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Via Email Only (pubcom@finra.org)

To Whom it May Concern
FINRA Dispute Resolution
Office of the Corporate Secretary
1735 K Street, N.W.
Washington, DC 20006-1506

Re: **The Law Offices of Patrick R. Mahoney, P.C.**
Official Comment on FINRA Regulatory Notice 17-42

To Whom It May Concern:

Please allow this letter to represent The Law Offices of Patrick R. Mahoney, P.C.'s ("PRM") comment on FINRA Regulatory Notice 17-42, which discusses proposed amendments to Codes of Arbitration Procedure relating to expungement requests of customer dispute information (the "proposed rules").

I) Introduction

PRM has handled numerous expungement matters on behalf of associated persons, and submits this comment with the best interests of those associated persons in mind.

In short, PRM strongly disagrees with the proposed rules—particularly as they relate to matters where the associated person is not a named party to an underlying customer case. These proposed changes would create a suffocating burden on associated persons to *disprove* the merits of an underlying customer complaint in instances in which (often) they are not even a named party to a customer case, and, in many cases, are not even *mentioned* in the customer case. If these proposed rules involved government actors, they would be dismissed out of hand as a violation of basic civil procedural and substantive due process rights.

There is no other industry (that this humble author can think of) in the United States that maintains a system that creates a rebuttable presumption of liability in the face of (often ambiguous) *allegations* of wrongdoing. The proposed rules do just that through their continued requirement that such allegations, irrespective of merit, remain publicly available *unless* the associated person has the resources to spend tens of thousands of dollars just to to *try* prove otherwise.

What's more, as a result of the proposed rules' requirement for unanimity amongst the three arbitrator panel tasked with rendering a decision for, or against expungement, the burden of proof required to overcome this rebuttable presumption of liability is akin to "beyond a reasonable doubt"—the highest burden contemplated.

PRM agrees that the rules concerning expungement must be changed, but these proposed rules are not the answer.

II) PRM's Concerns Relating to Expungement Requests Involving Associated Persons who are named as a Party to a Customer Case.

1) Registered Representatives Benefit from the Rights Available to all Respondents When they are named in a Customer Case.

PRM agrees that a CRD record disclosure of an underlying customer complaint is warranted when a customer actually names the registered representative as a respondent to their case. By actually naming the registered representative, the customer undeniably makes an allegation, *specifically directed at the registered representative,* that he or she made some type of sales practice violation.

Meanwhile, the registered representative has all of the rights available to any respondent in a FINRA case. They can: (1) answer the statement of claim and assert all available defenses; (2) engage in discovery; (3) attend all underlying arbitration hearings; (4) choose their own counsel; and, (5) (most importantly) may benefit from the fundamental requirement that places the burden on the Claimant to establish his or her claims *directed towards the registered representative* by a preponderance of the evidence.

2) If the Underlying Customer Case Closes by Award, and the Customer's Claims are Denied in their Entirety, FINRA should Automatically Grant Expungement.

Where the underlying customer case closes by award, and the award denies all claims directed at the associated person, the associated person should automatically have their CRD record expunged of all reference to the complaint. After all, *the associated person won the case on the merits*. FINRA rules should not then subject associated persons to a second determination that shifts the burden on the associated person to further disprove a claim that they already successfully defended.

The proposed rules do not subject the member firm (and co-respondent to the hypothetical action) to such burden-shifting. If the proposed rules did, member firms would undoubtedly oppose them en masse.

Therefore, if a customer names an associated person as a respondent in a customer case, and the arbitration panel renders an award denying the customer's claims directed at the registered representative, there should be no need to make a second determination on expungement. To require otherwise unfairly creates a separate set of standards depending on whether the respondent is a registered representative or member firm.

III) Unnamed Associated Persons in Customer Cases Should Not Be Subjected to the Same Expungement Standards as Named Associated Persons to Customer Cases.

1) FINRA's Overbroad CRD Reporting Rules are the Exclusive Source of the Influx of Expungement Proceedings.

Though not stated explicitly in Regulatory Notice 17-42, the proposed rules seek to develop a new expungement system that aims to decrease the amount of instances that arbitrators grant expungement relief so that the statistics will properly reflect the remedy's "extraordinary" nature.

Ironically, FINRA created this problem when it broadened the rules as to what type of customer complaint a member firm must report on the CRD records of its associated persons. These overly broad reporting rules created countless situations where associated persons, with peripheral (at best) involvement in a customer complaint, had their CRD records tarnished due to flawed reporting criteria, and not actual wrongdoing. This, in turn, has led to an influx of successful expungement requests. If FINRA does not change its reporting standards, however, and implements the proposed rules, FINRA will exacerbate this existing problem to the extreme detriment to the associated persons who fall victim to it.

Pursuant to Regulatory Notice 09-23 ("RN 09-23") and the amendments FINRA made to Forms U4 and U5 that coincided with that regulatory notice, member firms are the exclusive arbiter in deciding which customer complaints require CRD record disclosure, and which do not.

