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(Via E-mail: pubcom@finra.org)

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 17-42 (Expungement of Consumer Dispute Information)

Dear Ms. Asquith,

The Cornell Securities Law Clinic (the "Clinic") welcomes the opportunity to provide feedback on the request for comment (the "Request") of the Financial Industry Regulatory Authority ("FINRA") on Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information ("CDI"). The Clinic is a Cornell Law School curricular offering, in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. For more information, please see: <http://www.securities.lawschool.cornell.edu/>

FINRA operates the Central Registration Depository (CRD) in order to maintain consolidated records of the employment histories, qualifications, and disclosures of broker-dealers and registered individuals. Some of this information is publicly accessible through the BrokerCheck system. Through the BrokerCheck system, public investors can view a variety of employment and dispute information that enables them to make informed choices regarding financial advisers.

For the reasons set forth below, the Clinic supports several of the Proposed Amendments, including (1) the Expungement Arbitrator Roster; (2) the one-year limitation on requesting expungement of CDI under Proposed Rule 13805(a)(3)(D); (3) the unanimity requirement for granting expungement under Proposed Rule 13805(b)(3); (4) the heightened standard for granting expungement under Proposed Rule 13805(b)(3)(B); (5) the personal appearance requirement for an associated person requesting expungement under Proposed Rule 13805(c)(2); and (6) changing the word "grant" to "recommend" within the text of Rules 12805 and 13805.

However, the Clinic also strongly opposes the Rule Proposal's requirement that an associated person request expungement during the underlying customer case.



Historically, there are numerous instances of associated persons abusing the expungement process, and that abuse has damaged a system designed to protect public investors. Five years before investors lost \$125 million in a Ponzi scheme allegedly run by Carl Matellaro, two investors claimed that they lost \$1.75 million with Matellaro's firm.¹ However, investors in the Ponzi Scheme could not have found out about the prior claims because they had been expunged from Matellaro's NASD record.² In 2013, an individual had a dispute expunged from her record, despite Wells Fargo's payment of a \$125,000 settlement in the case and the presence of nine other disputes on the individual's record.³

As discussed in the regulatory notice, between 2014 and 2016, arbitrators granted expungement for at least one associated individual in 75% of the 808 cases.⁴ When cases closed by settlement, arbitrators granted expungement for at least one associated person in 88% of the cases.⁵ The Clinic recognizes that there are a small number of cases where expungement may be an appropriate remedy. Nevertheless, the history of abuse of the expungement process warrants stringent requirements for this extraordinary remedy.

1. The Clinic Supports The Expungement Arbitrator Roster

Currently, in order to determine expungement requests, an arbitrator need only be qualified pursuant to FINRA Rule 13400. We support creating an Expungement Arbitrator Roster so that the arbitrators considering expungement have been trained on the unique issues and rules related to expungement. That will likely lead to more consistent results.

Under the Proposed Amendments, individuals on the Expungement Arbitrator Roster would need to meet additional requirements. Specifically, the individual would need to have (1) completed enhanced expungement training; (2) be admitted to practice law in at least one jurisdiction; and (3) have five years' experience in one of the listed disciplines.

The Clinic supports the additional requirements for an individual to be listed on the Expungement Arbitrator Roster. Additional training will ensure that the arbitrators considering expungement have training on the unique issues and rules related to expungement. It is likely that the additional training and qualifications will lead to more consistent applications of this extraordinary remedy.

¹ <https://www.forbes.com/global/2000/1225/0326129a.html#7e931af36422>

² *Id.*

³ <https://dealbook.nytimes.com/2013/06/10/a-rise-in-requests-from-brokers-to-wipe-the-slate-clean/>

⁴ Regulatory Notice, p.14

⁵ *Id.*

2. The Clinic Supports The One-Year Limitation On Requesting Expungement Of CDI Under Proposed Rule 13805(a)(3)(D)

Currently, there are no time-based restrictions under Rule 2080 that limit when an associated person may pursue expungement. As a result, an associated person may seek expungement long after the resolution of the underlying dispute with the customer. The Clinic believes that this system does not serve the interests of public investors.

Under the Proposed Amendments, an associated person is barred from bringing a claim for expungement, unless that claim is brought within one year of the closure of the underlying dispute with the customer. This Proposed Amendment will make it more difficult for an associated person to bring a stale claim for expungement. The Clinic supports this proposal because it will help resolve the issue, one way or another, in a timely fashion when the witnesses and evidence are still available that might cause arbitrators to decline expungement.

One comment letter notes that “brokers can go years before they learn of a standalone customer complaint that had been denied by their firm (often their former firm with which they have no contact) and not followed-up on by the customer.”⁶ The Clinic is sympathetic to associated persons who did not receive notice that their firm (or former firm) denied a customer complaint. However, public investors should not be penalized for the failure of firms to implement streamlined notification and recordkeeping procedures. Certainly if an associated person is aware of an initial claim, it is not too much to ask that the associated person follow up as to disposition by the firm. The Clinic strongly believes that the one-year limitation on expungement requests is neither inequitable, nor harsh, and will improve the process.

3. The Clinic Supports The Unanimity Requirement For Granting Expungement Under Proposed Rule 13805(b)(3)

Currently, an arbitration panel need not unanimously determine that expungement is an appropriate remedy in order to grant expungement.

Under the Proposed Amendments, in order to grant expungement, a panel of three arbitrators would need to unanimously determine that expungement is an appropriate remedy. Expungement prevents public investors from knowing that the person whom they might trust to manage their investments was involved in a dispute. Since it may impede the ability of public investors to make informed investment decisions, expungement ought to be an extraordinary remedy. Requiring three qualified arbitrators to unanimously determine that expungement is an appropriate remedy protects public investors.

