested, irrespective of whether the request is made in a straight-in request or in an underlying customer arbitration. FINRA notes that other claims for relief filed by associated persons during a customer arbitration (i.e., counterclaims, cross claims, and third party claims) all result in a separate filing fee, just as they would if the associated person filed the claim in a separate arbitration. FINRA acknowledges that the costs to process straight-in requests and requests made in an underlying customer arbitration may not be identical.[72] However, FINRA believes that the proposed minimum

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[72] See supra note 11 (describing how a second member surcharge and process fee will not be assessed in an arbitration, even if expungement is requested).

filing fee is commensurate with the additional work that arbitrators should undertake when expungement is requested.[73]

With respect to the concern that the minimum filing fee may prevent associated persons from making meritorious expungement requests, FINRA notes that the Director may defer payment of all or part of an associated person's filing fee on a showing of financial hardship.[74]

A. Cost Shifting

Some commenters proposed shifting the costs of requesting expungement away from associated persons. Braschi suggested that FINRA provide a mechanism to shift the cost of expungement to customers and their attorneys, and Wellington suggested that FINRA should impose little or no cost if the associated person receives an expungement recommendation. Liebrader stated that FINRA should have its members "shoulder more of the cost in this mandatory arbitration forum" and should "provide more relief for Claimants who for financial reasons have trouble coming up with the filing fees."

FINRA believes that the costs associated with expungement requests should generally be shared by the associated persons who are the subject of the customer complaints and arbitrations, and the firms that employ them.[75] In addition, consistent

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73 See supra Item II.A.1.(b)I.

74 See supra note 32.

75 Under the Codes, a panel may order in the award that a party reimburse another party for all or part of any filing fee paid. See supra note 32. In addition, in a customer arbitration, the Director will refund the member surcharge if the panel denies all of the customer's claims against the member or associated person and allocates all hearing session fees against the customer. See FINRA Rule 12901(b)(1).

with the current fee structure under the Codes, under the proposed rule change member firms will continue to bear the larger share of the costs of expungement. As with other types of arbitration claims, member firms that are respondents or employed the associated person seeking expungement, not the associated person or customer, pay the majority of the expense of the forum through the member surcharge and process fee. In addition, as noted above, the Director may defer payment of the filing fee for claimants that demonstrate financial hardship.[76]

Member Surcharge and Process Fee

In the Notice, FINRA proposed that when expungement is requested, there would be an assessment of a member surcharge and process fee, consistent with the existing provisions of the Codes,[77] against each member that is named as a party or respondent, or that employed the associated person named as a respondent or party at the time of the events giving rise to the dispute, as applicable. Several commenters expressed concerns with this proposal.

A. Assessment Against Firm that Employed Associated Person "At the Time of the Events Giving Rise to the Dispute"

Keesal stated that the proposed assessment of a member surcharge and process fee against the member firm that employed the associated person at the time of the "events giving rise to the dispute" required "further clarification." Keesal stated that parties may contend that multiple events gave rise to a customer claim, during which the associated person may have been employed with multiple member firms.

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76 See supra note 32.

77 See supra notes 10 and 11 and accompanying text.

After considering the comment, FINRA has modified the proposal to assess, consistent with the existing provisions of the Codes, member surcharge and process fees against the member firm that is a party or is named as a respondent, or "that employed the associated person at the time the customer dispute arose."[78] This is the standard that currently triggers an obligation to pay the process fee and member surcharge in FINRA arbitrations.[79]

B. When Expungement is Requested in a Customer Arbitration

SIFMA expressed concern that, when expungement is requested in a customer arbitration, the proposal would result in the assessment of a second member surcharge and process fee against a member firm "in addition to the fees charged in the underlying arbitration." Keesal similarly stated that imposing these fees during the customer arbitration was not justified because the expense of "empaneling and compensating arbitrators and administering the case" should be handled as part of the customer arbitration.

FINRA notes that the proposal retains the existing requirement that firms may be assessed only one member surcharge and one process fee in a customer arbitration,[80] and that the proposal does not impact how the member surcharge and process fee are assessed today in a customer arbitration.[81] Accordingly, member firms will not be assessed these

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78 See supra notes 35 and 43 and accompanying text.

79 See, e.g., FINRA Rules 12901(a)(1)(C) and 13903(b).

80 See supra notes 36 and 45; see also proposed Rules 12901(a)(6), 12903(e), 13901(f), and 13903(e).

81 See supra note 10.

fees twice in the same customer arbitration, even if expungement is requested during the arbitration. In addition, in the proposal, FINRA has clarified that the minimum member surcharge and process fee apply only when the associated person files a straight-in request against a member firm or customer.[82]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2020-005 on the subject line.

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[82] See proposed Rules 12901(a)(3), 12903(c), 13901(c), and 13903(c).

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2020-005. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2020-005 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[83]

Jill M. Peterson
Assistant Secretary

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83 17 CFR 200.30-3(a)(12).

Exhibit 2a

# Regulatory Notice 17-42

# Expungement of Customer Dispute Information

## FINRA Requests Comment on Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information

**Comment Period Expires: February 5, 2018**


## Summary

FINRA seeks comment on establishing a roster of arbitrators with additional training and specific backgrounds or experience from which a panel would be selected to decide an associated person's request for expungement of customer dispute information.[1] The arbitrators from this roster would decide expungement requests where the underlying customer-initiated arbitration is not resolved on the merits or the associated person files a separate claim requesting expungement of customer dispute information. The *Notice* also proposes additional changes to the expungement process that would apply to all requests for expungement of customer dispute information.


This proposal is one in a series of regulatory initiatives that FINRA is considering related to the expungement process. For example, the FINRA Board of Governors has approved filing with the Securities and Exchange Commission (SEC) proposed amendments to the Codes of Arbitration Procedure for Customer and Industry Disputes (Codes) to make the best practices from the Notice to Arbitrators and Parties on Expanded Expungement Guidance[2] (Guidance) rules that arbitrators must follow when considering expungement requests. In addition, FINRA staff has been working with the North American Securities Administrators Association (NASAA) on various expungement issues, including potential amendments to the existing regulatory review process.

The text of the proposed amendments can be found at *www.finra.org/notices/17-42*.

**December 6, 2017**

### Notice Type

- Request for Comment

### Suggested Routing

- Compliance
- Legal
- Operations
- Registered Representatives
- Senior Management

### Key Topics

- Arbitration
- Associated Person
- Code of Arbitration Procedure
- Dispute Resolution

### Referenced Rules & Notices

- Code of Arbitration Procedure for Customer Disputes, Rule 12000 Series
- Code of Arbitration Procedure for Industry Disputes, Rule 13000 Series
- FINRA Rule 12100
- FINRA Rule 12805
- FINRA Rule 13805
- FINRA Rule 13806

Questions concerning this *Notice* should be directed to:

- Kenneth L. Andrichik, Senior Vice President and Chief Counsel, Office of Dispute Resolution, at (212) 858-3915;
- Victoria Crane, Associate General Counsel, Office of General Counsel, at (202) 728-8104; or
- Mignon McLemore, Assistant Chief Counsel, Office of Dispute Resolution, at (202) 728-8151.

## Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by February 5, 2018.

Member firms and other interested parties can submit their comments using the following methods:

- Emailing comments to *pubcom@finra.org*; or
- Mailing comments in hard copy to:

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

To help FINRA process and review comments more efficiently, persons should use only one method to comment on the proposal.

**Important Notes:** The only comments that FINRA will consider are those submitted pursuant to the methods described above. All comments received in response to this *Notice* will be made available to the public on the FINRA website. Generally, FINRA will post comments as they are received.[3]

Before becoming effective, a proposed rule change must be authorized for filing with the SEC by the FINRA Board of Governors, and then must be filed with the SEC pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).[4]

## Background & Discussion

Through the expungement process, associated persons may seek to remove allegations made by customers from the Central Registration Depository (CRD ®) system and hence from the FINRA BrokerCheck (BrokerCheck ®) system.[5] It has been FINRA's long-held position that expungement of customer dispute information is an extraordinary measure, but it may be appropriate in certain circumstances.

CRD is the central licensing and registration system for the U.S. securities industry. In general, registered securities firms and regulatory authorities submit information in CRD in response to questions on the uniform registration forms.[6] These forms collect administrative, disciplinary and other information about registered personnel, including customer complaints, arbitration claims and court filings made by customers, and the arbitration awards or court judgments that may result from those claims or filings (*i.e.*, customer dispute information).[7] The SEC, FINRA, state and other regulators use this information in connection with their licensing and regulatory activities. Most of the CRD information is made publicly available through BrokerCheck. Associated persons may seek to have customer dispute information removed from CRD (and thereby, from BrokerCheck) pursuant to FINRA Rule 2080 because the claim or allegation is factually impossible, clearly erroneous or false, or if the associated person was not involved in the alleged investment-related sales practice violation.[8]

Critics of expungement have raised specific concerns about expungement hearings held after a settlement in the customer's arbitration case that gave rise to the customer dispute information (Underlying Customer Case). In these instances, critics argue that the panel from the Underlying Customer Case has not heard the full merits of that case and, therefore, may not have any special insights in determining whether to grant a request for expungement of customer dispute information under Rule 2080. Further, claimants and their counsel have little incentive to participate in an expungement hearing after the Underlying Customer Case settles and typically do not participate in such hearings. Thus, during these expungement hearings, the panel may receive information that is one-sided, which may favor the associated person requesting expungement.

The proposed amendments to the Codes would make a number of important changes to the current framework related to the expungement of customer dispute information. Among other things, the proposed amendments would:

***All Requests for Expungement of Customer Dispute Information***

- amend the Codes to require that for all requests for expungement of customer dispute information:
  - the associated person who is seeking to have his or her CRD record expunged must appear at the expungement hearing; and
  - to grant expungement, a three-person panel of arbitrators must unanimously agree that expungement is appropriate under Rule 2080(b)(1) and find that the customer dispute information has no investor protection or regulatory value.

***Expungement Requests During the Underlying Customer Case***

- limit an associated person who is named as a party to one opportunity to request expungement, and that opportunity must be exercised during the Underlying Customer Case;
- create limitations on requests for expungement of customer dispute information, including a one-year limitation period after the Underlying Customer Case closes for an associated person to file an expungement request that was not decided during the Underlying Customer Case;
- codify a party's ability to request expungement on behalf of an associated person not named as a respondent in the Underlying Customer Case (hereinafter referred to as an unnamed person)[9] during the Underlying Customer Case, and establish procedures for such requests;
- require associated persons who file expungement requests outside of the Underlying Customer Case to file the request under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute;
- remove the option to file an expungement request outside of the Underlying Customer Case against a customer; and
- specify a minimum filing fee of $1,425 for expungement requests.

***Expungement Arbitrator Roster***

- establish a roster of public chairpersons with additional qualifications to decide expungement requests (Expungement Arbitrator Roster) filed against a firm under the Industry Code.

***Expungement Requests in Simplified Arbitration Cases***

- require that an associated person or an unnamed person wait until the conclusion of a customer's simplified arbitration case to file an expungement request, which must be filed against the firm not the customer and would be heard by a panel selected from the Expungement Arbitrator Roster.

***Expungement Requests relating to Customer Complaints that Do Not Result in an Arbitration Claim***

- require that the associated person seek expungement of the customer dispute information relating to a customer complaint within one year of the member firm initially reporting the customer complaint to CRD.

**I. Requesting Expungement Relief During the Underlying Customer Case**

Current FINRA Rule 12805 provides a list of requirements that arbitrators must meet before they may grant expungement.[10] The rule does not, however, provide any guidance for associated persons on how and when an associated person may request expungement relief during the Underlying Customer Case. As discussed further below, the proposal would amend Rule 12805 to set forth requirements for expungement requests filed by an associated person as a party as well as on behalf of an unnamed person.

*A. Expungement Requests by an Associated Person Named as a Party*

1. Applicability

Currently, under FINRA Rule 12805, an associated person who is a named party in an arbitration may request expungement during that arbitration, but is not required to do so. Some associated persons have filed requests seeking to expunge customer dispute information years after FINRA closed the Underlying Customer Case. Given the length of time between case closure and filing of the request, in many of these instances, the customers cannot be located and any documentation that could explain what happened in the case is not available or cannot be located. Thus, under the proposal, an associated person who is named as a party would be required to request expungement in the Underlying Customer Case. If the associated person does not request expungement in the Underlying Customer Case, the associated person would be prohibited from seeking to expunge the customer dispute information arising from the customer's statement of claim during any subsequent proceeding under the Codes. Requiring an associated person who is named in an arbitration to request expungement of the customer dispute information during the Underlying Customer Case would eliminate expungement requests filed years after the Underlying Customer Case concludes.

2. Method of Request and Fees

The proposed amendments would permit the associated person to file an expungement request or include such request in the answer or any pleading.[11] The associated person would be permitted to file the request no later than 60 days before the first scheduled hearing session,[12] otherwise, the associated person would be required to file a motion[13] to seek an extension to file the expungement request. Thus, if an associated person files an expungement request after the 60-day timeframe, the non-moving parties could object and the panel would be required to decide the associated person's motion.

Along with the expungement request, the associated person would be required to pay a filing fee of $1,425 or the applicable filing fee provided in Rule 12900(a)(1), whichever is greater.[14] In addition, consistent with existing provisions under the Codes, there would be an assessment of a member surcharge[15] and process fee[16] against each member that is named as a party or respondent, or that employed the associated person named as a respondent or party at the time of the events giving rise to the dispute, as applicable.[17]

3. Underlying Customer Case Closes by Award

If the Underlying Customer Case closes by award, the panel would be required to consider and decide the expungement request during the Underlying Customer Case. The panel must, among other things, agree unanimously to grant expungement and in the arbitration award: (1) identify at least one of the Rule 2080(b)(1) grounds for expungement that serves as the basis for expungement and provide a brief written explanation of the reasons for its finding that one or more Rule 2080(b)(1) grounds for expungement applies to the facts of the case; and (2) find that the customer dispute information has no investor protection or regulatory value.

The unanimity requirement would apply to all requests for expungement of customer dispute information. Thus, when a panel decides an associated person's expungement request during the Underlying Customer Case, the panel would be required to agree unanimously to grant expungement. In deciding the customer's claims, however, a majority agreement of the panel would continue to be sufficient.

4. Underlying Customer Case Closes Other than by Award

If the Underlying Customer Case closes other than by award (*e.g.*, the parties settle the arbitration), the panel in the Underlying Customer Case would not decide the associated person's expungement request. In this situation, the associated person would be permitted to file the expungement request as a new claim under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute.[18] Under the proposal, an associated person would not be permitted to file the new expungement request against the customer because the customer should not be asked to participate in another arbitration hearing that could increase the customer's costs and expenses. Instead, the associated person 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 with the goal of having a more robust expungement proceeding that will help the panel determine whether to grant expungement. As discussed in further detail below, this new claim would be decided by a three-person panel selected from the Expungement Arbitrator Roster.

5. Limitations on Expungement Requests

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. Under the proposal, an associated person would be barred from requesting expungement relief if: (1) a panel or arbitrator in the Underlying Customer Case issued a decision on the expungement request for the same customer dispute information; (2) the associated person requested expungement of the same customer dispute information in court and the court denied the request; (3) the Underlying Customer Case has not concluded; (4) it has been more than a year since FINRA closed the Underlying Customer Case; or (5) if there was no Underlying Customer Case involving the customer dispute information, more than one year has elapsed since the date that the member firm initially reported the customer complaint to CRD.[19]

The first two limitations would prevent an associated person from forum shopping to garner a favorable outcome on his or her expungement request. Under the proposal, these limitations would apply to all requests for expungement of customer dispute information filed in the forum, including requests decided prior to the effective date of the proposal.

With respect to the third limitation, if an associated person's expungement request was not decided during the Underlying Customer Case, the associated person would be required to wait until the Underlying Customer Case concludes before filing a request for expungement. Thus, under the proposal, if the Underlying Customer Case has not concluded and an associated person has filed a request for expungement of the customer dispute information at issue in the Underlying Customer Case, FINRA would stay the associated person's expungement request until the Underlying Customer Case concludes and permit the associated person to refile it under the Industry Code so that it could be heard by a panel from the Expungement Arbitrator Roster.

With respect to the fourth limitation, if the expungement request is not filed within a year after the Underlying Customer Case closes, the associated person would forfeit his or her right to request expungement. The one-year limitation period would ensure that the expungement hearing is held close in time to the Underlying Customer Case, when information regarding the Underlying Customer Case is available and in a timeframe that would increase the likelihood for the customer to participate if he or she chooses to do so.

Under the proposal, the one-year limitation period would apply where the Underlying Customer Case closes after the effective date of the proposal. If the Underlying Customer Case closes on or prior to the effective date of the proposal, the associated person would have six months from the effective date to file the expungement request.

The fifth limitation would establish a one-year period for associated persons to expunge customer dispute information that arose from a customer complaint and did not result in an arbitration claim. Under the proposal, the associated person would have a year from the date that a member firm initially reported a customer complaint to CRD to file an expungement request.[20] If a member firm initially reports a customer complaint to CRD on or prior to the effective date of the proposal, the associated person would have six months from the effective date of the proposal to file the expungement request.

*B. Expungement Requests by a Party on Behalf of an Unnamed Person*

1. Applicability

The proposal would define an unnamed person to mean an associated person or formerly associated person who is identified in Forms U4 or U5 as having been the subject of an investment-related customer-initiated arbitration that alleged that he or she was involved in one or more sales practice violations, but who was not named as a respondent in the arbitration.[21]

Currently, unnamed persons have three arbitration avenues to pursue expungement under the Codes: (1) a party to an arbitration may request expungement on their behalf during the Underlying Customer Case; (2) the unnamed persons may try to intervene in the Underlying Customer Case; and (3) the unnamed persons may file a separate arbitration case seeking expungement after the Underlying Customer Case closes.

As explained further below, the proposed amendments would codify the ability of a party in the Underlying Customer Case to request expungement on behalf of an unnamed person with the written approval of the unnamed person. The proposed amendments would also codify procedures regarding when and how an unnamed person may file a separate case seeking expungement of customer dispute information after the Underlying Customer Case closes.

As these would be the only avenues by which an unnamed person may request expungement of customer dispute information under the Codes, the proposed amendments would foreclose the option for an unnamed person to intervene in the Underlying Customer Case and thereby remove the potential for the unnamed person to become a party in the Underlying Customer Case.

2. Procedural Similarities to Expungement Requests by an Associated Person Named as a Party

The proposed procedures discussed above that would apply to expungement requests by an associated person named as a party (*i.e.*, method of request and fees, customer case closure either by award or otherwise, and one-year limitation period) would also apply to expungement requests by a party on behalf on an unnamed person, with some modifications as explained below.

First, a party requesting expungement relief on behalf of an unnamed person would be required to file with the Director of the Office of Dispute Resolution[22] (Director) and serve on all parties no later than 60 days before the first scheduled hearing session: (1) a Form Requesting Expungement Relief on Behalf of an Unnamed Person, signed by the unnamed person whose CRD record would be expunged;[23] and (2) a statement requesting expungement relief.[24] The signed form would represent an acknowledgement by the unnamed person that he or she agrees to be bound by the panel's decision on the request for expungement relief. If the party does not request expungement within the 60-day timeframe, the party would be required to file a motion seeking an extension to file the expungement request.

Second, if the Underlying Customer Case closes other than by award, FINRA would notify the unnamed person in writing that the case has closed. This milestone in the customer's case would start the one-year limitation period for the unnamed person to seek expungement of the customer dispute information against the firm at which he or she was associated at the time of the events giving rise to the customer dispute, in a separate action under the Industry Code (as discussed in further detail below).

Finally, if a party from the Underlying Customer Case does not request expungement relief on behalf of the unnamed person, the unnamed person would be permitted to file an expungement request under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute, within one year of the Underlying Customer Case closure, provided the expungement request is not barred.[25]

## II. Proposed Changes that Apply to All Requests for Expungement of Customer Dispute Information

Currently, the Codes provide criteria that a panel must follow before it may decide an expungement request.[26] As explained in further detail below, under the proposal, the current requirements to hold a hearing session and to provide a basis for expungement in an arbitration award would be expanded to clarify the process and guide further the arbitrators' decision-making. The proposed changes would apply to all requests to expunge customer dispute information filed under the Codes.

### *A. Hold a Hearing Session*

Currently, the Codes require a panel that is deciding an expungement request to hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement.[27] The proposed amendments would require that an associated person who is seeking to have his or her CRD record expunged appear at the expungement hearing, either in person or by videoconference; appearance by telephone would not be an option. As the associated person is requesting the permanent removal of information from CRD, FINRA believes that the associated person should be available in person or by videoconference to present his or her case and respond to questions from the panel.

### *B. Unanimity and Additional Finding Required to Grant Expungement of Customer Dispute Information*

Currently, the Codes require that the panel indicate in the arbitration award which of the Rule 2080 grounds for expungement serves as the basis for its expungement order and provide a brief written explanation of the reasons for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.[28]

The proposed amendments would require that the panel agree unanimously to grant expungement and in the arbitration award: (1) identify at least one of the Rule 2080(b)(1) grounds for expungement that serves as the basis for expungement and provide a brief written explanation of the reasons for its finding that one or more Rule 2080(b)(1) grounds for expungement applies to the facts of the case; and (2) find that the customer dispute information has no investor protection or regulatory value.

The proposal would clarify for arbitrators that the standard for granting the permanent removal of customer dispute information from CRD is a finding that the customer dispute information has no investor protection or regulatory value. Since Rule 2080 has been in effect, FINRA has implemented policies and procedures to strengthen the expungement process. For example, in 2008, FINRA adopted Rule 12805 to require arbitrators to perform additional fact finding before granting expungement of customer dispute information.[29] After the approval of FINRA Rule 12805, FINRA staff updated the arbitrator training materials and all arbitrators were required to certify that they had familiarized themselves with the requirements of the expungement rules.[30] In 2013, in response to FINRA staff's concerns about the number of expungement requests granted after the Underlying Customer Case settles, FINRA published the Guidance for arbitrators to use when considering expungement requests.[31]

Based on FINRA's review of awards where expungement has been granted, arbitrators appear to be following the practices identified in the Guidance and have a heightened awareness that expungement is an extraordinary remedy. FINRA has noticed a marked improvement in the quality of the awards in which expungement is granted. Notwithstanding these positive results, FINRA believes that expanding the findings that arbitrators must make before granting expungement of customer dispute information would help FINRA maintain the accuracy of the data that appears in CRD by ensuring that only information that is not valuable to regulators and investors is expunged from CRD.[32]

**III. Requests for Expungement of Customer Dispute Information Under the Industry Code and the Expungement Arbitrator Roster**

As explained above, if an expungement request is not decided during the Underlying Customer Case, the proposal would permit an associated person to file the expungement request as a new claim against the firm33 at which he or she was associated at the time of the events giving rise to the customer dispute, provided the claim is not barred.[34] A three-person panel selected from the Expungement Arbitrator Roster would decide this new claim.

*A. Selection of Panel*

Under the proposal, the Neutral List Selection System[35] (NLSS) would randomly select three public chairpersons[36] from the Expungement Arbitrator Roster to decide an expungement request.[37] To be on the Expungement Arbitrator Roster, the public chairpersons would be required to have the following additional qualifications:

(1) completed enhanced expungement training;[38]
(2) admitted to practice law in at least one jurisdiction; and
(3) five years' experience in any one of the following disciplines:

(a) litigation;
(b) federal or state securities regulation;
(b) administrative law;
(c) service as a securities regulator; or
(d) service as a judge.

The proposed changes to the expungement framework would help arbitrators on the Expungement Arbitrator Roster better understand the unique nature of this extraordinary remedy and the importance of maintaining the integrity of the public record. The proposed roster composition and the proposed additional requirements to grant expungement, taken together, should help FINRA maintain the integrity of its CRD records and ensure that expungement is only granted in appropriate circumstances.

*B. Expungement Hearing*

Under the proposal, once the panel is selected from the Expungement Arbitrator Roster, it must hold a recorded hearing session regarding the appropriateness of the associated person's request for expungement of customer dispute information. With respect to the hearing session, the proposal provides that: (1) the associated person whose CRD record would be expunged must appear at the expungement hearing either in person or by videoconference;[39] (2) the Director would notify the parties from the Underlying Customer Case or the customer complaint of the time and place of the expungement hearing; and (3) all customers in the Underlying Customer Case or customers who filed a customer complaint are entitled to appear at the expungement hearing. At the customer's option, the customer may appear by telephone.

As discussed above in connection with expungement hearings in the Underlying Customer Case, 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. In addition, FINRA believes that allowing customers to appear by telephone would make it easier for them to participate in the expungement hearing and, therefore, could encourage them to participate.

*C. Unanimity and Additional Finding Required to Grant Expungement*

Consistent with requests for expungement relief considered by a panel under the Customer Code, a panel selected from the Expungement Arbitrator Roster under the Industry Code may grant expungement of customer dispute information only if the panel agrees unanimously. In addition, in the arbitration award the panel must: (1) identify at least one of the Rule 2080(b)(1) grounds for expungement that serves as the basis for expungement and provide a brief written explanation of the reasons for its finding that one or more Rule 2080(b)(1) grounds for expungement applies to the facts of the case; and (2) find that the customer dispute information has no investor protection or regulatory value.

**IV. Expungement Requests in Simplified Arbitrations**

Under the Codes, arbitrations involving $50,000 or less are decided by a single arbitrator without a hearing, also referred to as a decision "on the papers," and are called simplified arbitrations.[40] The Codes provide that the requirement to hold a hearing to decide an expungement request applies to expungement requests made in simplified arbitrations.[41]

Under the proposal, an associated person or unnamed person would be required to file an expungement request under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute, and only at the conclusion of the simplified case. Thus, a panel from the Expungement Arbitrator Roster would consider and decide the expungement request.[42]

The proposed amendments would address a concern raised by customers that when an associated person requests expungement during a simplified case, the arbitrator holds a hearing during the simplified case to decide the appropriateness of expungement. When the arbitrator conducts a hearing in this situation, the customer is forced to participate in a hearing that he or she did not request, which delays the customer's case and the rendering of an award in the customer's simplified case. The proposed amendments would ensure that expungement requests would not be heard during a simplified case.[43]

## V. Preliminary Economic Impact Analysis

### *A. Regulatory Need*

Associated persons can request expungement of customer dispute information from CRD. As discussed above, some critics have raised concerns about arbitration panels granting requests for expungement of customer dispute information when the panel has not heard the full merits of the Underlying Customer Case. Claimants and their counsel may not have the incentive to participate in expungement hearings. Panels, therefore, may receive information that is one-sided, which could favor the associated person seeking expungement. The proposed amendments would provide for an increased opportunity for customer participation in expungement decisions, make information regarding the Underlying Customer Case more readily available, make the expungement decision more timely relative to the Underlying Customer Case, and establish an Expungement Arbitrator Roster to decide expungement requests when expungement has not been decided as part of the Underlying Customer Case.

### *B. Economic Baseline*

The economic baseline for the proposed amendments is the current rules under the Codes that address the process for associated persons to expunge customer dispute information from CRD. The proposed amendments are expected to affect associated persons; firms; customers to complaints or arbitration cases; customers that publicly view CRD information through BrokerCheck; and the SEC, FINRA, state and other regulators that use CRD.

Associated persons have incentive to file for expungement relief to remove customer dispute information from CRD. By removing customer dispute information from CRD, associated persons would also remove customer dispute information from BrokerCheck. Customer dispute information on CRD and BrokerCheck may impact the business of associated persons and reduce their professional opportunities. Investors (including current and prospective customers) use BrokerCheck to learn about the professional background and conduct of associated persons. Current and prospective customers may be less likely to select or remain with associated persons who have customer dispute information on their records. Current and future employers can also consider customer dispute information when making employment decisions.

