

Expungement Procedures

FINRA Requests Comment on Proposed New *In re* Expungement Procedures for Persons Not Named in a Customer-Initiated Arbitration

Comment Period Expires: May 21, 2012

Executive Summary

FINRA is requesting comment on proposed new rules that would permit persons who are the “subject of” allegations of sales practice violations made in arbitration claims, but who are not named as parties to the arbitration (unnamed persons), to seek expungement relief by initiating *In re*³ expungement proceedings at the conclusion of the underlying customer-initiated arbitration case. These allegations must be reported in the same way that customer complaints are reported—to the Central Registration Depository (CRD[®]) system on Forms U4 or U5. Currently, the Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code) (together, Codes) do not provide unnamed persons with express procedures to seek expungement of these types of allegations.

FINRA believes the proposed *In re* expungement rules and accompanying forms provide unnamed persons with a remedy to seek redress concerning allegations that could impact their livelihoods, yet maintain the protections of FINRA’s expungement rules to ensure the integrity of the CRD records, on which the investing public relies.

The text of the following proposed rules can be found at www.finra.org/notices/12-18:

- ▶ 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).

April 2012

Notice Type

- ▶ Request for Comment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Arbitration
- ▶ Central Registration Depository
- ▶ Code of Arbitration Procedure
- ▶ Dispute Resolution
- ▶ Expungement
- ▶ Form U4
- ▶ Form U5

Referenced Rules & Notices

- ▶ FINRA Rule 2080
- ▶ Code of Arbitration Procedure for Customer Disputes, Rule 12000 Series
- ▶ Code of Arbitration Procedure for Industry Disputes, Rule 13000 Series
- ▶ FINRA Rule 12805
- ▶ FINRA 13805
- ▶ Regulatory Notice 09-23

The proposed Notice of Intent to File an *In re* Expungement Claim (Notice of Intent to File) and Submission Agreement for *In re* Expungement Claims (*In re* Submission Agreement) forms are set forth as Attachments A and B, respectively.

Questions concerning this *Notice* should be directed to:

- ▶ Kenneth L. Andrichik, Senior Vice President, Chief Counsel and Director of Mediation and Strategy, Dispute Resolution, at (212) 858-3915 or ken.andrichik@finra.org; or
- ▶ Mignon McLemore, Assistant Chief Counsel, Dispute Resolution, at (202) 728-8151 or mignon.mclemore@finra.org.

Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by May 21, 2012.

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.²

Before becoming effective, a proposed rule change must be authorized for filing with the Securities and Exchange Commission (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).³

Background and Discussion

In 2009, the SEC approved amendments to Forms U4⁴ and U5⁵ to, among other things, require the reporting of allegations of sales practice violations made against unnamed persons. 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.⁶

FINRA has received numerous inquiries from unnamed persons who want these disclosures expunged from their CRD records⁷ because they believe that the allegations against them in the arbitration claims are unfounded or that they have been incorrectly identified as the person involved in the alleged sales practice violation. Currently, the Customer Code⁸ and Industry Code⁹ do not provide unnamed persons with express procedures to seek expungement of these types of allegations.

Under the Codes, an unnamed person may seek to expunge these “subject of” allegations by:

- ▶ asking their current or former firm that is a party to the arbitration to request expungement on their behalf;
- ▶ seeking to intervene in the arbitration filed by the customer; or
- ▶ initiating a new arbitration case in which the unnamed person requests expungement relief and names the customer or firm as the respondent.

FINRA believes that the current options do not always adequately address a number of issues that can arise in connection with expungement requests. First, FINRA does not believe it is fair to the unnamed person to rely on the person’s current or former firm to request expungement relief on the person’s behalf, especially in an adversarial proceeding in which the interests of the unnamed person and firm may not be aligned. Second, FINRA believes that a customer’s arbitration case should not be disrupted or delayed to address an issue that may have no bearing on the outcome of the customer’s relief requests. Moreover, it may be impractical for the unnamed person to become a party in the customer’s arbitration case, as it could expose the person to liability. Finally, if the unnamed person files a new arbitration case to expunge these allegations, FINRA believes that neither the firm nor customer should be required to incur the additional expense of participating as a respondent in a new case.

For these reasons, FINRA is proposing new (or revised) FINRA Rules 12100(z), 12806, 13100(cc), 13806 and 13807, and new Notice of Intent to File and In re Submission Agreement forms to address expungement requests.

