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April 9, 2021

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: File No. SR-FINRA-2020-030 (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 Modify the Current Process Relating to the Expungement of Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests)

Dear Ms. Countryman:

This letter is submitted by the Financial Industry Regulatory Authority (“FINRA”) in response to comments received by the Securities and Exchange Commission (“SEC” or “Commission”) on the above-referenced rule filing related to proposed amendments to the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) (together, “Codes”) to modify the current process relating to the expungement of customer dispute information, including creating a special arbitrator roster to decide certain expungement requests (“Proposal”).¹

Specifically, the Proposal would amend the Codes to: (1) impose requirements on expungement requests (a) filed during an investment-related, customer initiated arbitration (“customer arbitration”) by an associated person, or by a party to the customer arbitration on-behalf-of an unnamed associated person, or (b) filed by an associated person separate from a customer arbitration (“straight-in request”); (2) establish a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide

¹ See Securities Exchange Act Release No. 90000 (September 25, 2020), 85 FR 62142 (October 1, 2020) (Notice of Filing of File No. SR-FINRA-2020-030) (“Initial Filing”).

straight-in requests (“Special Arbitrator Roster”);² (3) establish procedural requirements for expungement hearings; and (4) codify and update the best practices of the Notice to Arbitrators and Parties on Expanded Expungement Guidance (“Guidance”) that arbitrators and parties must follow.³ In addition, the Proposal would amend the Customer Code to specify procedures for requesting expungement of customer dispute information arising from simplified arbitrations. The Proposal would also amend the Codes to establish requirements for notifying state securities regulators and customers of expungement requests.

The Commission published the Proposal for public comment in the Federal Register on October 1, 2020 and received eight comments in response to the Proposal.⁴ On December 18, 2020, FINRA responded to the comments and filed

² To be eligible for the Special Arbitrator Roster, arbitrators must: (1) be public arbitrators who are eligible for the chairperson roster; (2) have evidenced successful completion of, and agreement with, enhanced expungement training provided by FINRA; and (3) served as an arbitrator through award on at least four customer-initiated arbitrations administered by FINRA or by another self-regulatory organization (“SRO”) in which a hearing was held. See proposed Rule 13806(b)(2).

³ See Guidance, available at <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

⁴ See Letter from Steven B. Caruso, Maddox Hargett & Caruso, P.C., to Vanessa Countryman, Secretary, SEC, dated September 28, 2020; letter from Dochtior D. Kennedy, President & Founder, AdvisorLaw, LLC, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated October 22, 2020; letter from Benjamin P. Edwards, Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated October 12, 2020 (“Edwards”); letter from Lisa Hopkins, President, North American Securities Administrators Association, Inc., to Vanessa Countryman, Secretary, SEC, dated October 22, 2020; letter from Amanda Skrelja, Paige Guarino, William Lapadula, and Zachary Dukoff, Legal Interns & Elissa Germaine, Supervising Attorney, John Jay Legal Services, Inc., Elizabeth Haub School of Law, PACE University, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated October 22, 2020; letter from Kevin M. Carroll, Managing Director and Associate General Counsel, SIFMA, to Vanessa A. Countryman, Secretary, SEC, dated October 22, 2020; letter from Ruben Huertero, Legal Intern & Christine Lazaro, Director of the Securities Arbitration Clinic and Professor of Clinical Legal Education, St. John’s University School of Law, to Vanessa Countryman, Esq., Secretary, SEC, dated October 22, 2020; and letter from David P. Meyer, President, Public Investors Advocate Bar Association, to Brent J. Fields, Secretary, SEC, dated October 23, 2020.

