

January 19, 2021

Via Electronic Submission

J. Matthew DeLesDernier  
Assistant Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
rule-comments@sec.gov

Re: File Number SR-FINRA-2020-030

Dear Assistant Secretary DeLesDernier:

I write to expand on my comments on the series of changes to FINRA's expungement process proposed by SR-FINRA 2020-030 and to provide my comments in response to the amendment FINRA proposed on December 18, 2020 (the Amended Proposal). I thank the Commission for requesting comment on the Amended Proposal. I am an Associate Professor of Law at the University of Nevada, William S. Boyd School of Law. I have carefully studied the current arbitration-facilitated expungement process and do not believe that the Amended Proposal sufficiently addresses the core problems with the current expungement process. Many of my concerns about the current expungement process are detailed in a recently-published law review article entitled *Adversarial Failure*.<sup>1</sup> Additional concerns were transmitted to the Commission in my earlier letter dated October 12, 2020.<sup>2</sup> As the Commission would likely benefit from oral presentations from myself and others who have studied this issue, I request a hearing pursuant to Rule 19b-4.

FINRA deserves praise for its attempts to improve the current expungement system and many of the Amended Proposal's changes would improve the arbitration-facilitated expungement process. The changes it embraced by amending the Proposal will do some real good. Even though the Amended Proposal offers an improvement over the status quo, the changes to the process under consideration do not go far to make arbitration-facilitated expungement acceptable.

Much of my concern about the current expungement process flows from personal experience. As someone who has represented customers opposing expungement requests, I have seen far too many flaws with the system to have confidence that that the current system, even if modified by the Amended Proposal, will sufficiently protect the public's interest.

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<sup>1</sup> My earlier comment letter provided the Commission with a copy of the draft article. It is now published and publicly available at this citation: Benjamin P. Edwards, *Adversarial Failure*, 77 WASH. & LEE L. REV. 1053 (2020).

<sup>2</sup> A copy of my prior letter is available here: <https://www.sec.gov/comments/sr-finra-2020-030/srfinra2020030-7893494-224270.pdf>.

The existing expungement system, even as modified by the Amended Proposal, unduly burdens competition and efficiency, conflicts with the core rationale for federal securities laws, seemingly conflicts with the text of the federal securities laws, and is inconsistent with the public interest and the protection of investors. The Commission should require significant changes to the Amended Proposal or, in the alternative, use its authority to institute proceedings to amend FINRA’s rules governing expungement.<sup>3</sup> Below, I detail specific concerns with the Amended Proposal and divide my comments into two main groups. The first explains why the Commission should require FINRA to coordinate with states and other stakeholders create an administrative expungement process without making arbitrators—many of whom lack legal training—responsible for deciding whether public information should be expunged. My second group of comments addresses improvements that should be made as stopgap measures to mitigate the damage being done by arbitration-facilitated expungement.

## **I. The Commission Should Require FINRA to Abandon Arbitration Facilitated Expungement**

Long experience has shown that frequently one-sided, arbitration-facilitated expungement does not reliably surface the information and arguments needed for arbitrators to make decisions about whether or not to expunge customer dispute information. My comments below explain why the Commission should require FINRA to cease using arbitration hearings to facilitate the removal of valuable public information. As it stands, the system acts as a fraud-enabling farce.<sup>4</sup>

### **A. The Amended Proposal Improperly Relies on an Adversarial Arbitration Process**

As I explained in my initial letter, the current expungement process—even as modified by the Amended Proposal—improperly relies on an adversarial system to surface information relevant to whether customer dispute information should be expunged. The current adversarial structure fails to function because expungement hearings have most often proceeded as *de facto ex parte* hearings. In its response to earlier comments (FINRA’s Response), FINRA effectively conceded that the expungement hearings conducted within its forum often lack any meaningful adversarial scrutiny.<sup>5</sup> In response to one commenter, FINRA stated that “[t]hese hearings are also often one-sided as the customer or the customer’s representative has little incentive to participate if the customer’s concerns have been resolved.”<sup>6</sup> FINRA also acknowledged the general lack of adversarial scrutiny when it explained that it determined to strip parties of the ability to rank or strike arbitrators because of the concern that parties would use process “to assemble a panel that could be more favorable to recommending expungement.”<sup>7</sup>

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<sup>3</sup> See 15 U.S.C.A. § 78s (c) (stating that the Commission may amend “the rules of a self-regulatory organization . . . as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization. . . or otherwise in furtherance of the purposes of this chapter”).