Under the proposed rules, FINRA would notify an unnamed person in writing when a firm reports to the CRD system that an unnamed person was the subject of an investment-related customer-initiated arbitration proceeding alleging sales practice violations. An unnamed person would file a Notice of Intent to File to alert FINRA that the person is considering filing a claim for expungement relief. At the conclusion of the underlying customer-initiated arbitration case, FINRA would notify the unnamed person who filed the Notice of Intent to File that it has closed the underlying case. If an unnamed person determines to seek expungement relief, the person would then file a statement of claim and an *In re* Submission Agreement, which would allow FINRA to arbitrate these types of cases.

I. Proposed Rules 12100(z) and 13100(cc)—Definition of Unnamed Person

FINRA is proposing to define a person who is not named in an arbitration, but is the “subject of” allegations of sales practice violations, as an “unnamed person.”

Proposed FINRA Rules 12100(z) and 13100(cc) would define an unnamed person as an associated person who is identified in a Form U4 or Form U5 as having been the subject of an investment-related customer-initiated arbitration proceeding that alleged that the associated person was involved in one or more sales practice violations, but who was not named as a respondent in the proceeding.

II. Proposed Rule 13807—Expungement of Customer Dispute Information by an Unnamed Person

Under proposed FINRA Rule 13807, unnamed persons who are the “subject of” allegations of sales practice violations made in arbitration claims may seek expungement of these allegations from their CRD records by initiating *In re* expungement proceedings.

A. Applicability and Limitations of the Proposed *In re* Expungement Rule

Under proposed Rule 13807(a), the unnamed person would be the sole party in the case, and thus may not name the customer, firm or any other party as respondents.

The unnamed person may request expungement relief only. The arbitrator would not have the authority to award monetary damages or other relief in an *In re* proceeding. Also, the *In re* proceedings would commence only after the underlying customer arbitration has concluded.

Further, under proposed Rule 13807, an unnamed person would be expressly precluded from seeking expungement relief by attempting to intervene in the arbitration filed by the customer. However, a party to the underlying arbitration may still request expungement relief on behalf of an unnamed person. In addition, the proposal would preclude an unnamed person from filing a claim to request expungement relief that names either the customer or member firm as the respondent.

Proposed Rule 13807 would not apply if the unnamed person decides to pursue other claims in addition to a claim to expunge a “subject of” allegation. For example, if the unnamed person has a defamation claim against a firm and a claim to expunge a “subject of” allegation, the unnamed person may file both claims in one arbitration proceeding against the firm under current Code rules. As this dispute would involve adverse parties, proposed Rule 13807 would not apply.

B. Notice to the Unnamed Person

FINRA would notify an unnamed person in writing when a member firm reports to the CRD system, through a Form U4 or Form U5, that the person was the subject of a customer arbitration claim alleging sales practice violations. In addition to this notification, FINRA would provide a copy of the statement of claim in the underlying customer arbitration case. Further, under proposed Rule 13807, FINRA would send the written notice and statement of claim using overnight mail or express courier service to the unnamed person’s residential address, as reflected in the CRD system,¹⁰ to ensure timely delivery and proof of delivery.

C. Unnamed Person’s Notice of Intent to File

Proposed Rule 13807(c) would require that an unnamed person notify FINRA of the intent to file for relief by submitting a signed Notice of Intent to File within 180 days from the date FINRA sends written notice. (See discussion about the proposed Notice of Intent to File in Section III below.)

An unnamed person who does not timely notify FINRA of the intent to file would not be permitted to seek relief through an *In re* expungement proceeding, unless the Director extends or modifies the time period for good cause. By giving notice of intent, an unnamed person would not be required to file an *In re* proceeding at the conclusion of the underlying case. The unnamed person could determine whether to go forward when the underlying case closes, whether by award, settlement or withdrawal.

The Notice of Intent to File would alert FINRA staff and the arbitrators on the underlying customer arbitration case to prepare for a possible *In re* claim. The 180-day timeframe would assist the forum in processing these claims efficiently by ensuring that the relevant parties receive notice in a timely manner, and that arbitrators consider the evidence and other information presented during the underlying customer arbitration for possible relevance to the *In re* claim.