Although panels that decide expungement requests receive information related to the expungement request from associated persons, they may not receive such information from customers. Panels are likely to receive information from customers if the panel decides the expungement request during the Underlying Customer Case. Panels are less likely to receive such information if the Underlying Customer Case is settled or withdrawn. Panels may also not receive information from customers if associated persons file separate claims requesting expungement and the customers are unwilling or unable to participate. In these instances, customers and their counsel may not have the incentive to participate in the separate expungement hearing. Associated persons may also request expungement of customer dispute information long after the Underlying Customer Case closes, making it potentially more difficult for customers to participate and the panel to verify or validate the information provided.

One-sided information could favor the associated persons seeking expungement, which has the potential to reduce the integrity and reliability of the information on CRD and BrokerCheck. As noted above, investors use that information to make decisions about associated persons with whom they may wish to do business. The SEC, FINRA, state and other regulators use CRD information for licensing and regulatory activities. Accordingly, the integrity and reliability of CRD information is critical to the needs of these stakeholders.

FINRA staff is able to identify 5,482 customer claims in arbitration that were filed from 2014 to 2016, and that were closed as of June 30, 2017. FINRA staff is also able to identify 12,849 customer complaints that were filed against associated persons and closed during the same time period but did not result in an arbitration claim. These customer claims and complaints are available in the CRD system and disclosed through BrokerCheck and, therefore, could be the subject of an expungement request by an associated person.

FINRA staff is able to identify 2,232 customer arbitration cases involving an expungement request that were filed from 2014 to 2016 and closed as of June 30, 2017. Among the 2,232 cases, 1,738 (78 percent) were closed by settlement or mediation. Another 384 (17 percent) of the 2,232 cases were closed by hearing or on the papers; another 92 (4 percent) were withdrawn; and 18 (less than 1 percent) were closed by other means. In addition to the 2,232 customer arbitration cases, FINRA staff is also able to identify 183 intra-industry arbitration cases that involve an expungement request of customer dispute information.

Among the cases containing a request for expungement of customer dispute information that were filed from 2014 to 2016 and closed as of June 30, 2017, arbitrators made a determination regarding the expungement of customer dispute information in 808 of these cases. The 808 cases include decisions regarding expungement requests as part of the Underlying Customer Case as well as decisions regarding expungement requests when associated persons filed a separate claim for expungement following the close of the Underlying Customer Case.

Arbitrators recommended expungement for at least one associated person in 608 (75 percent) of the 808 cases. In another 213 (26 percent) of the 808 cases, arbitrators did not grant expungement for at least one associated person. In a few of the 808 cases where more than one associated person sought expungement relief, arbitrators both granted and did not grant expungement relief for at least one associated person. Among the 808 cases in which arbitrators made a determination regarding the expungement of customer dispute information, the Underlying Customer Case closed by settlement in 436 of the cases. Arbitrators recommended expungement for at least one associated person in 88 percent of these 436 cases.

If an arbitration panel grants expungement of customer dispute information, the associated person must obtain an order from a court of competent jurisdiction confirming the arbitration award containing expungement relief. In the experience of FINRA staff, courts typically confirm arbitration awards containing expungement relief. Associated persons that obtain a court order confirming the arbitration award must then serve the confirmed award on FINRA to have the customer dispute information expunged. Not all panel expungement recommendations result in the expungement of customer dispute information from CRD and BrokerCheck. Some associated persons may determine not to confirm the award in court. As of June 30, 2017, FINRA had expunged customer dispute information in connection with 391 (64 percent) of the 608 cases pursuant to a court order. As of that date, associated persons may have not yet sought or obtained a court order for the remaining 217 of the 608 cases. Other associated persons may have not yet served the confirmed award on FINRA.

Lastly, the current fee structure for filing a request to expunge customer dispute information provides incentives for associated persons to file a request separately from the Underlying Customer Case and add a small monetary claim, thus making it a simplified claim, to reduce the filing fee to $50 from $1,575 (*i.e.*, the filing fee for a non-monetary/ unspecified claim). Further, by making the request a simplified claim, the case can be heard by one arbitrator as opposed to the default of a three-arbitrator panel for non-monetary or unspecified claims.[44]

*C. Economic Impacts*

The proposed amendments are designed, among other things, to improve the quality and timeliness of the information available to panels determining requests for expungement. The panels assigned to the Underlying Customer Case would be more likely to decide expungement requests, if any. In addition, expungement decisions would occur soon after the Underlying Customer Case closes or a member firm initially reports a customer complaint to CRD. The proposed amendments would therefore increase the opportunity for or likelihood that panels would receive information from customers when considering expungement requests. The information is therefore less likely to be one-sided and favor associated persons. The proposed amendments would also establish qualifications for those arbitrators on the Expungement Arbitrator Roster who decide expungement requests when customers are less likely to provide information in connection with an expungement request. With these additional qualifications, the arbitrators should be better able to evaluate the information they receive in a more judicious and discerning manner.

The proposed amendments would benefit investors, member firms, and regulators by helping to ensure that the customer dispute information on CRD and, therefore, BrokerCheck more accurately reflects those customer disputes that have investor protection or regulatory value. Stakeholders would be more confident in the reliability of the customer dispute information contained on CRD and BrokerCheck. The customer dispute information contained on CRD and BrokerCheck would also be more meaningful and valuable to stakeholders.

Customers would benefit from the proposed amendments that restrict the manner and timing of associated persons' requests for expungement of customer dispute information. Associated persons would have one year after a customer complaint was initially reported to CRD to request expungement of the information. For customer complaints that result in an arbitration claim, associated persons named in an Underlying Customer Case would be required to request expungement during the Underlying Customer Case. Associated persons whose expungement request is not determined during the Underlying Customer Case would then have one year following the close of the Underlying Customer Case to request expungement of the customer dispute information. Customers would therefore have a greater ability to participate in the expungement hearings, if they so choose. In addition, if a separate expungement case were filed, the associated person would no longer be able to name the customer as the opposing party. Customers would therefore no longer incur the costs and inconvenience to be a party to these claims. Lastly, expungement requests would not be heard during a simplified case. As a result, customer claimants in simplified cases would no longer experience delays in the resolution of their cases as a result of expungement hearings, and would not be forced to attend a hearing in a case that the customer chose to be decided on the papers.

The proposed amendments would impose costs on associated persons, primarily by restricting how and when they could file an expungement request and, in some cases, by increasing the cost of filing an expungement request. The stricter requirements for requesting expungement of customer dispute information are meant to improve the quality and timeliness of the information that the panel hearing the request receives. The information that panels receive is less likely to be one-sided from associated persons only. The information is therefore less likely to favor the associated persons requesting expungement.

The requirement that the decision be unanimous, rather than a majority decision, could also increase the difficulty for an associated person to obtain expungement. To the extent that customers and firms use customer dispute information to make business and employment decisions, if customer dispute information is not expunged as frequently, associated persons could experience a loss of business and professional opportunities, loss of employment at their current firm, and thus, decreased income.[45]

Associated persons could also incur additional fees to file expungement requests. The associated person would be required to pay a filing fee of $1,425 or the applicable filing fee provided in Rule 12900(a)(1), whichever is greater. This aspect of the proposed amendments would end the practice of associated persons adding a monetary claim of less than $1,000 to separately filed expungement requests to reduce their filing fee to the minimum of $50.[46]

Associated persons would also be required to attend expungement hearings in person, either by traveling to the hearing location or by videoconference, depending on the method permitted by the arbitration panel. Traveling to the hearing location could significantly increase the cost of having their request heard, by increasing both transportation and room and board costs as well as lost time in transit. Attendance by videoconference would eliminate many of these costs.

The potential decrease in the frequency in which panels recommend expungement and the potential increase in costs to file and to attend hearings could reduce the incentive of associated persons to request expungement of customer dispute information. Associated persons could continue to request expungement relief if they believe that the request is likely to be granted and that any reduction to their income potential is greater than any costs that they could incur. Accordingly, the types of expungement cases that arbitration panels would consider under the proposed amendments would likely be more meritorious.

The proposed amendments would also impose additional costs on member firms. If associated persons file a separate claim for expungement, they would be required to file the claim against the firm at which he or she was associated at the time of the events giving rise to the customer dispute, rather than against the customer. To the extent that member firms would become a party to the expungement case more frequently, they could experience higher costs associated with those cases.

The magnitude of the benefits and costs of the proposed amendments depends on the change in the number of associated persons requesting expungement of customer dispute information, the number of arbitration awards that grant expungement, and the number of expungement awards confirmed by the courts. The extent to which awards granting expungement become more informed would enhance the integrity and reliability of the customer dispute information on CRD and, therefore, BrokerCheck and the ability of customers and regulators to rely on the information as an accurate description of the conduct of associated persons. The magnitude of the benefits and costs also depends on the extent to which the record of associated persons decreases their business or professional opportunities. A greater decrease in business or professional opportunities would result in a greater economic transfer between associated persons. The proposed amendments would have no effect on associated persons that do not have future customer claims or complaints.

*D. Alternatives Considered*

As noted above, FINRA staff has been working with NASAA on various expungement issues, including potential amendments to the existing regulatory review process. The proposed amendments in this *Notice* reflect just one approach. FINRA requests comment below to inform subsequent revisions to the proposed amendments, including other approaches that could reduce the potential that panels receive information that is one-sided, which may favor the associated person requesting expungement.

## Request for Comment

FINRA is interested in receiving comments on all aspects of the proposed amendments. In particular, FINRA seeks comment on the following questions:

1. FINRA Rules 12805 and 13805 provide, in relevant part that, in order to grant expungement of customer dispute information under Rule 2080, the panel must comply with the requirements stated in the rule. (Emphasis added.) FINRA notes, however, that if a panel issues an arbitration award containing expungement relief, the award must be confirmed by a court of competent jurisdiction and FINRA could decide to oppose the confirmation. Thus, as the associated person is required to complete additional steps after the arbitrators make their finding in the award before FINRA will expunge the customer dispute information, FINRA believes the word "grant" may not be an appropriate description of the panel's authority in the expungement process. FINRA is considering changing the word to "recommend." Please discuss whether the rule should retain "grant" or change to "recommend" or some other description to more accurately reflect the panel's authority in the expungement process.
2. Would named associated persons request expungement in every case to preserve the right to have the expungement claim heard and decided, either in the Underlying Customer Case or as a new claim under the Industry Code? If so, what would be the potential costs and benefits of a named person requesting expungement in every case?
3. Should FINRA consider bifurcating the expungement request from the customer's claim in all cases relating to customer disputes? What would be the costs and benefits of such an approach?
4. What are the costs and benefits of requiring the unanimous consent of a three-person panel to grant all requests for expungement of customer dispute information?
5. Is the one-year limitation on being able to request expungement of customer dispute information appropriate? Should the time period be longer or shorter? Please discuss.

6. Should the associated person who is requesting expungement be required to appear in person or by videoconference, rather than by phone, at the expungement hearing?
7. Should the arbitrators on the Expungement Arbitrator Roster have specific qualifications? If so, are the proposed additional qualifications appropriate or should FINRA consider other qualifications?
8. Should the arbitrators on the Expungement Arbitrator Roster be lawyers only or could the experience of serving on three arbitrations through award be a sufficient substitute?
9. How would the proposed amendments affect the granting or denying of expungement requests? Which aspect of the proposed amendments would have the largest impact on expungement determinations? Why?
10. The proposal would establish a one-year limitation period for associated persons to expunge customer dispute information that arose from a customer complaint. The limitation period would start on the date that the member firm initially reported the customer complaint to CRD. Should the one-year limitation period be based on a different milestone? If so, what should it be?
11. The proposal would clarify for arbitrators that the standard for granting the permanent removal of customer dispute information from CRD is a finding that at least one of the Rule 2080(b)(1) factors applies and that the customer dispute information has "no investor protection or regulatory value." Are there specific factors that arbitrators should consider when making a finding that the customer dispute information has "no investor protection or regulatory value"?
12. In a simplified arbitration case, if a customer requests a hearing, should the single arbitrator be permitted to decide an expungement request, if a request is filed?

## Endnotes

1. On December 16, 2015, the FINRA Dispute Resolution Task Force (Task Force) issued its Final Report and Recommendations (Final Report). One of the recommendations was that FINRA create a special arbitrator roster to handle expungement requests in settled cases and in cases when a claimant did not name the associated person as a respondent. A list of the Task Force members is available at http://www.finra.org/arbitration-and-mediation/finra-dispute-resolution-task-force. The Final Report is available at http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf.

2. *See* Expanded Expungement Guidance (September 2017), available at http://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance.

3. Persons submitting comments are cautioned that FINRA does not redact or edit personal identifying information, such as names or email addresses, from comment submissions. Persons should submit only information that they wish to make publicly available. *See Notice to Members 03-73* (Online Availability of Comments) (November 2003) for more information.

4. *See* Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Certain limited types of proposed rule changes take effect upon filing with the SEC. *See* SEA Section 19(b)(3) and SEA Rule 19b-4.

5. FINRA operates the CRD system pursuant to policies developed jointly with NASAA. FINRA works with the SEC, NASAA, other members of the regulatory community, and member firms to establish policies and procedures reasonably designed to ensure that information submitted and maintained on the CRD system is accurate and complete. These procedures, among other things, cover expungement of customer dispute information from the CRD system in narrowly defined circumstances.

6. For example, broker-dealers use the Uniform Application for Securities Industry Registration or Transfer, referred to as Form U4, to register or transfer the registrations of, associated persons with self-regulatory organizations (SROs), and with states, commonwealths and territories. Also, broker-dealers use the Uniform Termination Notice for Securities Industry Registration, referred to as Form U5, to terminate the registrations of associated persons with SROs, and with states, commonwealths and territories.

7. *See Notice to Members 04-16* (March 2004).

8. FINRA Rule 2080 requires members or associated persons seeking expungement of customer dispute information to obtain an order from a court of competent jurisdiction directing expungement or confirming an arbitration award recommending expungement relief and requires the member or associated person to name FINRA as a party in any judicial proceeding seeking expungement relief. FINRA may, however, waive the requirement to name it as a party if it determines that the requested expungement relief is based on affirmative judicial or arbitral findings that: (1) the claim, allegation or information is factually impossible or clearly erroneous, (2) the associated person was not involved in the alleged investment-

related sales practice violation, forgery, theft, misappropriation or conversion of funds, or (3) the claim, allegation, or information is false. In addition, FINRA has sole discretion "under extraordinary circumstances" to waive the requirement if the expungement request is meritorious and expungement would not have a material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements.

9. In 2009, Forms U4 and U5 were amended to add questions that required registered persons to report allegations of sales practice violations made in customer-initiated arbitrations even if they were not named as a respondent in the arbitration. *See* Securities Exchange Act Release No. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) (Order Approving SR-FINRA-2009-008); *see also* Regulatory Notice 09-23 (May 2009). Such persons may believe these allegations are unfounded and seek to have them expunged. Because they are not parties to the customer-initiated arbitration, they are unable to seek expungement relief in the Underlying Customer Case.

10. FINRA Rule 12805 provides that a panel must comply with the following criteria before granting expungement: (1) hold a hearing to decide the issue of expungement; (2) review settlement documents, and consider the amount of payments made to any party, and any other terms and conditions of the settlement; (3) indicate in the award which of the grounds in FINRA Rule 2080 is the basis for expungement and provide a brief written explanation of the reasons for granting expungement; and (4) assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief. *See also* FINRA Rule 13805.

11. Under the Codes, a pleading is a statement describing a party's causes of action or defenses (*e.g.*, statement of claim, answer, or counterclaim). *See* FINRA Rule 12100(v).

12. A hearing session is any meeting between the parties and the arbitrator(s) of four hours or less, including a hearing or prehearing conference. *See* FINRA Rules 12100(p) and 13100(p).

13. *See* FINRA Rule 12503.

14. Currently, if an associated person requests expungement relief only in a claim filed separately, the filing fee would be the non-monetary/unspecified claim amount, or $1,575. *See* FINRA Rules 12900(a) and 13900(a). Associated persons have been adding a monetary claim of less than $1,000 to a request for expungement relief to reduce the filing fee to $50. By converting the non-monetary/unspecified claim into a simplified claim, the associated person reduces the number of arbitrators who would hear and consider a complex matter like expungement from three to one. *See* FINRA Rules 12401 and 13401.

15. A surcharge is assessed against each member that is named as a respondent in or employed, at the time the dispute arose, an associated person who is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Codes. *See* FINRA Rules 12901(a)(1)(B) and 12901(a)(1)(C) and FINRA Rules 13901(a)(2) and 13901(a)(3).

16. Each member that is a party to an arbitration claim in which more than $25,000 is in dispute is required to pay a process fee based on the amount of the claim. In addition, if an associated person of a member is a party, the member that employed the associated person at the time the dispute arose is charged the process fee, even if the member is not a party. *See* FINRA Rules 12903(a) and (b) and FINRA Rules 13903(a) and (b).

17. Under the Codes, no member is assessed more than a single surcharge or one process fee in any arbitration. *See* FINRA Rules 12901(a)(4) and 12903(b) and FINRA Rules 13901(d) and 13903(b).

18. The proposed amendments would not allow an associated person named in the Underlying Customer Case to file the claim requesting expungement relief against the customer from the Underlying Customer Case.

19. *See* proposed FINRA Rule 13805(a)(3).

20. A customer complaint can be reported to the CRD system via a Form U4 or Form U5. Pursuant to the requirements of FINRA Rule 1010, an associated person should be aware of the filing of a Form U4 by the associated person's member firm, as well as any amendments to the Form U4 to report a customer complaint involving that person. Article V, Section 3 of FINRA's By-Laws requires that a member firm provide an associated person a copy of an amended Form U5, including one reporting a customer complaint involving the associated person. Moreover, FINRA provides several methods for associated persons and former associated persons to check their records (*e.g.*, by requesting an Individual Snapshot or by checking BrokerCheck).

21. *See* proposed FINRA Rule 12100(dd). *See also supra* note 9.

22. The term "Director" means the Director of the Office of Dispute Resolution. Unless the Codes provide that the Director may not delegate a specific function, the term includes staff to whom the Director has delegated authority. *See* FINRA Rules 12100(m) and 13100(m).

23. The text of the form can be found at www.finra.org/notices/17-42.

24. Under the proposal, the party may include the request for expungement relief in an answer or pleading.

25. *See* proposed FINRA Rule 13805(a)(3). The unnamed person also would be prohibited from filing an expungement request against a customer.

26. *See supra* note 10.

27. *See* FINRA Rules 12805(a) and 13805(a).

28. *See* FINRA Rules 12805(c) and 13805(c).

29. *Id.*

30. In 2014, FINRA staff revamped the arbitrator training materials and amended them again in 2016.

31. *See supra* note 2.

32. *See* Securities Exchange Act Release No. 48933 (Dec. 16, 2003), 68 FR 74667, 74672 (Dec. 24, 2003) (Order Approving File No. SR-NASD-2002-168).

33. A firm, named as a respondent, would be assessed a member surcharge and process fee as provided under the Codes. *See supra* notes 15, 16 and 17.

34. *See* proposed FINRA Rule 13805(a)(3).

35. *See* FINRA Rule 13400.

36. A public arbitrator is an individual who does not have significant ties to the securities industry. *See* FINRA Rule 13100(x). Arbitrators are eligible to serve as chairpersons if they have completed chairperson training and: (1) have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least one arbitration administered by an SRO in which hearings were held; or (2) have served as an arbitrator through award on at least three arbitrations administered by an SRO in which hearings were held. *See* FINRA Rule 13400(c).

37. The first arbitrator selected by NLSS would be the chairperson of the panel. The parties would not be permitted to strike any arbitrators selected by NLSS, but would be permitted to challenge any arbitrator selected for cause, pursuant to FINRA Rule 13410. If an arbitrator is removed, NLSS would randomly select a replacement subject only to a challenge for cause. The parties would not be permitted to agree to fewer than three arbitrators on the panel, and the parties would not be permitted to stipulate to the use of pre-selected arbitrators. Finally, if the associated person withdraws the claim after a panel is appointed, the case would be closed with prejudice, unless the panel decides otherwise. *See* proposed FINRA Rule 13806.

38. The Task Force suggested that the arbitrators be chair-qualified. In addition, it suggested that the arbitrators who would serve on the special arbitrator panel complete enhanced expungement training. FINRA agrees that the training for arbitrators selected for the Expungement Arbitrator Roster should be expanded. Thus, FINRA would create training for these arbitrators, which would emphasize that, if there is no party opposing the associated person's request for expungement relief, the panel would need to review more proactively the request and documentation and, if necessary, ask questions and for more information, before making a decision. The training would also focus on the need to identify one or more of the grounds for expungement in FINRA Rule 2080(b)(1) as the basis for expungement.

39. The panel would determine the method of appearance.

40. *See* FINRA Rules 12800(a) – (c); *see also* FINRA Rules 13800(a) – (c).

41. *See* FINRA Rules 12805(a) and 13805(a).

42. *See* proposed FINRA Rule 12800. FINRA Rule 13800 would also be amended to require that an associated person may only request expungement of customer dispute information under Rule 2080 by filing the request pursuant to Rule 13805(a) at the conclusion of the simplified arbitration case.

43. FINRA Rule 12800(c)(1) permits a customer to request a hearing. Under the proposal, if a customer requests a hearing, the arbitrator would decide the customer's case and at the conclusion of the customer's case, the associated person could file the expungement request against the firm and a panel from the Expungement Arbitrator Roster would decide the request. *See also* FINRA Rule 13800(c)(1).

44. Among the 2,232 customer arbitration cases and 183 intra-industry arbitration cases (mentioned above) that involve an expungement request of customer dispute information, 67 (3 percent) of the cases had an initial filling fee of $50.

45. Researchers find a negative relationship between misconduct disclosures on CRD and the employment opportunities of associated persons. The misconduct disclosures in their analysis, however, include more than just customer allegations. *See* Mark Egan, Gregor Matvos, and Amit Seru, *The Market for Financial Adviser Misconduct*, 2016.

46. Among the 2,232 customer arbitration cases and 183 intra-industry arbitration cases (mentioned above) that involve an expungement request of customer dispute information, approximately one-fifth of the expungement filing fees would have increased to $1,425 under the proposed amendments. The increase in fees would range from $450, for claims greater than $50,000 but less than or equal to $100,000 which currently have a filing fee of $975, to $1,375, for claims with a monetary value of less than or equal to $1,000 which currently have a filing fee of $50.

**EXHIBIT 2b**

**Alphabetical List of Written Comments**
**Regulatory Notice 17-42**

1. Ralph S. Behr, Esq. ("Behr") (January 11, 2018)

2. Joseph Borg, North American Securities Administrators Association ("NASAA") (February 5, 2018)

3. Juan Braschi, Merrill Lynch Global Wealth Management ("Braschi") (January 25, 2018)

4. Kevin Carroll, Securities Industry and Financial Markets Association ("SIFMA") (February 5, 2018)

5. Roger B. Deal, Sequoia Wealth Partners, LLC ("Deal") (February 1, 2018)

6. Michael J. Di Silvio, Di Silvio Financial Group ("Di Silvio") (January 25, 2018)

7. G. Thomas Fleming III and Kevin K. Fitzgerald, Jones, Bell, Abbott, Fleming & Fitzgerald L.L.P. ("JonesBell") (January 9, 2018)

8. Stacey M. Garrett, Keesal, Young & Logan ("Keesal") (February 1, 2018)

9. Susan Harley and Remington A. Gregg, Public Citizen ("Public Citizen") (February 5, 2018)

10. Eric Harris, ("Harris") (December 9, 2017)

11. Jay R. Higgenbotham, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Higgenbotham") February 1, 2018)

12. Jim Isola, Wells Fargo Advisor ("Isola") (January 25, 2018)

13. David Wm. James, Legacy Planning Group, Inc. ("James") (February 2, 2018)

14. Dave Liebrader, ("Liebrader") (February 5, 2018)

15. Patrick R. Mahoney, The Law Offices of Patrick R. Mahoney, P.C. ("Mahoney") (February 5, 2018)

16. Andy Rieger, Morgan Stanley Wealth Management ("Reiger") (February 1, 2018)

17. Armin Sarabi, AdvisorLaw, LLC ("AdvisorLaw") (February 2, 2018)

18. Gary M. Saretsky, Jonathan M. Sterling and Collen M. Nickel, Saretsky Hart Michaels + Gould PC ("Saretsky") (February 5, 2018)

19. Gregory Scrydloff, (“Scrydloff”) (January 31, 2018)

20. David Shields, Wellington Shields & Co. LLC (“Wellington”) (February 1, 2018)

21. Barrick A. Smart, Smart Investments Advisory Inc. (“Smart”) (January 31, 2018)

22. W. Alan Smith, Janney Montgomery Scott LLC (“Janney”) (February 5, 2018)

23. Jeff Speicher, Wells Fargo Advisor (“Speicher”) (January 26, 2018)

24. John D. Stewart, Baritz & Colman LLP (“Baritz”) (February 5, 2018)

25. Joe Tully, Commonwealth Financial Network (“Commonwealth”) (February 5, 2018”)

26. Leslie M. Walter, JD (“Walter”) (February 5, 2018)*

27. Stacie Weinerf, RBC Wealth Management (“Weinerf”) (February 1, 2018)

28. Brooks White (“White”) (January 15, 2018)

* On 10/12/2021, the letter was redacted to remove personal identifying information at the request of the author.

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January 11, 2018

***Sent Via U.S. Mail***

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**
**(December 6, 2017)**

Dear Mrs. Asquith:

I write to endorse the cogent and prescient arguments contained in a comment submitted by the firm of Jones Bell dated January 9, 2018 and noted as received by FINRA on January 10, 2018.

I would only add the following comment:

The essence of Due Process is fundamental fairness. FINRA as an industry regulator must maintain both the appearance of fairness and effectuate processes that are fundamentally fair: fair to all parties.

The perceived and actual effect of the proposed amendments fails to meet even a casual due process review.

Accordingly, I urge FINRA to reject Regulatory Notice 17-42.

Very truly yours,

Ralph S. Behr, Esq.
cc: Jones, Bell, Abbott, Fleming & Fitzgerald, L.L.P.

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
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February 5, 2018

***Submitted electronically to pubcom@finra.org***

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

**RE: FINRA Regulatory Notice – 17-42 – Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information**

Dear Ms. Asquith,

On behalf of the North American Securities Administrators Association ("NASAA"),[1] I hereby submit the following comments in response to FINRA Regulatory Notice 17-42 ("the Proposal"), issued on December 6, 2017.[2] NASAA has a long-standing interest in ensuring that there is no compromise in the integrity of the information housed on the Central Registration Depository ("CRD") and its investment adviser equivalent, the Investment Adviser Registration Depository ("IARD").[3] Each system contains the information filed with state securities administrators by applicants for registration as broker-dealers, investment advisers, and their representatives. In addition to using that information as part of licensing and ongoing oversight responsibilities,[4] state securities administrators are obligated under state securities and public records laws to ensure that records are maintained in accordance with those laws. These laws almost universally require the retention of all information filed as part of a registration application and amendments to the application. NASAA has gained a unique expertise in this area, as we have been involved in developing—and reforming—the expungement process since its inception, and are pleased to offer our comments on the Proposal.[5]

[1] NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum for these regulators to work with each other in an effort to protect investors at the grassroots level and to promote fair and open capital markets.

[2] FINRA Regulatory Notice 17-42 – *Expungement of Customer Dispute Information – Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information* (Dec. 6, 2017), *available at* http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-42.pdf.

[3] FINRA, NASAA, and state securities regulators developed the CRD system collaboratively and jointly administer policies related to the jointly owned licensing information held on CRD. The IARD is an electronic filing system for investment advisers sponsored by the Securities and Exchange Commission and NASAA, with FINRA serving as the developer and operator of the system. *See* www.iard.com.

