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February 5, 2018

VIA EMAIL (pubcom@finra.org)
Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-42
Proposed Amendments to the Codes of Arbitration Relating to Requests to Expunge Customer Dispute Information

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to provide this letter in response to the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 17-42, proposing amendments to the Codes of Arbitration, including FINRA Rules 12805 and 13805, relating to requests to expunge customer dispute information (the "Notice" or the "Proposal").

I. Executive Summary

SIFMA continues to support the essential goals of the Central Registration Depository ("CRD") and FINRA BrokerCheck public disclosure system, including that investors should have access to ***complete and accurate*** information about firms and individual registered representatives.[2] Given the general public's increased use of and reliance upon BrokerCheck, the accuracy of reported

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] See NASD Notice to Members 99-54, p. 2 (July 1999) stating that "NASD Regulation recognizes that the information on the CRD system has important investor protection implications, provided it is complete and accurate." See also SIFMA April 2012 comment letter in response to Regulatory Notice 12-10 (February 2012) stating that "the information maintained in BrokerCheck must be accurate, clear, concise and relevant to the investor, and must be balanced against member firms' and their employees' legitimate privacy interests, and expectations of fairness and balance." See also Notice to Arbitrators and Parties on Expanded Expungement Guidance (Updated September 2017) requiring that disclosures be "accurate and meaningful."

information should be of paramount concern. No one benefits when a regulatory entity publishes, and thereby attaches its imprimatur to, potentially inaccurate or misleading information.

SIFMA believes that existing rules and FINRA's expanded expungement guidance provide sufficient safeguards for the expungement process. The proposed rules would establish inconsistent adjudicatory standards and procedures applicable only to expungement applications, and would increase the cost and burden on registered representatives seeking to protect their reputations and livelihoods from the harm caused by the disclosure of false or misleading customer complaint information.

The Notice asserts that by increasing the obstacles to expungement, including the costs and inconvenience to registered representatives, expungement filings would be fewer and more meritorious. However, the rule proposals and accompanying conclusions have been presented without any accompanying evidence that such changes are in fact necessary. Namely, the Proposal does not provide any cost-benefit analyses or empirical evidence that expungements are too numerous, are being improperly granted, or are being pursued in ways that are inconsistent with FINRA rules and regulatory guidance.[3] Anecdotal concerns from "critics of expungement" should not be the basis for wholesale changes to an essential remedy afforded to over 630,000 registered representatives to prevent the unfair dissemination of false or misleading information.

II. FINRA's Disclosure Regime Is Allegation-Driven And Expungement Is An Essential Remedy To Prevent The Dissemination Of False Or Misleading Information

The CRD/BrokerCheck regulatory reporting regime presently requires the public disclosure of more information by registered persons than any other regulated profession. The broad reporting requirements related to customer complaints are "allegation-driven," rather than outcome-based, and require disclosure based on the "four corners" of a written customer complaint or pleading, even in the face of clear evidence to the contrary. Moreover, many complaints involve product-related allegations that in some cases unfairly result in disclosures against individual registered representatives.

FINRA's 2009 amendments to the Uniform Forms (Forms U4 and U5), especially those requiring disclosure of customer complaints against "unnamed" persons (See Reg. Notice 09-23), and the BrokerCheck Disclosure Rule (FINRA Rule 8312) have resulted in an increase in reportable disclosures, which can remain on a registered persons' public record for as long as they are in the industry and for several years thereafter.

[3] See Framework Regarding FINRA's Approach to Economic Impact Assessments for Proposed Rulemaking (Sept. 2013) (detailing FINRA's cost-benefit analysis obligations), available at http://www.finra.org/sites/default/files/Economic%20Impact%20Assessment_0_0.pdf

The Notice states that "[i]t has been FINRA's long-held position that expungement of customer dispute information is an extraordinary measure, but it may be appropriate in certain circumstances." However, expungement has long been recognized as a core part of an arbitrator's power to award equitable relief. See NASD NTM 99-54, p. 3. Expungement serves one of the "three competing interests" of the CRD/BrokerCheck system, including, critically, the interests of over 630,000 registered representatives:

> (1) the interests of NASD, the states, and other regulators in retaining broad access to customer dispute information to fulfill their regulatory responsibilities and investor protection obligations; **(2) the interests of the brokerage community and others in a fair process that recognizes their stake in protecting their reputations and permits expungement from the CRD system when appropriate**; and (3) the interests of investors in having access to accurate and meaningful information about brokers with whom they conduct, or may conduct, business.