D. Conclusion of the Underlying Customer Arbitration Case

At the conclusion of the underlying customer arbitration case, FINRA would inform the unnamed person who provided notice of intent to file that the case had concluded. The unnamed person would then have 60 days from the date of the notification letter that the case had concluded to file an *In re* claim with FINRA. An unnamed person who does not timely file within the 60-day period would not be permitted to file such a claim, unless the Director extends or modifies the time period for good cause.

In addition to the notice, FINRA would provide a copy of the pleadings (including any exhibits) submitted in the underlying proceeding as well as a copy of the award, if any. If the parties settled the underlying customer arbitration case, the FINRA-registered party in that arbitration would be required to provide a copy of any settlement agreements to the unnamed person within 10 days from the date that the unnamed party requests such documents. These documents would be subject to the confidentiality agreement contained in the Notice of Intent to File. (See discussion about the proposed Notice of Intent to File in Section III below.)

FINRA recognizes that the proposed process for unnamed persons to receive expungement relief is long, because the unnamed person must wait until the underlying customer arbitration is concluded to pursue relief. However, it is unlikely that the arbitration panel could determine that expungement is appropriate without reaching a conclusion in the underlying case. Further, if the arbitrators attempted to make an interim ruling regarding expungement during the pending customer claim, it could result in delays and increased costs for the customer—a result that FINRA does not endorse. Therefore, FINRA believes that the proposed *In re* procedures allow for the efficient resolution of a customer's case while establishing a process for an unnamed person to seek expungement relief.

E. Filing a Claim

To file an *In re* expungement claim under proposed Rule 13807(f), an unnamed person would be required to file a statement of claim and an *In re* Submission Agreement.

The *In re* Submission Agreement would require the associated person to, among other things, agree to arbitrate the request for expungement relief in accordance with FINRA's rules, and to agree to be bound by FINRA's procedures and rules. (See discussion about the proposed *In re* Submission Agreement in Section III.)

FINRA would provide a copy of the pleadings (including any exhibits) submitted in the underlying customer arbitration proceeding within 10 days from the date the unnamed person files an expungement claim, if the unnamed party did not receive a copy of them.

F. Filing Fees

In addition to the statement of claim and *In re* Submission Agreement, the unnamed person would be required to pay a nonrefundable fee of \$750. The \$750 filing fee would include one hearing session with the arbitrator.¹¹ Unnamed persons would be responsible for the costs of any additional hearing sessions, which would be calculated at a rate of \$450 per session.

Proposed Rule 13807(g) would also allow the Director to defer or waive payment of all or part of the filing or hearing session fees upon a showing of financial hardship. Additionally, FINRA would not assess member surcharge fees in these cases.¹²

G. Arbitrator Appointment

Under proposed Rule 13807(h), FINRA would appoint a single public arbitrator to hear *In re* expungement proceedings. Once appointed, the arbitrator would be required to follow the requirements enumerated in Rule 13805.¹³

In cases in which FINRA appointed a panel in the underlying customer arbitration case, the *In re* proceeding would be handled by the public chairperson of that arbitration panel. In a majority public panel arbitration, if the public chairperson is unable or unwilling to serve, FINRA would appoint the public arbitrator from the panel to hear the *In re* expungement proceeding. If the public arbitrator is unable or unwilling to serve, FINRA would appoint randomly a new public chair-qualified arbitrator to hear the *In re* proceeding.

In an optional all public panel arbitration, in which there are three public arbitrators, if the public chairperson is unable or unwilling to serve, FINRA would appoint one of the two remaining public arbitrators from the panel in the underlying customer arbitration case to hear the *In re* expungement proceeding. FINRA will use the parties' rankings in the underlying case to determine which of the two arbitrators to appoint. FINRA would first attempt to appoint the person who was the highest ranked public arbitrator from the parties' combined ranked list of public arbitrators. If that public arbitrator is unable or unwilling to serve, FINRA would appoint the remaining public arbitrator from that panel. If neither of the public arbitrators is able or willing to serve, FINRA would appoint randomly a new public chair-qualified arbitrator to handle the expungement request.

If no arbitrators were appointed in the customer case, FINRA would appoint randomly, using the Neutral List Selection System (NLSS),¹⁴ a single chair-qualified public arbitrator to handle the *In re* proceeding.

H. Arbitrator Challenges

Proposed Rule 13807(i) would permit an unnamed person to consider an arbitrator's disclosures and raise a challenge for cause based on the disclosure information, as any party has the right to do in other arbitration proceedings.¹⁵ However, under this proposed rule, the unnamed person could not challenge arbitrators based on their rulings and decisions in the underlying customer arbitration case.