[4] *E.g.* completing broker-dealer and investment adviser examinations and bringing enforcement actions.

[5] Most recently, NASAA laid out its views regarding expungement in a letter to FINRA's Arbitration Task Force. *See* Letter from William Beatty, NASAA President and Washington Director of Securities, to Barbara Black, FINRA Dispute Resolution Taskforce, Re, NASAA Comments on Expungement of Matters from the Central

NASAA's position on expungement is clear: expungement is an extraordinary remedy to be granted solely in limited circumstances and the current process has failed to properly maintain the limited scope of this remedy.[6] In its 2015 letter, NASAA urged FINRA's Arbitration Taskforce, at a minimum, to endorse short-term solutions that would improve the existing expungement process, while regulators worked on more substantial reforms.[7] In the current Proposal, FINRA has taken a necessary first step towards those short-term solutions in meaningful expungement reform by proposing thoughtful amendments designed to mitigate some of the long-recognized issues with the existing expungement process. We appreciate and agree with the recognition that the Proposal is only a first step and reiterate our commitment to work with FINRA to implement more substantial regulatory reforms than those contemplated by the Proposal.

NASAA supports FINRA's efforts in the Proposal, but, along with FINRA, remains concerned with how far the current expungement process has strayed from the original intent of Rule 2080 and related arbitration rules. FINRA Rule 2080 and prior versions of the rule established a process designed to end the practice of arbitration panels granting expungement without clear criteria, regulatory participation, and court involvement.[8] The Proposal builds upon the original procedural framework by adding beneficial requirements and limitations related to the procedure of expungement. While NASAA supports the Proposal as an important first step, certain aspects of the proposed changes require further consideration.

Unanimity and In-Person Requirements

NASAA supports the proposed requirement that all expungement recommendations be made unanimously by a three-person arbitration panel. Given the extraordinary nature of expungement relief, it is inappropriate to recommend expungement without the agreement of the full arbitration panel. A divided panel indicates that there is doubt that the broker has met the

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Registration Depository, ("2015 Letter") (Aug. 31, 2015), *available at* http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/NASAA-Expungement-Letter-enclosure.pdf.

[6] *Id*. *See also*, Letter from Joseph Borg, NASAA President, to Barbara Sweeney, Secretary NASD Regulation, Inc., Re, Request for Comments – 01-65 Proposed Rules and Policies Relating to the Expungement of Information from the Central Registration Depository (December 31, 2001) *available at* http://www.nasaa.org/wp-content/uploads/2011/07/95-Letter.37262-47637.pdf ("NASAA 2001 Letter"); Letter from Deborah Bortner, NASAA CRD Steering Committee Co-Chair, to Margaret H. McFarland, Deputy Secretary, U.S. Securities and Exchange Commission, Re, File No. SR-NASD-2002-168; Proposed Rule 2130 Concerning the Expungement of Customer Dispute Information from CRD (June 4, 2003) *available at* http://www.nasaa.org/wp-content/uploads/2011/07/82-ProposedNASDRule-202130.37775-72237.pdf ("NASAA 2003 Letter"); Letter from Karen Tyler, NASAA President, to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, Re, Release No. 34-57572; File No. SR-FINRA-2008-010, Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure To Establish New Procedures for Arbitrators To Follow When Considering Requests for Expungement Relief (April 24, 2008) *available at* http://www.nasaa.org/wp-content/uploads/2011/07/31-Release-No34-57572SR-FINRA-2008-010NASAA.pdf ("NASAA 2008 Letter"); Letter from Andrea Seidt, NASAA President, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Re, Release No. 34-71959, File No. SR-FINRA-2014-020 Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 2081 (Prohibited Conditions Relating to Expungement of Customer Dispute Information) (May 14, 2014) *available at* http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Comment-Letter-Release-No-34-71959-File-No-SR-FINRA-2014-020.pdf ("NASAA 2014 Letter").

[7] *See* NASAA 2015 Letter, *supra* note 4, at 6.

[8] *See id*. at 3-6 (discussing the original intent of Rule 2080 and its predecessor rule).

higher burden attendant to eligibility for extraordinary relief, and thus should not merit an expungement recommendation. NASAA supports FINRA's recognition of the import of this decision and supports FINRA's corresponding proposal to eliminate the option to have a single arbitrator in a simplified arbitration proceeding make an expungement recommendation.

NASAA also supports the Proposal's requirement that a broker requesting expungement be present for an in-person hearing on his or her request. NASAA does not believe, however, that the proposed in-person requirement should be satisfied by appearing via video conference. Requiring a broker to be physically present during an expungement hearing is not an unreasonable burden given the extraordinary relief the broker is seeking.

As discussed in more detail below, however, NASAA opposes the inclusion of what it sees as a new "prong" to Rule 2080 by way of proposed changes to the expungement rules in the Code of Arbitration; namely, that arbitrators be required to make a finding that the customer dispute information that is the subject of the expungement petition has no regulatory or investor protection value. This "value" determination should be reserved for regulators.

Expungement-Only Arbitration Panels

NASAA also supports the Proposal's requirement that arbitration matters involving an expungement request that are not decided during the underlying customer case be heard by a specialized panel of arbitrators with particular expertise and training. In NASAA's experience, the majority of expungement requests are made in arbitration matters in which the underlying customer dispute is settled. As NASAA has noted previously, post-settlement expungement hearings often consist of a one-sided presentation of the facts, as investors and their counsel—the only other party in the case—have little incentive to participate after the investor's concerns have been resolved.[9] While an expungement-only arbitration panel does not fully address NASAA's concerns related to expungement recommendations based on one-sided proceedings, requiring such requests be heard by specially trained and experienced arbitrators is a good first step.[10]

In the Proposal, FINRA lays out the necessary qualifications for arbitrators on expungement-only panels.[11] NASAA supports the proposed additional qualifications.[12] NASAA generally agrees with FINRA's assessment that individuals meeting the proposed requirements would "better understand the unique nature of this extraordinary remedy and the importance of

[9] *Id*. at 4-5. *See also* NASAA 2003 Letter, *supra* note 5.

[10] NASAA has previously advocated that an expungement-only panel is an important interim step in expungement reform. *See* 2015 NASAA Letter, *supra* note 4, at 7.

[11] *See* the Proposal, *supra* note 2, at 10 (requiring that the Expungement Arbitrator Roster only include public chairpersons that have completed advanced expungement training, licensed to practice law, and have at least five years of relevant experience).

[12] FINRA recently changed its definition of public arbitrators to exclude certain lawyers from serving as public arbitrators if their practice involves representing clients in certain investment related actions. In NASAA's view, this limitation could create an artificially shallow pool of arbitrators for expungement-only panels due to the requirement that these arbitrators be attorneys and potentially have regulatory experience. FINRA should consider allowing lawyers that represent clients in investment-related cases serve on expungement-only panels.

maintaining the integrity of the public record."[13] However, the extent to which these expungement-only panels truly appreciate the nuanced regulatory issues related to expungement largely depends on the content and effectiveness of the proposed "enhanced expungement training" and future substantive changes to the qualification prongs in Rule 2080. NASAA encourages FINRA to consult with state regulators when developing this new training program.

Requiring Named Brokers to Request Expungement during the Underlying Customer Case

If adopted, the Proposal would require brokers named as a party in a customer-initiated arbitration to request expungement in the course of the underlying dispute. NASAA supports this proposed changed. As the Proposal notes, "some associated persons have filed requests seeking to expunge customer dispute information years after FINRA has closed the Underlying Customer Case."[14] This lack of timeliness of expungement requests is a significant concern for NASAA and its members. As more time passes, evaluating the merits of a request for expungement becomes more challenging. When expungement requests lack timeliness, it can be difficult or impossible to locate relevant individuals or documents, as FINRA notes in the Proposal.[15] Requiring named brokers to bring their expungement requests during the underlying customer case goes a long way at closing a significant loophole in the current expungement process.

While this amendment, if adopted, would likely result in timelier expungement requests, it does not fully address—and nor do the other aspects of the Proposal—the problems created by the current Rule 2080's procedural nature. Correcting these issues is a main focus of NASAA's continued work to reform expungement. Further, because the Proposal does not fully address the shortcomings of the current Rule 2080 process due to its procedural nature, it is imperative that FINRA, as it has acknowledged in the Proposal, views the proposed changes as the starting point, not the finish line, for expungement reform.

Changes for Unnamed or "Subject of" Brokers

The Proposal would codify a FINRA-member firm's ability, with the broker's consent, to request expungement on behalf of a broker who is unnamed in a customer arbitration but is the "subject of" the dispute.[16] In the event that a firm does not request expungement on behalf of an unnamed broker, the unnamed broker would be required to bring a request for expungement within one year after the closing of the underlying customer case.[17] As further steps toward reforming the expungement process, NASAA supports this requirement along with the provision in the Proposal that would prevent an unnamed broker from filing an arbitration claim seeking expungement against an investor.

While NASAA supports the proposed changes related to expungement requests by unnamed or "subject of" brokers, particularly the one-year time limitation and prohibition on

[13] *See* the Proposal, *supra* note 2, at 10.
[14] *Id*. at 5.
[15] *Id.*
[16] *Id*. at 7-8.
[17] *Id*. at 8.

actions against investors, there are challenges in allowing firms to bring actions on behalf of brokers. Such an approach would require cooperation between the firms and the relevant brokers. This cooperation may not always exist, particularly in cases in which brokers are no longer associated with the relevant firm or the firm's and the broker's pecuniary interests diverge. As a result, the processes and procedures used by FINRA to notify unnamed brokers about closed matters is particularly important as that notice triggers the proposed one-year time limitation. If the Proposal is adopted, FINRA would be required to develop robust, mandated notification procedures to limit potential disputes regarding whether subsequent expungement requests are timely.[18]

Increased Fees

The Proposal would also require brokers seeking expungement to pay additional fees. FINRA and the states expend significant resources in reviewing expungement requests. While the increase in fees does not directly offset those costs, the increased fees would at least in part reduce the costs FINRA incurs in responding and processing expungements. NASAA therefore supports this proposed changed.

Further Expungement Reform is Required

In 2003, NASAA agreed with the very limited expungement process for removing certain limited information from the CRD originally memorialized in the provisions of Rule 2130. At the time, Rule 2130 appeared to provide a better solution for expunging a broker's CRD records, as the then-NASD was expunging records solely based on recommendations from arbitrators without the standards of factual impossibility, lack of involvement, and false claims or allegations as set forth in the rule.[19] Unfortunately, this framework has failed, and is applied in a way that favors the interests of a single registrant over regulatory imperatives and the public interest. As indicated above, the Proposal, if implemented, would improve the existing expungement process, and NASAA applauds FINRA for this step towards meaningful expungement reform.

Expungement of a broker's CRD record is an extraordinary remedy. If the remedy remains commonplace and routine grants are not curtailed, the ongoing deletion of disclosure information from CRD will result in a loss of confidence in the CRD system.[20] Moreover, regularly expunging this information could lead to distrust in the other regulatory safeguards that rely on the information housed in the CRD. Without more significant reforms, the existing expungement process will continue to result in the deletion of critically valuable regulatory information from the

[18] NASAA also notes the potential for workability complications related to brokers bringing actions against firms that are out of business and/or no longer FINRA members. This issue is also presented by the Proposal's formal expansion of the Rule 2080 process to mere customer complaints, which is addressed in more detail below. In this context, NASAA again sees practical concerns with the requirement that brokers bring claims against the firm they were associated with at the time of the customer complaint.

[19] Currently codified in Rule 2080(b)(1).

[20] In the Proposal, FINRA acknowledges that between 2014 and 2016 arbitrators granted 75% of the expungement requests they decided. *See* The Proposal, *supra* note 2, at 13-14. This makes clear that expungement is no longer an extraordinary remedy.

CRD. If such information continues to be removed without meaningful consideration as to its regulatory value, regulators, industry, and investors can no longer trust that the data in the CRD contains all of the information necessary to make licensing and hiring decisions or to determine which financial professional to entrust with an investor's financial future.

The Proposal attempts to recognize the important regulatory value of customer complaint information by requiring arbitrators make a specific finding that information that is the subject of an expungement request has no regulatory or investor protection value before granting an expungement request.[21] NASAA appreciates FINRA's efforts to enhance its expungement rules by requiring arbitrators to make this important determination before granting an expungement request. However, this is a regulatory determination, which cannot be shifted to arbitrators selected to resolve a dispute pursuant to a contract between private parties. It would be inappropriate to deputize arbitrators and usurp a regulator's responsibilities.

In fact, regulators have already determined that customer complaint information has investor protection and regulatory value by requiring brokers to disclose it. By requiring the disclosure of this information on uniform registration forms, securities regulators—state and federal—have concluded that *all* customer complaint information within defined parameters is *presumptively* valuable. The presumptive value of this information underpins the premise that the expungement of any information is an extraordinary remedy.

NASAA, however, recognizes that there are certain very narrow situations in which customer complaint information should be expunged; namely, when, as the result of an error in responding to the questions on registration forms soliciting customer complaint information, such information is reported and subsequently disclosed publicly. Despite the intended rare recommendation contemplated by the original rules, expungement under the current Rule 2080 process is all too frequently recommended. NASAA can point FINRA to myriad examples where the current process has failed by recommending that valuable regulatory information be removed from the system, and is willing to provide these cases should FINRA find them useful. Because regulators have already determined the presumptive value of customer complaint information by requiring that it be disclosed, regulators have a responsibility to ensure such information is in fact disclosed and maintained. The expungement process cannot be used to routinely reverse these important regulatory disclosures.

Consequently, NASAA opposes the Proposal's expansion of the types of customer complaint information that would be subject to expungement under the Rule 2080 process. We recognize that there is increasing use of the expungement process beyond the scope originally intended with the rules now being used to address expungement requests related to customer *complaints* that were *not* the subject of arbitration. NASAA objects to expanding the scope of Rule 2080 to apply to all information related to customer complaints. Such an approach would further embed a flawed process that does not afford regulators the ability to preserve information already considered to have regulatory value and provide investor protection.

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[21] *See id*. at 3, 9-10.

The Proposal would reward brokers who capitalize on the procedural nature of the rule and seek to expand its scope beyond arbitrated complaints. In NASAA's view, now is not the time to codify and expand an already broken process. Despite the Proposal's attempt to apply some limitations, formalizing a process to expunge customer *complaints* without a full vetting of the policy implications and collateral consequences of such a rule is not appropriate.[22] While this is an issue that FINRA and NASAA need to address as we continue to rework the expungement issue, expanding the scope of a flawed approach through this Proposal is not the appropriate approach to address this matter.

Finally, one of the primary areas that the amendments in the Proposal does not, and as a procedural proposal cannot, successfully address is the fact that more and more brokers are bypassing the Rule 2080 process entirely by going directly to court. Again, NASAA can point FINRA to many examples of cases purposely pursued in court to avoid the procedures—although flawed—in place in the arbitration expungement context. This is a significant concern for NASAA and its members, and for all the good ideas put forth by FINRA in the Proposal, none of them address this issue. Only substantive changes to broker's behavioral rules will curtail the rapid erosion of information from CRD and IARD. In its current form neither Rule 2080 nor the Proposal would prevent this unfortunate reality. In NASAA's view, such a mechanism is required, and its absence highlights the problems with Rule 2080's procedural nature. To truly fix the expungement process, wholesale reform is necessary.

The Path Forward

As noted in the Proposal, NASAA and FINRA have been working together to explore potential amendments to the expungement process. NASAA appreciates the time and effort FINRA staff have dedicated to this important issue. While this work is ongoing and many issues must still be resolved, in NASAA's view, a workable expungement framework that truly preserves expungement as an extraordinary remedy would be built around the following core principles:

- Substantive standards that properly limit the scope of expungement requests, including a clearer presentation of new standards that replace the flawed and misapplied prongs outlined in Rule 2080;
- Mandatory process, meaning all expungement requests must be made pursuant to the new process, which would be designed to close loopholes in and avoid unintended outcomes of the current process;
- Increased regulatory participation, allowing for both a regulatory determination regarding the merits of an expungement request and the legal process to protect the data;
- Earlier notices to state regulators of an expungement request to better facilitate regulator involvement where appropriate;

[22] Further, other means are available today for brokers to address their concerns related to customer complaints. When customer complaints are disclosed on the Form U4, brokers have the ability to provide their own responses to rebut the allegations in the complaints.

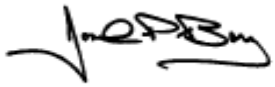
- Leverage the efficiencies of arbitration in fact finding, but limit the ability of arbitrators to "grant" expungement requests, instead only allowing factual, not legal, recommendations that are not considered awards;[23]
- Preserve the requirement that a court order the expungement of records prior to the removal of any information from the CRD.

NASAA has engaged FINRA with these core principles in mind, and pledges to work towards meaningful expungement reform.

Conclusion

NASAA appreciates the opportunity to offer its comments in support of the Proposal, as it is a significant first step in meaningful expungement reform. The current expungement process is broken: a fact on which NASAA and FINRA agree. And as stated above, NASAA is prepared to provide and discuss with FINRA examples of expungement requests illustrating many of the problems unsolved by the changes in the Proposal. While NASAA looks forward to its continued dialog with FINRA on expungement, this dialog cannot continue indefinitely, while stop-gap fixes are applied to a fundamentally flawed expungement foundation. It is critical that a long-term solution to the expungement problem be reached, so as to stop the abuses that cannot be stopped by the Proposal. Should you have any questions regarding the comments in this letter, please do not hesitate to contact A. Valerie Mirko, (vm@nasaa.org), NASAA General Counsel, via email or by phone at 202-737-0900 or Melanie Senter Lubin (mlubin@oag.state.md.us), Maryland Securities Commissioner, Chair, NASAA's CRD/IARD Steering Committee, via email or by phone at 410-576-6365.

Sincerely,



Joseph Borg
Alabama Securities Director
NASAA President

[23] In the Proposal, FINRA specifically seeks comment on whether it should remove the concept of "granting expungement" in favor of "recommending expungement." *See* the Proposal, *supra* note 2, at 17. In NASAA's view, FINRA should make this change. As explained in prior comment letters, *supra* notes 4-5, the structure of Rule 2080 requires the confirmation of an arbitration award in a court of competent jurisdiction. This structure significantly limits a state regulator's ability to present arguments opposing the merits of an expungement request during a confirmation proceeding in state court due to the deference courts are required to give arbitration awards under the Federal Arbitration Act. *See* Federal Arbitration Act, 9 U.S.C. § 10-11 (explaining the limited circumstances a court can vacate or modify an arbitration award).

In 31 years of service, I have seen the scale tilt from rogue brokers; to rogue clients and lawyers, to the abusive state in which we are now. Very few professions are as regulated as ours has become. In the meantime it has become easier and easier for rogue clients and lawyers to file suit and always gain a financial settlement on any kind of claim, meritless or not. Meritless and frivolous claim are being paid by the big firms because its easier and cheaper to settle, than the costs of going to court and defending their advisors!
In the meantime the advisor is left with a negative mark . His reputation threaten and trashed by a frivolous client and his lawyers , the regulators suffocating the innocent advisors and the big firms accepting their regulatory injustice because is cheaper and it helps them to tie up their advisors to the firm . The US system is based on Justice!!!! But where has it gone in this profession, when you are penalized even if you are innocent. Even if it's a meritless and frivolous case and is proven, you still have to pay thousands of dollars for an expungement for doing your job right ????? Where is the justice on that ? All the harm goes to the advisors no matter what; and they are left or force to fend for themselves.
It`s like having a gun to your head and no matter what you say or do the trigger is going to be pulled, even if you are innocent!
I think it`s time for our profession, professionals, firms and regulators(finra) to balance the scale again and stop the abuse that is growing to a monstrous scale and having innocent people who do their job well, fairly defended. Rouge clients and their layers need to become liable as well and should be put on a win, lose situation, penalized and fined. Not a win ,win which is where we are and making it easier for them. Anybody for any stupidity can file suit and they are assured by their layers that some financial reward will come out of this with zero downside or liability. It`s become a great business for lawyers and their clients!!!!!
In the meantime Finra keeps taking away the advisors rights and giving it to the core of the problem which is overregulating , giving more power to rogue clients and their lawyers as the firms are not taking a stance on this abuse.
Fair is fair and that is what justice is based on ! Finra should open their eyes and stop suffocating and overregulating advisors and make clients and their layers more liable . Finra needs to balance the scale. Penalize and make pay the liable party being the advisor or the client and his layers. This is where their efforts should be focused and stop the witch hunt with the advisors and the monetary bonanza gifts abuse given to the client. Making it easier and easier for them and ruining countless innocent carriers.

*Juan Braschi*
First Vice President
Senior Financial Advisor

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February 5, 2018

**VIA EMAIL (pubcom@finra.org)**
Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

**Re: FINRA Regulatory Notice 17-42**
**Proposed Amendments to the Codes of Arbitration Relating to Requests to Expunge Customer Dispute Information**

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to provide this letter in response to the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 17-42, proposing amendments to the Codes of Arbitration, including FINRA Rules 12805 and 13805, relating to requests to expunge customer dispute information (the "Notice" or the "Proposal").

## I. Executive Summary

SIFMA continues to support the essential goals of the Central Registration Depository ("CRD") and FINRA BrokerCheck public disclosure system, including that investors should have access to ***complete and accurate*** information about firms and individual registered representatives.[2] Given the general public's increased use of and reliance upon BrokerCheck, the accuracy of reported

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] See NASD Notice to Members 99-54, p. 2 (July 1999) stating that "NASD Regulation recognizes that the information on the CRD system has important investor protection implications, provided it is complete and accurate." See also SIFMA April 2012 comment letter in response to Regulatory Notice 12-10 (February 2012) stating that "the information maintained in BrokerCheck must be accurate, clear, concise and relevant to the investor, and must be balanced against member firms' and their employees' legitimate privacy interests, and expectations of fairness and balance." See also Notice to Arbitrators and Parties on Expanded Expungement Guidance (Updated September 2017) requiring that disclosures be "accurate and meaningful."

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information should be of paramount concern. No one benefits when a regulatory entity publishes, and thereby attaches its imprimatur to, potentially inaccurate or misleading information.

SIFMA believes that existing rules and FINRA's expanded expungement guidance provide sufficient safeguards for the expungement process. The proposed rules would establish inconsistent adjudicatory standards and procedures applicable only to expungement applications, and would increase the cost and burden on registered representatives seeking to protect their reputations and livelihoods from the harm caused by the disclosure of false or misleading customer complaint information.

The Notice asserts that by increasing the obstacles to expungement, including the costs and inconvenience to registered representatives, expungement filings would be fewer and more meritorious. However, the rule proposals and accompanying conclusions have been presented without any accompanying evidence that such changes are in fact necessary. Namely, the Proposal does not provide any cost-benefit analyses or empirical evidence that expungements are too numerous, are being improperly granted, or are being pursued in ways that are inconsistent with FINRA rules and regulatory guidance.[3] Anecdotal concerns from "critics of expungement" should not be the basis for wholesale changes to an essential remedy afforded to over 630,000 registered representatives to prevent the unfair dissemination of false or misleading information.

## II. FINRA's Disclosure Regime Is Allegation-Driven And Expungement Is An Essential Remedy To Prevent The Dissemination Of False Or Misleading Information

The CRD/BrokerCheck regulatory reporting regime presently requires the public disclosure of more information by registered persons than any other regulated profession. The broad reporting requirements related to customer complaints are "allegation-driven," rather than outcome-based, and require disclosure based on the "four corners" of a written customer complaint or pleading, even in the face of clear evidence to the contrary. Moreover, many complaints involve product-related allegations that in some cases unfairly result in disclosures against individual registered representatives.

FINRA's 2009 amendments to the Uniform Forms (Forms U4 and U5), especially those requiring disclosure of customer complaints against "unnamed" persons (See Reg. Notice 09-23), and the BrokerCheck Disclosure Rule (FINRA Rule 8312) have resulted in an increase in reportable disclosures, which can remain on a registered persons' public record for as long as they are in the industry and for several years thereafter.

[3] See Framework Regarding FINRA's Approach to Economic Impact Assessments for Proposed Rulemaking (Sept. 2013) (detailing FINRA's cost-benefit analysis obligations), available at http://www.finra.org/sites/default/files/Economic%20Impact%20Assessment_0_0.pdf

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The Notice states that "[i]t has been FINRA's long-held position that expungement of customer dispute information is an extraordinary measure, but it may be appropriate in certain circumstances." However, expungement has long been recognized as a core part of an arbitrator's power to award equitable relief. See NASD NTM 99-54, p. 3. Expungement serves one of the "three competing interests" of the CRD/BrokerCheck system, including, critically, the interests of over 630,000 registered representatives:

> (1) the interests of NASD, the states, and other regulators in retaining broad access to customer dispute information to fulfill their regulatory responsibilities and investor protection obligations; **(2) the interests of the brokerage community and others in a fair process that recognizes their stake in protecting their reputations and permits expungement from the CRD system when appropriate**; and (3) the interests of investors in having access to accurate and meaningful information about brokers with whom they conduct, or may conduct, business.

NASD NTM 04-16, p. 2 (footnote omitted, emphasis added).

Based on these guiding principles, expungement is the *only* remedy available to registered representatives to remove false, inaccurate or erroneous information from their public disclosures. Contrary to expungement being an "extraordinary"[4] measure, expungement is an *essential* remedy to ensure the appropriate balance between the public disclosure of meritorious versus spurious complaints within the "three competing interests" of the CRD/BrokerCheck reporting regime.

## III. Current Rules And Expanded Expungement Guidance Provide Substantial Safeguards For The Expungement Process

Current FINRA rules ensure that expungement decisions are made only after a fact-based inquiry by competently trained arbitrators. In order for an expungement to be granted, Rule 2080(b)(1) requires a finding that (i) the claim or allegation is factually impossible or clearly erroneous; (ii) the registered person was not involved in the alleged sales practice violation, forgery, theft, misappropriation or conversion of funds, or (iii) the claim, allegation, or information is false. If the expungement award is based on any findings other than these three grounds, FINRA maintains the right to be named as a party and challenge any expungement award in a state court confirmation proceeding. (Rule 2080(b)(2)). Rules 12805 and 13805 require a recorded hearing along with a written explanation detailing the basis for the expungement relief. Rule 2081 prohibits conditioning settlements on non-opposition to requests for expungement relief. Additionally, the court confirmation requirements under FINRA Rule 2080 and relevant guidance (including those

[4] The "extraordinary remedy" language should not become part of the rule because the term is overly broad, vague and not susceptible to clear and consistent application as a legal term.

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addressing waiver requests and preserving the rights of FINRA and state regulators to be made aware of and, if appropriate, challenge expungement awards) provide additional safeguards against inappropriate grants or potential abuses of the expungement process.

In 2013, FINRA began issuing "expanded" guidance to be followed by arbitrators when considering expungement requests. This guidance, updated as recently as September 2017, provides additional safeguards that increase the opportunity for customer participation, including requirements that: (i) allow a customer and his/her counsel to appear and testify at the expungement hearing; (ii) allow counsel for the customer or a pro se customer to introduce documents and evidence at the expungement hearing; (iii) allow counsel for the customer or a pro se customer to cross-examine the broker and other witnesses called by the party seeking expungement; and (iv) allow counsel for the customer or a pro se customer to present opening and closing arguments if the panel allows any party to present such arguments. Other expungement guidance requires arbitrators to review BrokerCheck Reports and prohibits the re-filing of expungement applications after a prior petition has already been made and adjudicated.[5]

Accordingly, FINRA already has in place a robust set of rules and expanded guidance to safeguard the expungement process, and there does not appear to be any empirical or other justification for many of the additional onerous regulations contained in the Proposal.

