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January 9, 2018



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Via Federal Express

Financial Industry Regulatory Authority
Attn: Marcia E. Asquith
Office of the Corporate Secretary
1735 K Street NW
Washington, DC 20006-1506

Re: **FINRA Regulatory Notice 17-42**
(December 6, 2017)

Dear Ms. Asquith:

We write in response to the request for comment on the proposals concerning “expungement of customer dispute information” as set forth in FINRA’s Regulatory Notice 17-42, which was dated December 6, 2017 (hereinafter, the “Proposal”).

Since 1977, this law firm has been actively involved in the representation of clients having legal matters concerning the financial services industry in general, and arbitration proceedings before FINRA Dispute Resolution (formerly NASD arbitration) in particular. In our view it is essential that FINRA Dispute Resolution be viewed by all as a neutral forum where both public customers, and industry members and their registered representatives can receive a fair and impartial resolution of their disputes. Over the past decades, many changes to FINRA’s Code of Arbitration (the “Code”) have enhanced FINRA’s reputation as a fair and impartial forum; unfortunately, that is not the case with respect to the changes to the procedures for expungement, as set forth in the Proposal.

This topic is of great importance to registered persons, given the relatively recent evolution of industry rules concerning the reporting of customer complaints. Today, most customer complaints against a registered person, including false and even defamatory claims, must immediately be reported on their CRD registration record; and there they must remain, publicly available on the Internet to be viewed by their customers, potential customers and anyone else, unless and until “expunged” from the CRD system. Traditional notions of basic fairness and due process demand that the right to seek expungement of false claims not be subjected to unreasonable conditions, restrictions and excessive fees; unfortunately, the Proposal would do just that, and thereby would diminish FINRA’s reputation as a fair and neutral forum. In our view, the proposed amendments to FINRA’s Codes of

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Arbitration Procedure relating to requests to expunge customer dispute information from the securities industry registration records of associated persons, as set forth in the Proposal, are ill-advised and should not be implemented, for the reasons set forth below. For ease of reference, we address the proposed changes in the order set forth in the Proposal.

“All Requests for Expungement of Customer Dispute Information”

FINRA proposes to require that, for all requests for expungement, the associated person seeking that relief must appear at the hearing, and that *“to grant expungement, a three-person panel of arbitrators must unanimously agree that expungement is appropriate”* (emphasis ours.) We believe this aspect of the Proposal is both inappropriate and unfair, for several reasons. First, under Section 12410 of the Code all rulings and determinations of the panel concerning customer disputes are to be made *“by a majority of the arbitrators”* (An identical rule is applicable to industry disputes under Section 13414 of the Code.) We can conceive of no good-faith basis for treating an associated person’s expungement request differently than a decision on the merits of a customer complaint. Any duly-appointed FINRA panel has the authority, by a majority vote, to enter an Award which could be financially and/or professionally disastrous for a registered person; such an Award by a majority of an arbitration panel would be final, and non-appealable (except on the very limited grounds applicable to a motion to vacate the award). If a determination by a majority of a FINRA arbitration panel is sufficient to financially or professionally destroy a registered representative who appears as a respondent before that panel, why should a unanimous decision of a FINRA arbitration panel be required to remove a false or erroneous claim from that associated person’s registration record?

To require a unanimous decision on any expungement request obviously would give a single individual sitting on a three-member arbitration panel the power to prevent, for improper reasons or no good reason at all, a meritorious request that a false or erroneous claim be removed from a representative’s CRD record. The Proposal to require a unanimous decision for expungement reflects a bias in favor not just of customer claimants, but of the claimants’ bar, and an antipathy toward registered persons seeking to maintain their good name and reputation in the industry. If FINRA truly desires to maintain *“the integrity of the public record,”* then its rules should facilitate – not complicate – the removal from the CRD record of claims that are false. We strongly urge that this aspect of the Proposal be rejected.

“Expungement Arbitrator Roster”

Under the Proposal, a new roster of *“expungement arbitrators”* would be culled from the *“public chairperson”* panel. To be included on that new panel, an individual would be required to (1) complete *“enhanced expungement training,”* (2) be admitted to practice law in at least one jurisdiction, and (3) have *“five years’* experience in litigation, state or federal securities regulation, administrative law, or as a judge.” Conspicuously *absent* from this list, of course, is anyone having five or more years’ experience in the securities industry (from which substantially all customer arbitration claims arise).

