

Dear FINRA Office of Dispute Resolution:

Being a longtime FINRA arbitrator and upon receiving today the December, 2017 FINRA Dispute Resolution Update, I noticed in it a call for comments on proposed expungement rule changes, detailed in FIRNA Regulatory Notice 17-42. Having served recently on several expungement matters and scheduled to participate in more in 2018, I wanted to offer my related comments to address the 12 specific areas for which guidance is sought on pp. 17-18 of the notice. My comments are provided in the attached Word file.

One thing I would say here, assuming you adopt the requirement that only licensed and highly experienced attorneys as qualified for any new expungement panels, as a non-attorney I would thus automatically be rejected as qualified and would find that highly discriminatory. It is bad enough that you have arranged the system to exclude any non-attorneys from serving as mediators, regardless of their talents or capabilities for performing in such a capacity. Now apparently someone is proposing the same for expungement, which beyond the certainty of adding to the complexity, cost, and the time required to arrive at an expungement decision, doesn't seem to offer any obvious advantage in contrast to making a less radical adjustment. I also think it would add to your difficulty in finding good non-attorney arbitrators, as it would serve as another example of an effectively second class status being assigned to them.

In any case, my impressions are offered for your further consideration, thank you.

Sincerely,

Gregory Gocek

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

1. FINRA Rules 12805 and 13805 provide, in relevant part that, in order to grant expungement of customer dispute information under Rule 2080, the panel must comply with the requirements stated in the rule. (Emphasis added.) FINRA notes, however, that if a panel issues an arbitration award containing expungement relief, the award must be confirmed by a court of competent jurisdiction and FINRA could decide to oppose the confirmation. Thus, as the associated person is required to complete additional steps after the arbitrators make their finding in the award before FINRA will expunge the customer dispute information, FINRA believes the word “grant” may not be an appropriate description of the panel’s authority in the expungement process. FINRA is considering changing the word to “recommend.” Please discuss whether the rule should retain “grant” or change to “recommend” or some other description to more accurately reflect the panel’s authority in the expungement process.

*Agree that given mandated court approval, panels are not the ultimate authority on the outcome of the expungement request and therefore are not “granting” such. “Recommend” or “agree with the associated person” seems more appropriate.*

2. Would named associated persons request expungement in every case to preserve the right to have the expungement claim heard and decided, either in the Underlying Customer Case or as a new claim under the Industry Code? If so, what would be the potential costs and benefits of a named person requesting expungement in every case?

*The amendments will introduce a definite incentive to brokers to routinely include expungement requests in customer cases. This will increase the complexity and time of those proceedings, but if the claims were resolved there it would be much less burdensome to FINRA’s administrative capabilities than creating a basically entirely new parallel set of proceedings outside the customer claims.*

3. Should FINRA consider bifurcating the expungement request from the customer’s claim in all cases relating to customer disputes? What would be the costs and benefits of such an approach?

*Anyone with experience in FINRA arbitration would likely recognize this would be ill advised. FINRA staff resources are quite stretched already and adding a separate series of disputes would just make things more problematic for the arbitrators responsible for hearing these claims. This would introduce new scheduling complications and it would of course be impossible to rule on expungement before the underlying customer claim was resolved.*

4. What are the costs and benefits of requiring the unanimous consent of a three-person panel to grant all requests for expungement of customer dispute information?

*It seems most appropriate to have a uniform decision standard for both the customer claim and the subsidiary expungement request. So if unanimous consent is required for one, it is unclear what the rationale would be for a simple majority in the other. If there is a non-public arbitrator in an expungement proceeding, is there a concern that such person will be a hold-out in favor of expungement, making it easier to grant by only requiring one of the public arbitrator’s assent as opposed to requiring approval from both of the public arbitrators? The why not have only public arbitrators hearing expungement requests and then requiring a simple majority for the approval? Unanimity will definitely create a greater burden on brokers seeking expungement,*

5. Is the one-year limitation on being able to request expungement of customer dispute information appropriate? Should the time period be longer or shorter? Please discuss. Regulatory Notice 17 December 6, 2017 17-42

*Agree, if the customers have to satisfy a timeliness standard, it seems fully appropriate to accept the same of brokers for such requests. 1 year seems right, it would seem best to have the requests included as part of the defense to the original proceeding as opposed to having the possibility for a long deferral open to the broker. This would still make it fairly easy for customers to participate if they so wished.*

6. Should the associated person who is requesting expungement be required to appear in person or by videoconference, rather than by phone, at the expungement hearing?