NASD NTM 04-16, p. 2 (footnote omitted, emphasis added).

Based on these guiding principles, expungement is the *only* remedy available to registered representatives to remove false, inaccurate or erroneous information from their public disclosures. Contrary to expungement being an "extraordinary"[4] measure, expungement is an *essential* remedy to ensure the appropriate balance between the public disclosure of meritorious versus spurious complaints within the "three competing interests" of the CRD/BrokerCheck reporting regime.

III. Current Rules And Expanded Expungement Guidance Provide Substantial Safeguards For The Expungement Process

Current FINRA rules ensure that expungement decisions are made only after a fact-based inquiry by competently trained arbitrators. In order for an expungement to be granted, Rule 2080(b)(1) requires a finding that (i) the claim or allegation is factually impossible or clearly erroneous; (ii) the registered person was not involved in the alleged sales practice violation, forgery, theft, misappropriation or conversion of funds, or (iii) the claim, allegation, or information is false. If the expungement award is based on any findings other than these three grounds, FINRA maintains the right to be named as a party and challenge any expungement award in a state court confirmation proceeding. (Rule 2080(b)(2)). Rules 12805 and 13805 require a recorded hearing along with a written explanation detailing the basis for the expungement relief. Rule 2081 prohibits conditioning settlements on non-opposition to requests for expungement relief. Additionally, the court confirmation requirements under FINRA Rule 2080 and relevant guidance (including those

[4] The "extraordinary remedy" language should not become part of the rule because the term is overly broad, vague and not susceptible to clear and consistent application as a legal term.

addressing waiver requests and preserving the rights of FINRA and state regulators to be made aware of and, if appropriate, challenge expungement awards) provide additional safeguards against inappropriate grants or potential abuses of the expungement process.

In 2013, FINRA began issuing "expanded" guidance to be followed by arbitrators when considering expungement requests. This guidance, updated as recently as September 2017, provides additional safeguards that increase the opportunity for customer participation, including requirements that: (i) allow a customer and his/her counsel to appear and testify at the expungement hearing; (ii) allow counsel for the customer or a pro se customer to introduce documents and evidence at the expungement hearing; (iii) allow counsel for the customer or a pro se customer to cross-examine the broker and other witnesses called by the party seeking expungement; and (iv) allow counsel for the customer or a pro se customer to present opening and closing arguments if the panel allows any party to present such arguments. Other expungement guidance requires arbitrators to review BrokerCheck Reports and prohibits the re-filing of expungement applications after a prior petition has already been made and adjudicated.[5]

Accordingly, FINRA already has in place a robust set of rules and expanded guidance to safeguard the expungement process, and there does not appear to be any empirical or other justification for many of the additional onerous regulations contained in the Proposal.

IV. Comments to FINRA's Proposed Amendments

A. Expungement Awards Should Not Require Unanimous Decisions By Mandatory Three-Member Arbitration Panels

Since the advent of FINRA's three-member panels, arbitration awards have been issued based on the determination of a majority of arbitrators. The Notice proposes a different and more stringent threshold for expungement decisions by requiring a unanimous decision in favor of expungement. Adoption of the proposed changes would result in a panel potentially applying a majority rules standard to the liability determination, but a unanimity standard to the expungement determination in the same case. The Proposal purports to assign greater value and scrutiny to expungements compared to other types of cases, but does not offer any explanation or empirical evidence as to why expungements warrant a higher threshold than a multi-million dollar customer or industry case. If implemented, this rule would impinge upon the fundamental fairness of the expungement process in providing an effective balance to the allegation-based complaint reporting regime and will have a significant impact on registered representatives' ability to protect their livelihoods and reputations.

[5] See Notice to Arbitrators and Parties on Expanded Expungement Guidance (Updated Sept. 2017) available at: https://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance

The proposal to increase arbitrator qualifications and training through a separate Expungement Arbitrator Roster (the "Roster") consisting of practicing attorneys who have received advanced expungement training and have at least five years of experience in either litigation, securities regulation, administrative law, service as a securities regulator or service as a judge is commendable. More highly qualified and trained expungement arbitrators should lead to a more efficient and fair process, instill greater confidence in arbitrators by FINRA, customers, firms and registered persons and reduce the perceived need for unanimous decisions.