Conspicuously *included* within the requisite “disciplines” for inclusion on the expungement arbitrator roster would be members of the claimants’ bar, whose business is the litigation of customer complaints against associated persons and member firms. The claimants’ bar, of course, has a strong financial interest in having *all* customer complaints remain available on the CRD system; and claimants’ lawyers would certainly populate the proposed “expungement arbitrator roster.” This fact, coupled with the Proposal’s requirement of “unanimity” concerning any expungement request, would virtually guarantee that most, if not all, expungement requests made following adoption of the Proposal would be denied.

We believe that any FINRA arbitrator who is qualified to fairly decide the merits of a customer complaint should be equally capable of “understanding the unique nature of a request for expungement.” The creation of a new “expungement arbitrator roster” will neither promote a fair and impartial resolution of expungement requests, nor serve to the “maintain the integrity of the public record.”

“Expungement Requests In Simplified Arbitration Cases”

The Proposal would require in simplified cases that a registered person “wait until the conclusion of a customer’s simplified arbitration case to file an expungement request, which . . . would be heard by a panel selected from the expungement arbitrator roster.” For all the reasons set forth above, there should *not* be a separate “expungement arbitrator roster” created to consider expungement requests, and this is especially so with regard to “simplified” cases, for several reasons. First, there is no person more qualified to consider an expungement request than the arbitrator who hears all the evidence in the customer’s “simplified arbitration” case. Second, the additional time, effort, and expense required of an associated person to bring a *new* expungement proceeding after the conclusion of a “simplified arbitration” would make the process anything *but* “simplified” for the associated person. Once again, this aspect of the Proposal suggests an antipathy toward registered persons, and to expungement requests in general.

“Expungement Requests Relating to Customer Complaints That Do Not Result in an Arbitration Claim”

The Proposal would also require that an associated person seeking expungement of a customer complaint do so “within one year of the member firm initially recording the customer complaint to CRD.” In our view, a one-year window of eligibility for a registered representative to make an expungement request would be unreasonably short, arbitrary, and unfair, for several reasons.

First a one-year eligibility window is inconsistent with other provision of the Code. For many years, Section 12206 of the Code has provided a *six (6) year period of eligibility* for customers to file an arbitration claim following the “occurrence or event giving rise to the claim.” There is no basis for a one (1) year eligibility period for a registered representative to file an expungement request, other

than to create a trap for an unwary registered representative, and to cause well-founded expungement requests to be forever time-barred.

Also, a one-year eligibility period for expungement requests would, as a practical matter, lead to inequitable results. In our experience, it sometimes happens that a registered representative may be unaware, for a variety of business or personal reasons, that a member firm (perhaps his or her previous employer) has reported a customer complaint on his or her CRD. Under the Proposal, the expiration of one-year from the date of the initial CRD report would be a bar to him or her making an expungement request, regardless of how ill-founded and meritless the customer complaint may have been.

This aspect of the Proposal once again reflects antipathy toward registered persons, and a bias in favor of the claimants' bar. For these reasons, we strongly urge that the "eligibility period" for expungement requests, if such a limitation is to be added to the Code, be the same as the eligibility period for customer complaints of Section 12206 of the Code, i.e. six (6) years.

"Requesting Expungement Relief in the Underlying Customer Case (Where an Associated Person Is Named as a Party)"

We would have no objection to a rule that would require an associated person, who has been named as a party *and has appeared in the underlying customer case*, to make his or her expungement request during the course of the underlying customer case. As stated above, we believe the arbitration panel assigned to resolve the underlying customer case is best situated to resolve a request that a claim be expunged from the associated person's record. However, we have the following objections and comments regarding specific aspects of this part of the Proposal:

- Where the registered person has (for whatever reason) not appeared as a respondent in the underlying customer case, no such limitation should apply; in that case, he or she should have the otherwise-applicable eligibility period in which to bring an expungement request. (As also set forth above, the "eligibility period" of such requests should be the same as the eligibility period for customer complaints, i.e., 6 years.)
- The Proposal would require that the expungement request be made by the individual respondent "no later than 60 days before the first scheduled hearing session." There is no good-faith basis for such a limitation, other than to create a potential trap for the unwary; and, such a limitation is inconsistent with Section 12503 of the Code, which provides that "a party may make motions in writing, or orally during any hearing session." Basic fairness requires that an individual respondent in the arbitration be permitted to make a motion for expungement at any time, up to an including closing argument in the underlying customer case.