I. Hearing Location

Under proposed Rule 13807(j), the hearing location of the *In re* expungement proceeding would be determined by the availability of the public arbitrators from the underlying customer arbitration proceeding.

If a public arbitrator from the underlying customer arbitration case is available to serve, then the hearing location would be in the same location as the underlying customer arbitration case. However, if none of the public arbitrators from the underlying customer arbitration case is available to serve, the hearing location for the *In re* proceeding would be the hearing location closest to where the unnamed person was employed at the time of the dispute.¹⁶ In this case, the arbitrator would be selected randomly from this location.

J. Appearance

Proposed Rule 13807(k) provides that all parties to the underlying customer arbitration proceeding would be permitted to attend the *In re* expungement proceeding.¹⁷ Parties to the underlying customer arbitration proceeding could elect to appear and testify either in-person or by telephone. This proposed rule provides that the absence of a party at the *In re* expungement proceeding would not create a presumption that the absent party either consents to or opposes the expungement request. Further, all parties from the underlying customer arbitration case would have the right to representation at the *In re* expungement proceeding.¹⁸

K. Discovery

Proposed Rule 13807(l) addresses discovery issues concerning *In re* expungement proceedings.

Documents

Proposed Rule 13807(l) requires arbitrators to determine on a case-by-case basis whether an unnamed person may receive documents. This proposed rule limits document requests by unnamed persons to only those documents needed to establish the grounds for expungement under FINRA Rule 2080.¹⁹ An unnamed person would be required to demonstrate that the requested documents have a substantial and direct relationship to the request for expungement. Further, a party from the underlying customer arbitration case would be allowed to object to producing such documents within 10 days of the unnamed person's request. If a party objects to the additional document request, the objection must be in writing and served on the unnamed person and arbitrator at the same time and in the same manner. The arbitrator would rule on objections to additional document requests. The unnamed person requesting the production of documents would pay the costs of production.

Subpoenas or Orders for Witnesses to Appear

Proposed Rule 13807(l) limits subpoena requests by an unnamed person to witnesses needed to establish the grounds for expungement under Rule 2080. The proposed rule also requires that an unnamed person demonstrate that the requested witnesses have a substantial and direct relationship to the request for expungement. The proposal further limits the scope of the subpoena request to prohibit an unnamed person from seeking to subpoena a customer in the underlying customer arbitration case, unless the unnamed person demonstrates that the customer's testimony is not available from tape, digital or other recording or transcript, and that no other approach or method exists to introduce the relevant documents or information.

If a party to an underlying customer arbitration case objects to the scope or propriety of a subpoena, that party must file a written objection with the Director, with an additional copy for the arbitrator, and serve a copy on the unnamed person at the same time and in the same manner as on the Director. The unnamed person may respond to the objection. After considering the objections and responses, the arbitrator would rule on the issuance and scope of the subpoena. The unnamed person requesting the appearance of witnesses would pay the costs of the appearance.

Confidentiality

Proposed Rule 13807(l) also makes clear that unnamed persons would be subject to any confidentiality agreements or orders associated with the documents or testimony produced in the underlying customer arbitration case.

L. Consequences of Motions to Vacate an Award in the Underlying Customer Arbitration Case

A motion to vacate is a challenge to the validity of the award. Courts decide these motions and can either vacate, confirm or modify the award. A confirmed award stands as issued by the arbitrators. An award vacated by the courts is voided.

i. Motions to Vacate Pending

Under proposed Rule 13807(a), an *In re* proceeding starts only after the conclusion of the underlying customer arbitration case. If a party to the underlying customer arbitration case files a motion to vacate and it is pending in court, FINRA would not consider the underlying customer arbitration case to be concluded. Therefore, under proposed Rule 13807(e), if there is a pending motion to vacate and an unnamed person files an *In re* expungement claim, FINRA would accept the *In re* filing, but declare it as “inactive” until the conclusion of the court action concerning the motion to vacate.

ii. Motions to Vacate Denied

If a court denies a party’s motion to vacate an award in the underlying customer arbitration case, the award would stand as issued by the arbitrators. FINRA would consider the underlying customer arbitration case to be concluded, which would permit the *In re* proceeding to commence.