## IV. Comments to FINRA's Proposed Amendments

### A. Expungement Awards Should Not Require Unanimous Decisions By Mandatory Three-Member Arbitration Panels

Since the advent of FINRA's three-member panels, arbitration awards have been issued based on the determination of a majority of arbitrators. The Notice proposes a different and more stringent threshold for expungement decisions by requiring a unanimous decision in favor of expungement. Adoption of the proposed changes would result in a panel potentially applying a majority rules standard to the liability determination, but a unanimity standard to the expungement determination in the same case. The Proposal purports to assign greater value and scrutiny to expungements compared to other types of cases, but does not offer any explanation or empirical evidence as to why expungements warrant a higher threshold than a multi-million dollar customer or industry case. If implemented, this rule would impinge upon the fundamental fairness of the expungement process in providing an effective balance to the allegation-based complaint reporting regime and will have a significant impact on registered representatives' ability to protect their livelihoods and reputations.

[5] See Notice to Arbitrators and Parties on Expanded Expungement Guidance (Updated Sept. 2017) available at: https://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance

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The proposal to increase arbitrator qualifications and training through a separate Expungement Arbitrator Roster (the "Roster") consisting of practicing attorneys who have received advanced expungement training and have at least five years of experience in either litigation, securities regulation, administrative law, service as a securities regulator or service as a judge is commendable. More highly qualified and trained expungement arbitrators should lead to a more efficient and fair process, instill greater confidence in arbitrators by FINRA, customers, firms and registered persons and reduce the perceived need for unanimous decisions.

Current FINRA rules permit the parties, upon consent, to select a single arbitrator. However, as noted above, the Notice proposes a mandatory three-person panel that FINRA would randomly assign from the Roster for expungement cases. The Notice does not contain any discussion or evidence that a single arbitrator is unable to reach a just decision or that a three-person panel is more efficient or may reach a more accurate decision than a single highly qualified and trained arbitrator. If FINRA, customers, firms and registered persons can have confidence in a highly qualified and experienced single arbitrator through the Roster, there appears no compelling need to use three instead. This proposal will increase the financial burden on registered representatives seeking expungement.

SIFMA disagrees with the proposed process of FINRA randomly assigning arbitrators instead of permitting parties to rank and/or strike them, as is the current practice. Parties' selection of neutral arbitrators is a hallmark of the arbitration process. FINRA's random assignment of arbitrators removes the parties' involvement and input, as well as the consensual nature of arbitration. Moreover, if implemented, the rule would treat expungement differently than any other arbitration proceeding, for which the parties could still select a single arbitrator or three-person panel. Accordingly, SIFMA supports continuing the arbitrator ranking system from the proposed Roster for expungement-only cases. However, to preserve arbitrator neutrality and foster greater transparency in arbitration education and assignment, SIFMA proposes that FINRA make the following publicly available relating to Roster arbitrators: (1) all training materials utilized; 2) all FINRA communications with Roster arbitrators regarding expungement; and (3) all documents related to the addition, removal or exclusion of any Roster arbitrators.

Additionally, current FINRA rules allow expungements to proceed in those cases resolved other than by award (*i.e.*, settlement) using the same arbitrators empaneled in the underlying case. The Proposal would instead require the filing of a new expungement matter for cases resolved other than by award, using a panel randomly assigned from the Roster. This proposal appears inefficient because often times the sitting panel involved in a case since inception is in the best position to know and assess a case's facts and circumstances. Permitting a sitting panel to determine expungement in these cases would be most appropriate because it would provide for greater efficiency, lower costs and a quicker resolution. To address FINRA's concern for greater training and increased qualifications for those arbitrators determining expungement, while also providing

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for greater efficiency for a sitting panel to determine expungement, SIFMA proposes that at least one arbitrator on a three-person panel be selected from the Roster at each case's inception (or that all Chairs be Roster certified).

### B. Panels Should Not Be Required To Find That The Information To Be Expunged Has "No Investor Protection Or Regulatory Value"

FINRA already imposes high standards in order for arbitrators to recommend expungement. FINRA Rule 2080(b)(1) requires a finding either that: (i) the claim or allegation is factually impossible or clearly erroneous; (ii) the registered person was not involved in the alleged sales practice violation, forgery, theft, misappropriation or conversion of funds, or (iii) the claim, allegation, or information is false. If the expungement award is based on any findings other than the above, FINRA maintains the right to be named as a party and challenge any expungement award in a state court confirmation proceeding. See Rule 2080(b)(2).

By proposing additional elements for expungement requiring interpretation and imposition of regulatory policy, the Notice suggests the current high standards of falsity, impossibility or non-involvement are somehow insufficient. However, the Notice appears to provide no evidence or argument as to why these high standards are insufficient or why they need to be bolstered.

In addition to the high standards imposed by FINRA Rule 2080(b)(1), the Notice proposes that a Panel must also find (and state in the Award) the customer dispute information has *no investor protection or regulatory value*. However, customer dispute information that satisfies one of the three grounds under Rule 2080(b)(1) simply cannot otherwise have any investor protection or regulatory value. Requiring a specific finding that the information has no investor protection or regulatory value would be redundant given the current high standards imposed under the rule. The imposition of these additional standards would appear to be largely symbolic and deterrent in nature, yet lack practical application.

Moreover, this proposed rule is already part of FINRA's expanded expungement guidance, which provides that "[c]ustomer dispute information should be expunged only when it has no meaningful investor protection or regulatory value." Notice to Arbitrators and Parties on Expanded Expungement Guidance (Updated Sept. 2017). Such language has also been incorporated into FINRA's expungement script. However, these proposed rule changes reflect an overarching regulatory policy and should not be included as a factual finding required in an award. This proposed language may have the effect of discouraging otherwise meritorious expungement claims and stifling the process by increasing the burden on the registered representative with no attendant practical benefit.

The current expungement standards under Rule 2080(b)(1) require arbitrators to apply the specific facts of a case to determine whether expungement is warranted under the rule. Arbitrators are

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further required to provide written factual findings in support of any expungement award. If implemented, this proposal would transform the traditional role of arbitrators as fact-finders and further require them to make a policy determination in each case. FINRA sets regulatory policy; it is not an arbitrator's role to interpret and implement regulatory policy on a case-by-case basis.

### C. The Proposed One-Year Limitations Period For Filing Expungement Should Be Modified Or Eliminated

FINRA currently imposes no time limitation specific to expungement claims. To satisfy the laudable goal of preserving the integrity of customer complaint reporting by providing complete and accurate information to investors, false complaints should be expunged, no matter how old. The Notice proposes a one-year limitation commencing on the initial reportability of a customer complaint by the firm or one year after the conclusion of an arbitration in which the broker was not a named party. However, the Notice cites no basis for a one-year limitation for expungement claims and does not appear to provide any distinction as to why expungement limitations periods should be treated differently from all other limitations periods. Since FINRA Rules 12504 and 13504, which already provide a six-year eligibility period to file claims, ostensibly apply to expungements, there is no basis for a separate and significantly shorter time limitation for expungement-only matters.

There are also practical and procedural limitations of this proposed one-year limitations period. The proposed one-year limitation is insufficient for firms to properly investigate customer complaints and respond to customers. This would necessarily lead to the filing of expungements for pending or recently denied complaints that would then be stayed under recent expungement guidance that precludes concurrent actions. This would lead to registered representatives and firms devoting time, resources and capital to an inefficient regime created by an artificially short limitations period. In order to address this, SIFMA proposes that any such time limitation run from the close-out of the customer complaint on CRD (or the close of the arbitration), and not the initial reporting of the complaint on CRD.

Additionally, the Proposal does not address proposed time limitations for filing expungement actions for customer complaints that are disclosed before the implementation of the proposed rules. SIFMA requests further guidance on the extended time period that will be afforded registered representatives who have eligible claims for expungement that would become ineligible if the rule proposals were implemented. In any event, SIFMA proposes a one-year time period for registered representatives to file for expungement of previously disclosed customer complaints that were eligible for expungement prior to any rule change and requests that FINRA provide sufficient flexibility to address subsequent rule changes that may implicate limitations period by having retroactive effect.[6]

[6] In 2010, FINRA amended Rule 8312, requiring the reportability of previously archived historical complaints. Sufficient safeguards and flexibility should be built into the proposed time limitations rules to address subsequent rule

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### D. Other Important Proposed Changes Require Additional Consideration By FINRA

#### 1. The Requirement For an In-Person or Video-Conference Expungement Hearing is Unnecessary and Inefficient

Current FINRA Rules provide that an expungement hearing must be recorded, but that it may be held telephonically. The panel retains discretion to order an in-person hearing and exercises that discretion upon occasion when circumstances warrant. The Proposal would eliminate telephonic expungement hearings and would instead mandate in-person or video-conference expungements. However, the Proposal permits customers to testify by telephone. The Proposal offers no evidence concerning the efficacy of telephonic hearings or why expungements should require in-person hearings, while other cases, such as customer cases, could still be held telephonically. This Proposal would greatly increase the cost of expungement through attendant travel costs and loss of productivity. Additionally, permitting customers, but not registered representatives, to provide telephonic testimony reflects disparate witness standards. There appears no basis for requiring in-person testimony for a panel to better assess a registered representative's credibility, yet not requiring in-person testimony for a panel to better assess a complaining customer's credibility.

#### 2. The Proposed Increase in Filing Fees and Additional Member Fees are Burdensome and Punitive

In pending arbitrations where a registered representative is named as a party, the Proposal would require the individual to pay an additional expungement filing fee of at least $1425 and would assess an additional member surcharge and processing fee against the firm, in addition to the fees charged in the underlying arbitration. These additional fees are burdensome, punitive and will likely discourage registered representatives and firms from pursuing otherwise meritorious expungement claims. This could have an unfortunate impact of creating a tiered system where only registered representatives and firms that can absorb these additional costs will be able to pursue expungement, regardless of merit. The factual basis of each customer complaint should be the determining factor in expungement and not prohibitive costs that may deter otherwise meritorious expungement filings.

changes that have retroactive effect, such as starting the limitations period from the time of the rule change having retroactive effect, as opposed to the initial reportability of the customer complaint.

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3. **New Expungement Filings For All Cases Closed Other Than by Award are Unwarranted**

Currently, registered representatives may file for expungement in a customer case, even when that case is closed other than by award (*i.e.*, settlement). The Proposal would require registered representatives to file a new expungement matter, and would require registered representatives and member firms (that must now be named as a party), to pay the applicable filing, processing and member fees. As previously noted, the sitting panel is in the best position to determine expungement based on its involvement in the customer case. Such proposal would increase the costs, burden and time for resolution and may serve as a punitive measure for both the registered representative and the member firm, creating the unintended consequence of a tiered system described above.

Moreover, the proposed requirement to file for expungement 60 days prior to the first scheduled hearing date appears untenable and impractical. The proposal would require the registered representative and firm to pay separate expungement fees, even though a large portion of cases settle within 60 days of the hearing. Such fee structure is punitive in nature because it would essentially require triple payment by member firms (underlying customer arbitration, expungement during underlying arbitration, expungement in separate expungement matter) and double payment by registered representatives (expungement in underlying arbitration, expungement in separate matter). In addition to exponentially increasing the cost of expungement, this could also have the indirect effect of increasing the cost of settlement, potentially discouraging settlement in smaller cases due to the increased costs associated with expungement.

4. **New Procedures for Simplified Arbitrations ($50,000 or less) Appear Inefficient and Not Simplified**

The current process for simplified arbitrations is for a single arbitrator to rule on liability first, then hold a hearing solely for the purpose of determining expungement. The Proposal would require the registered representative to file a *new* expungement claim, with FINRA randomly assigning three arbitrators from the Roster only *after* resolution of underlying arbitration on papers. FINRA would then assess additional fees against the registered representative and member firm. This proposal is inconsistent with the purposes of simplified arbitrations to reduce costs and resolve cases expeditiously. A simplified arbitration should be *simplified* for all parties involved, not just the customer. This change would make expungement in simplified arbitrations cost prohibitive and discourage meritorious expungement claims.

SIFMA proposes modification of the rules for simplified arbitrations by providing for the selection of a single arbitrator from the Roster to decide both liability and expungement. The arbitrator would issue a bifurcated order, first deciding the issue of liability on papers, then hold a hearing

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solely to determine expungement. This would promote greater cost efficiency, a quicker resolution and greater customer participation.

SIFMA reiterates its general support for FINRA's desire to continuously improve the expungement process by providing complete and accurate customer complaint disclosure information on individual registered representatives and firms to the investing public. However, sufficient safeguards are already in place in the form of extensive rules and enhanced expungement guidance that are already onerous on registered representatives. The proposed rules establish inconsistent adjudicatory standards and procedures applicable only to expungement applications and would unfairly increase the cost and burden on registered representatives seeking to protect their reputations and livelihoods from the harm caused by the disclosure of false or misleading customer complaint information. These changes could potentially tip the balance between the allegation-based reporting regime and the need to provide only complete and accurate disclosure information. Many of the rule proposals will have a significant deterrent effect and stifle the expungement of otherwise meritorious expungement claims. SIFMA thanks FINRA staff for its willingness to consider the issues raised in this letter. We look forward to our next opportunity to comment on issues related to FINRA's expungement process.

If you have any questions or require further information, please contact me at 202-962-7300, kcarroll@sifma.org, or our counsel, Mark D. Knoll and David Hantman, Bressler, Amery & Ross, P.C., at 212-510-6901 / 212-510-6912, mknoll@bressler.com / dhantman@bressler.com.

Very truly yours,

Kevin M. Carroll

Kevin Carroll
Managing Director and Associate General Counsel

cc: Mark D. Knoll, Bressler, Amery & Ross (by electronic mail)
David I. Hantman, Bressler, Amery (by electronic mail)

I am writing this email during the comment period regarding Regulatory Notice 17-42. We live in a society where we are supposed to be considered innocent until proven guilty. The current process for expungement already allows for a complaint to remain on an advisor's record even if the case is found to be frivolous and even not true entirely. Then we, as advisors, as required to spend time and money proving again that we are innocent of all claims. I personally have an existing example of how this is unfair to the advisor. A claimant testified in his deposition that he did not believe I did anything wrong nor was I guilty of any of the claims filed against me…but rather that his attorney told him he had to name me (along with the Broker Dealer) in the lawsuit in order to get the best claim and most recompense. While I am confident that this claim will be expunged from my record, how could it be right that I have to spend time and money to prove what the client stated under oath. Now, you are proposing to raise the cost and make the decision more difficult to prove that I am innocent when the claimant testified to such under oath?? Again…where is the innocent until proven guilty status we are all guaranteed under the law??

Please reconsider the proposals under Regulatory Notice 17-42 and provide a more fair process for cases to be heard simultaneously with the original complaint. That would seem to save everyone time and money…while being more fair to all involved.

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I respectfully request that FINRA provide a swift and affordable process for advisors to expunge meritless claims off their records.

*Michael J. Di Silvio*

Managing Director - Investments
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January 9, 2018



***Via Federal Express***

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**
**(December 6, 2017)**

Dear Ms. Asquith:

We write in response to the request for comment on the proposals concerning "expungement of customer dispute information" as set forth in FINRA's Regulatory Notice 17-42, which was dated December 6, 2017 (hereinafter, the "Proposal").

Since 1977, this law firm has been actively involved in the representation of clients having legal matters concerning the financial services industry in general, and arbitration proceedings before FINRA Dispute Resolution (formerly NASD arbitration) in particular. In our view it is essential that FINRA Dispute Resolution be viewed by all as a neutral forum where both public customers, and industry members and their registered representatives can receive a fair and impartial resolution of their disputes. Over the past decades, many changes to FINRA's Code of Arbitration (the "Code") have enhanced FINRA's reputation as a fair and impartial forum; unfortunately, that is not the case with respect to the changes to the procedures for expungement, as set forth in the Proposal.

This topic is of great importance to registered persons, given the relatively recent evolution of industry rules concerning the reporting of customer complaints. Today, most customer complaints against a registered person, including false and even defamatory claims, must immediately be reported on their CRD registration record; and there they must remain, publicly available on the Internet to be viewed by their customers, potential customers and anyone else, unless and until "expunged" from the CRD system. Traditional notions of basic fairness and due process demand that the right to seek expungement of false claims not be subjected to unreasonable conditions, restrictions and excessive fees; unfortunately, the Proposal would do just that, and thereby would diminish FINRA's reputation as a fair and neutral forum. In our view, the proposed amendments to FINRA's Codes of

Arbitration Procedure relating to requests to expunge customer dispute information from the securities industry registration records of associated persons, as set forth in the Proposal, are ill-advised and should not be implemented, for the reasons set forth below. For ease of reference, we address the proposed changes in the order set forth in the Proposal.

***"All Requests for Expungement of Customer Dispute Information"***

FINRA proposes to require that, for all requests for expungement, the associated person seeking that relief must appear at the hearing, and that *"to grant expungement, a three-person panel of arbitrators must unanimously agree that expungement is appropriate . . . ."* (emphasis ours.) We believe this aspect of the Proposal is both inappropriate and unfair, for several reasons. First, under Section 12410 of the Code all rulings and determinations of the panel concerning customer disputes are to be made "by a majority of the arbitrators . . . ." (An identical rule is applicable to industry disputes under Section 13414 of the Code.) We can conceive of no good-faith basis for treating an associated person's expungement request differently than a decision on the merits of a customer complaint. Any duly-appointed FINRA panel has the authority, by a majority vote, to enter an Award which could be financially and/or professionally disastrous for a registered person; such an Award by a majority of an arbitration panel would be final, and non-appealable (except on the very limited grounds applicable to a motion to vacate the award). If a determination by a majority of a FINRA arbitration panel is sufficient to financially or professionally destroy a registered representative who appears as a respondent before that panel, why should a unanimous decision of a FINRA arbitration panel be required to remove a false or erroneous claim from that associated person's registration record?

To require a unanimous decision on any expungement request obviously would give a single individual sitting on a three-member arbitration panel the power to prevent, for improper reasons or no good reason at all, a meritorious request that a false or erroneous claim be removed from a representative's CRD record. The Proposal to require a unanimous decision for expungement reflects a bias in favor not just of customer claimants, but of the claimants' bar, and an antipathy toward registered persons seeking to maintain their good name and reputation in the industry. If FINRA truly desires to maintain "the integrity of the public record," then its rules should facilitate – not complicate – the removal from the CRD record of claims that are false. We strongly urge that this aspect of the Proposal be rejected.

***"Expungement Arbitrator Roster"***

Under the Proposal, a new roster of "expungement arbitrators" would be culled from the "public chairperson" panel. To be included on that new panel, an individual would be required to (1) complete "enhanced expungement training," (2) be admitted to practice law in at least one jurisdiction, and (3) have "five years' experience in litigation, state or federal securities regulation, administrative law, or as a judge." Conspicuously *absent* from this list, of course, is anyone having five or more years' experience in the securities industry (from which substantially all customer arbitration claims arise).

Conspicuously *included* within the requisite "disciplines" for inclusion on the expungement arbitrator roster would be members of the claimants' bar, whose business is the litigation of customer complaints against associated persons and member firms. The claimants' bar, of course, has a strong financial interest in having *all* customer complaints remain available on the CRD system; and claimants' lawyers would certainly populate the proposed "expungement arbitrator roster." This fact, coupled with the Proposal's requirement of "unanimity" concerning any expungement request, would virtually guarantee that most, if not all, expungement requests made following adoption of the Proposal would be denied.

We believe that any FINRA arbitrator who is qualified to fairly decide the merits of a customer complaint should be equally capable of "understanding the unique nature of a request for expungement." The creation of a new "expungement arbitrator roster" will neither promote a fair and impartial resolution of expungement requests, nor serve to the "maintain the integrity of the public record."

***"Expungement Requests In Simplified Arbitration Cases"***

The Proposal would require in simplified cases that a registered person "wait until the conclusion of a customer's simplified arbitration case to file an expungement request, which . . . would be heard by a panel selected from the expungement arbitrator roster." For all the reasons set forth above, there should *not* be a separate "expungement arbitrator roster" created to consider expungement requests, and this is especially so with regard to "simplified" cases, for several reasons. First, there is no person more qualified to consider an expungement request than the arbitrator who hears all the evidence in the customer's "simplified arbitration" case. Second, the additional time, effort, and expense required of an associated person to bring a *new* expungement proceeding after the conclusion of a "simplified arbitration" would make the process anything *but* "simplified" for the associated person. Once again, this aspect of the Proposal suggests an antipathy toward registered persons, and to expungement requests in general.

***"Expungement Requests Relating to Customer Complaints That Do Not Result in an Arbitration Claim"***

The Proposal would also require that an associated person seeking expungement of a customer complaint do so "within one year of the member firm initially recording the customer complaint to CRD." In our view, a one-year window of eligibility for a registered representative to make an expungement request would be unreasonably short, arbitrary, and unfair, for several reasons.

First a one-year eligibility window is inconsistent with other provision of the Code. For many years, Section 12206 of the Code has provided a *six (6) year period of eligibility* for customers to file an arbitration claim following the "occurrence or event giving rise to the claim." There is no basis for a one (1) year eligibility period for a registered representative to file an expungement request, other

than to create a trap for an unwary registered representative, and to cause well-founded expungement requests to be forever time-barred.

Also, a one-year eligibility period for expungement requests would, as a practical matter, lead to inequitable results. In our experience, it sometimes happens that a registered representative may be unaware, for a variety of business or personal reasons, that a member firm (perhaps his or her previous employer) has reported a customer complaint on his or her CRD. Under the Proposal, the expiration of one-year from the date of the initial CRD report would be a bar to him or her making an expungement request, regardless of how ill-founded and meritless the customer complaint may have been.

This aspect of the Proposal once again reflects antipathy toward registered persons, and a bias in favor of the claimants' bar. For these reasons, we strongly urge that the "eligibility period" for expungement requests, if such a limitation is to be added to the Code, be the same as the eligibility period for customer complaints of Section 12206 of the Code, i.e. six (6) years.

***"Requesting Expungement Relief in the Underlying Customer Case (Where an Associated Person Is Named as a Party)"***

We would have no objection to a rule that would require an associated person, who has been named as a party *and has appeared in the underlying customer case*, to make his or her expungement request during the course of the underlying customer case. As stated above, we believe the arbitration panel assigned to resolve the underlying customer case is best situated to resolve a request that a claim be expunged from the associated person's record. However, we have the following objections and comments regarding specific aspects of this part of the Proposal:

- Where the registered person has (for whatever reason) not appeared as a respondent in the underlying customer case, no such limitation should apply; in that case, he or she should have the otherwise-applicable eligibility period in which to bring an expungement request. (As also set forth above, the "eligibility period" of such requests should be the same as the eligibility period for customer complaints, i.e., 6 years.)

- The Proposal would require that the expungement request be made by the individual respondent "no later than 60 days before the first scheduled hearing session." There is no good-faith basis for such a limitation, other than to create a potential trap for the unwary; and, such a limitation is inconsistent with Section 12503 of the Code, which provides that "a party may make motions in writing, or orally during any hearing session." Basic fairness requires that an individual respondent in the arbitration be permitted to make a motion for expungement at any time, up to an including closing argument in the underlying customer case.

- The Proposal also would impose an additional "filing fee" for the making of an expungement motion: "along with the expungement request, the associated person would be required to pay a filing fee of $1,425 or the applicable filing fee provided in Rule 12900(a)(1), whichever is greater." Clearly, the only purposes of this amendment would be to financially punish the associated person for making an expungement request, and to generate additional (but unwarranted) revenue for FINRA. The presentation of an expungement request by a registered person who is a party to the underlying customer case does not require any additional administrative time or effort, either by FINRA, or by the arbitrators; thus, there is no good-faith basis for charging this new fee. Here again, the Proposal reflects an antipathy on the part FINRA both toward registered persons and toward expungement requests, and has an adverse effect on FINRA's reputation as a fair and neutral forum.

- The Proposal specifies that although the panel would be required to agree unanimously to grant expungement, "in deciding the customer's claims, however, a majority agreement of the panel would continue to be sufficient." Again, there is no good-faith basis for allowing a final award to be rendered on a customer complaint by a majority of the arbitration panel, but requiring unanimity to grant the associated person's expungement request.

- We strongly object to the Proposal's requirement that, where a customer complaint has been resolved by settlement, the panel appointed in the underlying customer case "would not decide the associated person's expungement request." Once again, there is no good-faith basis for requiring an associated person to forfeit all of the time, effort and expense incurred in the underlying customer case, and to begin a new FINRA proceeding in order to make an expungement request. It is common for customer cases to settle, sometimes on the eve of the hearing, or even after several days of hearing on the merits. By that point, the associated person and/or his or her member firm will have incurred substantial attorneys' fees, forum fees, and costs, in the defense of the customer's claims; in addition, by that point, huge amounts of time and energy will have been devoted to the defense of the case, the selection of an arbitration panel, motion practice, and so on. There is no good-faith reason why all of that time, energy and money should be forfeited by requiring the associated person to commence a new FINRA proceeding for the purpose of making an expungement request. The arbitration panel selected to preside over the arbitration since its inception is clearly best suited to hear the associated person's expungement request; this is perhaps best demonstrated by other parts of the Proposal, which bemoan the occasional instance where an expungement request is made to an arbitration panel that does not have the benefit of hearing from the claimant. Where a customer case is

settled or dismissed before the completion of the hearing on the merits, the arbitration panel in that case has the advantage of having considered all of the pleadings, evidence and argument which the claimant and his or her lawyers have offered up to and including the point of settlement, or dismissal. The requirement that a new proceeding be initiated in this circumstance once again reflects an antipathy toward registered persons and expungement requests, which diminishes FINRA's reputation as a neutral forum.

- The Proposal also would prohibit a registered person who is *not* named as a respondent from intervening in the arbitration. This part of the Proposal is both unfair, and unnecessary. It is not uncommon for claimants' lawyers to name a member firm, but *not* name the associated person responsible for the alleged investment-related claim; this presents a tactical advantage for the claimants' bar, as the un-named associated person is less likely to participate vigorously in defense of the claim. In many cases, the un-named associated person may no longer be registered with the member firm when the customer complaint is filed, or when it goes to hearing; a registered person in this circumstance rightly may wish to intervene in the arbitration proceeding, and to protect his or her reputation by seeking expungement. The Proposal, however, "would foreclose the option for an un-named person to intervene in the underlying customer case." Once again, it is difficult to imagine any good-faith basis to "foreclose" a registered representative's right to intervene in an arbitration which concerns his or her alleged sales practice violations. Clearly, allowing intervention would be the most economical way to resolve both the customer's claims, and the associated person's request for expungement; to prohibit intervention in this circumstance serves no purpose, other than to allow the claimants' bar to make sure that the associated person does not participate in the defense of the customer's claims. Once again, this aspect of the Proposal would not enhance FINRA's reputation as a fair and neutral forum.

***Conclusion***

Registered persons seeking expungement of a customer claim that appears on their CRD Registration Record should be entitled to the same treatment under the FINRA Code as a customer bringing an arbitration claim: a fair hearing by a qualified panel of arbitrators, under procedural rules that are neither biased in favor of, nor prejudiced against, either side. Unfortunately, a plain reading of the Proposal contained in Regulatory Notice 17-42 leads to the conclusion that FINRA, bowing to pressure from the claimants' bar, is biased in favor of allowing ill-founded claims to remain on an individual's CRD Registration Record, and is prejudiced against the notion that a registered person should be given a fair opportunity to protect his or her reputation, and to have false claims expunged from his or her CRD Record.

For all of the reasons set forth above, we urge that the Proposal set forth in Regulatory Notice 17-42 be rejected.

Very truly yours,

G. Thomas Fleming III

Kevin K. Fitzgerald

of

**JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.**

GTF:mmd

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February 1, 2018

***Via E-Mail – pubcom@finra.org***

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

Re: **Comments regarding FINRA Regulatory Notice 17-42 (12/6/2017)**

Dear Ms. Asquith:

We write in response FINRA's request for comment on the proposed rule changes concerning expungement of customer dispute information set forth in FINRA's Regulatory Notice 17-42 (December 6, 2017).

