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April 17, 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: Comment on FINRA Notice 12-10

Dear Ms. Asquith:

In the past 20 years, she has been on the Board of Directors of the *Public Investors Arbitration Bar Association ("PIABA"),* as well as a member of the *Securities Industry Association (now "SIFMA"), New York County Lawyers Association,* Securities and Exchanges Committee, and NYS Bar Association. She has taught classes at NY and Brooklyn Law Schools, as well as been an NASD (now FINRA) and NYSE arbitrator and chairperson, spoken on several panels at and written articles for PLI, NYCLA and PIABA. I have represented both public customers and registered persons and firms in the industry.

Transparency Issues

1. A FINRA Arbitration Docket

    a. CRD Entry

Given that FINRA receives every arbitration complaint and sends those complaints to FINRA Regulatory, who manages the Broker Check database, FINRA should enter arbitration and customer complaints directly onto firms and parties CRD records.

Self-reporting remains spotty and inaccurate and it is in the public customers' best interest that there be full and fair reporting. Given that the arbitration (and even FINRA Regulatory) complaints are already passing through two hands at FINRA, the additional time to input the data into the database is relatively minimal given the importance of the disclosure.

Failing to record the information that FINRA has in its possession is a failure to the investing public.

b. Case Docket and Calendar

Without question, a great improvement to the transparency of the arbitration process would be to create a FINRA case docket that provides access to the vitals of a case. The vitals of a case include the parties, their counsel and the arbitrators.

Given that the state and federal court systems have already developed (through vendors ready to sell new, similar products) computer systems to provide people with access to the court system and given that FINRA has already put in the party and claim data, as well as the data for arbitrator enhanced disclosures, there should be no reason that the parties should not have access to such a searchable database, the way they do in the court system. This would help parties manage and cooperate in discovery the way they would in court actions, as well as keep firms "honest" in arbitration reporting – or providing avenues to find out when they have not been – important information to find out. At the moment, I also understand that a large part of FINRA's docket increasingly involves "product cases." A docket that disclosed this information could be useful to parties that want to cooperate in product discovery and strategy on both sides.

Additionally, a calendar system, where parties to a case could have access to an online calendar would relieve the staff's burden of calls from counsel about deadlines and make the forum easier to use for participants.

c. Order Docket

Decisions on arbitrators as the most important decision a public investor makes on any case both for their case, as well as during settlement negotiations. Knowing what the arbitrator is capable of doing helps both sides make informed decisions both about who to choose and what to do with your case when an arbitrator is appointed.

While the Arbitrator Disclosure Forms currently have cases on which the arbitrator has rendered a final decision in a case, it fails to list many important activities that both a public customer and industry person should equally like to know about an arbitrator, such as the following:

1) Cases on which the arbitrator is currently or has sat in the past that have settled without a "Stipulated Award"
    a. This is important to know whether there are any pending or prior matters with the parties, counsel or involving products that may in any way affect an arbitrators decision making in a potential case;
2) Final decisions on discovery motions and/or dispositive motions where it does not affect the pendency of the entire case;
    a. This is important, as if an entire case is disposed of, the award is posted and made public, but where there is only an award that affects a part of the case, the award is not made public. There should be no rational reason to differentiate between decisions that affect a part of the case and those that

affect the entire case. While these orders would not have precedential value, neither do the ultimate awards; however, both would help the public and the industry make informed decisions.

2. Continued Expungement Abuse

I also comment to provide examples and considerations necessary to consider in the expungement process. I offer some examples and considerations regarding what appear to be continued abuses of the expungement process.

I note as a pre-cursor to this discussion that I have successfully represented registered representatives in the industry who have obtained expungement, but never in just an hour long call. In the cases I tried, including Wachovia v. Brucker, FINRA case number 06-03260 (August 2008), a reasoned decision after 14 hearing sessions, you will see that there was good cause after a full and fair hearing, in person. We have other examples like this.

By way of example of what I believe to be an again growing problem, in a recent case, after completing discovery, the parties agreed to mediate the matter and ultimately settled the case. Few people enjoy the litigation process when they are a party to it, and ultimately seek finality once a settlement is reached. The same way a firm may settle a case that they believe they did nothing wrong in to obtain finality, so may a customer, particularly an elderly one.