Under proposed Rule 13807(e), FINRA would appoint the public chairperson of the customer arbitration panel to the *In re* expungement proceeding. If the public chair-qualified arbitrator is unable or unwilling to serve, FINRA would appoint a replacement arbitrator pursuant to the procedures described in proposed Rule 13807(h).

iii. Motions to Vacate Granted

When a court grants a motion to vacate, the court may vacate the award, in whole or in part, may send the matter back to the arbitration panel (remanding the case), or may order the case to be reheard by a new panel.

If a court vacates an award, whether in whole or in part, in the underlying customer arbitration case without remand, the issues vacated would be heard anew in FINRA's forum. FINRA would appoint new arbitrators to decide the outstanding issues in the underlying customer arbitration case. The *In re* expungement proceeding would commence at the conclusion of this customer arbitration case. Further, under proposed Rule 13807(e), FINRA would appoint the public chairperson of the new customer arbitration panel to the *In re* expungement proceeding.

If a court vacates an award, whether in whole or in part, and remands the matter to the same arbitrators, FINRA would appoint the chair-qualified public arbitrator from the underlying customer arbitration case to the *In re* proceeding at the conclusion of the underlying customer arbitration case. If the public chair-qualified arbitrator is unable or unwilling to serve, FINRA would appoint the next available public arbitrator pursuant to proposed Rule 13807(h).

iv. Effect of Appeals

A losing party may appeal a court's decision concerning a motion to vacate. This means that the losing party could request that a higher court review the lower court's decision.

FINRA does not consider the underlying customer arbitration to be concluded until the higher court decides the appeal. For example, if a court denies a respondent's motion to vacate, the respondent may appeal the decision. If the respondent appeals, the underlying customer arbitration case would not be concluded until a higher court renders a decision on the appeal. Similarly, if a court grants a respondent's motion to vacate, the customer may appeal, thereby delaying the conclusion of the underlying customer arbitration case. Thus, the *In re* proceeding would not commence until the higher court decides the appeal.

M. Petitioning a Court Concerning Expungement Relief

Under FINRA Rule 2080,²⁰ registered persons must obtain a court order directing expungement or confirming an arbitration award containing an expungement directive. In addition, Rule 2080 requires that FINRA be named as a party to the court proceedings and be served with all appropriate documents, unless FINRA waives that requirement.

Proposed Rule 13807(m) incorporates this requirement of Rule 2080 by mandating that an unnamed person name FINRA as a party to any court proceedings in which the unnamed person seeks to vacate an *In re* award. A request to vacate an *In re* award is likely only when the arbitrator denies the expungement request. Since there would be no other party to object to the motion to vacate, proposed Rule 13807(m) requires the unnamed person to name FINRA as a party to any court proceedings, to allow FINRA to oppose the motion if appropriate under Rule 2080.

III. Proposed Notice of Intent to File and *In re* Submission Agreement

As mentioned above, FINRA is proposing to create two new documents to facilitate the *In re* expungement process: a Notice of Intent to File and an *In re* Submission Agreement. The unnamed person would file the Notice of Intent to File before the conclusion of the underlying customer arbitration case to declare an intent to seek expungement relief under proposed Rule 13807. The *In re* Submission Agreement, however, would be filed, along with the Statement of Claim, after the conclusion of the underlying customer arbitration and would alert FINRA that the unnamed person has initiated expungement proceedings.

The Notice of Intent to File would serve as a mechanism for the unnamed person to preserve the right to file an *In re* expungement claim in the future, and alerts FINRA and the arbitrators in the underlying customer case to that possibility. Further, it would contain confidentiality provisions that require the unnamed person to maintain confidentiality of any documents from the underlying customer arbitration to which the person is given access before the person files an *In re* expungement claim.²¹ It also would require the unnamed person to abide by any confidentiality agreements or orders associated with documents or testimony produced from the underlying customer arbitration case.

The *In re* Submission Agreement would require the associated person to agree to arbitrate the request for expungement relief in accordance with FINRA's rules, and to agree to be bound by FINRA's procedures and rules. The *In re* Submission Agreement contains a provision that requires the unnamed person to maintain the confidentiality of any settlement agreement, tape, digital or other recording, or transcript from the underlying customer arbitration case to which the party is given access. In addition, the *In re* Submission Agreement requires the unnamed person to agree to abide by any confidentiality agreements or orders associated with documents produced from the underlying arbitration case. By filing this document, the unnamed person would initiate expungement proceedings and allow FINRA to arbitrate the claim.

