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April 15, 2008

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA- 2008-010

Dear Ms. Morris:

The Investor Rights Clinic at Pace University School of Law, operating through John Jay Legal Services, Inc. ("PIRC"), welcomes the opportunity to comment on FINRA's rule proposal to establish new procedures for arbitrators to follow when considering expungement relief. PIRC is a law school curricular program in which J.D. students, for academic credit and under close faculty supervision, represent individual investors of modest means in arbitrable securities disputes. Through our representation, we have become aware of efforts by brokers and/or brokerage firms to request expungement of their CRDs on grounds not recognized by NASD Conduct Rule 2130.

We strongly support this rule proposal as it aims to eliminate instances of arbitrators inappropriately including in their awards an order to expunge information from a CRD. Expungement is the equivalent of erasing an event by removing a record from public access.[1] Thus, before agreeing to issue an expungement order, courts need to weigh the public's interest in maintaining accurate public records with the harm an individual may sustain if that record is kept.[2] Courts emphasize that expungement is an extraordinary form of relief since it erases all

[1] *See* United States v. Crowell, 374 F.3d 790, 792 (9th Cir. 2004) (holding that federal courts have the inherent power to expunge criminal records in appropriate and extraordinary circumstances despite a lack of express legislative authority).

[2] *See* National Treasury Employees Union v. I.R.S., 601 F.Supp. 1268 (D.D.C. 1985) (holding that expungement was proper where the records substantially harmed the individual in his efforts to secure employment); U.S. v. Henderson, 482 F.Supp. 234 (D.N.J. 1979) (holding that the inherent authority to expunge is a narrow one exercised only in extraordinary circumstances); Meinken v. Burgess, 426 S.E.2d 876 (Ga. 1993) (providing expungement is warranted only when state interest in maintaining records is outweighed by individual's interest in freedom from harm from the records).

evidence of the event[3] and has an exceedingly narrow scope.[4] Some courts have stated that expunging information amounts to the "judicial editing of history" that may "produce a greater harm than that sought to be corrected."[5] Hence, public policy supports a cautious utilization of such an extreme remedy.

In the broker-dealer context, expungement of information from the CRD also requires a balancing of competing interests: brokers want to protect their reputations from frivolous claims and investors want to know the complete historical record and have access to pertinent information. Both investors and brokers rely on the CRD, through BrokerCheck and other state disclosure programs, for accurate information. Indeed, FINRA recognizes in its rule proposal that "accurate and complete reporting in the CRD system is an important aspect of investor protection."[6] Erasing such information runs the risk of creating inaccurate records, essentially misrepresenting a broker's history. However, brokers should have a right to have trivial or completely baseless items removed.[7]

In settlement situations, as FINRA noted in its proposal, since the enactment of Rule 2130, arbitrators have been directing expungement in their award even though they had not reviewed settlement terms or other corresponding documentation or conditions of the settlement, or otherwise explained the basis of their expungement decision.[8] FINRA's current rule proposal will now require arbitrators to comply with Rule 2130 by following specified procedures before including expungement relief in their award. This will ensure that the extraordinary expungement remedy will be available only to those settling brokers and firms who prove to the panel that the claim or allegations against them meet the Rule 2130 criteria. It will also reduce pressure on customers to accede to expungement requests made by brokers and their firms as a condition of settlement.

Finally, we strongly support the proposed rule's requirement that arbitrators assess all forum fees against the party requesting expungement. This ensures that investors are not taxed with the cost of a collateral proceeding that serves no benefit and even harms their interests.

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[3] *See* State v. M.B.M., 518 N.W.2d 880, 882 (Minn. Ct. App. 1994) (holding that expungement means to "erase all evidence of the event as if it never occurred").

[4] *See* Rogers v. Slaughter 469 F.2d 1084 (5th Cir. 1972) (holding that expungement is an "exceedingly narrow" remedy and is only granted in very narrow circumstances and not to be used regularly); McGough v. Corrections Corp. of America, 2008 WL 313064, *4 (M.D.Tenn. Feb. 1. 2008) (holding that there is a strong public interest in maintaining accurate records in civil cases).

[5] Rogers, 469 F.2d at 1085.

[6] Proposed Rule Change by FINRA to adopt Rule 12805 of the Customer Code and Rule 13805 of the Industry Code, March 13, 2008, at 7.

[7] Rosensweig v. Morgan Stanley & Co., Inc., 494 F.3d 1328 (11th Cir. 2007) (affirming the confirmation of arbitral award and order requiring firm to expunge record as properly written to eliminate all adverse reports based on Rosensweig's discharge from Morgan Stanley, but nothing else).

[8] In the Matter of Kay v. Abrams, 2008 WL 451440 (Sup. Ct. N.Y. Co. Feb. 21, 2008) (affirming an arbitral award and panel's expungement order even though the award lacked an explanation for the expungement). Notably, the court acknowledged that FINRA's proposed rule change to adopt Customer Code Rule 12805 "would clearly be in the public interest." *Id.* at *14.

Thank you for providing us with the opportunity to comment on this proposed rule change. Please do not hesitate to contact us if you have any questions regarding these comments.

Respectfully Submitted,

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