Since 1970, Keesal, Young & Logan has represented companies and individuals associated with the financial services industry. Our attorneys have appeared in securities arbitration proceedings conducted by the Financial Industry Regulatory Authority (FINRA), the New York Stock Exchange, Pacific Stock Exchange, American Stock Exchange, National Association of Securities Dealers, American Arbitration Association, Judicial Arbitration and Mediation Services (JAMS), National Futures Association and the Municipal Securities Rulemaking Board. We also have significant experience handling regulatory proceedings initiated by the Securities and Exchange Commission, FINRA and state regulators, and frequently speak on topics related to the securities industry in general and FINRA procedure generally. The opinions and views expressed in this letter are solely those of Keesal, Young & Logan, P.C.

## Introduction

Associated persons' livelihoods depend on their reputations. The overwhelming majority of associated persons work diligently to serve investors' needs with integrity and professionalism. Nevertheless, most customer complaints against associated persons must be reported on the associated persons' Central Registration Depository ("CRD") records and also appear on the associated persons' publicly-available BrokerCheck records regardless of whether

the complaints are timely, justified or meritorious. There is no "gatekeeper" function to weed out false, factually impossible or even defamatory complaints before they are publicly reported on an associated person's CRD record. Rather, the only tool associated persons have to restore their professional reputations and good names after the filing of such unmeritorious claims is the expungement process.

FINRA and its predecessor organizations have a long history of recognizing the importance of a fair expungement process. In 2001, FINRA's immediate predecessor, the National Association of Securities Dealers Regulation ("NASD"), noted that "individuals in the brokerage community have an interest in securing a fair process that recognizes their stake in protecting their reputations and permits expungement from the CRD system when appropriate…." (NASD Notice to Members 01-65, p. 565 (2001)). NASD Regulation likewise recognized that "in some cases, allegations of misconduct may be without merit or may falsely or mistakenly accuse associated persons of engaging in misconduct…" and that those types of allegations "may unfairly tarnish the reputations of those associated persons…." (*Id*., p. 566.) In our opinion, it is critical that the CRD record-keeping system and FINRA Dispute Resolution treat all involved—the investing public, broker-dealer firms, and associated persons—in a fair and neutral manner. We agree with and commend FINRA's goal of providing a fair and neutral forum for public investors; of course, that goal also should embody the equally important goal of providing a fair and neutral forum for associated persons.

Although some of the changes proposed by Regulatory Notice 17-42 are relatively minor, others unfairly skew the expungement procedures against associated persons and will result in an unfair, and unfairly administered, forum. While investor protection and overall transparency are imperative, many of the proposed rule changes do not advance those goals. In the end, the changes serve mainly to punish associated persons who are trying to serve their clients honestly and professionally. That does not protect investors. We therefore urge FINRA's Board of Governors to reject most of the changes proposed by Regulatory Notice 17-42 and to decline to submit the proposed amendments to the Securities and Exchange Commission for adoption. The reasons for our views are discussed below.

## Comments on Regulatory Notice 17-42

**1. Regulatory Notice 17-42 asks whether the word "grant" in FINRA Rules 12805 and 13805 should be changed to "recommend" or some other description to more accurately reflect the panel's authority in the expungement process.**

We agree that the word "grant" in FINRA Rules 12805 and 13805 should be changed to "recommend." This is a clarifying change that accurately reflects the scope of the panel's authority.

Re: Comments regarding FINRA Regulatory Notice 17-42 (12/6/2017)

**2. Regulatory Notice 17-42 proposes that associated persons who are named parties in an arbitration be required to seek expungement relief in the "Underlying Customer Case" or else they will be barred from seeking expungement relief at a later date. (Regulatory Notice 17-42, I.A.1.)**

If an associated person *does not appear* in the "Underlying Customer Case" (perhaps because he or she was not properly served with the claim and had no notice of it, or because he or she is no longer subject to FINRA's jurisdiction), we believe it would violate principles of fairness and due process to bar the associated person from seeking expungement relief at a later date.

By making it *mandatory* for associated persons to seek expungement relief in the Underlying Customer Case at the risk of being barred from seeking that relief at a later date, Regulatory Notice 17-42 virtually ensures that every associated person will assert a claim for expungement in every case in which they are named. This will result in increased expense to every associated person and to every member firm that employed the associated person during the time of the events alleged in the Underlying Customer Case. In addition, it will increase the cost and expense associated with arbitration, which perversely could impede the goals of protecting investors and ensuring that FINRA arbitration remains an expedient and cost-effective forum.

To address this very real concern, we suggest that where an associated person's request for expungement relief is granted under Rule 2080 as part of the Underlying Customer Case, the arbitrators be specifically authorized to assess, in appropriate cases, any additional filing fees or costs associated with the expungement to the associated person (and against the customer who initiated the unmeritorious claim).

**3. To seek expungement relief as part of the resolution of the "Underlying Customer Case," Regulatory Notice 17-42 proposes that associated persons be required to (1) file the expungement request no later than 60 days before the first scheduled hearing session (or obtain an extension of that deadline) and (2) pay a filing fee of $1,425 or the filing fee provided in Rule 12900(a)(1), whichever is greater, and further contemplates the assessment of a "member surcharge" and a "process fee." (Regulatory Notice 17-42, I.A.2.)**

If an associated person has been named in *and has appeared in* an Underlying Customer Case, we agree that it is reasonable to require the associated person to state his or her intent to seek expungement relief at least 60 days before the first scheduled hearing date (or to seek relief from that deadline by way of a

motion). This process ensures that all participants in the Underlying Customer Case are on notice of the issues to be addressed and determined at the evidentiary hearing.

We urge FINRA to reject the proposed $1,425 filing fee that an associated person would be required to pay to restore his or her good name under the expungement procedures in the Underlying Customer Case, as well as the related "member surcharge" that would be charged to the associated person's employer and/or former employer(s).[1] Regulatory Notice 17-42 does not explain the rationale for imposing these additional filing fees on an associated person, nor does Regulatory Notice 17-42 justify imposing a "member surcharge" and "process fee" on the associated person's employer during the time of the events at issue, *regardless of whether that member is a named party to the arbitration*. Since Regulatory Notice 17-42 would *require* an associated person to seek expungement relief in the Underlying Customer Case (where the associated person appears in the Underlying Customer Case), the expense of empaneling and compensating arbitrators and administering the case should be handled as part of the Underlying Customer Case. Any additional administrative or processing burden as a result of the expungement request would be *de minimis*.

Additionally, we are concerned about Regulatory Notice 17-42's proposal that all member firms who employed the associated person during the time of the events giving rise to the dispute would be subject to a member surcharge. The proposal fails to recognize at least three realities:

First, Regulatory Notice 17-42 neither defines nor provides any guidelines regarding the meaning of the phrase "during the time of the events giving rise to the dispute." Frequently, an "occurrence or event" that is the basis for a customer's claim occurred years ago, but the customer contends that he or she is entitled to damages up to and including the date of the hearing, in some instances based on the argument that there exists a "continuing duty" or "continuing harm." Does the "time of the events giving rise to the dispute" refer to simply the date of the event or occurrence that gave rise to the dispute? Or does it refer to the entire time period that the customer contends is at issue (frequently a hotly contested issue).

[1] By way of comparison, the cost to file a complaint in Los Angeles County Superior Court is $435 (unlimited civil cases). Cal. Gov. Code §§70611, 70602.5, 70602.6.

Second, where an associated person changes employers during the events alleged in the claim, the former firm may not wish to pay a member surcharge and "process fee" for the former employee; likewise, the new employing firm may not wish to pay a member surcharge and "process fee" relating to conduct that arguably occurred long before the associated person was hired. The imposition of these fees (whether mandatory or voluntary) on the former and current member firms creates an obvious tension between the associated person and his or her former and current employer(s). This tension may deter an associated person from pursuing meritorious requests for expungement relief simply because of unrelated economic pressure.

Third, an associated person's employment may change as a result of a broker-dealer firm being sold or acquired by another firm. In that instance—where the associated person does not voluntarily change jobs but instead the employing firm changes names or owners around the associated person—will both Firm 1 and Firm 2 (the *former* member firm and the *new* member firm) be assessed "member surcharges"? Regulatory Notice 17-42 does not address this.

Regulatory Notice 17-42 should not be approved without further clarification and guidance to member firms and associated persons on these important issues.

**4. Regulatory Notice 17-42 proposes that a three-person panel of arbitrators must unanimously agree that expungement is appropriate. (Regulatory Notice 17-42, I.A.3 and II.B.)**

Imposing a unanimity requirement on expungement decisions is unfair to associated persons and effectively imposes a higher burden of proof (unanimity) on associated persons than on customers in the same case (where a majority of arbitrators may decide the merits of a claim). Under Rule 12410, all rulings and determinations of the panel concerning customer disputes are to be made "by a majority of the arbitrators . . . ." Rule 13414 pertaining to industry disputes is identical. There exists no reasonable basis for treating an associated person's expungement request materially differently from a decision on the merits of the underlying customer complaint. The same rules that apply to a determination of the merits of a customer case should apply to determining whether expungement relief is warranted under Rule 2080. We urge FINRA to reject this proposed component of Regulatory Notice 17-42.

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**5. Regulatory Notice 17-42 proposes that in order to grant expungement relief, the arbitrators must (1) identify at least one of the Rule 2080(b)(1) grounds for expungement that serves as the basis for expungement and (2) find that the customer dispute information has no investor protection or regulatory value. (Regulatory Notice 17-42, I.A.3 and II.B.)**

This is a material change to Rule 2080 that serves only to unnecessarily complicate and confuse the expungement process to the detriment of associated persons with no corresponding investor protection value. Current FINRA Rule 2080 sets forth the circumstances under which expungement of customer complaint information from an associated person's CRD record would be appropriate. Expungement relief is appropriate under Rule 2080(b)(1) where the arbitrators find that:

(A) the claim, allegation or information is factually impossible or clearly erroneous;

(B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or

(C) the claim, allegation or information is false.

If the expungement relief is based on judicial or arbitral findings other than those described above, expungement relief can be granted under Rule 2080(b)(2) where the arbitrators conclude that:

(A) the expungement relief and accompanying findings on which it is based are meritorious; and

(B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements.

Regulatory Notice 17-42 proposes to remove the arbitrators' ability to grant expungement relief based on judicial or arbitral findings "other than" those listed in Rule 2080(b)(1). We urge FINRA to reject this component of the proposal. Customer disputes arise in a myriad of ways and under countless circumstances. Arbitrators must be empowered to restore balance and the status quo of an untarnished professional reputation in circumstances where they determine such relief is warranted under the alternate grounds identified in Rule 2080(b)(2).

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Regulatory Notice 17-42 also proposes to treat Rule 2080(b)(2) as an *additional* requirement for expungement relief instead of as an *alternate* basis for expungement relief. This additional burden is not justified and simply will confuse the proceedings. For instance, if the arbitrators find that a claim is "factually impossible," "clearly erroneous," "false," or that the registered representative was "not involved in the alleged investment-related sales practice violation" (under Rule 2080(b)(1)), the claim by definition has no investor protection value. What "investor protection" interest could be served by the continued reporting of a false, factually impossible, or clearly erroneous claim? The requirements of Rule 2080(b)(2) are already satisfied by definition when any of the grounds of Rule 2080(b)(1) has been established. There is plainly nothing more for the arbitrators determine, and FINRA should not suggest that arbitrators must make additional findings as a prerequisite to granting expungement relief.

**6. Regulatory Notice 17-42 discusses expungement relief in the context of two possible resolutions to customer cases: closing by award and closing by "other than award" (e.g., the parties settle the arbitration). (Regulatory Notice 17-42, I.A.3 and I.A.4.)**

Regulatory Notice 17-42 proposes that, if the case is resolved by an award, the arbitrators must consider and decide the expungement request during the Underlying Customer Case. If the case closes "other than by award" (such as by settlement), Regulatory Notice 17-42 proposes that the panel in the Underlying Customer Case would not decide the associated person's expungement request. In that situation, the associated person would be permitted to file the expungement request as a new claim under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute. (Regulatory Notice 17-42, I.A.3 and I.A.4.) This component of Regulatory Notice 17-42 raises but does not address the following important issues:

<u>If a case closes as a result of an order dismissing the case under Rule 12206 or Rule 12504</u>, will the request for expungement relief be determined by the same arbitrators who ruled on the motion in the Underlying Customer Case? What if the motion to dismiss is granted *before* the associated person has made a request for expungement? Will the associated person have the right to seek expungement relief before the same arbitrators who determined the Underlying Customer Case?

<u>If a case closes by settlement</u>, Regulatory Notice 17-42 proposes that the panel in the Underlying Customer Case would *not* decide the associated person's expungement request. In that situation, the associated person would be permitted

to file the expungement request as a new claim under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute. If the settlement occurs late in the case (perhaps even after the commencement of or during the presentation of evidence in the merits hearing), does the associated person have the right to request that the panel in the Underlying Customer Case continue to serve, for the purpose of resolving the related request for expungement relief? Clearly at that point the arbitrators would be familiar with the issues and at least some of the evidence; it would seem to be a waste of time, effort and resources to require the associated person to initiate a *new* request for expungement relief before a *new* panel of arbitrators under the Industry Code. Further, if the associated person has already paid the filing fee for expungement contemplated by Regulatory Notice 17-42 in the Underlying Customer Case, will the associated person be required pay *another* filing fee upon the filing of a new expungement request under the Industry Code?

If FINRA wishes to pursue possible modifications to the expungement rules and procedures, we urge FINRA to reject the Regulatory Notice 17-42 in its current form and to consider these issues and ramifications before recommending any proposed rule changes.

**7. Regulatory Notice 17-42 proposes a one-year limitation on an associated person's right to request expungement of customer dispute information where the dispute did not result in an arbitration claim. (Regulatory Notice 17-42, I.A.5.)**

Regulatory Notice 17-42 proposes that an associated person seeking expungement of a customer complaint that does not result in an arbitration claim be required to file a request for expungement relief "within one year of the date that a member firm initially reported a customer complaint to CRD." In our opinion, the one-year period is unreasonably short and unfair for at least the following reasons.

First, a one-year eligibility requirement on expungement requests is inconsistent with other provisions of the FINRA Rules. For example, Rule 12206 allows customers to file an arbitration claim within six years after the occurrence or event giving rise to the claim. Regulatory Notice 17-42 fails to justify the disparity in allowing customers six years to bring a claim while restricting associated persons to just one year to seek expungement relief.

Second, Regulatory Notice 17-42 proposes that, if the customer complaint did not result in an arbitration, the one-year limitation on an expungement request would begin to run from the date that a member firm initially reported the

customer complaint to CRD. Due to the six-year eligibility period for customer complaints under Rule 12206, this will lead to inequitable and inconsistent results. It is entirely possible, for instance, that a customer might submit a complaint to a firm (resulting in the complaint being reported on the associated person's CRD and BrokerCheck) but allow the complaint to remain dormant, without initiating an arbitration claim, for a period of three, four or five years. If, in the fifth year, the customer initiates an arbitration claim, the customer's claim may be eligible for arbitration under Rule 12206 but the associated person's request to expunge that very same claim would be time-barred. That is an inequitable result that should be avoided.

Third, instead of decreasing expungement requests, the proposed one-year limitation on expungement relief claims likely would increase the frequency of those requests. Under the proposal in Regulatory Notice 17-42, an associated person would be obligated to seek expungement relief within one year of the date a customer complaint is first reported on the associated person's CRD. An associated person could timely initiate and obtain expungement relief, only to find that three, four or five years later the customer initiates an arbitration based on the complaint that was previously expunged. Assuming that the customer's initiation of the dispute in arbitration would be reported anew on the associated person's CRD, the associated person would be required to initiate a second request for expungement relief of the same complaint that had been expunged years earlier. This obviously results in an undue burden on associated persons and member firms, as well as an undue consumption of arbitral (and, in some instances, judicial) resources.

In our opinion, if FINRA ultimately imposes an eligibility period on expungement relief, the period should be six years (the same period of time as the eligibility for customer complaints under Rule 12206), and the six-year period should commence one year after the member firm's filing of the "closing event" Form U4 or Form U5 amendment and Disclosure Reporting Page (reporting the resolution of the claim). Further, similar to Rule 12206(b), if the arbitrators in a FINRA arbitration determine that the associated person's request for expungement relief is ineligible for arbitration because it was initiated more than six years after the "closing event" on the associated person's Form U4 or Form U5 (and correlating CRD), the associated person should have the right to withdraw the request for expungement relief from arbitration, without prejudice, and pursue expungement relief in court.

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**8. Regulatory Notice 17-42 proposes eliminating the ability of unnamed associated persons to intervene in the Underlying Customer Case for the purpose of seeking expungement relief. (Regulatory Notice 17-42, I.B.2.)**

This component of Regulatory Notice 17-42 is unnecessary. Customers frequently name member firms as the respondent in arbitration but avoid naming the individual associated person who is accused of various sales practice violations. Regardless of whether the associated person is named as a respondent, the claim may nevertheless be one that requires reporting on the associated person's CRD. In that instance, the associated person may have an interest in intervening in the Underlying Customer Case for the purpose of seeking expungement relief. This approach often can be economical, given that the evidence on the merits (or lack thereof) of the customer's complaint will be presented at the evidentiary hearing and that same evidence will provide the basis for expungement relief. Regulatory Notice 17-42 does not explain the reason for eliminating the rights of unnamed associated persons in this circumstance. We urge FINRA to reject this component of the proposal.

**9. Regulatory Notice 17-42 proposes requiring associated persons seeking expungement relief to appear in person or by videoconference, rather than by telephone. (Regulatory Notice 17-42, II.A.)**

Again, this proposal reflects a disparity in FINRA's treatment of customers who seek awards of money damages and associated persons who seek expungement relief. No rule requires customers seeking monetary awards to appear in person or by video conference in order to initiate or pursue a claim. Arbitrators frequently allow customers and other witnesses to appear by telephone. In certain circumstances, an associated person's appearance by telephone in an expungement relief proceeding is both efficient and appropriate. The associated person is available and can answer questions from the arbitrators, if necessary. Associated persons should not be subject to more stringent burdens on their requests for expungement relief than customers have in their requests for damages.

**10. Regulatory Notice 17-42 proposes a special "Expungement Arbitrator Roster" for use in cases where the expungement relief is not decided as part of the "Underlying Customer Case." (Regulatory Notice 17-42, III.A.)**

We commend FINRA for providing expungement training to its arbitrators, but we find at least three shortcomings with the proposed "Expungement Arbitrator Roster" process and suggest that it should be rejected.

Re: Comments regarding FINRA Regulatory Notice 17-42 (12/6/2017)

First, Regulatory Notice 17-42 provides that in cases where expungement relief is not sought as part of the Underlying Customer Case, FINRA will randomly select three public chairpersons to decide an expungement request. This appears to suggest that three — and only three — arbitrators will be imposed on the associated person, meaning that the associated person would not have the right to strike or rank proposed arbitrators for the expungement relief hearing. Again, this imposes an unfair restriction on associated persons, and is a restriction that is absent from customer dispute cases. We suggest that FINRA randomly select a minimum of 12 proposed arbitrators to serve on an expungement relief case, from which the associated person and anyone else involved in the case can rank and strike the proposed panelists.

Second, Regulatory Notice 17-42 proposes a specialized "Expungement Arbitrator Roster." To be included on the "Expungement Arbitrator Roster," an arbitrator must be admitted to practice law in at least one jurisdiction and have at least five years' experience in "litigation" (not necessarily securities litigation). The "Expungement Arbitrator Roster" does not include non-lawyers who have five or more years' experience in the securities industry. We believe that non-lawyers who have five or more years' experience in the securities industry bring valuable experience and practical perspective to securities arbitrations. FINRA shares this belief, which is why it permits non-lawyers with five or more years' experience in the securities industry to serve as arbitrators in the resolution of customer disputes. We believe that the qualifications of arbitrators in expungement relief cases should mirror the qualifications of arbitrators in customer dispute cases.

Third, as noted above, non-lawyers who have five or more years' experience in the securities industry are permitted to serve as arbitrators in customer disputes. Therefore, it is likely that in cases where the request for expungement relief is sought as part of the Underlying Customer Case, the associated person's request for expungement relief may be decided by a panel that includes a non-lawyer arbitrator; but in cases where the request for expungement is not decided as part of an Underlying Customer Case, non-lawyer arbitrators would not be eligible to participate. FINRA obviously believes that non-lawyer arbitrators are capable of "understanding the unique nature of a request for expungement," because FINRA permits non-lawyer arbitrators to decide expungement requests in the context of Underlying Customer Complaints. These same non-lawyer arbitrators should be permitted to serve on arbitration panels where expungement is the only relief sought. There is no rational basis to create a two-tiered system for the resolution of requests for expungement relief depending

on whether the requests are part of an Underlying Customer Complaint or brought as a stand-alone claim.

**11. Regulatory Notice 17-42 proposes use of the "Expungement Arbitrator Roster" in simplified cases. (Regulatory Notice 17-42 IV.)**

Regulatory Notice 17-42 proposes that an associated person would not be permitted to request expungement relief as part of the Underlying Customer Case in "simplified arbitrations" (typically arbitrations involving $50,000 or less, which are resolved by a single appointed arbitrator). Instead, under the proposal, the associated person would be required to file an expungement request under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute, and only at the conclusion of the simplified case. Regulatory Notice 17-42 proposes that a three-member panel from the "Expungement Arbitrator Roster" would consider and decide the expungement request.

For the reasons discussed at item 10 above, we urge FINRA to reject the proposed "Expungement Arbitrator Roster." In addition, we believe that the arbitrator who is most qualified to determine a request for expungement relief in any particular case is the same arbitrator who heard and considered the evidence and merits (or lack thereof) of the underlying customer case which is the basis for the request for expungement. If that evidence has been reviewed and considered by a single arbitrator pursuant to the simplified arbitration rules, then that arbitrator, acting alone, should likewise have the authority to determine the associated person's correlating request to expunge information about that complaint from his or her CRD. It is unfair to impose the burden of a second arbitration and its attendant added expense, delay and effort on the associated person in this circumstance. Further, requiring the associated person to initiate a new arbitration for expungement relief under the Industry Code (rather than seek expungement relief as part of the Underlying Customer Case in the simplified arbitration) risks inconsistent results between the two proceedings. FINRA should simplify the process, not make it more complicated.

**12. Additional comment regarding Regulatory Notice 17-42 and Expungements.**

In addition to the foregoing comments, we urge FINRA to consider the following:

a. <u>Guidance to Associated Persons Regarding Registration Requirements and Expunged Claims</u>. We request that FINRA provide clarity and

guidance to associated persons and registration personnel regarding the meaning and effect of an expunged claim in the context of licensing and registration questionnaires.

For instance, the Uniform Application for Securities Industry Registration or Transfer (Form U4 (Rev. 5/2009)) asks applicants a number of questions regarding whether they have ever been named as a respondent in or the subject of an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that the associated person was *involved* in one or more *sales practice violations* and the resolution of those claims. (*See* Form U4 Questions 14.I(1)-(5).) Must applicants answer "Yes" to these questions if the customer claim asserted against them has been determined to be "false," or "factually impossible," or a panel of arbitrators or court determined that the associated person was "not involved" in the alleged conduct, and therefore the complaint has been duly expunged from the associated person's CRD record? The instructions for completing the Form U4 do not answer this question, and we have found no guidance from FINRA on this issue.

We urge FINRA to expressly inform associated persons that they may confidently answer these questions "No" with respect to claims that have been expunged from their records.

b. Explicitly Recognizing Orders From Other Arbitration Forums For Expungement Relief.

In an effort to provide public customers with a choice of alternative dispute resolution forums, member firms frequently allow public customers to elect arbitration before FINRA, the American Arbitration Association, and other providers. If a public customer elects arbitration before an arbitration forum other than FINRA, the arbitral findings should be recognized and afforded the same weight as arbitral findings of arbitrators in a FINRA-administered arbitration, provided that (1) the arbitrators make written, factual findings as the basis for expungement under Rule 2080, and (2) the requirements of Rule 12805 are satisfied. Arbitrators in these alternate forums are qualified to determine whether, after a recorded hearing, the evidence supports a finding that a claim is "factually impossible or clearly erroneous," or that the associated person was "not involved" in the alleged wrongdoing, or that the claim is "false," or that a claim for expungement is meritorious and expungement would have no material adverse effect on investor protection.

Re: Comments regarding FINRA Regulatory Notice 17-42 (12/6/2017)

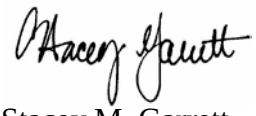
Currently, FINRA Rules 2080 and 12805 refer to "arbitration awards seeking expungement relief" and "confirming an arbitration award containing expungement relief" without specifying that the Award must be a FINRA Award. FINRA states that it will accept expungement orders issued by a court of competent jurisdiction (without an underlying arbitration award). We suggest that FINRA explicitly state that orders from other respected arbitral tribunals, validated by judicial confirmation, will be accorded comity. By doing so, FINRA will encourage member firms to continue providing public customers with their choice of arbitration forum (not restricting that choice to FINRA, simply because it is the only arbitration forum in which expungement relief can be obtained), and FINRA likewise will encourage associated persons to seek expungement relief as part of the "Underlying Customer Case" where the arbitrators will be familiar with the evidence from that proceeding.

## Conclusion

As securities attorneys, we value FINRA's desire to provide a fair, neutral, and transparent forum for public investors; however, the rights and interests of associated persons must not be trampled in the process. To reiterate, we agree that misconduct by associated persons towards investors should not be swept under the rug. However, the mechanism for expunging false, defamatory or factually impossible claims from honest associated persons' records should not be made so onerous that it hurts the very associated persons who share FINRA's concern for helping the investing public. Thank you for FINRA's continued recognition that associated persons have an interest in protecting their professional reputations from false or mistaken claims through the expungement process, and for the opportunity to comment on the proposals in Regulatory Notice 17-42.

For the reasons set forth above, we urge FINRA's Board of Governors to reject the proposal in Regulatory Notice 17-42 with the few exceptions noted herein and work towards drafting proposed rules concerning expungement with the goal of fairness and expediency in mind for all participants in the FINRA arbitral process.

Very truly yours,



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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 though 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 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.

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[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).

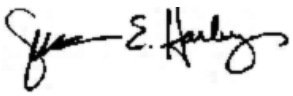
## III. Suggested Changes to Strengthen Proposed Amendments

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).

It's absolutely repulsive that you make the expungement process so one sided. Being in the securities industry for over 25 years I have seen many frivolous complaints, and for your regulatory organization to make the process so expensive and complex to have legitimate meritless cases that are sitting on the CRD is a joke. You are treating the very people that support your regulatory firm like criminals. Only in the securities business are you treated guilty until proven innocent. Shame on your organization for treating the financial professionals that way. You imposing these rules only benefit the attorneys. Find a way to penalize the rogue brokers, and not the broker that may have a rogue client post frivolous complaints on a hard working brokers CRD.

Hopefully this gets squashed.

To whom it may concern,

I understand that you are considering changes to the expungement process financial advisors utilize to challenge disclosures on their record. I am writing you to ask that you not make these proposed changes. I have disclosures on my record related to funds offered by my employer, Morgan Keegan, which crashed during the 2007-2008 Financial Crisis. None of the clients named me in their complaints, which were driven by excessive advertising by plaintiff lawyers, and my employer elected to settle the cases for economic reasons rather than fight them, which would have kept them off of my record. If you make it more expensive, change the process from a majority decision to a unanimous decision, or remove any chance of expungement after 12 months, you are making it next to impossible for advisors like myself to be able to try and remove disclosures related to massive settlements like I experienced with Morgan Keegan.

