

Faculty Supervisors

JONATHAN BROWN
DAVID N. DORFMAN
MARGARET M. FLINT
ROBIN FRANKEL
ELISSA GERMAINE
VANESSA MERTON
DANIELLE SHALOV

JOHN JAY LEGAL SERVICES, INC.

ELISABETH HAUB SCHOOL OF LAW
PACE UNIVERSITY
80 NORTH BROADWAY
WHITE PLAINS, NY 10603
TEL 914-422-4333
FAX 914-422-4391
[REDACTED]

Executive Director

ELISSA GERMAINE

Clinic Administrator

ROBERT WALKER

Staff

BARBARA SARMIENTO
BRENDA THORNTON

October 22, 2020

VIA ELECTRONIC SUBMISSION

J. Matthew DeLesDernier, Assistant Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609
rule-comments@sec.gov

Re: File No. SR-FINRA-2020-030, Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests

Dear Mr. DeLesDernier,

The Pace Investor Rights Clinic at the Elisabeth Haub School of Law at Pace University, operating through John Jay Legal Services, Inc. (PIRC),¹ welcomes the opportunity to write this comment letter in support of FINRA’s proposed amendments to the Codes of Arbitration Procedure. We support the proposed amendments and believe they will improve the current process relating to the expungement of customer dispute information.

The proposed rule change would amend the Codes to: (1) impose requirements on expungement requests (a) filed during an investment-related, customer-initiated arbitration (“customer arbitration”) by an associated person, or by a party to the customer arbitration on-behalf-of an associated person (“on-behalf-of request”), or (b) filed by an associated person separate from a customer arbitration (“straight-in request”); (2) establish a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide straight-in requests; (3) establish procedural requirements for expungement hearings; and (4) codify and update the best practices of the Notice to Arbitrators and Parties on Expanded Expungement Guidance (“Guidance”) that arbitrators and parties must follow. The

¹ PIRC opened in 1997 as the nation’s first law school clinic in which law students, for academic credit and under close faculty supervision, provide pro bono representation to individual investors of modest means in arbitrable securities disputes. See Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000); see also Press Release, Securities Exchange Commission, SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings (Nov. 12, 1997), available at <http://www.sec.gov/news/press/pressarchive/1997/97-101.txt>.

proposed rule change would amend the Customer Code to specify the procedure for requesting the expungement of customer dispute information arising from simplified arbitrations. It would also amend the Codes to establish requirements for notifying state securities regulators and customers of expungement requests.

FINRA recognizes the importance of making information contained in the CRD publicly available through BrokerCheck to help investors make informed decisions about individual brokers and firms with which they choose to invest their hard-earned money and retirement savings. We support FINRA's efforts to improve the accuracy of the CRD and the integrity of the expungement process through this rule proposal. However, we believe that FINRA should continue to refine its efforts to encourage customer participation. In this submission, we will highlight aspects of the proposed amendments to the expungement process, including procedural changes, amendments to the requirements of expungement requests, the creation of a special arbitrator roster, amendments to the expungement hearing process, and customer participation.

I. Method and Required Contents of an Expungement Request

The proposed rule sets forth requirements for expungement requests during customer arbitrations. It would establish different requirements for non-simplified and simplified customer arbitrations, and for an associated person named or unnamed to a (non-simplified or simplified) customer arbitration. Additionally, it would limit how and when expungement requests may be made during a customer arbitration.

The proposed rule change would require the party requesting expungement to explain whether expungement of the same customer dispute information was previously requested and, if so, how it was decided. This requirement would prevent parties from making second requests for expungement, for example, where brokers may individually submit an expungement request after their firm had already submitted a request on their behalf and been denied. This is consistent with the existing FINRA Guidance that states that arbitrators should ask a party requesting expungement whether an arbitration panel or a court previously denied expungement of the customer dispute information at issue and, if there was a prior denial, to deny the expungement request. The proposed requirement addresses concerns regarding associated persons making second requests to expunge the same customer dispute information and preserves the final and binding nature of arbitration awards.

Under the proposed rule change, if a named associated person requests expungement during the customer arbitration, the request must be included in the answer or a pleading requesting expungement. In addition, if an expungement request fails to include any of the proposed requirements for requesting expungement, the request would be considered deficient and would not be served unless the deficiency is corrected. These requirements should help ensure that FINRA, the panel, and the parties understand who is requesting expungement and which disclosure is the subject of the request. They also provide the panel considering the expungement request with information about the dispute giving rise to the disclosure the party is seeking to expunge.

A. Expungement Requests During a Simplified Arbitration

The proposed amendments would codify an associated person's ability to request expungement when named as a respondent in a simplified arbitration, and for other parties to request expungement on behalf of an unnamed person. It would also establish procedures for requesting and considering expungement requests in simplified arbitrations that are consistent with the expedited nature of these proceedings. The proposed changes limit arbitrator shopping by requiring an arbitrator to decide an expungement request once it is filed by the associated person and by requiring that any withdrawal or denial of the request be denied with prejudice. This would preclude associated persons from circumventing the simplified arbitration panel and filing a straight-in request. PIRC supports these proposals, recognizing that these requirements work to limit arbitrator shopping while reducing the chance that a request could be refiled.