<sup>4</sup> See Benjamin P. Edwards, *Adversarial Failure*, 77 Wash. & Lee L. Rev. 1053, 1101-1103 (2020) (describing how one advisor secured expungements and then went on to run a Ponzi scheme).

<sup>5</sup> A copy of FINRA’s Response is available here: <https://www.sec.gov/comments/sr-finra-2020-030/srfinra2020030-8163215-226938.pdf>.

<sup>6</sup> FINRA’s Response, at 4.

<sup>7</sup> *Id.*, at 6.

Taken together, the changes contemplated by the Amended Proposal do not sufficiently remedy the flaws with using an adversarial arbitration system to effectively decide expungement requests.

B. Law Requires that an “Administrative Process” Be Used to Contest Dispute Information in the CRD Database

The current expungement system seemingly violates federal law which directs that FINRA “shall adopt rules establishing *an administrative process* for disputing the accuracy of information provided in response to inquiries under this subsection in consultation with any registered national securities exchange providing information pursuant to paragraph (1)(B)(ii).”<sup>8</sup> The current expungement system does not appear to be an administrative process.

Although the statute does not define “administrative process,” other definitions may aid in understanding the statute’s meaning. US Legal defines “administrative process” as “the procedure used before administrative agencies, especially the means of summoning a witness before such agencies using a subpoena.”<sup>9</sup> Similarly, Black’s Law Dictionary defines “Administrative Hearing” as “[a]n administrative-agency proceeding in which evidence is offered for argument or trial.”<sup>10</sup>

The Commission should require FINRA to explain either why the current system qualifies as an “administrative process” or why this statutory provision does not apply. Now, an arbitration process—not an administrative one—results in the deletion of information from important records. This seemingly conflicts with the Congressional directive that an administrative process should be used to dispute information.

C. The Current Expungement Process Harms Non-Parties to FINRA’s Submission Agreement

My initial letter explained that significant evidence indicates that the expungement process now suppresses important public information and tends to increase financial misconduct. A study forthcoming in the *Journal of Financial Economics*—which FINRA relied upon in the initial Proposal—quantifies how the current process suppresses information indicating that particular associated persons pose significant risks to the public.<sup>11</sup> The authors found that associated persons who secured expungements through the current process “are 3.3 times as likely to engage in new misconduct as the average broker.”<sup>12</sup> Despite this finding, Amended Proposal continues to advocate for using a modified form of the existing process instead of making more meaningful changes.

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<sup>8</sup> 15 U.S.C.A. § 78o-3(i)(3) (West) (emphasis added).

<sup>9</sup> US Legal, Administrative Process, <https://definitions.uslegal.com/a/administrative-process/> (last visited Jan. 19, 2021).

<sup>10</sup> HEARING, Black’s Law Dictionary (11th ed. 2019).

<sup>11</sup> Colleen Honigsberg & Matthew Jacob, *Deleting Misconduct: The Expungement of BrokerCheck Records*, J. FIN. ECON. (forthcoming 2020) (hereinafter *Deleting Misconduct*).

<sup>12</sup> *Id.* at 4.

