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February 5, 2018

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VIA EMAIL AND FEDERAL EXPRESS

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

Re: Comments on FINRA's Proposed Amendments to its Expungement Arbitration Rules (Regulatory Notice 17-42)

Dear Ms. Asquith:

Below please find our comments on FINRA's proposed rule changes to the expungement process. We respectfully request that these comments be given careful consideration by FINRA.

Our comments are based on representing parties to FINRA arbitrations for many years. We have substantial experience in handling expungement proceedings. Although FINRA believes the amendments will further promote investor protection and regulatory value considerations, we cannot agree. Instead, we believe the proposed rules are inequitable, and instead have the effect of placing unnecessary and unfairly harsh, costly and unwarranted burdens on associated persons trying to recapture their business reputation. Our specific comments follow.

Expungement Requests Regarding an Underlying Customer Case Where the Associated Person is Named

Rule Change: An associated person is required to request expungement during an underlying customer case where he/she is named as a party.

FINRA's Rationale: Years after FINRA has closed an underlying customer case, a broker files a separate expungement request. "[I]n many of these instances, the customers cannot be located and any documentation that could explain what happened in the case is not available or cannot be located." Notice 17-42, p. 5.

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Comment: In all of our many expungement actions, we have yet to encounter a situation in which a customer could not be located. The overwhelming majority of customers are represented by counsel, who are able to offer the customer's most recent contact information. Modern techniques to locate people (such as the internet's many people finder sites) make searches easy, efficient and economical.

The concern that important documentary evidence will not be available is not legitimate. Even ignoring the likelihood that a customer and/or his/her attorney retained relevant records beyond the arbitration hearing itself, governing securities industry rules mandate the retention of important customer and account records for several years. If the unavailability of documents and records truly threatened the integrity of the arbitration process, surely FINRA Rule 12504(a)(6) would allow arbitrators to consider pre-hearing motions to dismiss on the grounds that a claim was brought beyond the record retention requirement (and, in many cases, the co-extensive time frame imposed by the eligibility rule), and important documents are no longer available. Arbitrators are well able to determine whether an expungement request is adequately supported and a rule change which forces premature consideration of expungement is ill-advised.

Rule Change: The filing fee is $1,425 or the applicable filing fee provided in Rule 12900(a)(1), whichever is greater.

FINRA's Rationale: Associated persons have been adding a monetary claim of less than $1,000 to reduce the filing fee to $50. This results in a simplified claim where only one arbitrator would hear and consider a "complex matter" like expungement. Notice 17-42, fn 14.

Comment: The filing fee an associated person pays in connection with an expungement request has no bearing on whether the arbitrators will grant his/her request. Raising the filing fee fails to acknowledge that an associated person has inevitably suffered indirect financial harm merely due to the negative notation on their CRD. Arbitrators retain the right to assess costs in connection with an expungement request, and the assessment of costs should be reserved until the arbitrators have heard and considered all of the evidence.

Further, FINRA's concern with having only one arbitrator decide an expungement request is a red herring. If FINRA believes its arbitrators are properly trained and competent to hear and decide full cases in simplified arbitration proceedings, surely arbitrators are well able to consider expungement, a corollary request. And, if one arbitrator, alone, is unable to understand an ostensibly "complex matter" like expungement, how does the inclusion of two additional arbitrators (presumably also unable to understand the issues on their own) enhance the decision-making process?

Rule Change: If a customer case closes by award, the panel must consider and decide the expungement request and "unanimously grant expungement". The award must identify at least one of the grounds under Rule 2080 and find that "the customer dispute information has no investor protection or regulatory value." Notice 17-42, p. 6

FINRA's Rationale: "The proposal would clarify for arbitrators that the standard for granting the permanent removal of customer dispute information from the CRD is a finding that the customer dispute information has no investor protection or regulatory value." Notice 17-42, p. 9

Comment: FINRA already cautions arbitrators that expungement is an "extraordinary" remedy that should only be granted in the limited circumstances provided under Rule 2080. In fact, FINRA acknowledges that its previous efforts (establishing Rule 12805 and publishing the Expanded Guidelines) have improved the expungement process.[1] That cautionary language is adequate to inform arbitrators as to a moving party's burden.

Imposing a "no investor protection or regulatory value" standard is absolute, subjective and excessive. The "extraordinary" remedy language should be balanced by permitting arbitrators to grant expungement if they conclude the customer dispute language has no **reasonable** investor protection or regulatory value. Such an objective standard is in keeping with the equitable nature of the forum.