In cases where I have represented customers in which a settlement agreement was reached and mutual releases executed, in which both Claimant and Respondents disclaimed all of their claims stemming from this action, including expungement requested specifically in Respondents' Statement of Answer. That mutual release was requested specifically for that purpose as a result of discussions in mediation, as if expungement were granted, Respondents would necessarily have to confirm in court, naming an elderly client that wanted finality, as a party to a subsequent litigation, which would contradict the agreement between the parties that settled the matter in full.

Claimant raised this issue for the Panel's consideration. Ultimately, the Panel concluded that Respondents had a "right" to pursue expungement under Rules 12805 and 2080, despite the mutual release contained in the Settlement Agreement.

Additionally, in contravention to the provision of the same "rule" that established the "right", according to the Panel, Rule 12805, which provides that "the panel must: . . . (d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief," the Panel assessed half of the fees for the call to the Claimant.

Whether intentionally or otherwise, the message behind an assessment in a matter such as this is that if a Claimant chooses to oppose expungement, he or she will have to pay for the privilege. This deterrent should not be in place within the system, and this practice is in direct contravention of the Rules.

I had the short expungement call taped. Sixteen minutes into the tape, you will hear arbitrator ask the question "What is your client's skin in this game?"

This is the voice we hear as attorneys in arbitration far too often: "for what it's worth", "does it matter?" It does matter. It matters because to expunge a complaint, it must be found, in writing in a reasoned decision publicly available, that the claim was "false" or otherwise not true, then confirmed in court in another public filing. What incentive does a claimant have to settle if they need to fully litigate a matter to avoid expungement and how do we stop the arbitrators from asking "why does it matter?", as that arbitrator did?

This same panel refused an in-person hearing at Claimant's request. Counsel for the parties seeking the expungement responded in one word (in an email): "Shocking." Clearly counsel for the party seeking expungement believes that this should be a rubber-stamp process rather than a search for the truth. I suggest that is because granting expungements has become quite perfunctory.

Our adversary from a well known law firm then "sewer served" the exhibits, meaning that when the short call (after which expungement was granted) occurred, we did not even have the exhibits in front of us that were presented to the Panel. That never would have happened in an in-person hearing, which we were denied. It is impossible to cross-examine a witness properly after being denied an in-person hearing. Moreover, one has no idea whether that witness is reading from a script or otherwise being coached by documents or the histrionics of the lawyer.

The proceedings that have taken place in this matter have raised some serious concerns about not only this matter, but also the current system under which FINRA Arbitrations take place, the propriety of the administration of the system, and its fairness to the public investors, who find themselves as Claimants in these proceedings. Is it in the spirit or dictates of "Good Faith and Fair Dealing" to subject an investor to a full hearing after they settle a matter to "defend" their claims? I believe it is not.

The most startling issues appear to raise themselves when matters before FINRA Dispute Resolution settle prior to a full hearing on the merits. In these situations, registered representatives oftentimes will request an expungement. Since Claimants frequently embrace the closure settling the matter provides, they oftentimes do not oppose, leaving these expungement hearings to proceed ex parte. In the materials we provided you, you will see that these ex-parte proceedings are used by brokerage firms to send the message to panels that "everyone is doing it" and "it happens all the time."

In order to avoid this, Claimants are forced to appear and oppose the petition for expungement, subjecting them unnecessarily to the rigors of preparing for and giving sworn testimony to an arbitration panel, in a matter that has already been resolved. This is especially concerning since many Claimants are senior citizens, some of whom may have considered avoiding the stress and the associated health risks as a reason for pursuing settlement rather than proceeding to a hearing. Not every settlement amount reflects the merits of the matter, as cases settle for various reasons, including health and personal issues that a claimant may not want to disclose to a panel or the other people in the hearing room.

While expungement after a fully litigated, multi-day arbitration hearing could be warranted where a Panel is given the full breadth of the evidence and concluded that the claim is false, it is hard to believe that there can be much confidence that that the same depth of understanding of the issues at hand can be garnered by the Panel from a brief telephonic conference or half day hearing (as most of these are) so as to warrant allowing the Panel to award the remedy of expungement.