RN 09-23 and its progeny require member firms to disclose customer complaints under the following situations:

- Where the associated person is a named party to the Statement of Claim;

- The Statement of Claim or complaint specifically mentions the individual by name and alleges the individual was involved in one or more sales practice violations; or

- Where the Statement of Claim or Complaint does not mention the individual by name but the firm has made a good faith determination that the sales practice violation(s) alleged involves one or more particular individuals.

The CRD record reporting criteria concerning customer complaints contemplate a massive scope of scenarios that might (depending on the member firms' subjective interpretation of the reporting rules) trigger a CRD record disclosure. These overbroad reporting criteria, coupled with the unfettered discerption given to member firms to determine reportability, have unfairly subjected someone who is neither named nor mentioned in a customer complaint, to the exact same expungement standard as someone named as a Respondent in a customer complaint and subjected to clear allegations of sales practice violations.

For example, suppose a customer names an associated person in their customer case, and directs specific causes of action against that associated person for fraud, breach of fiduciary duty, and unsuitability. Under RN 09-23, the firm where the associated person worked at the time of the complaint would amend the associated person's CRD record to reflect the complaint because the customer named the associated person as a respondent, and made unambiguous allegations that the associated person committed sales practice violations.

Alternatively, suppose a customer does not name or even mention any associated person in their case and makes allegations against only a member firm for fraud, breach of fiduciary duty, and unsuitability. RN 09-23 requires the reporting member firm to make the completely subjective determination to report this customer case on the CRD records of all associated persons "involved" in the allegations. This might include (among many other examples): the customer's broker of record; the broker of record's manager; or a licensed assistant who did nothing other than process paperwork at the direction of the broker of record.

And yet consider that: (1) the licensed assistant in the above example would have his CRD record blemished the same as the associated person actually named in the customer complaint in the first example; (2) the licensed assistant is presumed liable for reporting purposes in the same way as the associated person actually named in the complaint; and (3) the licensed assistant must convince a panel of three arbitrators, who FINRA will educate on the extraordinary nature of the expungement remedy, to unanimously agree that his record should be expunged pursuant to the same, one-sided expungement standards available to the associated person named in the complaint. And that is to say nothing of the cost associated with the licensed assistant's attempt to earn expungement.[1]

FINRA cannot continue to treat these immensely different situations equally for purposes of creating CRD reporting and expungement standards.[2]

2) <u>The Customer's Complaint should have to Unmistakably Direct Allegations of Sales Practice Violations towards an Associated Person to trigger any CRD Record Reporting.</u>

FINRA Rule 12313(a) specifically permits customers, at their own discretion, to name multiple respondents. That rule states in relevant part, "One or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law and fact common to all respondents…"

FINRA Rule 12302(a) similarly gives customers carte blanche authority to state their allegations in their statement of claim. Indeed, the statement of claim must "specify the relevant facts and remedies requested."

[1] PRM estimates that the Proposed Rules would regularly cost an associated person upwards of $20,000 to seek expungement. These costs are attributable to FINRA's proposed set filing fee for expungement proceeding, hearing costs, and proposed requirement that an in-person hearing and/or video conference be held in all expungement matters.

[2] PRM further notes the inherent ambiguity in trying to apply the standards set out in FINRA Rule 2080 (i.e. (1) that the claim is impossible or clearly erroneous ; (2) that the claim is false, or (3) that the associated person lacked involvement) when the associated person is not even mentioned in the underlying complaint.

Accordingly, the customer's complaint itself, above all else, should dictate whether it warrants disclosure on an associated person's CRD record in the first place. If a customer, in evaluating the parties he or she wants to name as respondents in their Statement of Claim, decides *not* to name an associated person as a respondent to their claim, FINRA must consider that to the associated persons' benefit when developing its reporting and expungement rules.

Similarly, if the customer does not include as part of their statement of "relevant facts and remedies" any specific allegations of wrongful conduct directed towards an associated person in their statement of claim; or, where the customer doesn't even *mention* any associated person in the statement of claim, FINRA must also consider those issues to the associated persons' benefit when developing CRD reporting and expungement rules.

Nevertheless, the proposed rules require the same rebuttable presumption of liability, and the same expungement standard regardless of whether the associated person is named in the customer case, unnamed but mentioned in the customer case, and unnamed and not mentioned in the customer case.

IV) Conclusion

FINRA's proposed rules are patently unfair to associated persons. They devalue the impact that publicly available customer complaints have on the reputation and continued employment of associated persons in the financial services industry. They do nothing to change the overbroad CRD record reporting rules that promote CRD record reporting under frivolous circumstances. And they create an unprecedented rebuttable presumption of liability, subject to "beyond a reasonable doubt" burden of proof, the likes of which are unseen in any other industry.

For those reasons, PRM opposes the proposed rules.

Sincerely,

/s/ Patrick R. Mahoney

Patrick R. Mahoney
The Law Offices of Patrick R. Mahoney, P.C.