FINRA prides itself on being an equitable forum. Equitable means fair or just. Permitting customer cases to be decided by a majority, but requiring a unanimous ruling as to expungement requests is contradictory to that ethos. There is absolutely no reason why a customer's complaint, which can result in an award of hundreds of thousands or millions of dollars, can be decided by only two arbitrators, but an expungement request must be granted by three.

Unanimity simply creates an unjust and unfair hurdle. Beyond the world of FINRA Arbitration, other important decisions do not require unanimity. Civil jury verdicts need not be unanimous; appellate decisions, including the United States Supreme Court, need not be unanimous; and legislators do not require unanimity.

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[1] "Based on FINRA's review of awards where expungement has been granted, arbitrators appear to be following the practices identified in the Expanded Guidelines and have a heightened awareness that expungement is an extraordinary remedy. FINRA has noticed a marked improvement in the quality of the awards in which expungement is granted." Notice 17-42, p. 10.

Rule Change: If a customer case closes other than by award (i.e., settlement), the associated person must file a new expungement request against the firm he/she was associated with at the time of the underlying events. The associated person cannot name the customer in the request.

> **FINRA's Rationale:** The customer should not be asked to participate in another arbitration hearing that could increase their costs/expenses. Instead, naming the firm is intended to allow a "more robust expungement proceeding". Notice 17-42, p. 6.

> **Comment:** Customers are free to participate in expungement proceedings, but are not required to do so. Customers should be free to assess themselves the relative costs and benefits of participating. In most cases, a customer who elects to participate will devote all of approximately one hour on a telephone conference call during which the expungement request is being formally presented. In contrast, the associated person has already suffered a negative notation on their CRD merely due to the assertion of the customer's claim, and expended many months of time and thousands of dollars on attorneys' fees and costs defending a claim he/she believes was without merit. In an equitable world, the balance of harm to the associated person is far greater than the minor inconvenience suffered by the customer – who voluntarily initiated the dispute in the first place.

> Allegations of wrongdoing made by a customer against an associated person are serious indeed. In most FINRA arbitrations, fraud and breach of fiduciary duty are routinely pled. Accountability for these allegations is basic to any true system of justice. The ability to allege with impunity, and to avoid accountability for one's accusations, is antithetical to any system seeking to do justice. An aggrieved associated person should be able to name the customer; a truly "robust" expungement proceeding would not mandate the exclusion of the underlying complainant from the process.

Rule Change: If a customer case closes other than by award (i.e., settlement), the associated person must seek expungement within one year. If there is no underlying customer case, the associated person must file an expungement request within one year from the date the member firm initially reported the customer complaint to CRD.

> **FINRA's Rationale:** The one-year limitation period would ensure that the expungement hearing is held close in time to the underlying case when information is available and the customer's participation in the expungement proceeding is more likely.

> **Comment:** FINRA allows customers to file claims up to six years after the occurrence or event giving rise to a dispute but wants to limit an associated person's ability to remedy a perceived meritless claim on their record. There is

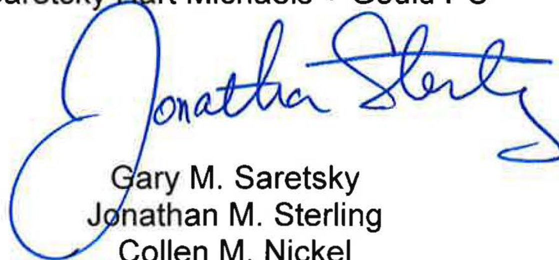
nothing equitable about this. As explained above, arbitrators are capable of determining if an expungement request lacks sufficient documentary support or whether the absence of a customer's testimony should weigh against granting the request. Thus, a restrictive time limit is unnecessary to hold an effective expungement hearing. And, the safeguards to investors afforded through the CRD system are not advanced by a time limit. The longer an associated person waits to seek expungement, the longer a negative CRD notation survives in the public domain. Arbitrators are free to weigh the evidentiary value (if any) of an associated person's undue delay in this regard. Further, FINRA already requires that customers be notified of any expungement request. Thus, customers are always afforded the opportunity to participate in expungement hearings or oppose the request. A time limit does not change this reality.

Conclusion

Protecting customers is important, but the cornerstone of FINRA arbitration is equity. Equity works both ways. The proposed amendments seem to suggest that FINRA does not fully value the concerns of members of the financial services industry as to the fairness of the expungement process. As a result, we ask FINRA to reconsider the proposed rule amendments.

Very truly yours,

Saretsky Hart Michaels + Gould PC



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