- The Proposal also would impose an additional “filing fee” for the making of an expungement motion: “along with the expungement request, the associated person would be required to pay a filing fee of \$1,425 or the applicable filing fee provided in Rule 12900(a)(1), whichever is greater.” Clearly, the only purposes of this amendment would be to financially punish the associated person for making an expungement request, and to generate additional (but unwarranted) revenue for FINRA. The presentation of an expungement request by a registered person who is a party to the underlying customer case does not require any additional administrative time or effort, either by FINRA, or by the arbitrators; thus, there is no good-faith basis for charging this new fee. Here again, the Proposal reflects an antipathy on the part FINRA both toward registered persons and toward expungement requests, and has an adverse effect on FINRA’s reputation as a fair and neutral forum.
- The Proposal specifies that although the panel would be required to agree unanimously to grant expungement, “in deciding the customer’s claims, however, a majority agreement of the panel would continue to be sufficient.” Again, there is no good-faith basis for allowing a final award to be rendered on a customer complaint by a majority of the arbitration panel, but requiring unanimity to grant the associated person’s expungement request.
- We strongly object to the Proposal’s requirement that, where a customer complaint has been resolved by settlement, the panel appointed in the underlying customer case “would not decide the associated person’s expungement request.” Once again, there is no good-faith basis for requiring an associated person to forfeit all of the time, effort and expense incurred in the underlying customer case, and to begin a new FINRA proceeding in order to make an expungement request. It is common for customer cases to settle, sometimes on the eve of the hearing, or even after several days of hearing on the merits. By that point, the associated person and/or his or her member firm will have incurred substantial attorneys’ fees, forum fees, and costs, in the defense of the customer’s claims; in addition, by that point, huge amounts of time and energy will have been devoted to the defense of the case, the selection of an arbitration panel, motion practice, and so on. There is no good-faith reason why all of that time, energy and money should be forfeited by requiring the associated person to commence a new FINRA proceeding for the purpose of making an expungement request. The arbitration panel selected to preside over the arbitration since its inception is clearly best suited to hear the associated person’s expungement request; this is perhaps best demonstrated by other parts of the Proposal, which bemoan the occasional instance where an expungement request is made to an arbitration panel that does not have the benefit of hearing from the claimant. Where a customer case is

settled or dismissed before the completion of the hearing on the merits, the arbitration panel in that case has the advantage of having considered all of the pleadings, evidence and argument which the claimant and his or her lawyers have offered up to and including the point of settlement, or dismissal. The requirement that a new proceeding be initiated in this circumstance once again reflects an antipathy toward registered persons and expungement requests, which diminishes FINRA's reputation as a neutral forum.

- The Proposal also would prohibit a registered person who is *not* named as a respondent from intervening in the arbitration. This part of the Proposal is both unfair, and unnecessary. It is not uncommon for claimants' lawyers to name a member firm, but *not* name the associated person responsible for the alleged investment-related claim; this presents a tactical advantage for the claimants' bar, as the un-named associated person is less likely to participate vigorously in defense of the claim. In many cases, the un-named associated person may no longer be registered with the member firm when the customer complaint is filed, or when it goes to hearing; a registered person in this circumstance rightly may wish to intervene in the arbitration proceeding, and to protect his or her reputation by seeking expungement. The Proposal, however, "would foreclose the option for an un-named person to intervene in the underlying customer case." Once again, it is difficult to imagine any good-faith basis to "foreclose" a registered representative's right to intervene in an arbitration which concerns his or her alleged sales practice violations. Clearly, allowing intervention would be the most economical way to resolve both the customer's claims, and the associated person's request for expungement; to prohibit intervention in this circumstance serves no purpose, other than to allow the claimants' bar to make sure that the associated person does not participate in the defense of the customer's claims. Once again, this aspect of the Proposal would not enhance FINRA's reputation as a fair and neutral forum.

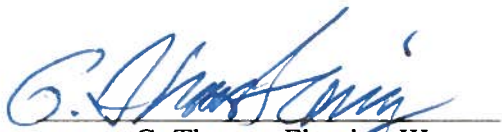
Conclusion

Registered persons seeking expungement of a customer claim that appears on their CRD Registration Record should be entitled to the same treatment under the FINRA Code as a customer bringing an arbitration claim: a fair hearing by a qualified panel of arbitrators, under procedural rules that are neither biased in favor of, nor prejudiced against, either side. Unfortunately, a plain reading of the Proposal contained in Regulatory Notice 17-42 leads to the conclusion that FINRA, bowing to pressure from the claimants' bar, is biased in favor of allowing ill-founded claims to remain on an individual's CRD Registration Record, and is prejudiced against the notion that a registered person should be given a fair opportunity to protect his or her reputation, and to have false claims expunged from his or her CRD Record.

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For all of the reasons set forth above, we urge that the Proposal set forth in Regulatory Notice 17-42 be rejected.

Very truly yours,



G. Thomas Fleming III

Kevin K. Fitzgerald

of

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