Partial Amendment No. 1 to the Proposal to propose amendments based on the comments received by the SEC.⁵

On December 28, 2020, the SEC published a notice and order in the Federal Register to solicit comments on the Proposal as modified by Partial Amendment No. 1 and to institute proceedings pursuant to Section 19(b)(2)(B) of the Securities Exchange Act of 1934 (“SEA”) in the above-referenced rule filing to determine whether to approve or disapprove the proposed rule change as modified by Partial Amendment No. 1.⁶ The SEC received nine comment letters in response to the Order.⁷ PIABA Foundation opposed the Proposal. Other commenters expressed general support for the Proposal, but also expressed concerns with some aspects of the Proposal and suggested modifications.⁸ NASAA 2 expressed appreciation for the fact that the Proposal would amend the Codes to establish requirements for

⁵ See FINRA Response to Comments, dated December 18, 2020 (“Response Letter”) and Partial Amendment No. 1 to SR-FINRA-2020-030 filed on December 18, 2020 (“Partial Amendment No. 1”), available at <https://www.finra.org/rules-guidance/rule-filings/sr-finra-2020-030>.

⁶ See Securities Exchange Act Release No. 90734 (December 18, 2020), 85 FR 84396 (December 28, 2020) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove File No. SR-FINRA-2020-030) (“Order”).

⁷ See Letter from Benjamin P. Edwards, Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated January 19, 2021 (“Edwards 2”); letter from Julius Z. Frager, to SEC Commission, dated January 7, 2021 (“Frager”); letter from Professor Lisa Miller, CEO, Lex Law Corporation, to Vanessa Countryman, Secretary, SEC, dated January 7, 2021 (“Miller”); letters from Lisa Hopkins, President, North American Securities Administrators Association, Inc., to Vanessa Countryman, Secretary, SEC, dated January 18, 2021 (“NASAA 2”) and January 28, 2021 (“NASAA 3”); letter from Kevin M. Carroll, Managing Director and Associate General Counsel, SIFMA, to Vanessa A. Countryman, Secretary, SEC, dated January 19, 2021 (“SIFMA 2”); letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Vanessa A. Countryman, Secretary, SEC, dated February 1, 2021 (“CFA”); letter from David P. Meyer, President, Public Investors Advocate Bar Association, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated February 2, 2021 (“PIABA 2”); and letter from Jason R. Doss, President and Celiza Brangança, Vice-President, the PIABA Foundation, Inc., to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated January 19, 2021 (“PIABA Foundation”). PIABA Foundation is a separate entity from PIABA.

⁸ See Edwards 2, PIABA 2 and CFA.

notifying state securities regulators of expungement requests earlier in the expungement process. Other commenters discussed particular provisions of the Proposal, without commenting on the Proposal as a whole.⁹ FINRA submits this response to the commenters' material concerns.

Expungement Under the Codes

Some commenters, while expressing general support for the Proposal, expressed their preference for an alternative approach to the current expungement process that would not rely on the FINRA arbitration forum. For example, Edwards 2 stated that "FINRA deserves praise for its attempts to improve the current expungement system and many of the Amended Proposal's changes would improve the arbitration-facilitated expungement process. The changes it embraced by amending the Proposal will do some real good. Even though the Amended Proposal offers an improvement over the status quo, the changes to the process under consideration do not go far to make arbitration-facilitated expungement acceptable." PIABA 2 stated that although it continues to support much of FINRA's "proposed incremental changes" to the expungement process, it also supports "broader fundamental changes in order to solve more of the systemic problems in expungement proceedings." CFA stated that "[u]ltimately, we agree

⁹ See Frager, Miller and SIFMA. Some commenters reiterated the same comments raised in response to the Initial Filing. FINRA considered and addressed those comments in the Response Letter and, therefore, incorporates those responses herein. For example, FINRA incorporates its previous response to Edwards 2's concern that the current expungement process improperly relies on an adversarial system and suppresses information and his suggestions to impose an expanded duty of candor on parties and their counsel seeking expungement; to create "a financial incentive for investor participation"; and to impose a standard of proof for expungement matters. See Response Letter at 5-6 (Non-Adversarial Nature of Straight-in Expungement Requests); at 5, n.12 (addressing duty of candor); at 7 (Create Financial Incentives for Customers to Participate); and at 11 (Standards for Recommending Expungement). SIFMA 2 reiterated its opposition to FINRA clarifying that a panel's decision to recommend expungement is limited to the grounds listed in FINRA Rule 2080(b)(1) and requested clarification that the proposed amendments do not preclude associated persons from seeking expungement relief in court. FINRA incorporates its previous responses to SIFMA 2's concerns. See Response Letter at 12 (Arbitrator Must Find Rule 2080(b)(1) Grounds for Expungement) and at 18-19, n.57 (explaining that the Proposal would not alter the ability of an associated person to seek court confirmation of an expungement arbitration award or to request expungement by going directly to court without first going through FINRA arbitration).