Continuing to use the current process significantly harms persons who have not signed any submission agreement agreeing to be bound by arbitration decisions within the FINRA forum. For example, state regulators have a significant interest in customer dispute information. So too do investors considering whether to hire a particular financial adviser. The current expungement system adversely affects their interests. The North American Securities Administrator's Association (NASAA) identified important stakeholders in their letter on the initial proposal:

As FINRA is aware, state securities administrators are not the only stakeholders who rely on the data in the CRD and IARD systems. These systems also contain critical information that allows the investing public to make informed decisions about selecting financial professionals to guide them in building sound financial futures. Industry also uses this data to evaluate and hire the representatives who will in turn be trusted with customers' financial futures. Given the data's many uses and critical importance, the integrity of this data is imperative to all stakeholders.<sup>13</sup>

The current system harms the ability of state regulators to protect their citizens and also inhibits the ability of ordinary investors to protect themselves by depriving them of the information they need to protect themselves. It also harms other members of the industry because it facilitates associated persons remaining employed in the industry despite past complaints that they engaged in fraud or misrepresentation.

#### D. The Current Expungement System Burdens Honest Competition

As it stands, the current expungement system unduly burdens honest competition in the market for financial advice in multiple ways. Well-informed and rational investors will seek to avoid brokers who have won expungements because the best available evidence indicates that associated persons who win expungements pose more than three times as much risk to investors as the average associated person. The current standards deprive honest associated persons of a meaningful way to clear their names. Instead, the current system makes it difficult to distinguish themselves from the scoundrels within the industry who win expungements by exploiting a poorly-designed system.

The current system also inhibits honest competition by making it possible for associated persons to avoid discipline and remain in the industry longer than they would under a better-designed system. This deprives honest associated persons of the opportunity to compete in a marketplace without other associated persons winning business through misrepresentations, half-truths, and other unsavory methods.

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<sup>13</sup> A copy of NASAA's letter on the initial proposal is available here: <https://www.sec.gov/comments/sr-finra-2020-030/srfinra2020030-7936105-224674.pdf>.

### E. The Current Expungement System Seemingly Conflicts with Important Federal Securities Laws

The current expungement system also frustrates the core rationale behind many federal securities laws—namely that information should be disclosed so that investors could decide for themselves. When Congress directed that information about past customer complaints be made available to the public, it surely did not intend for FINRA to use its arbitration forum to facilitate the suppression of vital public information.<sup>14</sup>

Notably, the same statute which called for securities associations to make information available to investors also specifies that “registered securities association shall adopt rules establishing *an administrative process* for disputing the accuracy of information provided.”<sup>15</sup> The current system does not appear consistent with Congressional intent and actively frustrates the securities laws’ disclosure mandates.

### F. The Current Expungement System Inhibits Investor Protection

The current expungement system continues to suppress vital public information. This harms investors because it makes it more difficult for them to inform themselves about past arbitrations—something Congress believed investors should have access to. It also makes it much more difficult for states, FINRA, and the Commission to identify high-risk brokers. The Commission recently approved a rule relating to protecting the public from the dangers posed by high-risk brokers.<sup>16</sup> Applying this rule requires FINRA to actually *have data* with which to identify high-risk brokers. The current expungement system inhibits this rule from functioning because it deprives FINRA, the Commission, and the public of vital information.

## **II. The Commission Should Require Significant Changes to the Amended Proposal**

Although the Commission should end the decades-long failed experiment with arbitration-facilitated expungement, the Amended Proposal should be modified if the Commission approves the continuance of arbitration-facilitated expungement for a limited period of time.

### A. Expungement Hearings Need Adversarial Scrutiny

The Amended Proposal does provide any reason to believe that arbitrators will conduct meaningful inquiries before deciding expungements—meaning that persons seeking expungements will only in rare circumstances face any real scrutiny. Arbitrators operating under existing guidance have not regularly conducted searching inquiries into expungement requests because they are not situated to conduct such inquiries. The Commission should not believe that arbitrators will suddenly become zealous inquisitors set on protecting the public’s interest once

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<sup>14</sup> See 15 U.S.C.A. § 78o-3(i)(1) (West).

<sup>15</sup> *Id.* at (i)(4) (emphasis added).

<sup>16</sup> See Exchange Act Release No. 34-88600 (Apr. 8, 2020), available at <https://www.sec.gov/rules/sro/finra/2020/34-90635.pdf>, 85 FR 20745, at 20745-6 (Apr. 14, 2020) (File No. SR-FINRA-2020-011).