Current FINRA rules permit the parties, upon consent, to select a single arbitrator. However, as noted above, the Notice proposes a mandatory three-person panel that FINRA would randomly assign from the Roster for expungement cases. The Notice does not contain any discussion or evidence that a single arbitrator is unable to reach a just decision or that a three-person panel is more efficient or may reach a more accurate decision than a single highly qualified and trained arbitrator. If FINRA, customers, firms and registered persons can have confidence in a highly qualified and experienced single arbitrator through the Roster, there appears no compelling need to use three instead. This proposal will increase the financial burden on registered representatives seeking expungement.

SIFMA disagrees with the proposed process of FINRA randomly assigning arbitrators instead of permitting parties to rank and/or strike them, as is the current practice. Parties' selection of neutral arbitrators is a hallmark of the arbitration process. FINRA's random assignment of arbitrators removes the parties' involvement and input, as well as the consensual nature of arbitration. Moreover, if implemented, the rule would treat expungement differently than any other arbitration proceeding, for which the parties could still select a single arbitrator or three-person panel. Accordingly, SIFMA supports continuing the arbitrator ranking system from the proposed Roster for expungement-only cases. However, to preserve arbitrator neutrality and foster greater transparency in arbitration education and assignment, SIFMA proposes that FINRA make the following publicly available relating to Roster arbitrators: (1) all training materials utilized; 2) all FINRA communications with Roster arbitrators regarding expungement; and (3) all documents related to the addition, removal or exclusion of any Roster arbitrators.

Additionally, current FINRA rules allow expungements to proceed in those cases resolved other than by award (*i.e.*, settlement) using the same arbitrators empaneled in the underlying case. The Proposal would instead require the filing of a new expungement matter for cases resolved other than by award, using a panel randomly assigned from the Roster. This proposal appears inefficient because often times the sitting panel involved in a case since inception is in the best position to know and assess a case's facts and circumstances. Permitting a sitting panel to determine expungement in these cases would be most appropriate because it would provide for greater efficiency, lower costs and a quicker resolution. To address FINRA's concern for greater training and increased qualifications for those arbitrators determining expungement, while also providing

for greater efficiency for a sitting panel to determine expungement, SIFMA proposes that at least one arbitrator on a three-person panel be selected from the Roster at each case's inception (or that all Chairs be Roster certified).

B. Panels Should Not Be Required To Find That The Information To Be Expunged Has "No Investor Protection Or Regulatory Value"

FINRA already imposes high standards in order for arbitrators to recommend expungement. FINRA Rule 2080(b)(1) requires a finding either that: (i) the claim or allegation is factually impossible or clearly erroneous; (ii) the registered person was not involved in the alleged sales practice violation, forgery, theft, misappropriation or conversion of funds, or (iii) the claim, allegation, or information is false. If the expungement award is based on any findings other than the above, FINRA maintains the right to be named as a party and challenge any expungement award in a state court confirmation proceeding. See Rule 2080(b)(2).

By proposing additional elements for expungement requiring interpretation and imposition of regulatory policy, the Notice suggests the current high standards of falsity, impossibility or non-involvement are somehow insufficient. However, the Notice appears to provide no evidence or argument as to why these high standards are insufficient or why they need to be bolstered.

In addition to the high standards imposed by FINRA Rule 2080(b)(1), the Notice proposes that a Panel must also find (and state in the Award) the customer dispute information has *no investor protection or regulatory value*. However, customer dispute information that satisfies one of the three grounds under Rule 2080(b)(1) simply cannot otherwise have any investor protection or regulatory value. Requiring a specific finding that the information has no investor protection or regulatory value would be redundant given the current high standards imposed under the rule. The imposition of these additional standards would appear to be largely symbolic and deterrent in nature, yet lack practical application.

