



Davidson & Grannum, LLP

Attorneys at Law

30 Ramland Road, Suite 201
Orangeburg, New York 10962
Telephone: (845) 365-9100
Facsimile: (845) 365-9190
www.davidsongrannum.com

April 16, 2012

VIA E-MAIL

pubcom@finra.org

Marcia E. Asquith

Office of the Corporate Secretary

FINRA

1735 K Street, NW

Washington, DC 20006-1506

Re: Davidson & Grannum, LLP's comment on the proposed new *In re* Expungement
Procedures for persons not named in a customer-initiated arbitration

We represent Registered Representatives in expungement proceedings in situations where they have been named as a party and in those situations where they have not been named as a party. We make the following observations and comments on the new proposed rules 12100(z), 13100(cc), 12806, 13806 and 13807.

I. Rule 12100(z)

First, it would appear that the definitional rule Customer Code 12100(z) is unnecessary as "Unnamed Person" – that is the non-party Registered Representative—is not a term utilized in the Customer Code as the "In Re" proceeding which is designed to give the Unnamed Person voice is a proceeding which is initiated under the Industry Code (Rules 13000 et seq.). We believe the definition as it appears at Code 12100(z) will, therefore, be confusing. We believe that proposed Code 12100(z) should not be instituted.

II. Rules 12806 and 13806

Proposed Codes Customer Rule 12806 and Industry Rule 13806 are not "In Re Expungement" Rules. Rather they are rules restricting the ability of a named Registered Representative from asserting a request for expungement under the Code except during the course of the customer's case (hereafter referred to as the "Restriction Rules").

To the extent these Rules are enacted we believe they should be separated from the “In re Expungement” Rules and the Regulatory Notice advising Members, Associated Persons and the Public of their passage should be either separate or more clearly state what the Rules are intended to do. In its present form, the Regulatory Notice lacks the proper notice of the restriction of a right which previously existed. It also may not draw the attention to comments on the Restriction Rules because it is overshadowed by the new “In re Expungement” rules which increases the Registered Representative’s rights.

It is also our opinion that the Restriction Rules are too rigid in their apparent application. Presently, there is no rule which prohibits a named Representative from initiating an arbitration after the customer’s case has concluded. These rules would change that status. While we do not believe that such restrictions, in and of themselves, are inappropriate, we do believe that these Rules go too far. They do not provide for exceptions or extraordinary circumstances which may arise. For example, what if the Registered Representative does not make an appearance at the hearing, but can later establish that he did not receive notice of the arbitration and was unaware of its occurrence. As the rule is presently written, he cannot seek to have the matter expunged from his Central Registration Depository (“CRD”). Even if there is a hearing on the merits and it is determined by the Arbitration Panel that the claim lacked merit and should be dismissed with prejudice, or in fact, even if the Panel determines that one of the 2080 elements existed – that is (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—he still may not attempt to have the matter expunged from his CRD. Even if all parties are in agreement that the expungement issue should be addressed after the hearing on the merits, the Registered Representative is afforded no relief from the Restriction Rules.

We believe the Restriction Rules are unnecessarily restrictive and contrary to the spirit of the Arbitration Code which otherwise appears to strive for equity and is flexible in permitting the parties to design their own procedural rules.

Although the Customer Code, 12000 seq. et., does not specifically address the Unnamed Person moving for expungement, Industry Code 13807(a)(2) does provide for a circumstance where that might happen. Specifically, it states

(2) Limitations

An unnamed person may not seek expungement relief by initiating an arbitration case that names the customer, member or any other party as the respondent. An unnamed person may not seek expungement relief by attempting to intervene in the arbitration filed by the customer. An unnamed person may seek expungement relief directly in the customer-initiated arbitration proceeding only if a party to the proceeding requests the relief on behalf of the unnamed person. [Emphasis added]

We believe a similar statement should be added to Customer Code Rule 12806 for clarity and consistency. If such verbiage is added it would, of course, require that Customer Code Rule 12100(z) remain in the Code.

III. The In re Expungement Rule 13807

First, we believe this rule is absolutely appropriate and necessary as an effort to address the void in the Arbitration Code which was created after the disclosure rules were amended to require the reporting of customer arbitrations on Registered Representatives' CRD's even in cases where the Registered Representative was not named in the arbitration. We recognize that this process also has inherent flaws because if the Registered Representative is not given an opportunity to present what he believes to be his redeeming case during the merits of the customer complaint, the case may not be dismissed, and he is less likely to get a grant of expungement during his In re proceeding. However, given the requirements of CRD disclosure and the Claimant's right to caption the case as he/she sees fit, this is a reasonable solution.

