



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

Re: Regulatory Notice 12-18, Expungement Procedures

The Securities Arbitration Clinic at St. John's University School of Law appreciates the opportunity to respond to the request for comment by the Financial Industry Regulatory Authority, Inc. ("FINRA") proposal for new (or revised) FINRA Rules 12100(z), 12806, 13100(cc), 13806, and 13807, which set forth the requirements for an unnamed person to seek expungement relief. As explained in greater detail below, the Clinic supports the proposed FINRA amendments to create an express procedure for unnamed parties to seek expungement of complaints from their Forms U4 or U5.

The Clinic is a not-for-profit organization where second and third year law students provide free legal services to investors. We generally represent low income and elderly clients in disputes with their brokers and brokerage firms. Our clients are investors who have been unable to obtain other legal representation and would be forced to proceed *pro se* without our services. In addition to representing aggrieved investors, the Clinic is committed to investor protection and offers education seminars at various locations in the community. Accordingly, we have a strong interest in the rules that affect investors.

There are a few benefits of the rule for investors. One of these benefits is that it allows unnamed brokers to use this explicit procedure instead of having the broker intervene in the

arbitration filed by the investor or initiate a new arbitration case in which the broker requests expungement relief and names the investor or firm as the respondent. First, having a broker intervene in the arbitration filed by the investor can disrupt and delay the proceedings. Second, having a broker intervene to become a named party in the arbitration filed by the customer can take away the customer's strategic decisions for not naming the broker. Finally, having a broker initiate a new arbitration case to request expungement relief and naming the investor will lead to the investor incurring additional expenses and time spent on the proceedings.

The proposed rules would benefit the investors in that the expungement proceedings would commence only after the underlying customer arbitration has concluded. The arbitration process is very long and complex, and many issues can occur along the way. Having a panel suspend the arbitration to make an interim ruling regarding expungement will not only complicate the entire process, but also cause greater delays and increased costs for the investors. This is extremely inefficient, and defeats one of the purposes of arbitration; providing quicker relief. Furthermore, we agree that it is unlikely in the majority of cases that an arbitration panel could determine that expungement is appropriate without reaching a conclusion in the underlying customer case.

The increased possibility that the arbitrator reviewing the *In re* expungement proceedings will already be familiar with the case is another benefit for investors. Under the proposed rules, the public chairperson of the underlying arbitration panel would handle the *In re* expungement proceedings. The chairperson would be familiar with the underlying facts and issues, which would allow the proceeding to move forward more efficiently.

The in-person appearance portion of the proposal also benefits investors, but the proposed rule has some shortcomings. Proposed Rule 13807(k) would allow all parties in the underlying customer arbitration proceeding to attend the *In re* expungement proceeding. This would allow the investor to have an opportunity to have a say in the expungement proceedings. The system should be designed to create the most efficient process for the investor, and 13807(l) allows the investor to skip the expungement proceeding without any presumptions being permissible based on the investor's absence. Furthermore, the rule allows for the investor's testimony from the underlying record in the customer proceeding to be used in lieu of testifying at the expungement proceeding. Investors who have to travel from other states may have limited funds, or be elderly, and may not be able to appear in the *In re* expungement proceedings. The investor should also have the ability to submit opposition in writing in addition to having the ability to testify in person or through a phone call.

The proposed rule has the potential to add undue hardship on the investor however. If for any reason there is no record of the investor's testimony, the broker may be allowed to subpoena the investor. This issue will likely come up in cases where an investor has settled his or her claims with the firm. This investor should not then be forced to testify. FINRA must ensure that

an investor is not prejudiced, and forced to incur the emotional and monetary costs of preparing to testify, simply because he or she has opted to settle their case with the firm.

Investors will also benefit from the confidentiality requirements. We agree with FINRA that the broker should be bound by the confidentiality agreements in the underlying customer arbitration. However, we believe that the broker should have to submit a subpoena for any tapes and relevant documents from the underlying arbitration after a showing of good cause and that these materials should not be made readily available. The arbitrator presiding over the *In re* proceeding should have the power to sanction the broker violating any confidentiality agreements in the underlying customer arbitration, up to and including dismissal of the *In re* proceeding. Our reasoning is that it will be difficult to enforce confidentiality agreements on brokers who are no longer employed in the industry.

As discussed above, we support the proposed rule changes as they are beneficial to investors. However, we ask that additional procedures be implemented to protect and include investors in this process. Thank you for your consideration in this important matter.

Respectfully submitted,
ST. JOHN'S UNIVERSITY SCHOOL OF LAW
SECURITIES ARBITRATION CLINIC

/s/

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