FINRA codifies existing guidance. Consider for example how regularly arbitrators operating under FINRA's existing guidance have recommended expungement for complaints dating back more than six years before the filing of the arbitration. FINRA's rules explain that its arbitration forum may only be used within six years of the occurrence or event giving rise to the claim.<sup>17</sup> Despite this, arbitrators have regularly recommended expungement for ancient complaints without giving any indication that they ever considered the threshold eligibility issue.<sup>18</sup> Little evidence indicates that arbitrators even think to ask these types of questions on their own.

To its credit, FINRA now proposes to place explicit time limitations on expungement requests in the Amended Proposal. This does not solve the underlying problem that arbitrators generally do not consider anything outside their immediate view or conduct research to ask informed questions. FINRA's guidance to arbitrators generally makes them neutral, passive, and reliant on the parties.<sup>19</sup> FINRA's training materials for arbitrators instruct that arbitrators "should not make independent factual investigations of a case."<sup>20</sup> Even with the ability to ask questions of the parties and for the parties to provide any briefing requested by the arbitrator, FINRA's guidance makes clear that arbitrators "generally should review only those materials presented by the parties."<sup>21</sup> The Amended Proposal does not offer any reason to believe that arbitrators will become better equipped to make reasonable and thoughtful inquiries before recommending expungement.

In reality, there is little reason to believe that arbitrators will direct parties to undertake even the crudest investigations such as simply Googling the name of the associated person seeking an expungement. A cursory review of the FINRA Award database did not reveal a single instance of an arbitrator directing the parties to an expungement proceeding to provide her with the results of a Google search of the associated person's name. This is the type of search that could reveal newspaper articles about an associated person's fraud. Although this falls within arbitrators' powers under existing guidance, the FINRA Award database does not reveal evidence that arbitrators regularly direct any meaningful investigations in expungements matters. They generally hew uncritically to reading FINRA-provided scripts and implementing FINRA's instructions. This makes sense—arbitrators are supposed to simply decide disputes between the parties before them. The expungement process forces them outside this role.

Courts have struggled with similar dynamics in the past. When adversarial norms between the parties break down, there are two possible approaches, expanded duties of candor for advocates and parties (something FINRA has thus far declined to impose) or guardians, special masters, and other appointed advocates. Consider, for example, the Delaware Chancery

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<sup>17</sup> FINRA Rule 12206.

<sup>18</sup> *See, e.g.* *Rosenberg v. A. G. Edwards & Sons, No. 19-02801*, 2020 WL 2494754, at \*2 (May 8, 2020) (Mintzer, Arb.) (recommending expungement where the underlying information "was received by Respondent on July 17, 2000 and solely alleged 'breach of fiduciary duty' concerning an 'Equity Listed (Common & Preferred Stock)'").

<sup>19</sup> FINRA's arbitration system characterizes arbitrators as "neutrals." Arbitrators access documents through FINRA's "DR Neutral Portal," which FINRA makes available for "FINRA neutrals (arbitrators and mediators)." FINRA, DR Portal, <https://www.finra.org/arbitration-mediation/dr-portal> (last visited Jan. 17, 2021).

<sup>20</sup> FINRA, FINRA DISPUTE RESOLUTION SERVICES ARBITRATOR'S GUIDE 60 (2020), <https://perma.cc/9DR9-49CC>.

<sup>21</sup> *Id.*

Court’s description of how breakdowns in the adversarial process for class action settlements force judges to become investigators:

The lack of an adversarial process often requires that the Court become essentially a forensic examiner of proxy materials so that it can play devil's advocate in probing the value of the “get” for stockholders in a proposed disclosure settlement. Consider the following example. During discovery, plaintiffs will typically receive copies of board presentations made by financial advisors who ultimately opine on the fairness of the transaction from a financial point of view. It is all too common for a plaintiff to identify and obtain supplemental disclosure of a laundry list of minutiae in a financial advisor's board presentation that does not appear in the summary of the advisor's analysis in the proxy materials—summaries that commonly run ten or more single-spaced pages in the first instance. Given that the newly added pieces of information were, by definition, missing from the original proxy, it is not difficult for an advocate to make a superficially persuasive argument that it is better for stockholders to have more information rather than less. In an adversarial process, defendants, armed with the help of their financial advisors, would be quick to contextualize the omissions and point out why the missing details are immaterial (and may even be unhelpful) given the summary of the advisor's analysis already disclosed in the proxy. In the settlement context, however, it falls to law-trained judges to attempt to perform this function, however crudely, as best they can.<sup>22</sup>