B. Straight-In Expungement Requests

Currently, Rules 12805 and 13805 do not address when a party would not be permitted to file an expungement request in the forum. The Guidance, however, describes several circumstances when an expungement request should be ineligible for arbitration. The proposed rule change would codify the limitations contained in the Guidance, providing that an associated person may not file a separate request for expungement of customer dispute information until the customer arbitration has concluded. The proposed rule change would codify and expand upon the existing Guidance by providing that an associated person may not file a straight-in request under proposed Rule 13805 if the customer arbitration, litigation, or complaint that gave rise to the customer dispute information has not closed.

In addition to prohibiting the filing of duplicative expungement requests, the proposed rule would prevent an associated person from obtaining a decision on an expungement request while the customer arbitration is still ongoing. This allows for the panel hearing an expungement request to be able to consider the final factual record from the customer arbitration before issuing a recommendation and works to avoid the possibility of inconsistent awards.

PIRC also supports the proposed prohibition of an associated person filing a straight-in request against a customer. While we believe that FINRA should encourage customer participation in expungement hearings (as discussed further below), we agree that customers should not be compelled to participate in a separate proceeding to decide an expungement request after their claim has been resolved.

II. Special Arbitrator Roster

The proposed rule establishes a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide straight-in requests. Arbitrators on the Special Arbitrator Roster would be public arbitrators who are eligible for the chairperson roster.

PIRC supports establishing a three-person panel of experienced arbitrators with enhanced training. The lack of customer involvement in the process (discussed further below) makes it more important to have a panel of multiple arbitrators who can serve as factfinders by requesting

evidence and asking questions. The proposed changes should lead to an increased level of engagement by the panel and attempt to ensure a more complete factual record on which the panel bases its decision. The enhanced expungement training should highlight to the special roster the importance of the role they play in maintaining the integrity of the CRD record and that expungement should only be recommended in the limited circumstances listed in FINRA Rule 2080.

In addition, PIRC supports the random selection process from the Special Arbitrator Roster for straight-in requests, as well as the proposed requirements that parties can no longer stipulate to the use of specific arbitrators, strike an arbitrator without cause, or stipulate to the use of fewer than three arbitrators. These proposed changes are appropriate as straight-in requests occur outside of the typical adversarial arbitrator selection process.

III. Expungement Hearings

A. Appearance by Associated Person

The proposal requires the associated person who is seeking expungement of the customer dispute information to appear personally at the expungement hearing. PIRC agrees with FINRA that if an associated person is requesting permanent removal of information from his or her CRD record, the associated person must participate in the hearing to respond to questions from the panel and those customers who choose to participate.

B. Customer Participation in Expungement Hearing

Customers need to know about the hearing in order to participate. To help ensure that customers are notified about the expungement hearing, the proposed rule provides that the associated person file with the panel all documents provided to the customers as part of the notice requirements. It also provides that the Director notify all customers whose customer arbitrations, civil litigations, and customer complaints gave rise to the customer dispute information that is a subject of the expungement request. These enhanced notification procedures should help to encourage customer participation in expungement hearings; however, we recommend that FINRA consider further improvements to notice (as discussed below).

The proposed rule change also provides that the customer may appear at the expungement hearing by telephone, in person, or by video conference. FINRA recognizes the importance of encouraging customers and their representatives to participate in the expungement hearing. In our experience, customers are hesitant to appear at expungement hearings for a variety of reasons. They may be embarrassed, nervous, intimidated by the process or their former broker, or worried about potential retaliation. In addition, typically, after their case is closed, customers have little incentive to dedicate additional time and potential attorney's fees to the matter, which they often want to put behind them. FINRA reasons that by allowing customers alternative options to participate in the hearing, customers will feel encouraged to participate and bring important information to the hearings that otherwise might not be considered, and we support this proposal. While we recognize the difficulty in fostering customer participation under the current and proposed expungement framework, we are concerned that the proposed

amendments may not sufficiently increase customer participation. We urge FINRA to continue to explore ways to do so. For example, in his October 12, 2020 comment letter on this rule proposal, Professor Benjamin Edwards suggests several proposed incentives to encourage customer participation and improve customer notice procedures. Further, we support the suggestion made by Steven Caruso in his September 28, 2020 comment letter that FINRA should monitor and publicly disclose the impact of the changes in order to assess whether the proposed amendments are addressing the underlying concerns about the process and FINRA's investor protection mission.

Thank you for the opportunity to submit our comments.

Respectfully yours,

Amanda Skrelja
Student Intern, PIRC

Paige Guarino
Student Intern, PIRC

William Lapadula
Student Intern, PIRC

Zachary Dukoff
Student Intern, PIRC

Elissa Germaine
Supervising Attorney, PIRC