*No, phone calls seem to be fine from the number of expungement requests I've ruled on recently, having separate in person hearings for this would be a real administrative burden and likely delay scheduling, make people incur extra travel expenses, etc.*

7. Should the arbitrators on the Expungement Arbitrator Roster have specific qualifications? If so, are the proposed additional qualifications appropriate or should FINRA consider other qualifications?

*Requiring some extra FINRA training seems OK, but mandating that persons granting expungement all have to be lawyers with extensive trial and regulatory experience seems excessive, sort of like a lawyer protection act to ensure they can get extra work like the entire parallel mediation system to arbitration is currently arranged. If a panel can decide on expungement related to a connected customer case, and not all of them need to be attorneys without such extensive qualifications, will that mean that everyone will then seek expungement at such hearings because they think it will be more likely granted then? Or the fact that a panel did grant an expungement at the customer case level without these extra qualifications, would that make the expungement any less acceptable? Maybe require the arbitrators to have some experience at FINRA, say five years, before qualifying to serve on expungement panels, in addition to the training, seems more than sufficient to me.*

8. Should the arbitrators on the Expungement Arbitrator Roster be lawyers only or could the experience of serving on three arbitrations through award be a sufficient substitute?

*As noted above, having lawyers only seems discriminatory to me and certainly serving on multiple arbitrations panels is more than enough to qualify to be a discerning evaluator of the requests. Further, if three persons will be serving on a panel, that should be enough to cover any potential limitations of one the panelists.*

9. How would the proposed amendments affect the granting or denying of expungement requests? Which aspect of the proposed amendments would have the largest impact on expungement determinations? Why?

*This would likely make expungement requests more challenging to get, as common sense dictates that if great rigor is infused in the process, this will impose greater hurdles- demand curves still are downward sloping, with a higher price indicating less demanded. Adding a lawyer only, three member panel requirement would likely result in longer deliberations and also most probably draw out the proceedings. I've had several occasions recently when lawyer panelists either had more difficulties with their*

*calendars, or wanted to have more extensive consultation with the other panelists, before moving to a decision, and I didn't experience such as positive for the process.*

10. The proposal would establish a one-year limitation period for associated persons to expunge customer dispute information that arose from a customer complaint. The limitation period would start on the date that the member firm initially reported the customer complaint to CRD. Should the one-year limitation period be based on a different milestone? If so, what should it be?

*It seem unfair to require one year from a filing date of a case, this could a negotiating advantage to the customer by putting up delays to the proceeding in order to deny expungement for a more favorable settlement. If also would not make it easier for arbitrators to intervene as referees on scheduling disputes. What if one of the arbitrators is a source of delay in coming to a final ruling? One year seems appropriate, but the clock should start running from when the underlying customer dispute is ruled upon or settled, not from when the claim is first reported or filed.*

11. The proposal would clarify for arbitrators that the standard for granting the permanent removal of customer dispute information from CRD is a finding that at least one of the Rule 2080(b)(1) factors applies and that the customer dispute information has "no investor protection or regulatory value." Are there specific factors that arbitrators should consider when making a finding that the customer dispute information has "no investor protection or regulatory value"?

*Because each case is being judged on its individual merits, and the arbitrators are not qualified as experts on broader systemic concerns or regulatory standards, I don't think there should be great specificity as to this last clause. It can be retained as guidance and an additional check that an expungement would not be considered as some special benefit available to a broker as long as they make some acceptable demonstration that it is appropriate. But why introduce a new potential point of debate as to what constitutes ideal investor protections or regulatory control? These standards are evolving and putting more explicit requirements in would simply guarantee that the written guidelines are more likely to be out of date with FINRA playing catch up, as regulators often do.*

12. In a simplified arbitration case, if a customer requests a hearing, should the single arbitrator be permitted to decide an expungement request, if a request is filed?

*Definitely, adding a three member panel, particularly if they were all required to be lawyers and a whole separate layer of proceedings for expungement, would be totally contrary to the intent of simplified proceedings. Allow one arbitrator to also decide that, and don't impose the excessive qualifications of a licensed attorney with extensive litigation experience, to do so. The whole point of arbitration is to get at the equity of the underlying dispute as efficiently as possible, not to create an adjudicatory system comparable to what parties are exposed to when they have to go to court in the traditional legal system.*