To deal with this breakdown in the adversarial process, Delaware’s Chancery recognized that “it may be appropriate for the Court to appoint an amicus curiae to assist the Court in its evaluation of [a settlement], given the challenges posed by the non-adversarial nature of the typical disclosure settlement hearing.”<sup>23</sup> Notably, Delaware’s Chancery Court is not the only court to deal with this problem. One federal district court judge recently appointed a special master in connection with another settlement deal to conduct a meaningful investigation into misleading statements in connection with fee investigations.<sup>24</sup> The court needed a special master because it, like FINRA’s arbitrators, was not well-equipped to do the independent investigation necessary.

FINRA could free its arbitrators from the need to also serve as skeptical investigators (something they are ill-equipped to do) by modifying the Proposal to provide for an Investor Advocate to appear on behalf of the public in expungement hearings. This proposal has been made before. The PIABA Foundation advocated for this proposal when it released a report on the FINRA expungement process in 2019.<sup>25</sup> I also advocated for it in my law review article.<sup>26</sup> If

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<sup>22</sup> In re Trulia, Inc. Stockholder Litig., 129 A.3d 884, 894 (Del. Ch. 2016).

<sup>23</sup> *Id.* at 899.

<sup>24</sup> See Benjamin P. Edwards & Anthony Rickey, *Uncovering the Hidden Conflicts in Securities Class Action Litigation: Lessons from the State Street Case*, 75 BUS. LAW. 1551, 1556 (2020) (explaining the need for adversarial scrutiny around class action settlements).

<sup>25</sup> PIABA Foundation, 2019 STUDY ON FINRA EXPUNGEMENTS: A SERIOUSLY FLAWED PROCESS THAT SHOULD BE STOPPED IMMEDIATELY TO PROTECT THE INTEGRITY OF THE PUBLIC RECORD 5, 10 (2019), <https://piabafoundation.org/wp-content/uploads/2019/10/Expungement-Study-101519-FINAL-VERSION.pdf>.

it maintains the current expungement system as modified by the Amended Proposal, the Commission should require FINRA to fund an investor advocate or modify the rules for expungements to direct arbitrators to appoint a special master to investigate with fees taxed to the party seeking an expungement.

B. Expungements Are Functionally Ex Parte Hearings And Require Full Candor from Any Party Seeking Expungement

My earlier letter explained the need for expanded duties of candor from parties and advocates seeking expungement. I continue to hold the same view. FINRA's Response indicated that it viewed the candor issue as more appropriately addressed to "state Rules of Professional Conduct that FINRA does not regulate" and that it does not "believe that it would be practical or appropriate to impose this legal-ethics principle on non-attorney associated persons."<sup>27</sup>

FINRA's Response puzzles because it seems to imply that it lacks the authority to regulate advocates appearing within its forum. The Commission should not accept this argument because FINRA's Board of Governors recently voted in favor of "prohibiting compensated non-attorney representatives from practicing in the FINRA arbitration and mediation forum."<sup>28</sup> If FINRA possesses the power to regulate the advocates parties may bring to its forum, it surely enjoys the power to regulate their conduct. Although state bars do independently regulate legal practice, FINRA's Response articulated no reason why it could not bar advocates who fail to provide full candor in expungement hearings.