The ex parte proceedings in which many expungement petitions are heard further complicate the matters since there are no checks and balances in place to reveal and prevent fabrications and half-truths. The adversarial system is centered on the premise that by allowing both sides to present their version of events to a neutral fact finder, including the cross examination of adverse witnesses, the truth will ultimately surface. In an ex parte proceeding, the checks have been removed, cross examination by an adverse party plays no part, and ultimately the panel, must decide whether or not to grant the extraordinary remedy of expungement based on an incomplete record. How could a panel possibly make an accurate determination of whether a claim is "factually impossible", "clearly erroneous", or "false" after only a short half day, ex parte proceeding? How is this in the dictate or spirit of "Good Faith and Fair Dealing" with an investor?

If a Claimant has to engage in a full hearing after settling to prevent mistruths being put into the record, there will never be any incentive to settle, as an investor can never truly have peaceful closure of the issues after they settle a case. Moreover, it is FINRA Regulator's role to police the CRD for the benefit of future investors with the subject registered person, not that of the investor who has settled his or her claims. Unfortunately, panels appear all too willing to rubber stamp unopposed proceedings and too many elderly clients cannot put themselves through the expungement proceeding.

FINRA also encourages Panels to review the settlement agreement reached between the parties in this process. This raises issues surrounding the confidential settlement process and that of mediation, which FINRA encourages to use and parties often do use effectively to settle their claims. A simple review of the settlement agreement also does not fully inform the Panel as to the reasons for settlement.

Although the securities exchanges center on money, life does not always revolve around money. Many reasons factor into an individual's decision to settle, including health concerns, family issues, costs of arbitration and questions about the theory and amount of damages. Is the claimant then forced to reveal his or her legitimate reason as for settling at a given amount, even though it may reveal health or personal issues that they rather not disclose to a broker or other people in the room that might, for example, share their country club? If they don't oppose it could lead to embarrassment as the broker waves the award around in front of the settling claimant – calling him or her a liar, even though Ms. Pessen questions in the telephone hearing "why it matters" and "why does the Claimant care," since he settled. This attitude makes it seem that panels either don't understand or don't care about the significance of the CRD system and view expungement a harmless act, making them more inclined to grant what is meant to be in reality extraordinary relief.

Moreover, in cases where there are found after discovery to be little or no damages under a certain theory and high damages under another theory, a review of the settlement agreement, which would could be for a relatively low amount, would only serve to mislead the Panel as to the issues of liability (distinct from damages), which generally involve rule violations that are really the true basis for reporting. What is the relevance of the settlement amount? Is a small settlement (which in some parts of this country would be someone's annual income, or wished annual income given the state of unemployment) unworthy of respect? The simple fact that there was little or no injury is fortunate, but it does not, and should not be viewed to, in and of itself justify the improper conduct.

One needs to look no further than FINRA records. For example, in the week of June 30 through July 7, 2011, of the seven stipulated awards that were reported, **all seven** were expunged by the Panel. This is at its essence, a continuation of the same conduct that FINRA has repeatedly stated that it was attempting to stop, in which the industry members essentially "purchase" an expungement in a settlement negotiation. Apparently, these efforts have been ineffective.

For years, I have raised the issue with colleagues at PIABA and who serve on the NAMC and other committees that, in my view, FINRA should be able to report arbitrations and disciplinary complaints directly on CRD and we would have many less disciplinary actions that involve failure to report customer complaints and arbitrations, as well as a more transparent system. I have always been told that there are likely budget issues that prevent it. It amazes me that while FINRA is not willing to add information onto the CRD system, FINRA arbitration is willing to help get reporting off the CRD system so routinely.

I certainly would not dispute that in instances where there are two John Smiths at a brokerage firm and they put the reporting on the wrong John Smith's record, he should be able to get that reporting off, but the "clearly erroneous" and "false" standards are being improperly manipulated by the brokerage firms and brokers FINRA regulates through FINRA's own arbitration system.

One would think that with the public relying on the veracity and transparency of the CRD system, as well as the supervisory responsibilities of broker dealers, how the public is served by telephonic, non-adversarial hearing, at which no evidence is entered except testimony of someone that no one viewed.

The abuse of this system must end. You have the data; you have the awards granting expungement. The patterns are clear.

Your time and attention to this matter is greatly appreciated.

Very truly yours,

Jenice L. Malecki