with those who have suggested expungement cannot reasonably be delegated to arbitrators and is instead more appropriately treated as a regulatory decision.”

As it did in the Initial Filing and the Response Letter, FINRA acknowledges the concerns expressed by commenters with the current expungement process, including concerns with the non-adversarial nature of some expungement proceedings and that expungement only be recommended in extraordinary circumstances. At this time, however, FINRA believes that enhancing the current expungement process is the appropriate course of action to address these concerns.

As detailed in the Initial Filing, the Response Letter and herein, FINRA is proposing a number of significant changes to the current process to help ensure that expungement, as an extraordinary remedy, is recommended by arbitrators only in circumstances when one of the FINRA Rule 2080(b)(1) grounds is met.¹⁰ Among other changes, the Proposal would impose requirements with respect to the circumstances under which an associated person may request expungement; the methods by which an associated person may request expungement; the time-frames within which an associated person may request expungement; the composition, experience, selection and responsibilities of the panel deciding an expungement request, particularly straight-in requests; the procedures that arbitrators and parties must follow at expungement hearings; customer notification of all expungement hearings; and encouraging and facilitating customer participation in expungement proceedings. The proposed changes are also intended to continue to balance the competing interests of providing regulators with broad access to information about customer disputes to fulfill their regulatory obligations, providing a fair process that recognizes an associated person’s interest in protecting their reputation, and ensuring investors have access to accurate information about associated persons.

In addition, as FINRA has previously stated, as it gains experience with the expungement process as revised by the Proposal, FINRA will continue to evaluate whether there are ways to further enhance the process. In addition, to increase transparency around expungement requests and the outcomes of such requests, FINRA will provide information on its website regarding expungement requests.

FINRA also welcomes continued engagement with interested parties on expungement, including on potential alternative frameworks to the current expungement process. In particular, FINRA will continue to discuss with NASAA and state securities regulators various alternative approaches to request to expunge

¹⁰ In recommending expungement, arbitrators must make an affirmative finding that: (i) the claim, allegation or information is factually impossible or clearly erroneous; (ii) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (iii) the claim, allegation or information is false. See FINRA Rule 2080(b)(1).

the Central Registration Depository (“CRD®”) records. FINRA appreciates PIABA Foundation’s description of the launch of its *pro bono* expungement program and looks forward to continued dialogue on ways to further encourage effective customer participation in expungement proceedings.¹¹ In addition, FINRA looks forward to working collaboratively with NASAA and state securities regulators on how best to provide for early notification of expungement requests to state securities regulators as contemplated by the Proposal.¹²

Independent Advocate

Some commenters stated that if the expungement process is not moved from FINRA’s arbitration forum to an alternative process, an independent advocate should be imbedded into the expungement process to represent stakeholders with an interest in the information contained in CRD at expungement hearings.¹³

As stated above, at this time FINRA believes that the Proposal appropriately addresses commenters’ concerns with the current expungement process. In addition, FINRA believes that the better approach is for FINRA to gain experience with the expungement process as revised by the Proposal and determine if additional changes are needed. As discussed in more detail below, FINRA believes that the Proposal’s requirements that a three-person panel randomly selected from the Special Arbitrator Roster decide all straight-in requests, and the requirements aimed at encouraging and facilitating customer participation in expungement proceedings, should help address concerns regarding the potential non-adversarial nature of the current expungement process (particularly with respect to straight-in requests) and help protect the integrity of the information in the CRD system.