One comment letter argues that the unanimity requirement is unfair because, *inter alia*, even in FINRA disciplinary decisions, only a simple majority of arbitrators is required to determine that a registered representative or firm violated the rules and that sanctions are

⁶ See 17-42_Robbins_Comment.pdf at 5.

warranted.⁷ Nevertheless, the history of abuse of the expungement process has caused particular damage to the legitimacy of the expungement process. As a result, special measures to ensure the accuracy of that process and restore its legitimacy are justifiable.

The unanimity requirement protects public investors by ensuring that the threshold for expungement is high. At the same time, given the history of abuse of the expungement process, the unanimity requirement helps to ensure that when expungement is granted, the expungement is legitimate.

For the reasons delineated above, the Clinic supports the unanimity requirement for granting expungement under Proposed Rule 13805(b)(3).

4. The Clinic Supports The Heightened Standard For Granting Expungement Under Proposed Rule 13805(b)(3)(B)

Currently, under Rule 2080(b)(1), in order to grant expungement, the arbitration panel must determine that (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.

Under Proposed Rule 13805(b)(3)(B), in addition to identifying one of the Rule 2080(b)(1) criteria listed above as a grounds for expungement, the arbitration panel must “make a finding that the customer dispute information has no investor protection or regulatory value.”

Requiring the panel to determine that CDI has no investor protection or regulatory value allows the panel to look beyond the claim at hand and at the associated person’s record as a whole. When CDI has investor protection or regulatory value, customers should have access to it so that they can make informed investment decisions. If, for example, an associated person has a history of expungements, it would not serve investor protection or regulatory oversight to allow such a person to present a cleansed regulatory record. This is something arbitrators should consider, since expungement is supposed to be extraordinary, not merely a resume-cleansing process.

In the example cited in the introduction, a registered person was granted expungement despite the presence of nine disputes on her record. When one claim with limited investor protection value is considered in light of the entire record, it may reveal a pattern that has greater investor protection or regulatory value than that claim may have when considered in isolation. The Clinic strongly supports codifying this heightened standard for granting expungement under Proposed Rule 13805(b)(3)(B) because we believe it will protect public investors.

⁷ See 17-42_Robbins_Comment.pdf at 4.

5. A Personal Appearance Should Be Required For An Associated Person Requesting Expungement Under Proposed Rule 13805(c)(2)

Currently, Rule 13805 allows an expungement hearing to be conducted via telephone, or in person.

Under Proposed Rule 13805(c)(2), a party requesting expungement would be required to appear before the arbitration panel in person or via videoconference. Expungement is designed to be an extraordinary remedy. Requiring a party requesting expungement to appear in person or via videoconference impresses the seriousness of the request upon the party. Physical or videoconference appearance will allow the arbitration panel to question the party requesting this extraordinary measure face-to-face, enabling the panel to better judge the responses of the party. The Clinic supports this measure because it will help the arbitration panel to more accurately judge the responses of the party requesting expungement.

6. Changing The Word “Grant” to “Recommend” Within The Text of Rules 12805 and 13805 Will More Accurately Reflect The Powers of The Arbitration Panel

Currently, Rules 12805 and 13805 state that in order to “grant” expungement, the arbitration panel must follow certain procedures. However, under Rule 2080, a party requesting expungement must obtain a court order confirming the arbitration panel’s expungement decision in order to have CDI expunged from that party’s record.

The Clinic believes that within Rules 12805 and 13805, the word “grant” should be changed to “recommend.” Since the expungement does not take effect until the associated person obtains a court order, the word “recommend” more accurately describes the power of the arbitration panel.

7. The Clinic Strongly Opposes The Proposed Requirement That An Associated Person Request Expungement During The Underlying Customer Case

The Clinic sees the value in deciding expungement requests in proximity to the underlying dispute with the customer. Nevertheless, we are concerned that requiring associated persons to request expungement in the underlying customer case may lead associated persons to request expungement in every dispute in order to preserve their right to request expungement.

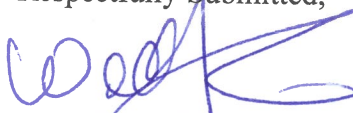
Additionally, the Clinic is concerned that requiring associated persons to request expungement during the underlying dispute with the customer will transform hearings designed to determine the merits of a customer dispute into lengthy expungement hearings. Specifically, the Rule Proposal states that “[i]f the underlying customer case closes by award, the panel would be required to decide the expungement request during the Underlying Customer Case.” It is unfair to require a customer to participate in a potentially lengthy expungement hearing that they did not ask for.

It is the Clinic's view that any hearing on expungement should be separate from the Underlying Customer Case. The Clinic believes that it is desirable for the same panel of arbitrators who determined the underlying case to make a determination regarding expungement. However, in order to prevent substantial inconvenience to the customer, the expungement issue ought to be decided in a separate proceeding. The one-year limitation under Proposed Rule 13805(a)(3)(D) should serve as an adequate safeguard against stale claims and loss of relevant documentation.

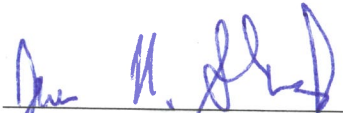
Conclusion

While the Clinic supports most of the Proposed Amendments, the Clinic strongly opposes the proposal to require that the expungement hearing be incorporated into the Underlying Customer Case.

Respectfully Submitted,



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