Thank you for your consideration in this very important matter.

Sincerely,
Jay Higgenbotham

**Jay R. Higgenbotham, CPWA®**
Wealth Management Advisor
Senior Vice President - Investments
Merrill Lynch, Pierce, Fenner & Smith Incorporated
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Yes,

I am in favor of having a fair system to remove meritless claims on our Broker Check. This should not have to be high cost/charge to an Financial Advisor at no fault of their own.

I am NOT in favor of rule 17-42.

Please re-consider.

Sincerely,

-Jim Isola

This letter is to express my frustration with the effort to eliminate (or make ridiculously expensive) the ability of people in our industry to remove events from our record that may be totally wrong. I have learned that when changing firms in this industry the Broker Dealer holds all of the cards. They can literally say anything they want and we are helpless, at a difficult time in our career to immediately battle with firms that have huge budgets. On the surface, this appears to favor the big entrenched firms and make it close to impossible for those who are actually meeting with and servicing average Americans every single day.
I would appreciate a response to my concerns. Thanks, Dave.

***David Wm. James*** AIF
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Please accept these comments regarding the proposed rule change.

My name is David Liebrader. For the past 25 years I have been representing public customers in claims against brokerage firms and registered representatives in the FINRA (formerly NASD) forum. I have handled well over 1000 cases in the forum.

I write in support of the amendment requiring "unanimous agreement among the panel" that the customer complaint sought to be expunged would have "no investor protection or regulatory value." Too many legitimate claims disappear from public view in the largely uncontested expungement process.

Over the course of many years I have settled hundreds of cases where the registered representative's counsel indicated that the rep wanted to seek expungement of the customer complaint if the case settled. As a practical matter, and as an advocate for my client, my primary consideration in prosecuting the case was to make my client "whole".

During settlement discussions Respondent's counsel would typically ask that my client "not oppose a request for expungement" as a condition to settling the case. Most of my clients, out of either the kindness of their hearts, the eagerness to have closure, or simply because the settlement was too good to pass up would agree not to oppose the request..

After settlement documents are negotiated and the settlement proceeds deposited the clients consider the matter closed. None of my clients ever appeared before a panel to testify as to the events, nor have any panels ever asked to speak with my clients formally or informally as to the allegations made in those claims. ZERO TIMES out of several hundred expungements.

In my experience the expungement hearings are one sided affairs that lack any substance or nuance, and allow the rep to paint the rosiest picture possible, and panels seem to grant the requests at an 80% rate.

I think the public would be better served if there were higher bars to expungement, and requiring unanimous consent after considering the interests of the broader investing public seems a good thing.

I also write to comment on the filing fee for expungement proceedings. I think they are too high. Court filing fees are in the $200 - $300 range. FINRA, as a self regulatory agency is clearly in a position to require its members to shoulder more of the cost in this mandatory arbitration forum.

Having represented a handful of reps over the years, I can tell you that when a frivolous claim is filed, it adds insult to injury to require these innocent reps to pay close to $1500 just to file their claim. The same holds true for aggrieved investors. I would like to see FINRA lower filing fees, not raise them, and to provide more relief for Claimants who for financial reasons have trouble coming up with the filing fees.

Thank you for considering these comments.

Dave Liebrader.

The Law Offices of
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February 5, 2018

**Via Email Only (pubcom@finra.org)**

To Whom it May Concern
FINRA Dispute Resolution
Office of the Corporate Secretary
1735 K Street, N.W.
Washington, DC 20006-1506

Re: **The Law Offices of Patrick R. Mahoney, P.C.**
**Official Comment on FINRA Regulatory Notice 17-42**

To Whom It May Concern:

Please allow this letter to represent The Law Offices of Patrick R. Mahoney, P.C.'s ("PRM") comment on FINRA Regulatory Notice 17-42, which discusses proposed amendments to Codes of Arbitration Procedure relating to expungement requests of customer dispute information (the "proposed rules").

## I) Introduction

PRM has handled numerous expungement matters on behalf of associated persons, and submits this comment with the best interests of those associated persons in mind.

In short, PRM strongly disagrees with the proposed rules—particularly as they relate to matters where the associated person is not a named party to an underlying customer case. These proposed changes would create a suffocating burden on associated persons to *disprove* the merits of an underlying customer complaint in instances in which (often) they are not even a named party to a customer case, and, in many cases, are not even *mentioned* in the customer case. If these proposed rules involved government actors, they would be dismissed out of hand as a violation of basic civil procedural and substantive due process rights.

There is no other industry (that this humble author can think of) in the United States that maintains a system that creates a rebuttable presumption of liability in the face of (often ambiguous) *allegations* of wrongdoing. The proposed rules do just that through their continued requirement that such allegations, irrespective of merit, remain publicly available *unless* the associated person has the resources to spend tens of thousands of dollars just to to *try* prove otherwise.

What's more, as a result of the proposed rules' requirement for unanimity amongst the three arbitrator panel tasked with rendering a decision for, or against expungement, the burden of proof required to overcome this rebuttable presumption of liability is akin to "beyond a reasonable doubt"—the highest burden contemplated.

PRM agrees that the rules concerning expungement must be changed, but these proposed rules are not the answer.

## II) PRM's Concerns Relating to Expungement Requests Involving Associated Persons who are named as a Party to a Customer Case.

### 1) Registered Representatives Benefit from the Rights Available to all Respondents When they are named in a Customer Case.

PRM agrees that a CRD record disclosure of an underlying customer complaint is warranted when a customer actually names the registered representative as a respondent to their case. By actually naming the registered representative, the customer undeniably makes an allegation, *specifically directed at the registered representative,* that he or she made some type of sales practice violation.

Meanwhile, the registered representative has all of the rights available to any respondent in a FINRA case. They can: (1) answer the statement of claim and assert all available defenses; (2) engage in discovery; (3) attend all underlying arbitration hearings; (4) choose their own counsel; and, (5) (most importantly) may benefit from the fundamental requirement that places the burden on the Claimant to establish his or her claims *directed towards the registered representative* by a preponderance of the evidence.

### 2) If the Underlying Customer Case Closes by Award, and the Customer's Claims are Denied in their Entirety, FINRA should Automatically Grant Expungement.

Where the underlying customer case closes by award, and the award denies all claims directed at the associated person, the associated person should automatically have their CRD record expunged of all reference to the complaint. After all, *the associated person won the case on the merits*. FINRA rules should not then subject associated persons to a second determination that shifts the burden on the associated person to further disprove a claim that they already successfully defended.

The proposed rules do not subject the member firm (and co-respondent to the hypothetical action) to such burden-shifting. If the proposed rules did, member firms would undoubtedly oppose them en masse.

Therefore, if a customer names an associated person as a respondent in a customer case, and the arbitration panel renders an award denying the customer's claims directed at the registered representative, there should be no need to make a second determination on expungement. To require otherwise unfairly creates a separate set of standards depending on whether the respondent is a registered representative or member firm.

## III) Unnamed Associated Persons in Customer Cases Should Not Be Subjected to the Same Expungement Standards as Named Associated Persons to Customer Cases.

### 1) FINRA's Overbroad CRD Reporting Rules are the Exclusive Source of the Influx of Expungement Proceedings.

Though not stated explicitly in Regulatory Notice 17-42, the proposed rules seek to develop a new expungement system that aims to decrease the amount of instances that arbitrators grant expungement relief so that the statistics will properly reflect the remedy's "extraordinary" nature.

Ironically, FINRA created this problem when it broadened the rules as to what type of customer complaint a member firm must report on the CRD records of its associated persons. These overly broad reporting rules created countless situations where associated persons, with peripheral (at best) involvement in a customer complaint, had their CRD records tarnished due to flawed reporting criteria, and not actual wrongdoing. This, in turn, has led to an influx of successful expungement requests. If FINRA does not change its reporting standards, however, and implements the proposed rules, FINRA will exacerbate this existing problem to the extreme detriment to the associated persons who fall victim to it.

Pursuant to Regulatory Notice 09-23 ("RN 09-23") and the amendments FINRA made to Forms U4 and U5 that coincided with that regulatory notice, member firms are the exclusive arbiter in deciding which customer complaints require CRD record disclosure, and which do not.

RN 09-23 and its progeny require member firms to disclose customer complaints under the following situations:

- Where the associated person is a named party to the Statement of Claim;

- The Statement of Claim or complaint specifically mentions the individual by name and alleges the individual was involved in one or more sales practice violations; or

- Where the Statement of Claim or Complaint does not mention the individual by name but the firm has made a good faith determination that the sales practice violation(s) alleged involves one or more particular individuals.

The CRD record reporting criteria concerning customer complaints contemplate a massive scope of scenarios that might (depending on the member firms' subjective interpretation of the reporting rules) trigger a CRD record disclosure. These overbroad reporting criteria, coupled with the unfettered discerption given to member firms to determine reportability, have unfairly subjected someone who is neither named nor mentioned in a customer complaint, to the exact same expungement standard as someone named as a Respondent in a customer complaint and subjected to clear allegations of sales practice violations.

For example, suppose a customer names an associated person in their customer case, and directs specific causes of action against that associated person for fraud, breach of fiduciary duty, and unsuitability. Under RN 09-23, the firm where the associated person worked at the time of the complaint would amend the associated person's CRD record to reflect the complaint because the customer named the associated person as a respondent, and made unambiguous allegations that the associated person committed sales practice violations.

Alternatively, suppose a customer does not name or even mention any associated person in their case and makes allegations against only a member firm for fraud, breach of fiduciary duty, and unsuitability. RN 09-23 requires the reporting member firm to make the completely subjective determination to report this customer case on the CRD records of all associated persons "involved" in the allegations. This might include (among many other examples): the customer's broker of record; the broker of record's manager; or a licensed assistant who did nothing other than process paperwork at the direction of the broker of record.

And yet consider that: (1) the licensed assistant in the above example would have his CRD record blemished the same as the associated person actually named in the customer complaint in the first example; (2) the licensed assistant is presumed liable for reporting purposes in the same way as the associated person actually named in the complaint; and (3) the licensed assistant must convince a panel of three arbitrators, who FINRA will educate on the extraordinary nature of the expungement remedy, to unanimously agree that his record should be expunged pursuant to the same, one-sided expungement standards available to the associated person named in the complaint. And that is to say nothing of the cost associated with the licensed assistant's attempt to earn expungement.[1]

FINRA cannot continue to treat these immensely different situations equally for purposes of creating CRD reporting and expungement standards.[2]

**2) <u>The Customer's Complaint should have to Unmistakably Direct Allegations of Sales Practice Violations towards an Associated Person to trigger any CRD Record Reporting.</u>**

FINRA Rule 12313(a) specifically permits customers, at their own discretion, to name multiple respondents. That rule states in relevant part, "One or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law and fact common to all respondents…"

FINRA Rule 12302(a) similarly gives customers carte blanche authority to state their allegations in their statement of claim. Indeed, the statement of claim must "specify the relevant facts and remedies requested."

[1] PRM estimates that the Proposed Rules would regularly cost an associated person upwards of $20,000 to seek expungement. These costs are attributable to FINRA's proposed set filing fee for expungement proceeding, hearing costs, and proposed requirement that an in-person hearing and/or video conference be held in all expungement matters.

[2] PRM further notes the inherent ambiguity in trying to apply the standards set out in FINRA Rule 2080 (i.e. (1) that the claim is impossible or clearly erroneous ; (2) that the claim is false, or (3) that the associated person lacked involvement) when the associated person is not even mentioned in the underlying complaint.

Accordingly, the customer's complaint itself, above all else, should dictate whether it warrants disclosure on an associated person's CRD record in the first place. If a customer, in evaluating the parties he or she wants to name as respondents in their Statement of Claim, decides *not* to name an associated person as a respondent to their claim, FINRA must consider that to the associated persons' benefit when developing its reporting and expungement rules.

Similarly, if the customer does not include as part of their statement of "relevant facts and remedies" any specific allegations of wrongful conduct directed towards an associated person in their statement of claim; or, where the customer doesn't even *mention* any associated person in the statement of claim, FINRA must also consider those issues to the associated persons' benefit when developing CRD reporting and expungement rules.

Nevertheless, the proposed rules require the same rebuttable presumption of liability, and the same expungement standard regardless of whether the associated person is named in the customer case, unnamed but mentioned in the customer case, and unnamed and not mentioned in the customer case.

## IV) Conclusion

FINRA's proposed rules are patently unfair to associated persons. They devalue the impact that publicly available customer complaints have on the reputation and continued employment of associated persons in the financial services industry. They do nothing to change the overbroad CRD record reporting rules that promote CRD record reporting under frivolous circumstances. And they create an unprecedented rebuttable presumption of liability, subject to "beyond a reasonable doubt" burden of proof, the likes of which are unseen in any other industry.

For those reasons, PRM opposes the proposed rules.

Sincerely,

/s/ Patrick R. Mahoney

Patrick R. Mahoney
The Law Offices of Patrick R. Mahoney, P.C.

Please keep in place a reasonable and cost effective mechanism for advisors to have their records reviewed and expunged.

There are plenty of examples of either false or frivolous claims against advisors that shouldn't be on their records.

This isn't to say that there also are bad apples who deserve to have marks on their records or to not be in the business of advising.

But to not have a reasonable forum with reasonable costs and mechanism in place to have things heard is simply not fair.

Regards,

**Andy Rieger**
**Senior Vice President**
**Financial Planning Specialist**
**Morgan Stanley**
**Wealth Management** **703 739-3694 Direct**
**333 John Carlyle St. Ste. 650** **703-879-1000 eFax**
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AdvisorLAW
REGULATORY REPRESENTATION

February 2, 2018

**By Electronic Mail** (pubcom@finra.org)

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

**Re: Regulatory Notice 17-42: FINRA Requests Comments on Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information**

Dear Ms. Asquith,

Thank you for the opportunity to submit these comments on the proposed amendments to the Financial Industry Regulatory Authority ("FINRA") Code of Arbitration Procedure for Customer Disputes, Rule 12000 Series (FINRA Rules 12100 and 12805) and Code of Arbitration Procedure for Industry Disputes, Rule 13000 Series (FINRA Rules 13805 and 13806) (the "Proposed Rules") on behalf of AdvisorLaw, LLC ("AdvisorLaw").

AdvisorLaw assists industry professionals in a variety of regulatory matters, and appreciates FINRA's continuous efforts to improve the financial services industry and protect the public by maintaining administrative, disciplinary and other useful information about registered persons in the Central Registration Depository ("CRD") system and making much of the same information publicly available through the FINRA BrokerCheck ("BrokerCheck") system.

As FINRA is aware, the efficacy of the CRD and BrokerCheck is greatly dependent on the timeliness and accuracy of the information provided therein. Further, to ensure the ongoing integrity of the CRD and BrokerCheck, both systems must continue to provide meaningful information to investors, employers and regulators. We applaud FINRA for the measures it has undertaken over the years to improve these systems, and for providing an avenue whereby inaccurate information may be either corrected through the filing of a BrokerCheck Dispute Form, or in the case of allegations made by customers, by way of expungement pursuant to FINRA Rule 2080.

FINRA has long-held the position that expungement of customer dispute information is an extraordinary measure, but it may be appropriate in certain circumstances. FINRA's historical position regarding expungements demonstrates FINRA's dedication to providing a system that not only protects the public, but one that is also equitable – recognizing the irreparable reputational and economic harm to registered persons who are falsely accused of sales practice violations. We are grateful to FINRA for advancing a well-thought-out proposal in efforts to

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continue the pursuit of integrity and fairness in the CRD and BrokerCheck. In the spirit of partnering with FINRA for the overall improvement of the CRD and BrokerCheck, we offer the following comments for FINRA's consideration regarding the Proposed Rules.

**1. Expungement Arbitrator Roster and the Neutral List Selection System ("NLSS")**

FINRA's proposal for the establishment of a roster of arbitrators with additional training and specific backgrounds and experiences to hear an associated person's request for expungement of customer dispute information is well aligned with the spirit of the Rules. Such a panel of arbitrators with enhanced expungement training would help improve the overall accuracy and preserve the integrity of the CRD and BrokerCheck by ensuring that only those customer allegations that meet the strict standards of FINRA Rule 2080 receive an arbitration award granting expungement of the allegations.

We also agree with FINRA's proposed requirements regarding additional qualifications of public arbitrators selected for expungement hearings, and ask FINRA to consider strengthening the qualifications to require selected arbitrators meet a minimum of five years' experience with the financial services industry. Requiring all expungement arbitrators to have a minimum of five years' experience with the financial services industry is appropriate considering the complexity of expungement requests in cases involving customer dispute information. Although we support additional training and relevant experience, we caution FINRA to not limit the roster of arbitrators to those who are admitted to practice law. FINRA's existing pool of public arbitrators is made up of very competent and capable arbitrators, many of whom have performed their arbitral duties with great care for several decades.

Finally, FINRA's proposal for the NLSS is reasonable considering the nature of expungement requests in cases involving customer dispute information. We also support Proposed Rules 13806(b)(4), (5) and (6) – allowing for removal of arbitrators for cause, requiring a randomly selected panel of three arbitrators and placing restrictions on the associated person's ability to withdraw the case once the panel has been selected. Proposed Rule 13806(b)(6) will create safeguards, and prevent an associated person from simply withdrawing their case and refiling in hopes of drawing a more favorable pool of randomly selected arbitrators.

**2. Three-Person Panel and Unanimous Decision**

We are in agreement with FINRA's proposal for a three-person panel; however, we believe the requirement for a unanimous decision of the panel to grant expungement in cases involving customer dispute information places an undue burden on associated persons and chills the traditional notions of fairness and due process. We understand FINRA's position that expungement under Rule 2080 is an extraordinary remedy, but FINRA's own Rules concerning customer disputes allow rulings to be made by a majority of arbitrators. We are unaware of any other system of review that requires such a high bar. This is especially troubling considering the irreparable harm that a meritless complaint causes to an associated person's reputation and career.

**3. Changing the Language in Rules 12805 and 13805 from "Grant" to "Recommend"**

We appreciate FINRA's inquiry regarding the use of the word "grant" versus "recommend," when referring to expungement awards involving customer dispute information. Using the correct language is especially important when considering that an arbitration panel's decision must be confirmed by a court of competent jurisdiction. To that end, we believe retaining the original language as "grant" is appropriate.

It has long been established that the decisions made in arbitration are final and binding upon the parties, and may not be challenged except for extreme circumstances. The integrity of the arbitration system depends on this very notion, and must be preserved if arbitration is to serve as a viable alternative to the courts. Changing the language of the Rule from the word "grant" to "recommend" may lessen the perceived binding effect of the decision. The arbitration panel needs to be given full authority to hear a case requesting expungement, and make a binding decision. The requirement for post-hearing confirmation by a court of competent jurisdiction should serve as safeguard in those rare instances where a state court finds the harm to the public interest exceeds the binding decision of the panel. If the decision of the arbitration panel is limited to a mere "recommendation," the legitimacy of the arbitration process may be compromised.

FINRA's concerns regarding the post-hearing confirmation process may be easier addressed by way of expanded instruction to the courts, without the need to replace critical language in the rules or the risk of compromising to the authority of the arbitrators.

**4. In-Person Appearance for Associated Persons**

We find FINRA's Proposed Rules regarding in-person appearance by the associate person seeking expungement of customer dispute information to be unnecessarily burdensome, especially when considering the already high cost to associated persons when requesting expungement of meritless claims against them. The decision whether to hold a hearing telephonically, by video or in-person should be left with the arbitration panel.

**5. Bifurcation of Expungement Hearing from the Customer's Claim in Cases Involving Customer Disputes**

Current FINRA Rules 12805 and 13805 do not provide any guidance as to how and when an associated person may request expungement of customer dispute information. Therefore, an associated person currently has the option to request expungement during the Underlying Customer Case whether or not the associated person is named, or the request for expungement can come in the form of a separate Rule 2080 hearing. The Proposed Rules provide additional guidelines and clearly define how and when an associated person may seek expungement; however, in doing so the Proposed Rules also create an inherent disparity between expungement requests brought under the Proposed Rule 12805 and 13805.

The disclosure of an alleged sales practice violation can have a crippling effect on an associated person's career – limiting their ability to earn business or seek employment. Such effects, although severe, are appropriate where the customer allegations are accurate. There are, however, many instances where the customer allegations are without merit, and FINRA's Rules pertaining to expungement of such disclosures must provide associated persons with an honest and impartial review process.

*a. Access to Special Expungement Arbitrator Roster Under Proposed Rule 13806*

FINRA's proposal for the establishment of a Special Expungement Arbitrator Roster is a welcomed step to help preserve the integrity of the CRD and BrokerCheck. As FINRA is well aware, expungement of customer dispute information is an extreme remedy, which is only appropriate pursuant to FINRA Rule 2080 if the claim or allegation is factually impossible, clearly erroneous or false, or if the associated person was not involved in the alleged investment related sales practice violation.

FINRA's Proposed Rules, if implemented, would obligate an associated person who is named in the Underlying Customer Case to request expungement within the underlying case or be prohibited from seeking to expunge the customer dispute information arising from the customer's statement of claim during any subsequent proceeding. Yet doing so means a request for expungement brought within the Underlying Customer Case would not be placed before an arbitration panel comprised of the Special Expungement Arbitrator Roster. This creates an inherent disparity in the effect of the Proposed Rules, and would unfairly prejudice both the Customer and the associated person. In cases where the Customer was genuinely harmed by a sales practice violation, an expungement of the customer dispute information is not appropriate, and a request to have such information expunged should receive the same level of review and consideration by a specially trained arbitration panel as would be the case in other expungement requests pursuant to Proposed Rule 13805. Conversely, where the customer dispute information is without merit and expungement is appropriate pursuant to FINRA Rule 2080, the associated person should also be afforded the same opportunity to be heard before a specially trained arbitration panel. It should also be noted that the same concerns apply where the associated person is not named in the Underlying Customer Case, but a named party requests expungement on behalf of the unnamed person.

To remedy this inherent disparity, FINRA must either prohibit an associated person's request for expungement from being heard in the Underlying Customer Case, or create a mechanism by which such a request is heard by a panel of specially trained arbitrators from Special Expungement Arbitrator Roster. The former is easily achieved through bifurcation of the Underlying Customer Case and expungement cases brought pursuant to FINRA Rule 2080. The latter, however, is somewhat problematic. To allow both the Underlying Customer Case and the request for expungement to proceed within the same case, and avoid the inherent disparities discussed above, FINRA would need to adopt rules requiring that all Underlying Customer Cases where a request for expungement is made be heard by a panel of specially trained arbitrators. The same rules regarding the random selection of the arbitrators via the NLSS would also have

to apply, but doing so would deny all parties in the Underlying Customer Case from the ability to strategically rank or strike specific arbitrators from the panel. Under the latter approach, one disparity is resolved at the expense of creating another. We therefore urge FINRA to consider revising the Proposed Rules and force all FIRNA Rule 2080 expungement hearings to be heard pursuant to Proposed Rule 13805.

*b. Potential for Bias Imputed onto Associated Person Due to Actions of Member Firm*

The Proposed Rules obligating associated persons to join their request for expungement when named in the Underlying Customer Case may also create an environment where wrongdoing on behalf of the member firm is imputed onto the associated person. This is especially concerning since associated persons are often not represented by independent counsel in such hearings, and when considering the severity of harm to the associated person if a request for expungement is denied unfairly. A bifurcation of the Underlying Customer Case from the expungement request will provide the associated person an opportunity to have their request heard by an impartial panel of specially trained arbitrators.

*c. Conflict of Interest Where a Member Firm Requests Expungement on Behalf of an Associated Person Not Named as a Respondent in the Underlying Customer Case*

The Proposed Rules, if implemented, will allow a member firm the ability to request expungement on behalf of an associated person who is otherwise not named in the Underlying Customer Case. We respectfully ask FINRA to reconsider this approach and instead prohibit the practice entirely, as there is too great of a potential for conflict of interest in co-representation.

In cases involving customer disputes with the member firm, counsel for the member firm is obligated to represent the best interest of their client. Yet those interests are rarely aligned with the interests of the associated person, and therefore there is inherent conflict. This conflict is heightened further by the fact that counsel for the member firm may have a considerable monetary incentive for maintaining a healthy relationship with the member firm – since counsel most likely represents the member firm regularly. The concern for such conflict of interest is so great in the legal community that Rule 1.7(a)(2) of the Model Rules of Professional Conduct (as well as most, if not all, state rules pertaining to professional conduct) prohibit co-representation of parties where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Rule 1.8(b) of the Model Rules of Professional Conduct also state that "a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent." The starting point in this rule is the consideration that counsel should not use any information relating to the representation of a client to the client's disadvantage. The rule creates a caveat where the client has given informed consent; however, we question the authenticity of such informed consent in cases where the associated person is currently employed by the member firm and likely has incentive to remain employed and in good standing. Further, such "consent" may be compromised in the likely scenario where the member

firm is providing financial assistance for the legal representation, as the associated person may agree under financial duress. The potential for financial duress, and the compromise of representation due to conflict is enough of a concern that the Model Rules of Professional Conduct specifically address the issue in Rule 1.8(f) stating: "A lawyer shall not accept compensation for representing a client from one other than the client." Rule 1.8(f) does provide some exceptions; however, when considering the disproportionate allegiance that counsel may have to the member firm as well as other ethical considerations, we believe a conflict of interest is simply unavoidable.

**6. Time Limitation Period for Associated Persons to Expunge Customer Dispute Information**

The Proposed Rules require that an associated person seek expungement of the customer dispute information relating to a costumer complaint within one year of the member firm initially reporting the customer complaint if the complaint does not result in an arbitration claim, or within one year after the Underlying Customer Case closes either through a binding decision of the arbitrators or settlement between the parties. In support of the Proposed Rules, FINRA represents that given the length of time currently between the initial complaint or the case closure, and filing of the request for expungement, the customers and relevant documentation cannot be located.

We respectfully challenge the Proposed Rules, and draw FINRA's attention to its own Rule 4511, which requires members to preserve books and records for a minimum of six years. We also note that while this is the absolute minimum retention period, many member firms retain books and records for far longer periods, and some simply do not destroy any books and records regardless of time passed. Barring an exceedingly rare circumstance (*e.g.*, the collapse of Tower 7 World Trade Center in the September 11 attacks), it is highly unlikely that relevant documents will not be available for at least the minimum required retention period.

When considering the fact that all of the relevant documentation is readily available during the requisite six-year retention period, and the availability of numerous online public records, an associated person's counsel or FINRA should have no difficulty locating the customers. In the seven hundred plus customer dispute disclosures that we have brought before FINRA for expungement, finding the customer has very rarely been an issue. The more common scenario, in fact, is that once the customer is reached they show little to no interest in opposing the associated person's request for expungement – often citing one of three reasons for their lack of interest: (a) they never intended their complaint against the associated person; (b) they have since been made whole or the perceived loss of value in their investment at the time of the complaint resulted from volatility in the market and their investments have since recouped; or (c) they are not interested in participating unless there is a monetary incentive.

Based on the above, we urge FINRA to reconsider the one-year period in the Proposed Rules, and instead allow associated persons six years in which to bring a case for expungement pursuant to FINRA Rule 2080. Further, in the Proposed Rules, FINRA suggests reducing the time period from one year to six months in all cases where the customer case closes on or prior

to the effective date of the Proposed Rules. Yet FINRA offers no support for this proposed six-month time frame, which not only appears to be completely arbitrary but also plainly creates an unjustifiable distinction between cases that close prior to the rules and those that close after. We therefore ask FINRA to consider either grandfathering all cases that close prior to the effective date of the Proposed Rules without any time limit, or in the alternative, apply the same time limitation to those cases as the ones that close after the effective date of the Proposed Rules.

