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April 24, 2008

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

Re: SR-FINRA-2008-010

To Whom It May Concern:

I am writing in response to the SEC's solicitation of comments on FINRA's proposed Rule 12805 of the Customer Code relating to procedures for arbitrators to follow when considering requests for expungement relief, as set forth in Release 34-57572. I am a law professor who has written extensively on SRO securities arbitration and who is a FINRA arbitrator. While implementation of the procedures and safeguards set forth in the proposed Rule would work an improvement over the current system, I do not believe that arbitration panels should play a significant role in determining whether customers' complaints are deleted from a broker's public record. The regulators responsible for maintaining the CRD should have the full authority with respect to expungement.

The Central Registration Depository ("CRD"), the securities industry online registration and licensing database, maintains the qualification, employment and disclosure histories of more than 500,000 registered brokers.¹ Developed by NASAA and NASD and implemented in 1981, the CRD is considered one of the best licensing systems in existence.² Investors can research brokers' records through the FINRA BrokerCheck, a free online tool. Indeed, FINRA advises investors that BrokerCheck "should be the first resource [they] turn to when choosing whether to do business with a particular broker or brokerage firm."³

Accurate and complete information is the CRD's essential characteristic. To permit expungement of information about customers' complaints from the CRD is to allow the deletion of a historical fact; accordingly, expungement should be granted sparingly and only for demonstrated good cause. NASD first proposed, and the SEC approved, procedures for expungement in 2003⁴ because they determined that additional safeguards were necessary to

¹ Central Registration Depository, <http://www.finra.org/RegulatorySystems/CRD/index.htm>.

² CRD at a Glance, http://www.nasaa.org/industry__regulatory_resources/CRD__IARD/.

³ Check the Background of Your Investment Professional,

<http://www.finra.org/InvestorInformation/InvestorProtection/ChecktheBackgroundofYourInvestmentProfessional/index.htm>.

⁴ Securities Exchange Act Release No. 48933 (December 16, 2003), 68 FR 74667 (December 24, 2003).

ensure full consideration of all competing interests before directing expungement of customer dispute information from the CRD system.⁵ Thus, Rule 2130 recognizes three narrow grounds for expungement: (i) the claim, allegation, or information is factually impossible or clearly erroneous; (ii) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (iii) the claim, allegation, or information is false.⁶ Since the adoption of Rule 2130, FINRA requires all arbitrators to take a one-hour online training program that focuses on the specific findings arbitrators should make in deciding to grant expungement relief.

However, notwithstanding FINRA's efforts to ensure that arbitration panels adhere to the procedures established in Rule 2130, a recent PIABA study of 200 stipulated or settled NASD customer awards issued in 2006, in cases in which the statements of claim were filed on or after Rule 2130's effective date, showed that the Rule's procedures and safeguards have not worked as contemplated. The study found that arbitrators granted brokers' requests for expungement in 98% of the awards and, even more alarming, did not conduct fact-based hearings in 71% of these cases.⁷

After release of the PIABA study, FINRA proposed new Rule 12805 that would explicitly require arbitrators to find and document that one of the narrow grounds for expungement exists.

In my opinion, however, the integrity of the CRD is such an important and integral part of an effective investor education and protection system that only the regulators whose responsibilities include, first and foremost, protection of the investing public should make decisions about removing information from the record. Arbitrators play a vital role in the securities arbitration process by deciding the specific disputes before them. The arbitrators' mission, however, does not include consideration of the larger policy implications and considerations associated with an effective CRD system. Accordingly, FINRA and NASAA should be the sole decision-makers on expungement.

Sincerely,

Barbara Black

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Director of Corporate Law Center

⁵ For further background, see Proposing Release 34-47435 (Mar. 4, 2003).

⁶ Rule 2130 requires that FINRA members or associated persons name FINRA as an additional party in any court proceeding in which they seek an order to expunge customer dispute information or request confirmation of an award containing an order of expungement. FINRA may waive this requirement if the arbitration panel made one of the three above-enumerated findings. FINRA may also waive the requirement if it determines that the expungement relief and accompanying findings on which it is based are meritorious and that expungement would not have a material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements.

⁷ PIABA Study of Settled or Stipulated NASD Customer Awards, https://secure.piaba.org/piabaweb/html/modules/ContentExpress/img_repository/ExpungementStudy09242007.pdf.