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My firm has represented a number of registered persons, named and unnamed, in expungement proceedings. We are writing in response to the Request for Comments on proposed rules Rule 12100(z) (Unnamed Person); Rule 12806 (Expungement of Customer Dispute Information by Persons Named as Parties); Rule 13100(cc) (Unnamed Person); Rule 13806 (Expungement of Customer Dispute Information by Persons Named as Parties); and Rule 13807 (Expungement of Customer Dispute Information by an Unnamed Person). We appreciate this opportunity to comment.

I. Current state of affairs

Currently, a named person has until the end of the case to make a decision as to whether or not to seek an expungement. That person may or may not be represented by separate counsel. That person may or may not receive advice from that lawyer regarding expungement. Some broker/dealers do not support their associated person's attempts to obtain expungements.

An unnamed registered person is essentially a refugee without a home. There is no stated procedure in the FINRA arbitration rules that allows a person to intervene in a case that has been reported on his CRD record and resolved either through hearing or settlement. Unnamed brokers only have rights in the pending arbitration proceeding to the extent that FINRA and/or the arbitrators allow their participation. Otherwise, the unnamed broker is left to file a separate proceeding.

An unnamed broker is left to rely upon the broker/dealer, or its counsel, for advice on when to intervene in an arbitration proceeding. Even then, as has happened, FINRA may take the position that the unnamed broker has no standing and, therefore, no right to even received notices from FINRA that the matter has settled. This lack of procedures has created an *ad hoc* procedure and, if the unnamed broker is lucky, a situation where the lack of rules results in inconsistency.

FINRA is right to propose procedures, the real question is "do the procedures adequately address the issue and provide the broker, whether named or unnamed, adequate protection?" We respectfully suggest that the proposed rule changes are not ready for implementation.

II. The FINRA proposal

FINRA has proposed that there be separate procedures, depending on whether or not the broker is named as a respondent.

A. Associated Person named as a Respondent

FINRA proposes that an associated person named as a Respondent “...seek expungement of the associated customer dispute information from the CRD system only during that customer arbitration.” (Proposed Rule 12806(a)) However, the proposed rule does not state when and in what form this application should be made. For instance, if a claim is dismissed under the very limited grounds of Rule 12504, will this immediately divest the panel of jurisdiction and eliminate the associated person’s ability to seek expungement. Or is FINRA proposing that the associated person file an expungement request concurrent with the Answer. Or, finally, does the associated person’s time run out when FINRA issues its “closing” letter?

Timing of the associated person’s application may be crucial because some broker/dealers will not pay for or support an expungement proceeding. Therefore, the associated person must locate competent separate counsel, have that counsel familiarize him/herself with the proceedings, and make the appropriate application in a timely manner. Proposed rule 13807 appears to provide a time limitation for an expungement request for an “unnamed person” that does not exist for an associated person named in an arbitration. It is unclear whether there is an advantage or disadvantage to being named or unnamed. FINRA may be better served by providing the same time limitations to both named and unnamed persons.

FINRA is also proposing that only a single arbitrator in a “named person” arbitration hear the expungement request. As noted by other commentators, there can be extensive discussion amongst the three arbitrators in a three arbitrator panel. Further, if this decision is to be made after an evidentiary hearing or significant issues have already been discussed with the panel, it would seem unfair to eliminate the input of two arbitrators whose opinion mattered up until the point the associated person asked to have the black mark removed from his/her CRD record.

III. Expungement for an unnamed person

As we have noted above, unnamed persons currently are proceeding without clear rules and procedures while attempting to clear their name. While this proposal seeks to create a set of rules, there are a number of places where this proposal can eliminate an unnamed person’s ability to clear her/his name.

A. The “180 day” rule

FINRA has arbitrarily suggested that an unnamed person has 6 months from the date of notice by FINRA to notify FINRA of her/his desire to seek expungement. However, if the claim is dismissed under 12504 or jurisdiction is declined under 12203, the 6 month period may not yet have elapsed, but the case would be dismissed. Perhaps a better solution is to provide the notice to unnamed persons that FINRA has suggested, but develop a time limitation that would allow for expungement requests in the event that a case is dismissed prior to the expiration of the 6 month period. As we have noted above, the procedures for named and unnamed persons differ significantly in this respect, and it appears that the unnamed person is at a disadvantage.