**7. Incorporation of Public Petition**

To ensure a fair representation of industry person's regarding these Proposed Rules, we circulated an online petition and wish to incorporate all signatories and comments here. The online petition may be found here: https://www.ipetitions.com/petition/fighting-for-a-balanced-finra-expungement-process#comments

Once again, AdvisorLaw thanks you for the opportunity to submit these comments. If there is any further information or other assistance that we may be able to provide, or if there are any questions we may be able to answer, please contact me at armin@advisorlawyer.com or 720-549-2880.

Respectfully,

Armin Sarabi
Senior Attorney
AdvisorLaw, LLC

SARETSKY HART MICHAELS + GOULD attorneys

February 5, 2018

**Jonathan M. Sterling**
jsterling@saretsky.com

VIA EMAIL AND FEDERAL EXPRESS

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

Re: Comments on FINRA's Proposed Amendments to its Expungement Arbitration Rules (Regulatory Notice 17-42)

Dear Ms. Asquith:

Below please find our comments on FINRA's proposed rule changes to the expungement process. We respectfully request that these comments be given careful consideration by FINRA.

Our comments are based on representing parties to FINRA arbitrations for many years. We have substantial experience in handling expungement proceedings. Although FINRA believes the amendments will further promote investor protection and regulatory value considerations, we cannot agree. Instead, we believe the proposed rules are inequitable, and instead have the effect of placing unnecessary and unfairly harsh, costly and unwarranted burdens on associated persons trying to recapture their business reputation. Our specific comments follow.

## Expungement Requests Regarding an Underlying Customer Case Where the Associated Person is Named

**Rule Change:** An associated person is required to request expungement during an underlying customer case where he/she is named as a party.

**FINRA's Rationale:** Years after FINRA has closed an underlying customer case, a broker files a separate expungement request. "[I]n many of these instances, the customers cannot be located and any documentation that could explain what happened in the case is not available or cannot be located." Notice 17-42, p. 5.

**Comment:** In all of our many expungement actions, we have yet to encounter a situation in which a customer could not be located. The overwhelming majority of customers are represented by counsel, who are able to offer the customer's most recent contact information. Modern techniques to locate people (such as the internet's many people finder sites) make searches easy, efficient and economical.

The concern that important documentary evidence will not be available is not legitimate. Even ignoring the likelihood that a customer and/or his/her attorney retained relevant records beyond the arbitration hearing itself, governing securities industry rules mandate the retention of important customer and account records for several years. If the unavailability of documents and records truly threatened the integrity of the arbitration process, surely FINRA Rule 12504(a)(6) would allow arbitrators to consider pre-hearing motions to dismiss on the grounds that a claim was brought beyond the record retention requirement (and, in many cases, the co-extensive time frame imposed by the eligibility rule), and important documents are no longer available. Arbitrators are well able to determine whether an expungement request is adequately supported and a rule change which forces premature consideration of expungement is ill-advised.

**Rule Change:** The filing fee is $1,425 or the applicable filing fee provided in Rule 12900(a)(1), whichever is greater.

**FINRA's Rationale:** Associated persons have been adding a monetary claim of less than $1,000 to reduce the filing fee to $50. This results in a simplified claim where only one arbitrator would hear and consider a "complex matter" like expungement. Notice 17-42, fn 14.

**Comment:** The filing fee an associated person pays in connection with an expungement request has no bearing on whether the arbitrators will grant his/her request. Raising the filing fee fails to acknowledge that an associated person has inevitably suffered indirect financial harm merely due to the negative notation on their CRD. Arbitrators retain the right to assess costs in connection with an expungement request, and the assessment of costs should be reserved until the arbitrators have heard and considered all of the evidence.

Further, FINRA's concern with having only one arbitrator decide an expungement request is a red herring. If FINRA believes its arbitrators are properly trained and competent to hear and decide full cases in simplified arbitration proceedings, surely arbitrators are well able to consider expungement, a corollary request. And, if one arbitrator, alone, is unable to understand an ostensibly "complex matter" like expungement, how does the inclusion of two additional arbitrators (presumably also unable to understand the issues on their own) enhance the decision-making process?

**Rule Change:** If a customer case closes by award, the panel must consider and decide the expungement request and "unanimously grant expungement". The award must identify at least one of the grounds under Rule 2080 and find that "the customer dispute information has no investor protection or regulatory value." Notice 17-42, p. 6

> **FINRA's Rationale:** "The proposal would clarify for arbitrators that the standard for granting the permanent removal of customer dispute information from the CRD is a finding that the customer dispute information has no investor protection or regulatory value." Notice 17-42, p. 9
>
> **Comment:** FINRA already cautions arbitrators that expungement is an "extraordinary" remedy that should only be granted in the limited circumstances provided under Rule 2080. In fact, FINRA acknowledges that its previous efforts (establishing Rule 12805 and publishing the Expanded Guidelines) have improved the expungement process.[1] That cautionary language is adequate to inform arbitrators as to a moving party's burden.
>
> Imposing a "no investor protection or regulatory value" standard is absolute, subjective and excessive. The "extraordinary" remedy language should be balanced by permitting arbitrators to grant expungement if they conclude the customer dispute language has no **reasonable** investor protection or regulatory value. Such an objective standard is in keeping with the equitable nature of the forum.
>
> FINRA prides itself on being an equitable forum. Equitable means fair or just. Permitting customer cases to be decided by a majority, but requiring a unanimous ruling as to expungement requests is contradictory to that ethos. There is absolutely no reason why a customer's complaint, which can result in an award of hundreds of thousands or millions of dollars, can be decided by only two arbitrators, but an expungement request must be granted by three.
>
> Unanimity simply creates an unjust and unfair hurdle. Beyond the world of FINRA Arbitration, other important decisions do not require unanimity. Civil jury verdicts need not be unanimous; appellate decisions, including the United States Supreme Court, need not be unanimous; and legislators do not require unanimity.

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[1] "Based on FINRA's review of awards where expungement has been granted, arbitrators appear to be following the practices identified in the Expanded Guidelines and have a heightened awareness that expungement is an extraordinary remedy. FINRA has noticed a marked improvement in the quality of the awards in which expungement is granted." Notice 17-42, p. 10.

**Rule Change:** If a customer case closes other than by award (i.e., settlement), the associated person must file a new expungement request against the firm he/she was associated with at the time of the underlying events. The associated person cannot name the customer in the request.

> **FINRA's Rationale:** The customer should not be asked to participate in another arbitration hearing that could increase their costs/expenses. Instead, naming the firm is intended to allow a "more robust expungement proceeding". Notice 17-42, p. 6.
>
> **Comment:** Customers are free to participate in expungement proceedings, but are not required to do so. Customers should be free to assess themselves the relative costs and benefits of participating. In most cases, a customer who elects to participate will devote all of approximately one hour on a telephone conference call during which the expungement request is being formally presented. In contrast, the associated person has already suffered a negative notation on their CRD merely due to the assertion of the customer's claim, and expended many months of time and thousands of dollars on attorneys' fees and costs defending a claim he/she believes was without merit. In an equitable world, the balance of harm to the associated person is far greater than the minor inconvenience suffered by the customer – who voluntarily initiated the dispute in the first place.
>
> Allegations of wrongdoing made by a customer against an associated person are serious indeed. In most FINRA arbitrations, fraud and breach of fiduciary duty are routinely pled. Accountability for these allegations is basic to any true system of justice. The ability to allege with impunity, and to avoid accountability for one's accusations, is antithetical to any system seeking to do justice. An aggrieved associated person should be able to name the customer; a truly "robust" expungement proceeding would not mandate the exclusion of the underlying complainant from the process.

**Rule Change:** If a customer case closes other than by award (i.e., settlement), the associated person must seek expungement within one year. If there is no underlying customer case, the associated person must file an expungement request within one year from the date the member firm initially reported the customer complaint to CRD.

> **FINRA's Rationale:** The one-year limitation period would ensure that the expungement hearing is held close in time to the underlying case when information is available and the customer's participation in the expungement proceeding is more likely.
>
> **Comment:** FINRA allows customers to file claims up to six years after the occurrence or event giving rise to a dispute but wants to limit an associated person's ability to remedy a perceived meritless claim on their record. There is

nothing equitable about this. As explained above, arbitrators are capable of determining if an expungement request lacks sufficient documentary support or whether the absence of a customer's testimony should weigh against granting the request. Thus, a restrictive time limit is unnecessary to hold an effective expungement hearing. And, the safeguards to investors afforded through the CRD system are not advanced by a time limit. The longer an associated person waits to seek expungement, the longer a negative CRD notation survives in the public domain. Arbitrators are free to weigh the evidentiary value (if any) of an associated person's undue delay in this regard. Further, FINRA already requires that customers be notified of any expungement request. Thus, customers are always afforded the opportunity to participate in expungement hearings or oppose the request. A time limit does not change this reality.

**Conclusion**

Protecting customers is important, but the cornerstone of FINRA arbitration is equity. Equity works both ways. The proposed amendments seem to suggest that FINRA does not fully value the concerns of members of the financial services industry as to the fairness of the expungement process. As a result, we ask FINRA to reconsider the proposed rule amendments.

Very truly yours,

Saretsky Hart Michaels + Gould PC

Gary M. Saretsky
Jonathan M. Sterling
Collen M. Nickel

JMS/nah

Why should the expungement process cost many thousands of dollars to remove meritless claims and now you are proposing making that more difficult or impossible? Frivolous claims on an advisor CRD can ruin a career, please reconsider.

Thank you

Gregory Scrydloff, CFP
National Securities

WELLINGTON SHIELDS & CO. LLC
MEMBER NEW YORK STOCK EXCHANGE
140 BROADWAY
NEW YORK, NY 10005



TEL: (212) 732-6800

TEL: (212) 320-3000
FAX: (212) 320-3040

**Comments Regarding Expungement of Customer Dispute Reg. Notice 17-42 and Other Issues Related to Arbitration**

February 1, 2018

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

Dear Ms. Asquith,

This is an informal comment letter on proposals to the Expungement Rule. In two recent FINRA arbitration cases (attached), Wellington Shields & Co., LLC has been exonerated. In both cases claimant's claims have all been denied and in both cases expungement had been "recommended".

Expungement Process

In the first case, Omega (case #14-02852), expungement proceedings cost the firm $4,000 in costs and attorney's fees. In the second case, Morello (case #16-02878), expungement is not yet completed but has been accrued at $5,000. There should be a procedure for FINRA to keep expungement "in house" and streamlined. At the same time FINRA should have a review process in place to confirm the appropriateness of the recommendation. There should be little or no cost to the parties that receive a unanimous "recommendation" of expungement. The cost of going into court and keeping FINRA up to date as well as getting permission from the plaintiff is onerous and when you have been vindicated it is extremely unfair.

Grant

If an expungement is endorsed unanimously, the term "grant" should be retained and honored by FINRA except in rare circumstances cited by FINRA. This would eliminate the need to go to court.

Attorney's Fees

In both the cited cases, Wellington Shields & Co. attorney's fees were denied. It is my understanding that while there is no rule regarding the award of fees by FINRA, it is customary that arbitration panels do not award fees. Panelists have told me they do not do award fees because they will not be chosen to serve again. This is a serious and unfair practice in the FINRA Arbitration system and should be addressed.

Reducing Frivolous Arbitrations

The risk of charging fees against a plaintiff will surely diminish unfounded claims. For example, the two cases previously cited, probably would never have come to arbitration if there had been a risk that the plaintiff would have to pay fees.

Respectfully submitted,

David V. Shields
Chief Executive Officer

Enclosures: Omega – case #14-02852
Morello – case #16-02878

**Award**
**FINRA Office of Dispute Resolution**

In the Matter of the Arbitration Between:

Claimants
Anthony Morello
Donna Morello

vs.

Respondent
Wellington Shields & Co., LLC

Case Number: 16-02878

Hearing Site: Newark, New Jersey

Nature of the Dispute: Customers vs. Member

This case was decided by an all-public panel.

## REPRESENTATION OF PARTIES

For Claimants Anthony Morello, and Donna Morello: Ross B. Intelisano, Esq. and Jessica Murzyn, Esq., Rich, Intelisano & Katz, LLP, New York, New York.

For Respondent Wellington Shields & Co., LLC: Neil A. Sussman, Esq., Sussman & Frankel, LLP, New York, New York.

## CASE INFORMATION

Statement of Claim filed on or about: September 29, 2016.
Donna Morello signed the Submission Agreement: August 31, 2016.
Anthony Morello signed the Submission Agreement: August 31, 2016.

Statement of Answer filed by Respondent on or about: January 13, 2017.
Wellington Shields & Co., LLC signed the Submission Agreement: January 9, 2017.

## CASE SUMMARY

Claimants asserted the following causes of action: breach of applicable securities laws, statutes, rules, regulations, and standards of conduct; common law fraud; misrepresentations and material omissions; breach of fiduciary duty; breach of contract; breach of implied covenant of good faith and fair dealing; negligence; negligent misrepresentation; failure to supervise; and respondeat superior.

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

## RELIEF REQUESTED

In the Statement of Claim, Claimants requested compensatory damages in excess of $113,000.01, attorneys' fees and costs.

In the Statement of Answer, Respondent requested that the Panel render an award:

a) dismissing the Statement of Claim with prejudice;
b) recommending expungement from both Respondent and unnamed party Pamela Taylor's CRD records;
c) imposing forum fees on Claimants; and
d) granting such other and further relief as appears just and appropriate.

At the close of the hearing, Claimants withdrew their claim for unsuitability and requested compensatory damages in the amount of $92,392.16.

## OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

The Claimants participated in the expungement hearing and contested Respondent's request for expungement.

In recommending expungement the Panel relied upon the following documentary or other evidence: Claimants' Statement of Claim, Respondent's Statement of Answer, Respondent and unnamed party Pamela Taylor's BrokerCheck® Reports, and the testimony and evidence presented at the hearing.

The Panel made no determination in connection with Respondent's request for expungement since the above-captioned arbitration is not reflected on Respondent's registration records maintained by the Central Registration Depository ("CRD").

The Panel noted that unnamed party Pamela Taylor did not previously file a claim requesting expungement of the same disclosure in the CRD.

The parties present at the hearing have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

## AWARD

After considering the pleadings, the testimony and evidence presented at the recorded hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are denied in their entirety.

2. The Panel recommends the expungement of all references to the above-captioned arbitration from registration records maintained by the Central Registration Depository ("CRD"), for unnamed party Pamela Taylor (CRD# 2255299), with the understanding that, pursuant to Notice to Members 04-16, unnamed party Pamela Taylor must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

   Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

   Pursuant to Rule 12805 of the Code, the Panel has made the following Rule 2080 affirmative finding of fact:

   The claim, allegation, or information is factually impossible or clearly erroneous.

   The Panel has made the above Rule 2080 finding based on the following reasons:

   No documentary or testamentary evidence was presented by Claimants to prove their claims. Moreover, Claimants' withdrawal of their suitability claim shows that Claimants have insufficient grounds to prove their claim.

3. Any and all claims for relief not specifically addressed herein, including attorneys' fees and costs, are denied.

## FEES

Pursuant to the Code of Arbitration Procedure, the following fees are assessed:

**Filing Fees**
FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

| | |
|---|---|
| Initial Claim Filing Fee | =$ 1,425.00 |

**The filing fee is made up of a non-refundable and a refundable portion.*

**Member Fees**
Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Wellington Shields & Co. LLC is assessed the following:

| | |
|---|---|
| Member Surcharge | =$ 1,700.00 |
| Member Process Fee | =$ 3,250.00 |

**Discovery-Related Motion Fee**
Fees apply for each decision rendered on a discovery-related motion.

| | |
|---|---|
| Two (2) decisions on discovery-related motions on the papers with one (1) arbitrator @ $200.00/decision | =$ 400.00 |
| Claimants submitted one (1) discovery-related motion<br>Respondent submitted one (1) discovery-related motion | |
| Total Discovery-Related Motion Fees | =$ 400.00 |

The Panel has assessed $200.00 of the discovery-related motion fees jointly and severally to Claimants.

The Panel has assessed $200.00 of the discovery-related motion fees to Respondent.

**Hearing Session Fees and Assessments**
The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

| | | | |
|---|---|---|---|
| One (1) pre-hearing session with a single arbitrator @ $450.00/session | | | =$ 450.00 |
| Pre-hearing conference: | August 9, 2017 | 1 session | |
| One (1) pre-hearing session with the panel @ $1,125.00/session | | | =$ 1,125.00 |
| Pre-hearing conference: | March 14, 2017 | 1 session | |
| Six (6) hearing sessions @ $1,125.00/session | | | =$ 6,750.00 |
| Hearing Dates: | November 1, 2017 | 2 sessions | |
| | November 2, 2017 | 2 sessions | |
| | November 3, 2017 | 2 sessions | |
| Total Hearing Session Fees | | | =$ 8,325.00 |

The Panel has assessed $4,162.50 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed $4,162.50 of the hearing session fees to Respondent.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

| | | |
|---|---|---|
| Martin R. Cramer | - | Public Arbitrator, Presiding Chairperson |
| Catherine Stewart | - | Public Arbitrator |
| Peter L. Michaelson | - | Public Arbitrator |

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures**

Martin R. Cramer
Public Arbitrator, Presiding Chairperson

12/14/2017
Signature Date

Catherine Stewart
Public Arbitrator

Signature Date

Peter L. Michaelson
Public Arbitrator

Signature Date

December 14, 2017
Date of Service (For FINRA Office of Dispute Resolution office use only)

## ARBITRATION PANEL

| | | |
|---|---|---|
| Martin R. Cramer | - | Public Arbitrator, Presiding Chairperson |
| Catherine Stewart | - | Public Arbitrator |
| Peter L. Michaelson | - | Public Arbitrator |

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**Concurring Arbitrators' Signatures**

Martin R. Cramer
Public Arbitrator, Presiding Chairperson

Signature Date

Catherine Stewart
Public Arbitrator

12/14/2017
Signature Date

December 14, 2017
Peter L. Michaelson
Public Arbitrator

Signature Date

Date of Service (For FINRA Office of Dispute Resolution office use only)

**ARBITRATION PANEL**

| | | |
|---|---|---|
| Martin R. Cramer | - | Public Arbitrator, Presiding Chairperson |
| Catherine Stewart | - | Public Arbitrator |
| Peter L. Michaelson | - | Public Arbitrator |

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures**

Martin R. Cramer
Public Arbitrator, Presiding Chairperson

Signature Date

Catherine Stewart
Public Arbitrator

Signature Date

Peter L. Michaelson
Public Arbitrator

December 14, 2017
Signature Date

December 14, 2017
Date of Service (For FINRA Office of Dispute Resolution office use only)

**Award**
**FINRA Office of Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant
Omega Facility Services, Solutions & Surety, LLC

vs.

Respondents
John M. Jacobs,
Jacobs & Company,
Wellington Shields & Co., LLC, and
Edward Ian Herbst d/b/a The Herbst Group, LLC

and

Counter-Claimants
Wellington Shields & Co., LLC and
Edward Ian Herbst d/b/a The Herbst Group, LLC

vs.

Counter-Respondent
Omega Facility Services, Solutions & Surety, LLC

Case Number: 14-02852

Hearing Site: Charleston, West Virginia

---

Nature of the Dispute: Customer vs. Member, Associated Person, and Non-Members

This case was decided by an all-public panel.

## REPRESENTATION OF PARTIES

For Claimant Omega Facility Services, Solutions & Surety, LLC ("Claimant"): Stephen P. Meyer, Esq., Meyer, Ford & Glasser, PLLC, Charleston, West Virginia and Brandon S. Steele, Esq., Beckley, West Virginia. On or about June 1, 2016, Stephen P. Meyer, Esq. and Brandon S. Steele, Esq., filed a Notice of Withdrawal. Thereafter, Claimant appeared pro se. On or about June 30, 2016, Brandon S. Steele, Esq. filed a Notice of Appearance.

For Respondents John M. Jacobs ("Jacobs") and Jacobs & Company: Herschel H. Rose, III, Esq., Rose Law Office, Charleston, West Virginia.

For Respondents Wellington Shields & Co., LLC ("Wellington Shields") and Edward Ian Herbst d/b/a The Herbst Group, LLC ("Herbst"): Neil A. Sussman, Esq., Sussman & Frankel, LLP, New York, New York.

## CASE INFORMATION

Statement of Claim filed on or about: September 11, 2014.
Claimant signed the Submission Agreement: September 10, 2014.
Claimant filed an Answer to the Counterclaim on or about: December 29, 2014.

Statement of Answer and Counterclaim filed jointly by Wellington Shields and Herbst on or about: December 10, 2014.
Wellington Shields signed the Submission Agreement: December 29, 2014.
Herbst signed the Submission Agreement: December 30, 2014.

## CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: breach of contract, breach of fiduciary duty, respondeat superior, misrepresentations, omissions, negligence, negligent supervision, fraud, violation of FINRA Conduct Rules 2020, 2111, and 3130, violation of the New York Stock Exchange Rules, violation of the Securities Exchange Act of 1933 and 1934, violation of the West Virginia Common Law, violation of the West Virginia Consumer Protection Act, violation of the West Virginia Securities Act, and violation of the Uniform Securities Act. Claimant alleged that Jacobs, Wellington Shields, and Herbst were negligent in the handling of Claimant's account, that Jacobs disregarded Claimant's stop-trade order, and, as a result, Claimant suffered losses in its account.

Unless specifically admitted in their Statement of Answer, Wellington Shields and Herbst denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

In the Counterclaim, Wellington Shields and Herbst asserted the following cause of action: indemnification. Wellington Shields and Herbst alleged that at all times, control over Claimant's account at-issue was vested exclusively in Jacobs & Company, Claimant's investment advisor, agent, and attorney-in-fact. Wellington Shields and Herbst alleged that they exercised due care to fulfill their obligations to Claimant and did not engage in misconduct of any kind.

Unless specifically admitted in its Statement of Answer to the Counterclaim, Claimant denied the allegations made in the Counterclaim and asserted various affirmative defenses.

## RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

| | |
|---|---|
| Compensatory Damages (in excess of) | $1,000,000.00 |
| Punitive Damages | Unspecified |
| Interest | Unspecified |
| Attorneys' Fees | Unspecified |
| Costs | Unspecified |
| Other Monetary Relief | Unspecified |

In the Statement of Answer, Wellington Shields and Herbst requested that the claims asserted against them be denied in their entirety that they be awarded their costs and expenses, and other and further relief as appears just.

In the Counterclaim, Wellington Shields and Herbst requested:

| | |
|---|---|
| Compensatory Damages (in excess of) | $1,000,000.00 |
| Punitive Damages | Unspecified |
| Interest | Unspecified |
| Attorneys' Fees | Unspecified |
| Costs | Unspecified |
| Other Monetary Relief | Unspecified |

In the Statement of Answer to the Counterclaim, Claimant requested the dismissal of the Counterclaim and that its claims be granted in their entirety.

## OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On or about December 9, 2014, Respondents John M. Jacobs and Jacobs & Company notified FINRA that they are neither members nor associated persons of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to Claimant's claims against Respondents John M. Jacobs and Jacobs & Company.

At the final hearing, which was recorded, Wellington Shields and Herbst made oral requests for expungement of all references to this matter from their registration records maintained by the Central Registration Depository ("CRD"). Claimant contested the requests for expungement.

The Panel reviewed the BrokerCheck® Reports for Wellington Shields and Herbst. In recommending expungement, the Panel relied upon the following documentary or other evidence: Investment Management Agreement, Collateral Control Agreement, account information, and the testimony of Claimant and Herbst.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

## AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims, each and all, are denied.

2. The Counterclaim of Wellington Shields and Herbst is denied.

3. The Panel recommends the expungement of all references to the above-captioned arbitration from registration records maintained by the CRD for Respondents Wellington Shields & Co., LLC (CRD #149021) and Edward Ian Herbst (CRD #243580), with the understanding that, pursuant to Notice to Members 04-16, Respondents Wellington Shields & Co., LLC and Edward Ian Herbst must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

   Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

   Pursuant to Rule 12805 of the Code, the Panel has made the following Rule 2080 affirmative findings of fact:

   - The claim, allegation, or information is factually impossible or clearly erroneous;
   - The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; and
   - The claim, allegation, or information is false.

   The Panel has made the above Rule 2080 findings based on the following reasons:

   The parties remaining in this matter, Wellington Shields and Herbst, entered into specific contractual agreements whereby they would follow specific instructions, which were made in writing. It was clear from both Claimant's and Respondents' evidence that they did this. Any misrepresentations were not made by Wellington Shields or Herbst, but by Mr. Jacobs, who did not submit to this arbitration, but was named in a separate state court lawsuit. Wellington Shields and Herbst played no role in those representations alleged.

4. Other than forum fees, which are specified below, the parties shall each bear their own costs and expenses incurred in this matter.

5. Any and all claims for relief not specifically addressed herein, including punitive damages and attorneys' fees, are denied.

## FEES

Pursuant to the Code, the following fees are assessed:

**Filing Fees**
FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

| | |
|---|---|
| Initial Claim Filing Fee | =$ 1,800.00 |
| Counterclaim Filing Fee | =$ 3,200.00 |

**The filing fee is made up of a non-refundable and a refundable portion.*

**Member Fees**
Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Wellington Shields & Co., LLC is assessed the following:

| | |
|---|---|
| Member Surcharge | =$ 2,800.00 |
| Pre-Hearing Processing Fee | =$ 750.00 |
| Hearing Processing Fee | =$ 5,000.00 |

**Adjournment Fees**
Adjournments granted during these proceedings for which fees were assessed:

| | |
|---|---|
| December 8-10, 2015, adjournment requested by Claimant | =$ 1,200.00 |
| July 6-8, 2016, adjournment requested by Claimant | =$ 1,200.00 |
| September 13-15, 2016, adjournment requested by Claimant | Waived |
| Total Adjournment Fees | =$ 2,400.00 |

The Panel has assessed $2,400.00 of the adjournment fees to Claimant Omega Facility Services, Solutions & Surety, LLC.