Special Arbitrator Roster

The Proposal would require that straight-in requests be decided by a randomly-selected panel of three arbitrators from the Special Arbitrator Roster.¹⁴ The arbitrators on the Special Arbitrator Roster would be experienced public chairpersons with

¹¹ See PIABA Foundation.

¹² See NASAA 2.

¹³ See Edwards 2 and PIABA 2; see also PIABA Foundation (stating that “[i]f the expungement process is going to remain in FINRA arbitration, however, the PIABA Foundation recommends that FINRA and/or the SEC create and embed an investor protection advocate into the expungement process similar to the role that a *guardian ad litem* serves in a court case”).

¹⁴ See proposed Rules 13805(a)(1) and 13806(a).

enhanced expungement training.¹⁵ Thus, the arbitrators deciding straight-in requests would be experienced in managing and conducting arbitration hearings in the forum. These requirements are particularly important because if customers decline to participate in straight-in requests, having three experienced, well-trained public arbitrators available to ask questions, request evidence and to serve generally as fact-finders in the absence of customer input would help ensure that a complete factual record is created to support the arbitrators' recommendation.¹⁶

In addition, by requiring that the arbitrators chosen to hear the request be randomly selected, the Proposal would eliminate the ability of the associated person to select arbitrators who may be unduly favorable to their expungement request.¹⁷ As

¹⁵ See supra note 2.

¹⁶ The Proposal would also codify the ability of arbitrators to request from the associated person and the member firm at which he or she was associated at the time the customer dispute arose or other party requesting expungement, any documentary, testimonial or other evidence that they deem relevant to the expungement request. See proposed Rule 13805(c)(6).

PIABA Foundation expressed concern that the Proposal would "poison" the public arbitrator pool for customer disputes because "attorneys representing the brokerage industry" would "have unfettered access to present the pool of public chairpersons with invalid defenses such as the prospectus defense." PIABA Foundation suggested either populating the Special Arbitrator Roster from the non-public arbitrator roster or reclassifying the chair-qualified arbitrators on the Special Arbitrator Roster as non-public arbitrators. For the reasons stated, FINRA believes it is important to have experienced public arbitrators, without significant ties to the financial industry deciding straight-in requests. Among other requirements, public arbitrators are not employed by the securities industry; do not devote 20 percent or more of their professional work to the securities industry or to parties in disputes concerning investment accounts or transactions or employment relationships within the financial industry; and do not have immediate family members or co-workers who do so. See FINRA Rule 12100(aa). In contrast, non-public arbitrators include persons who are associated with or represent the financial industry. See FINRA Rule 12100(aa); FINRA Rule 12100(t); see also Response Letter at 6, n.15 (addressing a similar suggestion by Edwards in response to the Initial Filing that the Proposal segregate arbitrators on the expungement roster from the customer arbitration pools).

¹⁷ See proposed Rule 13806(b)(1). In addition, if an associated person withdraws a straight-in request after a panel from the Special Arbitrator Roster is appointed, the case would be closed with prejudice. See proposed Rule 13805(a)(4).

FINRA stated in the Response Letter, FINRA determined that the current process for selecting arbitrators (i.e., striking and combining ranked lists) would not be appropriate for selecting arbitrators to decide straight-in requests.¹⁸ If the parties' interests are aligned, they could use the current arbitrator selection process to strike and rank arbitrators on the list to assemble a panel that could be more favorable to recommending expungement. Accordingly, the Proposal provides that the parties would not be permitted to stipulate to the use of pre-selected arbitrators, nor would they be permitted to strike any of the panelists.¹⁹

Frager suggested that having three arbitrators for straight-in requests is unnecessary. In addition, PIABA Foundation stated that it is unlikely that the three-arbitrator requirement "will reduce the number of expungements being granted."

FINRA disagrees with the commenters. FINRA believes that due to the importance of developing a factual basis for an expungement recommendation, it is appropriate to have three arbitrators decide straight-in requests. In addition, as FINRA has already stated, FINRA believes the proposed changes taken as a whole, including the requirement for a three-person panel randomly selected from the Special Arbitrator Roster, would help ensure that expungement is recommended by arbitrators only in circumstances when one of the FINRA Rule 2080(b)(1) grounds is met.