Consider, for example, the Commission's own regulations for attorneys practicing before the Commission. After Sarbanes-Oxley mandated that the Commission issue minimum standards of conduct for attorneys practicing before it in any way, the Commission simply promulgated a rule, notwithstanding the reality that states also issue generalized standards of conduct.<sup>29</sup>

C. The Commission Should Require Some Financial Incentive for Investor Participation

The Amended Proposal nowhere articulates any reason why an investor would desire to subject herself to participating in an expungement process where a former financial adviser, with the assistance of counsel, will call her a liar. The closest FINRA's Response came was its recognition that expungement hearings within its forum are "often one-sided as the customer or the customer's representative has little incentive to participate if the customer's concerns have been resolved."<sup>30</sup> FINRA's Response does not elaborate on what, exactly, the "little incentive"

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<sup>26</sup> Benjamin P. Edwards, *Adversarial Failure*, 77 WASH. & LEE L. REV. 1053, 1126–27 (2020) ("Adjudicators may also respond to adversarial failure by taking steps to restore adversarial scrutiny and increase the likelihood of an informed decision.").

<sup>27</sup> FINRA's Response, at 5 n. 12.

<sup>28</sup> FINRA, *Update: FINRA Board of Governors Meeting* (Dec. 21, 2018), <https://www.finra.org/about/governance/finra-board-governors/meetings/december-2018-email>.

<sup>29</sup> See SEC, Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185; 34-47276; IC-25919; File No. S7-45-02 (Aug. 5, 2003), <https://www.sec.gov/rules/final/33-8185.htm>.

<sup>30</sup> FINRA's Response at 4.

is. Whatever undefined incentive exists is plainly insufficient to generate the level of participation necessary to reliably surface information relevant for arbitrators to decide whether to recommend expungement.

FINRA's Response did not provide any substantial reason for not creating a financial incentive for investor participation. FINRA's Response stated that it believed that creating a financial incentive for participation in expungement hearings "would be inconsistent with FINRA's neutral administration of the arbitration forum."<sup>31</sup> The Commission should require more from FINRA because mismatched incentives for participation mean that a neutral forum will consistently yield skewed results.

There are multiple ways to create some financial incentive for participation. FINRA could issue a rule providing that an associated person who seeks an expungement must pay the reasonable attorney fees and costs of an investor who successfully opposes the expungement. This would in no way diminish the neutrality of FINRA's forum. In the alternative, FINRA could require an associated person seeking an expungement to post a \$10,000 bond for each customer dispute she seeks to toss down the memory hole. The bond would be forfeited to the customer should the panel not recommend expungement. This would not deter associated persons from seeking expungements. Counsel representing brokers seeking expungements often take a \$10,000 or greater fee, contingent on successfully securing an expungement. FINRA could restore equilibrium by making the existing contingent incentive available to the investor as well.

Financial incentives for customers to participate, would enhance these expungement hearings by creating an incentive for counsel to assist investors. An attorney fee provision or appropriate bond would incent appropriate opposition. Attorneys would not defend plainly baseless claims because they would not be likely to be paid. It would allow arbitrators to remain neutral and allow advocates to present information to so that arbitrators could decide a dispute in front of them.

Financial incentives for investors to participate would also benefit the associated persons who win expungements by creating confidence that they were rightly exonerated. As it stands, associated persons who win expungements now pose over three times as much danger to the investment public. Today, well-informed investors will rationally and rightly shun any associated person who has secured an expungement.

#### D. The Amended Proposal Does Not Provide Sufficient Access to Documents for Non-Party Investors in "Straight-In" Expungement Requests

To its credit, FINRA's Amended Proposal addresses some of the initial notification and participation problems I identified in my initial letter. Although these changes will reduce barriers to customer participation, the Commission should require greater access. FINRA currently allows parties and arbitrators to access documents through an online portal (the DR Portal). Although the Amended Proposal will give investors greater and more timely access to documents, it maintains

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<sup>31</sup> FINRA's Response at 7.

needless friction for investors seeking to access documents filed within a particular arbitration. The Commission should require FINRA to allow non-parties to access documents through the DR Portal on equal terms as the parties to an expungement request.