**Hearing Session Fees and Assessments**
The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

| | | | |
|---|---|---|---|
| Three (3) pre-hearing sessions with the Panel @ $1,200.00/session | | | =$ 3,600.00 |
| Pre-hearing conferences: | March 20, 2015 | 1 session | |
| | November 23, 2015 | 1 session | |
| | April 5, 2016 | 1 session | |
| Seven (7) hearing sessions @ $1,200.00/session | | | =$ 8,400.00 |
| Hearing Dates: | November 15, 2016 | 3 sessions | |
| | November 16, 2016 | 2 sessions | |
| | November 17, 2016 | 2 sessions | |
| Total Hearing Session Fees | | | =$12,000.00 |

The Panel has assessed $12,000.00 of the hearing session fees to Claimant Omega Facility Services, Solutions & Surety, LLC.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

## ARBITRATION PANEL

| | | |
|---|---|---|
| Thomas H. Barnard, Jr. | - | Public Arbitrator, Presiding Chairperson |
| Christopher M. McMurray | - | Public Arbitrator |
| John C. Aten | - | Public Arbitrator |

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

**Concurring Arbitrators' Signatures**

/s/ Thomas H. Barnard, Jr. — November 30, 2016
Thomas H. Barnard, Jr. — Signature Date
Public Arbitrator, Presiding Chairperson

/s/ Christopher M. McMurray — December 1, 2016
Christopher M. McMurray — Signature Date
Public Arbitrator

/s/ John C. Aten — December 1, 2016
John C. Aten — Signature Date
Public Arbitrator

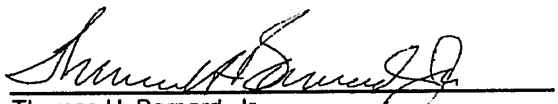
December 1, 2016
Date of Service (For FINRA Office of Dispute Resolution office use only)

**ARBITRATION PANEL**

| | | |
|---|---|---|
| Thomas H. Barnard, Jr. | - | Public Arbitrator, Presiding Chairperson |
| Christopher M. McMurray | - | Public Arbitrator |
| John C. Aten | - | Public Arbitrator |

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

**Concurring Arbitrators' Signatures**



Thomas H. Barnard, Jr.
Public Arbitrator, Presiding Chairperson

11/30/16
Signature Date

Christopher M. McMurray
Public Arbitrator

Signature Date

John C. Aten
Public Arbitrator

Signature Date

Date of Service (For FINRA Office of Dispute Resolution office use only)

**ARBITRATION PANEL**

| | | |
|---|---|---|
| Thomas H. Barnard, Jr. | - | Public Arbitrator, Presiding Chairperson |
| Christopher M. McMurray | - | Public Arbitrator |
| John C. Aten | - | Public Arbitrator |

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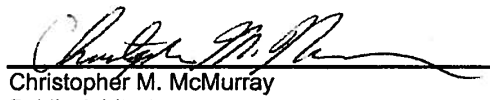
**Concurring Arbitrators' Signatures**

Thomas H. Barnard, Jr.
Public Arbitrator, Presiding Chairperson — Signature Date



Christopher M. McMurray
Public Arbitrator — 12/1/16
Signature Date

John C. Aten
Public Arbitrator — Signature Date

Date of Service (For FINRA Office of Dispute Resolution office use only)

**ARBITRATION PANEL**

| | | |
|---|---|---|
| Thomas H. Barnard, Jr. | - | Public Arbitrator, Presiding Chairperson |
| Christopher M. McMurray | - | Public Arbitrator |
| John C. Aten | - | Public Arbitrator |

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

**Concurring Arbitrators' Signatures**

Thomas H. Barnard, Jr.
Public Arbitrator, Presiding Chairperson

Signature Date

Christopher M. McMurray
Public Arbitrator

Signature Date

John C. Aten

John C. Aten
Public Arbitrator

12/1/16
Signature Date

Date of Service (For FINRA Office of Dispute Resolution office use only)

January 31, 2018

FINRA Comment Board

Reference: Rule 17-42

I recently became aware of the proposed Rule 17-42, and would appreciate the opportunity to offer my comments.

To make it more expensive, more rigorous and arbitrarily apply a time limit to the correction of the official record is completely unreasonable. Further, to apply differing standards to the procedures seems to me to be oxymoronic to the goals of the system – that is, to find and fairly reflect the truth. If one party is bound by a majority (rather than unanimous) decision, shouldn't both parties be? To do it any other way is completely unjust, and anathema to the system as conceived.

The truth shouldn't have a time limit, it shouldn't cost more!

The system was conceived to fairly treat all parties to a dispute. This rule does the opposite. The system needs to treat everyone evenhandedly, under the same standards or it will eventually lose its value.

Thank you for the forum to comment.

Sincerely,

Barrick A. Smart

*Barrick A. Smart*
*Smart Investments Advisory Inc.*
*WBB Securities, LLC*
*1849 W. Redlands Blvd., Suite 104*
*Redlands CA 92373*

*909-335-8565*
*909-335-8573 fax*

*www.smart-advisory.com*

W. Alan Smith
Deputy General Counsel
JANNEY MONTGOMERY SCOTT LLC
1717 Arch Street, 19th Floor
Philadelphia, PA 19103
215.665.6003
F 215.665.0824

February 5, 2018

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

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*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 a 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

To whom it may concern:

The Rule 17-42 is going to cause un-needed hardship on those advisors who are subjected to meritless claims.

I personally have only one mark on my U-4, FROM MY SISTER IN LAW, after more than 18 years in the business. I was pulled into a family squabble as leverage against my wife. The claim was meritless and was denied by my firm after they investigated. She was able to claim a loss of the magic number (over $5000) in spite of the fact her account was actually positive.

I submitted comments years ago to counter her claims, but it appears that those notes never made it to my U-4.
Currently in the process of trying to get the mark expunged.

It is un-fair that the costs of filing as case has increased.
It is just not right that a customer only needs a majority in arbitration for a bogus case, while the Financial Advisor will need a unanimous decision to have it expunged.

Finally, taking the ability to expunge off the table for those cases over 12 months is just plain wrong.
Personally, the last thing I wanted to do, or had the ability to do, early in my career when I was living on credit cards trying to build a book, was to reengage in a legal situation, especially when the cost of doing so is now $10,000 +.

These changes are going to negatively affect the next generation of advisor much more than those of us who are now established.

Thank you for your time,

*Click on my business card and its tabs to learn more.*

Schedule a consultation [wfasignatures.com] Are you on track? [wfasignatures.com]

Make an introduction [wfasignatures.com]


[speicherfg.com]

Save details to address book

[wfasignatures.com]

Sincerely,

Jeff Speicher
Managing Director - Investment Officer
Speicher Financial Group of Wells Fargo Advisors

Wells Fargo Advisors | 1129 Main Ave. | Durango, CO 81301
Tel 970-385-3985 | Toll-free 800-234-3390 | Fax 970-259-4514

jeffrey.speicher@wfadvisors.com | http://www.speicherfg.com[speicherfg.com]

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JOHN D. STEWART
jstewart@baritzcolman.com
Direct Dial: 646.376.7053

February 5, 2018

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

**Re: FINRA Regulatory Notice 17-42, December 6, 2017**

Dear Ms. Asquith:

We write in response to FINRA's request for comment on proposed amendments to the Codes of Arbitration Procedure relating to requests to expunge customer dispute information, as set forth in Regulatory Notice 17-42, dated December 6, 2017 (the "Proposal").

This law firm represents financial advisers and broker dealers on legal matters concerning the financial services industry, including FINRA Dispute Resolution arbitration proceedings. FINRA Dispute Resolution plays an essential role as an impartial arbiter of disputes involving the financial services industry, and the organization's function as a protector of the rights of customers is especially important. One significant manner by which FINRA Dispute Resolution protects the integrity of and ensures due process and fairness to the participants in the process, including the financial advisers and their customers, is through the expungement process. The expungement process contemplates and ensures that information reported on the Central Registration Depository ("CRD") is a truthful, accurate and reliable indicator of a financial adviser's history.

Member firms are required to report any and all customer complaints of alleged industry sales practice violations, regardless of their truth or falsity, before it is determined by either the

firm or a FINRA Dispute Resolution arbitration panel whether such complaints ultimately have merit. Often, such complaints subject a financial adviser to considerable expense and inconvenience, despite the fact that the customer has alleged no wrongdoing by that individual financial adviser. Although this process may result initially in the inclusion of misleading and inaccurate disclosures on a financial adviser's CRD record, FINRA's current expungement procedures ensure that those misleading (and at times, completely false) customer complaints are removed from the CRD record in order to provide an accurate record. Current FINRA Rule 2080 not only ensures a fair process for financial advisers but, more importantly, it ensures the accuracy and reliability of the CRD system.

The Proposal purportedly seeks to fill a perceived regulatory need of increased customer participation. While that is a worthy goal, it is one which has already been addressed by FINRA's September 2017, Notice to Arbitrators and Parties on Expanded Expungement Guidance. Since the dissemination of this Notice, arbitrators have been ordering customer notification and have sought participation from those customers. The proposed creation of an Expungement Arbitrator Roster is also a sensible proposal that will ensure only arbitrators experienced in the intricacies of the expungement rules make these important decisions.

However, most of the proposed amendments would not only fail to increase customer participation, but instead would needlessly increase the expense and decrease the accessibility to the expungement process which is plainly prejudicial to the financial adviser. The logical result of this decreased accessibility would be a corresponding decrease in expungement requests by financial advisers whose CRD records include false, misleading or inaccurate customer claims. Correspondingly, the CRD system would therefore be less accurate and would not adequately serve customers' needs.

Specifically, the following proposed amendments would make expungement less accessible to financial advisers:

1. In-Person Hearing Requirement

The requirement of an in-person hearing will significantly increase the cost to financial advisers. This increased cost, in attorneys' fees as well as work time lost by the financial advisers, will do nothing to improve the process. Stated differently, there is no demonstrable evidence that the current telephonic hearings fail to administer a fair outcome. The added cost will make it more onerous for those with false or incorrect disclosures to expunge such matters from their CRD records. As such, fewer financial advisers will seek expungement of misleading disclosures, and inaccuracies will necessarily remain in the CRD records.

2. Three-Person Panel Requirement

Similarly, the requirement of a three-person panel will also significantly increase the cost for financial advisers seeking expungement. The time necessary to rank and choose a Panel for these matters would increase threefold under this proposed rule change. In addition to the added

expense, such a requirement would significantly delay the process. All cynicism aside, other than the increase in filing fee revenues for FINRA Dispute Resolution, who would benefit from this proposed change?

Instead, by creating an Expungement Arbitrator Roster, FINRA can ensure that expungement requests are heard by arbitrators who are skilled and experienced in the nuances of the expungement rules.

3. Higher Burden of Proof

The Proposal, if enacted, would alter the purpose of Rule 2080 in a way which is counter to FINRA's stated goal of "maintaining a CRD system that provides public investors and regulators access to accurate information about firms and brokers..." See FINRA Notice to Members 04-16. As stated above, we fail to see the demonstrable evidence of failures in the current system. While the consequence to the financial adviser is plainly evident, it is not at all clear how the public would be better protected.

The proposed requirement that an arbitrator find expungement appropriate under both Rule 2080(b)(1)(A) ***AND*** Rule 2080(b)(1)(B) is not only unduly burdensome, but also alters Rule 2080 beyond its stated goal. This is a notable departure from the current provision which, pursuant to Rule 2080(b)(1)(A), already requires the Arbitrator to make a specific, reasoned determination regarding the propriety of expungement. Rule 2080(b)(1)(B) provides a safeguard by allowing for expungement of customer complaints in situations where fairness dictates such a result even if none of the Rule 2080(b)(1)(A) elements strictly apply. While it is the rare situation in which expungement would be appropriate under (A) but not (B), Rule 2080 purposely leaves open such a possibility in order to ensure the integrity of the CRD system.

Further, the standard for a finding under Rule 2080(b)(1)(B) would become more onerous under the Proposal – changing the requirement from a finding of "meritorious" requests that pose "no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements" to requiring a finding that "the customer dispute information has **no investor protection or regulatory value**." (emphasis added). The Proposal thus contradicts the stated goal of maintaining an accurate CRD System, which depends on the removal of false, misleading and inaccurate disclosures.

4. One-Year Statute of Limitations

Limiting to one year the time to file expungement requests that do not result in an arbitration claim would also constitute an unnecessarily harsh restriction on the rights of financial advisers who are subjects of misleading CRD disclosures. FINRA's stated goal for the Proposal is to increase customer participation; however, to the extent such participation may be limited due to stale expungement requests, a one year limit is unnecessary. State law statutes of limitation, which are enacted for similar reasons, primarily provide from three to six years to file an action. FINRA's proposal of a fraction of that time unduly prejudices financial advisers.

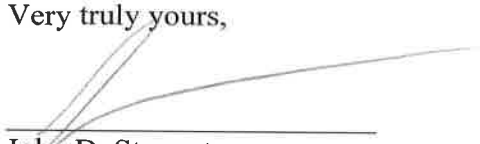
Additionally, such a short period is a disservice to all participants in the process, including customers, who necessarily rely on the integrity of the CRD system. A one year time limit for filing expungement claims would reduce the number of financial advisers filing expungement claims. As such, false, inaccurate and misleading disclosures, which imply wrongdoing on the part of a financial adviser when no such wrongdoing in fact occurred, would remain on the CRD record, making the CRD system less accurate and eroding customer confidence. Repeating a common theme from above, the Proposal fails to demonstrate flaws in the current system warranting this limitation.

Conclusion

Financial advisers seeking expungement of customer disputes on their CRD record are entitled to, and have come to expect, fair treatment by the FINRA Dispute Resolution system. It is therefore axiomatic that fair treatment of individual financial advisers serves investors by ensuring that expungement claims are thoroughly and objectively analyzed and that any disclosures allowed to remain on the CRD record truthfully and accurately reflect the misconduct they imply. The proposed amendments threaten the accuracy of this system, thus fundamental fairness dictates the rejection of the Proposal.

For all the reasons set forth above, we strongly recommend that the Proposal be rejected.

Very truly yours,



John D. Stewart
Baritz & Colman LLP

COMMONWEALTH *financial network*®

VIA ELECTRONIC MAIL

February 5, 2018

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

**Re: Regulatory Notice 17-42, Modifications to Expungement Process**

Dear Ms. Asquith:

In its Regulatory Notice 17-42, the Financial Industry Regulatory Authority, Inc. ("FINRA") solicited comments regarding proposed changes to rules affecting the expungement process.

Commonwealth Financial Network® ("Commonwealth") is an independent broker/dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 2,000 registered representatives ("RRs") who are independent contractors conducting business in all 50 states.

For the reasons set forth below, Commonwealth joins the many other individuals and firms that have already expressed concerns with the proposed modifications.

**The Proposed Rules Have no Real Benefit**

Nothing contained in the new rules will make the industry more transparent, create more investor confidence, or stop scoundrels from being scoundrels. Rather, the proposed rules simply make it harder for reputable RRs to deal with spurious allegations lodged by irrational customers who understand that a written complaint can be used as leverage to demand compensation for the slightest perceived wrong.

The system, as presently constituted: (i) already sufficiently accommodates customers who want to lodge complaints; (ii) already requires disclosure of minor complaints that serve no public purpose; and (iii) already requires a RR to make a substantial outlay of money and time to seek expungement – with no guarantee that it will succeed.

If FINRA believes that expungement is being granted at too frequent a rate, it should consider first studying the merits of the cases that are being expunged before it determines that expungement is being granted too liberally. It is much more likely that the FINRA-trained arbitrators granting the expungement awards (who are required to be chairperson certified) have

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determined that the disclosures are unwarranted than it is that the expungement standards aren't high enough.

**FINRA Should Change U4 Criteria Before Considering Expungement Modifications**

FINRA needs to amend the criteria for disclosure of customer complaints on RR U4s. The bar for disclosure is so low that almost any written complaint requires disclosure. Particularly, the $5,000 threshold should be drastically increased. It is an amount so de minimis that it is essentially superfluous.

Many frivolous and meritless complaints are required to be disclosed on RR U4s under the current rubric. These complaints are unduly prejudicial in this day and age when anyone with internet access can view RR's disclosures. Most customers that avail themselves of online disclosure information likely do not understand how easy it is for a customer complaint to become disclosable. Therefore, their assumption is that the disclosure must reflect something serious. This is unnecessarily prejudicial to RRs that bear the brunt of such complaints through no fault of their own.

Although some disclosures may be relevant to the consumer in choosing a RR, complaints should be acknowledged as an expected cost of doing business – not be treated as out of the ordinary "scarlet letters" that taint a customer's opinion of a RR because of an outdated standard.

If FINRA chooses to make it more difficult to expunge complaints it should ensure that only legitimate and warranted complaints are disclosed in the first place. This would include, at a minimum: (i) drastically increasing the alleged damages threshold; (ii) narrowing the definition of "sales practice violation"; and (iii) modifying the process such that clearly false or uncorroborated allegations do not require disclosure.

**FINRA Should Change Brokercheck Criteria Before Considering Expungement modifications**

Similar to the U4 concerns above, FINRA's Brokercheck site also unfairly publicizes certain RR disclosures. Although to a large extent the U4 and Brokercheck are one and the same, it is noteworthy to recall that the U4 requires only disclosure of certain customer complaints that have been lodged within the most recent 24 months. Yet those same complaints apparently remain on Brokercheck in perpetuity. This is also unnecessarily prejudicial to RRs as these complaints remain publicly available well beyond the time they are of any public benefit.

Sincerely,

Joe Tully
Assistant General Counsel

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,

Leslie M. Walter, JD
[redacted]

For those who have been unjustly tarred by un-valid complaints and wish to clear our names, I'm disgusted that FINRA has chosen to increase the fee and to do so by over a thousand dollars. The fee by FINRA as it exists, is already 1500 dollars per complaint. That alone is extortion, but to raise that fee any further is unconscionable. It's behavior expected of loan sharks. There are many Financial advisors who are targeted by bad actors for a number of reasons. We need a fair and reasonable system to clear our names. At one point ,FINRA used to remove complaints that were unfounded. Staining someone's name forever by forcing them to pay extortion and go to court is a cheesy way to collect income from people who are already victims. Thanks FINRA. Now we can be victimized twice.

Stacie Weinerf
Vice President- Financial Advisor
RBC Wealth Managementpeople who are aleady victims
Fax (413) 528-7159
Stacie.weiner@rbc.com
NMLS # 140813 through City National Bank

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

Re: FINRA Regulatory Notice 17-42, December 6, 2017
Comments on Proposed Rule Changes Regarding Expungement of Customer Dispute Information

Dear Ms. Asquith:

I am a FINRA public arbitrator. I have been a Chairperson and sole arbitrator in expungement arbitration proceedings in numerous customer and industry cases. My experience has included expungement proceedings following evidentiary proceedings, as well as stand-alone expungement proceedings. I am a practicing lawyer.

I share the viewpoint that arbitrators are not infrequently disadvantaged in hearing a customer expungement case when the arbitrator or panel has not had the benefit of additional information beyond the initial pleadings. When the customer settles the claim in advance of the evidentiary hearing and there has been no motion practice nor discovery conference, even the Chairperson has no knowledge besides the initial pleadings. Complicating this, the claimant may after settlement, send a one-line objection to the expungement request, and decline to participate directly, or through counsel, in the expungement proceeding. The panel or arbitrator must decide based upon the record of the expungement hearing only created by the broker seeking expungement, particularly when the notional past or current firm Respondent does not oppose the expungement. While the arbitrator or panel will challenge the broker's allegation of compliance with one of the 2080 standards, in the absence of the customer's involvement, this often done in a vacuum. For economic reasons, the customer generally does not appear or have his or her counsel file a brief or statement supporting the objection to the expungement. If the customer chooses to object it would be helpful if it was mandated that the customer participate in the hearing or file a substantive statement or brief opposing expungement. I don't see the proposed Rule changes under Regulatory Notice 17-42 making this a condition of customer objection to expungement. The proposed Rule changes, in my view, will not solve the problem that the Regulatory Notice aims to correct.

With regard to the specific proposals I offer a few general comments.

I. A. As a general matter, I have found that expungement is pled when the broker is a named party in the underlying action and is aware of it. On occasion I have seen a request made years after the underlying event, but the customer usually has long lost interest, if the customer can be located. Rule enhancement through time limitation and fees as expressed in the proposed Rule changes may benefit staff and limit these occasional issues but in my view, they do not address the stated purpose for this Regulatory Notice. As an arbitrator this is not a major concern. I leave to other commentators whether one-year is an appropriate time period.

I.B. Unnamed Persons: As an arbitrator I tend to see these matters in a separate expungement proceeding brought after the conclusion of the underlying dispute. Intervention is a strategic decision for counsel, although the expungement proceeding might change if the broker is a named party, and if

the customer ultimately participates in the expungement proceeding. The latter being the more relevant point.

II. Telephonic Hearing Session: Although I have a conceptual preference that aligns with live or video-conference hearings, I recognize that the latter may not be available and telephonic might be acceptable in limited circumstances. I believe arbitrators can make this determination and the Rule should not limit their flexibility to do so.

Unanimity and Additional Findings: I think both of these changes are harmful.

While there is a high bar for granting expungement, given that the hearing can often occur without evidence from the customer, the "unanimity" would still be based upon a limited record. Unanimity creates a veto power. It can cut both ways. Persuasion based upon majority decision is a better vehicle. Unanimity will create inefficiency if the panel deadlocks and will not improve the basis for the award.

Imposing the vague standard ("2) find that the customer dispute information has no investor protection or regulatory value") on arbitrators would encourage the use of experts in expungement hearings who could testify on the record as to compliance with such standards. Given the potential of little information beyond the initial pleadings, it would be hard for arbitrators (or an expert) to make such a finding.

III.

Selection of the Panel: Notwithstanding that I would meet the proposed experience standards, I don't think they are necessary. I have had panels composed of those who would qualify. Some have been well-qualified and diligent, and others less so. I think a capable non-lawyer could handle an expungement proceeding. I don't think a separate Roster is needed. Oddly, litigation is listed as an experience skill, but not arbitration.

I previously commented on proposed changes repeated in III.B. and C.

IV. Simplified Arbitration.

I think it best that the arbitrator hearing the underlying claim hear the expungement request, if the broker was a named party. If unnamed, the same panel should hear the expungement arbitration if available, and only if not, should new arbitrators be substituted. The panel should, upon its request, have selected documents or testimony from the underlying proceeding made available to it in the separate expungement arbitration of an unnamed person.

Respectfully submitted,

Brooks White, Esq.
FINRA Arbitrator

Dated: January 15, 2018

**EXHIBIT 5**

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

**12000. CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES**

* * * * *

**12900. Fees Due When a Claim Is Filed**

**(a) Fees for Claims Filed by Customers, Associated Persons and Other Non-Members**

(1) Customers, associated persons, and other non-members who file a claim, counterclaim, cross claim or third party claim must pay a filing fee in the amount indicated in the schedule below. [The Director may defer payment of all or part of the filing fee on a showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 12307.]

* * * * *

(2) No Change.

(3) The Non-Monetary/Not Specified filing fee under Rule 12900(a)(1) must be paid by an associated person who requests expungement of customer dispute information under the Code; or a party to an investment-related, customer-initiated arbitration who requests expungement of customer dispute information on-behalf-of an associated person during the arbitration case. If the associated person or other party requesting expungement adds a monetary claim to the expungement request, the filing fee shall be the Non-Monetary/Not Specified

filing fee or the applicable filing fee provided in Rule 12900(a)(1), whichever is greater.

(4) The Director may defer payment of all or part of the filing fee on a showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 12307.

(b) through (d) No Change.

**12901. Member Surcharge**

**(a) Member Surcharge**

(1) through (2) No Change.

(3) If an associated person files a request for expungement of customer dispute information against the customer pursuant to Rule 12302, the Non-Monetary/Not Specified member surcharge under Rule 12901(a)(1) shall be assessed against each member that employed the associated person at the time the customer dispute arose. If the associated person adds a monetary claim to the expungement request, the Non-Monetary/Not Specified member surcharge or the applicable surcharge provided in Rule 12901(a)(1), whichever is greater, shall be assessed against each member that employed the associated person at the time the customer dispute arose.

[3](4) If the claim is filed by the member, the surcharge is due when the claim is filed. If the claim is filed against the member, or against an associated person employed by the member at the time of the events giving rise to the dispute, the surcharge is due when the Director serves the Claim Notification Letter or the initial statement of claim in accordance with Rule 12300.

(5) If a claim is filed by an associated person pursuant to paragraph (a)(3), the surcharge is due when the Director serves the Claim Notification Letter or the initial statement of claim in accordance with Rule 12300.

[4](6) No member shall be assessed more than a single surcharge in any arbitration. The panel may not reallocate a surcharge paid by a member to any other party.

(b) No Change.

**12902. Hearing Session Fees, and Other Costs and Expenses**

**(a) Hearing Session Fees**

(1) through (4) No Change.

(5) The fee for each hearing session in which the sole topic is the determination of a request for expungement of customer dispute information shall be the Non-Monetary/Not Specified fee under Rule 12902(a)(1) for a hearing session with three arbitrators. If a request for expungement of customer dispute information includes a monetary claim, the hearing session fee shall be the Non-Monetary/Not Specified fee for a hearing session with three arbitrators or the applicable hearing session fee provided in Rule 12902(a)(1), whichever is greater. The arbitrator or panel shall assess the hearing session fees against the party or parties requesting expungement.

(b) through (e) No Change.

**12903. Process Fees Paid by Members**

(a) No Change.

(b) If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose will be charged the process fees, even if the member is not a party. [No member shall be assessed more than one process fee in any arbitration.]

(c) If an associated person files a request for expungement of customer dispute information against the customer pursuant to Rule 12302, the process fee for the member that employed the associated person at the time the customer dispute arose shall be the Non-Monetary/Not Specified fee under Rule 12903(a)(1). If the associated person adds a monetary claim to the expungement request, the process fee for the member that employed the associated person at the time the customer dispute arose shall be the Non-Monetary/Not Specified fee or the applicable process fee provided in Rule 12903(a)(1), whichever is greater.

[(c)](d) The panel may not reallocate to any other party any process fees paid by a member.

(e) No member shall be assessed more than one process fee in any arbitration.

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**13000. CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES**

* * * * *

**13900. Fees Due When a Claim Is Filed**

**(a) Fees for Claims Filed by Associated Persons**

(1) Associated persons who file a claim, counterclaim, cross claim or third party claim must pay a filing fee in the amount indicated in the schedule below. [The Director may defer payment of all or part of the filing fee on a

showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 13307.]

* * * * *

(2) No Change.

(3) An associated person who requests expungement of customer dispute information under the Code must pay the Non-Monetary/Not Specified filing fee under Rule 13900(a)(1). If the associated person adds a monetary claim to the expungement request, the filing fee shall be the Non-Monetary/Not Specified filing fee or the applicable filing fee provided in Rule 13900(a)(1), whichever is greater.

(4) The Director may defer payment of all or part of the filing fee on a showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 13307.

(b) through (d) No Change.

**13901. Member Surcharge**

(a) through (b) No Change.

(c) If an associated person files a request for expungement of customer dispute information pursuant to Rule 13302, the member surcharge shall be the Non-Monetary/Not Specified member surcharge under Rule 13901(a)(1). If the associated person adds a monetary claim to the expungement request, the member surcharge shall be the Non-Monetary/Not Specified member surcharge or the applicable surcharge provided in Rule 13901(a)(1), whichever is greater.

[(c)](d) If the claim is filed by the member, the surcharge is due when the claim is filed. If the claim is filed against the member, or against an associated person employed by the member at the time of the events giving rise to the dispute, the surcharge is due when the Director serves the Claim Notification Letter or the initial statement of claim in accordance with Rule 13300.

(e) If a claim is filed by an associated person pursuant to paragraph (c), the surcharge is due when the Director serves the Claim Notification Letter or the initial statement of claim in accordance with Rule 13300.

[(d)](f) No member shall be assessed more than a single surcharge in any arbitration. The panel may not reallocate a surcharge paid by a member to any other party.

[(e)](g) The Director may also refund or waive the member surcharge in extraordinary circumstances.

**13902. Hearing Session Fees, and Other Costs and Expenses**

**(a) Hearing Session Fees**

(1) through (3) No Change.

(4) The fee for each hearing session in which the sole topic is the determination of a request for expungement of customer dispute information shall be the Non-Monetary/Not Specified fee under Rule 13902(a)(1) for a hearing session with three arbitrators. If a request for expungement of customer dispute information includes a monetary claim, the hearing session fee shall be the Non-Monetary/Not Specified fee for a hearing session with three arbitrators or the applicable hearing session fee provided in Rule 13902(a)(1), whichever is greater.

The arbitrator or panel shall assess the hearing session fees against the party or parties requesting expungement.

(b) through (e) No Change.

**13903. Process Fees Paid by Members**

(a) No Change.

(b) If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose will be charged the process fees, even if the member is not a party. [No member shall be assessed more than one process fee in any arbitration.]

(c) If an associated person files a request for expungement of customer dispute information pursuant to Rule 13302, the process fee shall be the Non-Monetary/Not Specified fee under Rule 13903(a). If the associated person adds a monetary claim to the expungement request, the process fee shall be the Non-Monetary/Not Specified fee or the applicable surcharge provided in Rule 13903(a)(1), whichever is greater.

[(c)](d) The panel may not reallocate to any other party any process fees paid by a member.

(e) No member shall be assessed more than one process fee in any arbitration.

* * * * *