Some commenters questioned arbitrators' ability to act as factfinders in straight-in requests. For example, Edwards 2 stated that he did not believe that arbitrators "will become better equipped to make reasonable and thoughtful inquiries before recommending expungement" regardless of their ability to request additional information. PIABA Foundation suggested that the approach "may lessen pressure on the parties seeking expungement to affirmatively disclose facts that undermine their request because they would be permitted to rely on the arbitrator to advocate against expungement relief."

FINRA disagrees with the commenters. The arbitrators on the Special Arbitrator Roster would be experienced arbitrators—the arbitrators must be eligible for the chairperson roster and have served as arbitrators through award on at least four customer-initiated arbitrations administered by FINRA or by another SRO in which a hearing was held.²⁰ In addition, the arbitrators would be required to have evidenced

¹⁸ See Response Letter at 5-6; see also generally FINRA Rules 12402 and 12403.

¹⁹ See proposed Rules 13806(b)(1) and (4). The parties would also be prohibited from stipulating to the removal of a randomly selected panelist and would not be permitted to stipulate to fewer than three arbitrators on a panel. See proposed Rules 13806(b)(4) and (5).

²⁰ Arbitrators are eligible for the chairperson roster if they have completed chairperson training provided by FINRA and: (1) have a law degree and are a

successful completion of, and agreement with, enhanced expungement training provided by FINRA that would set forth the arbitrators' role and responsibilities with respect to straight-in requests. As discussed above, FINRA would also continue to monitor the expungement process to determine if additional enhancements are needed to help ensure that expungement, as an extraordinary remedy, is being recommended only in circumstances in accordance with FINRA rules.

Customer Participation in Straight-in Requests

As FINRA discussed in the Response Letter, the Proposal includes several provisions that address the potentially non-adversarial nature of straight-in requests by encouraging and facilitating customer participation in expungement proceedings.²¹ In addition, in response to comments on the Initial Filing, FINRA amended the Proposal in Partial Amendment No. 1 to require associated persons to notify all customers whose customer arbitrations and customer complaints gave rise to customer dispute information that is the subject of a straight-in request by serving on the customer the statement of claim and any answer within 10 days of filing of these documents with FINRA.²²

Also in response to comments on the Initial Filing, FINRA amended the Proposal in Partial Amendment No. 1 to require that the Director notify customers of the time, date and place of any prehearing conferences, in addition to the expungement hearing, and clarify that customers are entitled to appear at prehearing conferences.²³ Edwards 2 acknowledged that "these changes will reduce barriers to customer participation," but stated that "FINRA [should also] allow non-parties to access documents through the DR Portal on equal terms as the parties to an expungement request."²⁴ PIABA Foundation also expressed concern that "[c]ustomers who seek to

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 12400(c). FINRA also notes that before making any decision as an arbitrator or attending a hearing session, all arbitrators in the forum must sign the Oath of Arbitrator affirming that they will decide the controversy in a fair manner. See FINRA Rules 12402(f)(4), 12403(e)(4) and 13406(d).

²¹ See Response Letter at 6-10.

²² See proposed Rule 13805(b)(1)(B).

²³ See proposed Rules 13805(b)(2) and 13805(c)(3)(A).

²⁴ The DR Portal has two parts: the DR Neutral Portal is for FINRA neutrals (arbitrators and mediators) serving on the Dispute Resolution roster, and the

be heard are not given access to the documents that the broker and brokerage firm have filed on the FINRA Portal,” and that “[c]ustomers would be required to file a motion to compel the broker/brokerage firm to provide them with documents and other information provided to the arbitrator.”

FINRA agrees that customers who seek to participate in a straight-in request should have access to all documents filed in the arbitration that are relevant to the expungement request. Accordingly, FINRA is proposing in Partial Amendment No. 2 to amend proposed Rule 13805(b)(2) to provide that the Director shall provide the notified customers with access to all documents filed in the arbitration that are relevant to the expungement request.