IV. Proposed Rules 12806 and 13806—Expungement of Customer Dispute Information by Persons Named as Parties

Under the proposed *In re* expungement rule (as discussed in Section II above), unnamed persons may seek expungement relief of “subject of” allegations from their CRD records. If, however, the associated person is named in an investment-related customer-initiated arbitration proceeding, the proposed *In re* expungement rule would not apply.

Proposed Rules 12806 and 13806²² would state that an associated person named as a respondent in an investment-related customer-initiated arbitration proceeding may seek expungement of the associated customer dispute information from the CRD system only during that customer arbitration. The proposed rules state further that an associated person named as a respondent in an investment-related customer-initiated arbitration proceeding may not seek expungement of the customer dispute information under Rule 13807 or during any subsequent proceeding under the Code. Thus, if an associated person, named as a respondent in a customer-initiated arbitration, does not seek expungement during that customer case, the associated person could not later seek expungement under the proposed *In re* expungement rule or in a separate arbitration proceeding.

The proposed rules reflect the current procedures that associated persons may use to expunge customer disclosures when they are named in an arbitration. First, a named party may request expungement as a relief request when the party files either a statement of claim or answer. The arbitrators would consider and rule on this request as they do on other parties' requests for relief. Second, if the parties to an arbitration settle their claims, the named party may request a "stipulated award," in which all parties to the arbitration agree to grant expungement. Finally, in those arbitrations in which FINRA closes the case²³ and the customer does not oppose the named party's expungement request, the arbitrators from the customer arbitration would hold a separate hearing to decide the named party's request, which operates similarly to the proposed *In re* proceeding described above. Thus, named parties in an arbitration have several options to expunge customer disclosures, which would continue notwithstanding the express limitations in proposed Rules 12806 and 13806.

V. Applicable Rules of the Industry Code

FINRA notes that other rules of the Industry Code would apply to the *In re* expungement proceedings, and, is therefore, proposing to list them as Supplementary Material.

However, since *In re* expungement proceedings would not involve adverse parties, FINRA proposes to exclude from the list those rules that presume the existence of adverse parties.

Request for Comment

While FINRA is interested in receiving comments on all aspects of proposed FINRA Rules 12100(z), 12806, 13100(cc), 13806 and 13807 and the proposed forms, FINRA seeks specific comment on:

- ▶ whether the 180-day notice requirement in proposed Rule 13807(c) for the unnamed person to notify FINRA of the intent to file for expungement relief after FINRA sends its notice of an alleged sales practice violation would provide an unnamed person with sufficient time to determine whether to pursue an *In re* expungement claim; and
- ▶ whether FINRA should either automatically provide documents, defined as tapes, digital or other recordings or transcripts in proposed Rule 13807(l)(1)(A)(i), to an unnamed person or alternatively require the unnamed person to subpoena FINRA for these documents, rather than permit the unnamed person to request documents as provided in proposed Rule 13807(l)(1)(A)(i).

The comment period expires May 21, 2012.

Endnotes

1. The term “*in re*” is a method of entitling a judicial proceeding in which there are no adverse parties. The term is also sometimes used to designate a proceeding where one party makes an application on his or her own behalf. [Black’s Free Online Law Dictionary](#) (2d ed. 2012), (last visited February 22, 2012).
2. FINRA will not edit personal identifying information, such as names or email addresses, from submissions. Persons should submit only information that they wish to make publicly available. See *Notice to Members 03-73* (NASD Announces Online Availability of Comments) (November 2003) for more information.
3. 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, however, take effect upon filing with the SEC. See SEA Section 19(b)(3) and SEA Rule 19b-4.
4. The Uniform Application for Securities Industry Registration or Transfer, referred to as Form U4, is used by broker-dealers to register or transfer the registrations of, associated persons with self-regulatory organizations (SROs), and with states, commonwealths and territories.
5. The Uniform Termination Notice for Securities Industry Registration, referred to as Form U5, is used by broker-dealers to terminate the registrations of associated persons with SROs, and with states, commonwealths and territories.
6. See *Regulatory Notice 09-23* (Revised Forms U4 and U5) (May 2009).
7. In order for an arbitrator to grant expungement of customer dispute information under Rule 13805, the arbitrator must: (1) hold a recorded hearing regarding the appropriateness of expungement; (2) in cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement; and (3) indicate in the award which of the Rule 2080 grounds for expungement serves as the basis for the expungement order and provide a brief written explanation of the reasons for the finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.
8. See Code of Arbitration Procedure for Customer Disputes, Rule 12000 Series.
9. See Code of Arbitration Procedure for Industry Disputes, Rule 13000 Series.
10. If FINRA has actual knowledge that the residential address as reflected in the CRD is incorrect, FINRA will use the correct address.
11. A hearing session is defined in the Codes as any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference. See Rules 12100(n) and 13100(n).
12. See Rules 12901 and 13901 (Member Surcharge).
13. See *supra* note 7.
14. See Rules 12400(a) and 13400(a) (Neutral List Selection System).
15. See Rules 12407 and 13410 (Removal of Arbitrator by Director).
16. Hearing locations are selected in this manner currently under the Industry Code. See Rule 13213.