It permits the Registered Representative what is in essence a declaratory judgment on issues of paramount concern to him although the case and controversy did not name him. In this way, the Claimant may decide whether strategically it is in his/her best interest to name the Registered Representative without the Registered Representative being saddled with the CRD disclosure without a voice.

The definition of an "Unnamed Person" in Rule 13100(cc) is, however, confusing:

Rule 13100(cc). Unnamed Person.

The term "unnamed person" means an associated person who is identified in a Form U4 or Form U5 as having been the subject of an investment-related customer-initiated arbitration proceeding that alleged that the associated person was either named in or can be reasonably identified from the body of the arbitration claim as an associated person who was involved in one or more of the

alleged sales practice violations, but who was not named as a respondent in such proceeding.

We believe the following wording may cause less confusion: “**either identified in or can be reasonably identified from**”.

With regard to Industry Code Rule 13807(b), we believe the Registered Representative should not only be sent a copy of the Claim after its has been filed, but FINRA should also advise the Registered Representative that he/she has a right to file an expungement proceeding which will be waived if not timely filed.

IV. Rule 13807 Time Limitations are Not Necessary

We do not believe that Rule 13807(c) is necessary. We do not believe there is interest which is jeopardized if the Registered Representative fails to advise of his/her intention to file an expungement proceeding. It may be the case that the Registered Representative wants to know how the proceeding is concluded before reaching such a determination. The same argument could be made for the 60-day restriction on the Registered Representatives’ time to imitate the In re proceeding pursuant to Industry Code Rule 13807(d)(1). As there are no other parties to the proceedings there is no one who is prejudiced by a late filing of an In re proceeding. As the Registered Representative’s request for documents (Rule 13807(d)(2)) is directed at the “FINRA-registered party,” as long as that request is made within the document retention time and the arbitration is commenced within the Code Eligibility time, we see no prejudice.

V. The appointment of the single arbitrator

The appointment of the public arbitrators of the underlying customer arbitration appears to be an efficient and effective way of reducing the learning curve for the arbitrators who will be hearing the expungement matter. It is in line with what would have occurred had the Unnamed Party been party to the underlying arbitration agreement. Proposed Rule 13807(h).

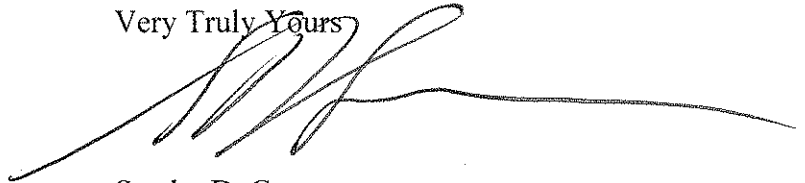
However, if the arbitrators who heard the testimony and reviewed the evidence in the underlying customer arbitration are not available, we believe the Registered Representative should be afforded the right of any other party to the forum to choose his arbitrator from FINRA’s well developed arbitrator list selection process.

VI. Confirmation of the Award of Expungement by the Unnamed Person

Proposed Rule 13807(m) advises that the Register Representative need not name FINRA as party in a Petition to Confirm the award of expungement which is still required to effectuate the expungement. However, 13807(a)(1) and (2) prohibits the naming of a customer or member or any other party as a respondent in the In re proceeding. However, the Petition to Confirm must have a counter party. And, some state courts require that the proceeding to confirm an award must be started by way of a summary proceeding (e.g., Order to Show Cause in New Jersey) requiring the Unnamed Person to name a Respondent or Defendant. It is unclear from the New Proposed Rule who that counterparty should be in light of the other provisions in the Rule. The most logical counter party may be FINRA. In any event, this is an issue which is worth resolving at this stage of the Rule writing process.

We believe the In re Expungment Proceedings will fill the gap which the reporting requirement has left in the due process rights for the Registered Representatives. However, we do have concerns regarding the wording an application of the Proposed New Rule in its present form.

Very Truly Yours

A handwritten signature in black ink, appearing to read 'SDG', followed by a long horizontal line extending to the right.

Sandra D. Grannum

SDG/yc