PIABA Foundation incorrectly stated that the Proposal would not require the panel to schedule the hearings to ensure that customers can participate, nor require that the associated person and member firm consult with the customers when scheduling hearings. FINRA notes that the Proposal states explicitly that the customers are “entitled to appear at the prehearing conferences and expungement hearing,”²⁵ and that as part of the enhanced expungement training, arbitrators would be reminded to consult with the customer or the customers’ counsel when selecting or rescheduling hearing dates where the customer expresses interest in participating.

Expungement of Multiple Complaints

Edwards 2 stated that because “many associated persons now seek to purge multiple complaints from their records in many expungement proceedings, FINRA should require each expungement hearing to proceed individually.” FINRA believes that the Proposal’s requirement to name the member firm at which the associated person was associated at the time the dispute arose and proposed time limits would significantly limit the practice of including multiple complaints in expungement requests.

Specifically, by requiring that all straight-in requests be filed against the member firm at which the associated person was associated at the time the dispute arose, the Proposal helps ensure that there is a connection between the associated person’s request and the firm against which the request is filed.

DR Party Portal is for arbitration and mediation case participants. Once registered on the DR Portal, parties may use the portal to, among other things, file an arbitration claim, view case documents, submit documents to FINRA and send documents to other portal case participants, and schedule hearing dates. See FINRA Dispute Resolution Services, DR Portal available at <https://www.finra.org/arbitration-mediation/dr-portal>

²⁵ See proposed Rule 13805(c)(3)(A).

In addition, the proposed time limits would prevent associated persons from including requests to expunge customer dispute information that was reported to the CRD system many years earlier (i.e., aged customer dispute information). For customer dispute information reported to the CRD system after the effective date of the proposed amendments, an associated person would be barred from requesting expungement if: (1) more than two years have elapsed since the close of the customer arbitration or civil litigation that gave rise to the customer dispute information;²⁶ or (2) there was no customer arbitration or civil litigation involving the customer dispute information, and more than six years have elapsed since the date that the customer complaint was initially reported to the CRD system.²⁷ For customer dispute information reported to the CRD system before the effective date of the proposed amendments, an associated person would be required to request expungement as a straight-in request under the Industry Code: (1) within two years of the effective date of the proposed amendments for disclosures that arose from a customer arbitration or civil litigation that closed on or prior to the effective date; and (2) within six years of the effective date of the proposed amendments for customer complaints initially reported to the CRD system on or prior to the effective date.²⁸

In the past, associated persons have filed straight-in requests to expunge customer dispute information many years after the customer arbitration has closed or the customer complaint is reported in the CRD system. They have done so despite the general six-year eligibility rule in the Codes,²⁹ and have received expungement recommendations in some cases.³⁰ The proposed time limitations would prevent associated persons from obtaining expungement recommendations for aged customer dispute information.

²⁶ See proposed Rule 13805(a)(2)(A)(iv).

²⁷ See proposed Rule 13805(a)(2)(A)(v).

²⁸ See proposed Rule 13805(a)(2)(B).

²⁹ The Codes provide that no claim shall be eligible for submission to arbitration under the Codes where six years have elapsed from the occurrence or event giving rise to the claim. The panel resolves any questions regarding the eligibility of a claim under this rule. See FINRA Rules 12206(a) and 13206(a).

³⁰ See Initial Filing at 62151; see also Edwards 2 (stating that despite the eligibility rule, arbitrators have “regularly recommended expungement for ancient complaints without giving any indication that they ever considered the threshold eligibility issue.”). In the Initial Filing, FINRA clarified that the general six-year eligibility rule applies to all claims, including expungement requests. See Initial Filing at 62143, n.14.