Moreover, this proposed rule is already part of FINRA's expanded expungement guidance, which provides that "[c]ustomer dispute information should be expunged only when it has no meaningful investor protection or regulatory value." Notice to Arbitrators and Parties on Expanded Expungement Guidance (Updated Sept. 2017). Such language has also been incorporated into FINRA's expungement script. However, these proposed rule changes reflect an overarching regulatory policy and should not be included as a factual finding required in an award. This proposed language may have the effect of discouraging otherwise meritorious expungement claims and stifling the process by increasing the burden on the registered representative with no attendant practical benefit.

The current expungement standards under Rule 2080(b)(1) require arbitrators to apply the specific facts of a case to determine whether expungement is warranted under the rule. Arbitrators are

further required to provide written factual findings in support of any expungement award. If implemented, this proposal would transform the traditional role of arbitrators as fact-finders and further require them to make a policy determination in each case. FINRA sets regulatory policy; it is not an arbitrator's role to interpret and implement regulatory policy on a case-by-case basis.

C. The Proposed One-Year Limitations Period For Filing Expungement Should Be Modified Or Eliminated

FINRA currently imposes no time limitation specific to expungement claims. To satisfy the laudable goal of preserving the integrity of customer complaint reporting by providing complete and accurate information to investors, false complaints should be expunged, no matter how old. The Notice proposes a one-year limitation commencing on the initial reportability of a customer complaint by the firm or one year after the conclusion of an arbitration in which the broker was not a named party. However, the Notice cites no basis for a one-year limitation for expungement claims and does not appear to provide any distinction as to why expungement limitations periods should be treated differently from all other limitations periods. Since FINRA Rules 12504 and 13504, which already provide a six-year eligibility period to file claims, ostensibly apply to expungements, there is no basis for a separate and significantly shorter time limitation for expungement-only matters.

There are also practical and procedural limitations of this proposed one-year limitations period. The proposed one-year limitation is insufficient for firms to properly investigate customer complaints and respond to customers. This would necessarily lead to the filing of expungements for pending or recently denied complaints that would then be stayed under recent expungement guidance that precludes concurrent actions. This would lead to registered representatives and firms devoting time, resources and capital to an inefficient regime created by an artificially short limitations period. In order to address this, SIFMA proposes that any such time limitation run from the close-out of the customer complaint on CRD (or the close of the arbitration), and not the initial reporting of the complaint on CRD.

Additionally, the Proposal does not address proposed time limitations for filing expungement actions for customer complaints that are disclosed before the implementation of the proposed rules. SIFMA requests further guidance on the extended time period that will be afforded registered representatives who have eligible claims for expungement that would become ineligible if the rule proposals were implemented. In any event, SIFMA proposes a one-year time period for registered representatives to file for expungement of previously disclosed customer complaints that were eligible for expungement prior to any rule change and requests that FINRA provide sufficient flexibility to address subsequent rule changes that may implicate limitations period by having retroactive effect.[6]

[6] In 2010, FINRA amended Rule 8312, requiring the reportability of previously archived historical complaints. Sufficient safeguards and flexibility should be built into the proposed time limitations rules to address subsequent rule

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D. Other Important Proposed Changes Require Additional Consideration By FINRA

1. The Requirement For an In-Person or Video-Conference Expungement Hearing is Unnecessary and Inefficient

Current FINRA Rules provide that an expungement hearing must be recorded, but that it may be held telephonically. The panel retains discretion to order an in-person hearing and exercises that discretion upon occasion when circumstances warrant. The Proposal would eliminate telephonic expungement hearings and would instead mandate in-person or video-conference expungements. However, the Proposal permits customers to testify by telephone. The Proposal offers no evidence concerning the efficacy of telephonic hearings or why expungements should require in-person hearings, while other cases, such as customer cases, could still be held telephonically. This Proposal would greatly increase the cost of expungement through attendant travel costs and loss of productivity. Additionally, permitting customers, but not registered representatives, to provide telephonic testimony reflects disparate witness standards. There appears no basis for requiring in-person testimony for a panel to better assess a registered representative's credibility, yet not requiring in-person testimony for a panel to better assess a complaining customer's credibility.