FINRA's Response indicated that it thought requiring an associated person seeking an expungement to provide all other documents "could be unnecessarily burdensome on the associated person."<sup>32</sup> FINRA could entirely avoid this burden by allowing investors and their counsel to simply access documents through the DR Portal after the investor has received copies of the Statement of Claim and Answer filed in the expungement proceeding.

Notably, many associated persons now seek to purge multiple complaints from their records in many expungement proceedings. FINRA should either require each expungement hearing to proceed individually or implement some method for allowing each investor involved in an expungement hearing in some way to use the DR Portal to access information concerning them without also disclosing other investors' private information.

#### E. The Proposal Must Include Some Standard of Proof Beyond Mere Preponderance

My initial letter explained the need for some standard of proof for expungement proceedings and provided the Commission with an example of an arbitrator recommending the purging of valuable public information based on the mere preponderance of evidence.<sup>33</sup> Although many arbitrators seemingly default to a preponderance standard, not all arbitrators take this approach. Another FINRA arbitrator concluded that the standard must be higher than a preponderance of the evidence because FINRA does not remove a customer complaint if the customer does not prevail in arbitration under an ordinary preponderance standard of civil proof.<sup>34</sup> Despite the inconsistent standards already being applied within its forum, FINRA has declined to articulate a standard of proof for expungement matters.<sup>35</sup> Which arbitrator had it right? FINRA has so far declined to answer the question.

To be sure, FINRA should not define standards of proof for ordinary arbitrations. That should be left to the arbitrator to decide. Yet expungement proceedings differ significantly from ordinary customer arbitrations and require different standards. These hearings significantly affect people, states, FINRA, the Commission, and other regulators who never agreed to be bound by any FINRA arbitrator.

The Commission should require FINRA to provide a meaningful standard of proof for these matters. FINRA has explicitly stated that it desires to avoid "the potential for inconsistent results among different arbitrators" in expungement matters.<sup>36</sup> Arbitrators now make inconsistent

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<sup>32</sup> FINRA's Response, at 8.

<sup>33</sup> See *Arford v. Geneos Wealth Mgmt., Inc.*, No. 19-00739, 2019 WL 5681728, at \*1 (Oct. 24, 2019) (Cutler, Arb.).

<sup>34</sup> *Gilliam v. Sagepoint Fin., Inc.*, No. 12-03717, 2013 WL 3963949, at \*2 (July 22, 2013) (Meyer, Arb.) ("[The customer] failed to prove his/her case by a preponderance of the evidence ... the allegations nevertheless appear on the respondents' CRD records .... From this it may be inferred that to expunge ... something more than a preponderance of the evidence is required.").

<sup>35</sup> FINRA's Response, at 12.

<sup>36</sup> *Id.*

decisions. Choices about the standard of proof determine outcomes. If the arbitrators apply a preponderance standard and only hear evidence from associated persons seeking expungements, they will simply recommend expungements. This happens because the arbitrators only have information presented to them in support of expungement.

FINRA's Response does not provide any comfort that this issue will be resolved. Instead, it contends that unspecified "additional training and qualifications for arbitrators on the special arbitrator roster, should help ensure that the existing standards are applied appropriately."<sup>37</sup> The only way to resolve this issue would be for the unspecified training to include some standard of proof. FINRA's Response does not explain whether it believes substantial evidence, preponderance, or clear and convincing evidence would be appropriate. FINRA has also not explicitly stated whether it believes that there should be no standard of proof for expungement proceedings.

Refusing to provide guidance endorses existing inconsistency. Arbitrators now apply different standards and generate inconsistent results. Some arbitrators with puzzlingly high expungement recommendation rates may be applying some standard even lower than a preponderance of the evidence.

The Commission must require FINRA to create some meaningful evidentiary standard to avoid the continued deletion of important public information through inconsistently applied arbitration standards.

Thank you again for considering these comments. With support and direction from the Commission, FINRA may be empowered to move away from maintaining the current arbitration-facilitated expungement process and begin the necessary work to develop an appropriate administrative process to remove false information from the records of associated persons.

Sincerely,



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<sup>37</sup> FINRA's Response, at 12.