Expungement Hearings

Under the Proposal, the arbitrator or panel would have the authority to determine whether to conduct the expungement hearing by telephone, in person or by video conference, as well as the method of the associated person's appearance.³¹ In all expungement cases, customers would be entitled to appear and participate in the expungement hearing.³²

Frager suggested that all expungement cases be "heard telephonically unless specifically requested otherwise by the associated person" to "eliminate the concern of not having enough qualified arbitrators on the roster." While FINRA appreciates the commenters' concern regarding having enough qualified arbitrators for the Special Arbitrator Roster, FINRA believes that to encourage appropriate fact-finding by the arbitrators, the panel should have the authority to decide whether a telephone, video conference or in-person hearing would be the most appropriate for the particular case.

Additional Payments to Arbitrators for Deciding Expungement Requests

Frager suggested that FINRA "consider paying a sole Arbitrator (or the Chairperson) an additional amount for each occurrence that the Arbitrator is granting an expungement as this takes extra work similar to an explained decision."³³ Frager also suggested that "if a 'straight-in' request for expungement is for more than one occurrence, the Arbitrator should be paid more than what is paid for an expungement for a single occurrence."

FINRA does not believe that it would be appropriate to pay arbitrators more for recommending an expungement request than denying it. FINRA notes that under the Codes, arbitrators receive \$300 for each hearing session in which the arbitrator participates,³⁴ and that, following recently-approved amendments, the Chairperson will receive an additional \$125 per day for each prehearing conference in which the chairperson participates and an additional \$250 per day (rather than \$125) for each

³¹ See, e.g., proposed Rules 12805(c)(1) and (2).

³² See, e.g., proposed Rules 12805(c)(3) and (5). The Proposal would also provide customers with the right to appear during the prehearing conference and be represented in a straight-in case. See proposed Rules 13805(c)(3)(A) and 13805(c)(4).

³³ See FINRA Rules 12904(g) and 13904(g).

³⁴ See FINRA Rules 12214(a) and 13214(a).

hearing on the merits.³⁵ These honorarium payments will apply to expungement hearings.³⁶

Consistency with SEA Rule 15A(i)(3)

Edwards 2 questioned whether the current expungement framework was consistent with SEA Rule 15A(i)(3)'s directive to "adopt rules establishing an administrative process for disputing the accuracy of information provided" in response to inquiries regarding registration information. FINRA notes that it provides information in response to inquiries regarding registration through BrokerCheck®, and has complied with this requirement by adopting FINRA Rule 8312(e). Separate from the expungement process, FINRA Rule 8312(e) codifies an administrative process by which parties "may dispute the accuracy of certain information disclosed through FINRA BrokerCheck."³⁷

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³⁵ Securities Exchange Act Release No. 90705 (December 17, 2020), 85 FR 84053 (December 23, 2020) (Order Approving File No. SR-FINRA-2020-035); Regulatory Notice 21-04 (February 2021) (announcing an April 19, 2021 effective date) at <https://www.finra.org/rules-guidance/notices/21-04>. Under the Proposal, the first arbitrator selected by Neutral List Selection System (from the Special Arbitrator Roster) would be the chairperson of the panel. See proposed Rule 13806(b)(3).

³⁶ Id.

³⁷ In addition to providing an administrative process for disputing the accuracy of information on BrokerCheck, FINRA Rule 8312(e) describes how FINRA will determine whether the dispute is also eligible for investigation by FINRA. Customer dispute information is generally ineligible for investigation. See FINRA Rule 8312.02; see also Securities Exchange Act Release No. 61927 (April 16, 2010), 75 FR 21064, 21068 (April 22, 2010) (Notice of Filing of Proposed Rule Change, describing how "[t]o be eligible for investigation, the dispute would need to pertain only to factual information and not to information that is subjective in nature or a matter of interpretation," and that "a dispute involving allegations in a customer complaint or a firm's determination that a customer complaint is required to be reported would not be eligible for investigation.")

Ms. Vanessa Countryman

April 9, 2021

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FINRA believes that the foregoing responds to the material concerns raised by the commenters. If you have any questions, please contact me on 202-728-8151, email: Mignon.McLemore@finra.org.

Sincerely,

/s/ Mignon McLemore

Mignon McLemore
Associate General Counsel
Office of General Counsel