2. The Proposed Increase in Filing Fees and Additional Member Fees are Burdensome and Punitive

In pending arbitrations where a registered representative is named as a party, the Proposal would require the individual to pay an additional expungement filing fee of at least $1425 and would assess an additional member surcharge and processing fee against the firm, in addition to the fees charged in the underlying arbitration. These additional fees are burdensome, punitive and will likely discourage registered representatives and firms from pursuing otherwise meritorious expungement claims. This could have an unfortunate impact of creating a tiered system where only registered representatives and firms that can absorb these additional costs will be able to pursue expungement, regardless of merit. The factual basis of each customer complaint should be the determining factor in expungement and not prohibitive costs that may deter otherwise meritorious expungement filings.

changes that have retroactive effect, such as starting the limitations period from the time of the rule change having retroactive effect, as opposed to the initial reportability of the customer complaint.

3. New Expungement Filings For All Cases Closed Other Than by Award are Unwarranted

Currently, registered representatives may file for expungement in a customer case, even when that case is closed other than by award (*i.e.*, settlement). The Proposal would require registered representatives to file a new expungement matter, and would require registered representatives and member firms (that must now be named as a party), to pay the applicable filing, processing and member fees. As previously noted, the sitting panel is in the best position to determine expungement based on its involvement in the customer case. Such proposal would increase the costs, burden and time for resolution and may serve as a punitive measure for both the registered representative and the member firm, creating the unintended consequence of a tiered system described above.

Moreover, the proposed requirement to file for expungement 60 days prior to the first scheduled hearing date appears untenable and impractical. The proposal would require the registered representative and firm to pay separate expungement fees, even though a large portion of cases settle within 60 days of the hearing. Such fee structure is punitive in nature because it would essentially require triple payment by member firms (underlying customer arbitration, expungement during underlying arbitration, expungement in separate expungement matter) and double payment by registered representatives (expungement in underlying arbitration, expungement in separate matter). In addition to exponentially increasing the cost of expungement, this could also have the indirect effect of increasing the cost of settlement, potentially discouraging settlement in smaller cases due to the increased costs associated with expungement.

4. New Procedures for Simplified Arbitrations ($50,000 or less) Appear Inefficient and Not Simplified

The current process for simplified arbitrations is for a single arbitrator to rule on liability first, then hold a hearing solely for the purpose of determining expungement. The Proposal would require the registered representative to file a *new* expungement claim, with FINRA randomly assigning three arbitrators from the Roster only *after* resolution of underlying arbitration on papers. FINRA would then assess additional fees against the registered representative and member firm. This proposal is inconsistent with the purposes of simplified arbitrations to reduce costs and resolve cases expeditiously. A simplified arbitration should be *simplified* for all parties involved, not just the customer. This change would make expungement in simplified arbitrations cost prohibitive and discourage meritorious expungement claims.

SIFMA proposes modification of the rules for simplified arbitrations by providing for the selection of a single arbitrator from the Roster to decide both liability and expungement. The arbitrator would issue a bifurcated order, first deciding the issue of liability on papers, then hold a hearing

solely to determine expungement. This would promote greater cost efficiency, a quicker resolution and greater customer participation.

SIFMA reiterates its general support for FINRA's desire to continuously improve the expungement process by providing complete and accurate customer complaint disclosure information on individual registered representatives and firms to the investing public. However, sufficient safeguards are already in place in the form of extensive rules and enhanced expungement guidance that are already onerous on registered representatives. The proposed rules establish inconsistent adjudicatory standards and procedures applicable only to expungement applications and would unfairly increase the cost and burden on registered representatives seeking to protect their reputations and livelihoods from the harm caused by the disclosure of false or misleading customer complaint information. These changes could potentially tip the balance between the allegation-based reporting regime and the need to provide only complete and accurate disclosure information. Many of the rule proposals will have a significant deterrent effect and stifle the expungement of otherwise meritorious expungement claims. SIFMA thanks FINRA staff for its willingness to consider the issues raised in this letter. We look forward to our next opportunity to comment on issues related to FINRA's expungement process.

If you have any questions or require further information, please contact me at 202-962-7300, kcarroll@sifma.org, or our counsel, Mark D. Knoll and David Hantman, Bressler, Amery & Ross, P.C., at 212-510-6901 / 212-510-6912, mknoll@bressler.com / dhantman@bressler.com.

Very truly yours,

Kevin M. Carroll

Kevin Carroll
Managing Director and Associate General Counsel

cc: Mark D. Knoll, Bressler, Amery & Ross (by electronic mail)
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