17. Parties to an arbitration may include investors, members and associated persons who were parties in the underlying case, as well as their respective counsel (as long as counsel still represents the client).
18. See Rules 12208 and 13208 (Representation of Parties).
19. Rule 2080 requires that FINRA members or registered persons name FINRA as an additional party in any court proceeding in which they request confirmation of an award containing an order of expungement. Upon request, however, FINRA may waive the requirement to name FINRA as a party in these proceedings—provided the arbitration award directing expungement contains, at least, one of the following arbitral findings: (1) the claim, allegation, or information is factually impossible or clearly erroneous; (2) the registered 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.
20. *Id.*
21. It is possible that the unnamed person may also need to review the settlement agreement to determine whether to pursue an expungement claim.
22. Identical rule language would be added to the Customer Code and Industry Code. The text of current Rule 13806 (Promissory Notes) would be renumbered as Rule 13808, but would otherwise remain unchanged.
23. FINRA considers a case to be concluded when the staff closes the case, whether the claim is withdrawn, settled or closed by award.

ATTACHMENT A

FINRA ARBITRATION — Notice of Intent to File an *In re* Expungement Claim

In the Matter of the Arbitration involving the Expungement Request of
 Name of Associated Person

1. The undersigned party (party) hereby notifies FINRA of the party's intent to file an *In re* expungement claim. This notice does not bind the party to file such a claim.
2. By filing this notice, the party agrees to maintain confidentiality of any settlement agreement, tape, digital or other recording, or transcript from the underlying customer arbitration case to which the party is given access.
3. The party agrees to abide by any confidentiality agreements or orders associated with documents produced from the underlying customer arbitration case.
4. The party or the person's representative hereto has signed and agrees to be bound by the provisions of this Notice.

Name of Associated Person (*please print*)

Associated Person (*signature*) Date

Name of Representative of Associated Person (*please print*)

Representative of Associated Person (*signature*) Date

Submission Instructions: The associated person must file this Notice with FINRA, using the instructions provided in FINRA's letter notifying the associated person that the associated person was the subject of a customer arbitration claim alleging sales practice violations.

If needed, copy this page.

ATTACHMENT B**FINRA ARBITRATION — Submission Agreement for *In re* Expungement Claims**

In the Matter of the Arbitration involving the Expungement Request of

Name of Associated Person

1. The undersigned party (party) hereby submits the request for expungement relief, as set forth in the attached statement of claim, to arbitration in accordance with the FINRA By-Laws, Rules and the FINRA Code of Arbitration Procedure for Industry Disputes.
2. The party hereby states that the person or the person's representative has read the procedures and rules of FINRA relating to arbitration, and the party agrees to be bound by these procedures and rules.
3. The party agrees to maintain confidentiality of any settlement agreement, tape, digital or other recording, or transcript from the underlying customer arbitration case to which the party is given access.
4. The party agrees to abide by any confidentiality agreements or orders associated with documents produced from the underlying customer arbitration case.
5. The party agrees that the hearing shall be held at a time and place as may be designated by the Director of Arbitration. The party further agrees and understands that the arbitration will be conducted in accordance with the FINRA Code of Arbitration Procedure for Industry Disputes.
6. The party or the person's representative hereto has signed and acknowledged the foregoing Submission Agreement.

Name of Associated Person (*please print*)

Associated Person (*signature*)

Date

Name of Representative of Associated Person (*please print*)

Representative of Associated Person (*signature*)

Date

If needed, copy this page.