During this 6 month period, an unnamed person, who is likely not represented by counsel since he/she is not named, would do well to locate and retain counsel in the event that an expungement is sought. This early in the case, a procedure that requires a non-party to seek legal counsel seems like an unnecessary expense.

Additionally, FINRA has not demonstrated why this 6 month rule is necessary. Arbitrations are taking 14 months or longer to complete. A named party appears to have the entire period of pendency to decide whether or not to pursue expungement, but the unnamed party, whose CRD is equally besmirched, has only 6 months to decide. Perhaps there is some logic, but it is not obvious.

B. The “no other action” rule

The requirement that expungement be sought within the customer case makes sense going forward after the effective date of the rule, but there is no mention of procedures to be pursued by named or unnamed persons for cases filed or closed prior to the effective date. For instance, I have seen cases where the public customer agreed not to oppose an expungement request in a settlement agreement but the expungement was never pursued, for whatever reason. Will this unnamed person now be forever foreclosed from seeking to enforce this agreement once this rule is enacted? Another example would be an unnamed person whose firm obtained a dismissal but neglected to request expungement for such person in a case that is now closed. FINRA does not appear to have provided for relief to those unnamed persons who may already be entitled to expungement.

We suggest that FINRA allow the initiation of *In re* proceedings for any expungement request, whether it is for a case filed after the effective date or prior. Further, we suggest that unnamed persons be given the same amount of time as named persons, which appears to be until the conclusion of the case.

Furthermore, most court rules include an “excusable neglect” or “good cause” clause that allows for the extension of deadlines that, on their face, appear to be set in stone. We suggest that FINRA include similar language to allow the Director, or a designee, to extend deadlines where appropriate using the “excusable neglect” or “good cause” standard. While Rule 13807(d)(1) allows for a modification of a time period for “good cause,” this does not appear to apply to named persons.

C. Discovery

It appears that an unnamed person has fewer discovery rights than a named person. Rule 13807 has different standards of proof for the issuance of subpoenas and document requests. A named person in an arbitration has broad discovery powers. Generally, the test is not relevance, but the likelihood of leading to relevant evidence. An unnamed person must demonstrate that the documents are “substantially and directly” related to the grounds for an expungement. A named person who has gone through a lengthy arbitration proceeding will have a significant evidentiary advantage.

Subpoenas must be requested at least 45 days prior to the first expungement hearing session for an unnamed person. A named person has no such constriction. Further, the subpoena can only be issued for witnesses who are “substantially and directly” related to the grounds for expungement.

A Claimant in an *In re* proceeding cannot be subpoenaed other than under what appear to be extraordinary circumstances. There is no such restriction for a named person.

Question - would it be a violation of FINRA rules to have the customer agree to cooperate, including testify, in an *In re* or named person proceeding? Further, would a customer be permitted to agree to provide certain documents, or even an affidavit, since Rule 13807 allows for the issuance of a subpoena if “no other approach or method exists” to obtain the information? Since an affidavit would clearly be an “approach or method” to obtain testimony, it appears that the arbitrator would be required under the rule to accept an affidavit as direct testimony by the affiant, even though, generally, affidavits are not used in arbitration for testimony that is central to the case.

Finally, the unnamed person would be entitled to (or required) to obtain the recordings or transcripts of any underlying proceedings and use those items in the *In re* hearing. In the event of a lengthy hearing, this could prove to be a costly endeavor unless FINRA has reduced its prices now that digital recording is prevalent and the replication of digital files is low-cost. And these rules do not appear to give the named person the right to request the hearing recordings or transcripts.

IV. Unaddressed expungement matters

Proposed Rule 13807 specifically addressed filed arbitrations. But there are many customer claims that settle with expungement agreements. Arbitrations are then filed to obtain the expungement award and the ensuing court proceeding confirms the award. The new rule is silent as to this situation.

We propose that the *In re* proceeding include applications for expungement where there is no underlying arbitration proceeding. Again, this would provide consistency in the application of the expungement rules and provide an avenue for registered representatives to remove CRD items that deserve expungement.

V. Conclusion

Given the lack of rules relating to expungement requests, this proposal is a good first attempt. However, it would make sense that the procedures for named and unnamed persons be identical, other than the notice given by FINRA to the unnamed person. This would eliminate confusion.

Further, pre-existing expungement rights need to be addressed within this proposal.

Finally, FINRA should formalize a procedure for obtaining expungements in matters that were not filed as arbitrations, such as customer complaints.

Very truly yours,
/s/Marc S. Dobin