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May 18, 2021

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: File No. SR-FINRA-2020-030 (Proposed Rule Change to Amend the FINRA Code of Arbitration Procedure for Customer Disputes and the FINRA Code of Arbitration Procedure for Industry Disputes to Modify the Current Process Relating to the Expungement of Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests)

Dear Ms. Countryman:

This letter is submitted by the Financial Industry Regulatory Authority (“FINRA”) on the above-referenced rule filing related to proposed amendments to the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) (together, “Codes”) to modify the current process relating to the expungement of customer dispute information, including creating a special arbitrator roster to decide certain expungement requests (“Proposal”).¹

FINRA is submitting this letter at the request of SEC staff to: (i) explain the circumstances under which FINRA will waive the requirement pursuant to FINRA Rule 2080 to name it as a party when members or associated persons seeking to expunge customer dispute information from the Central Registration Depository (“CRD[®]”) petition a court for expungement relief or seek judicial confirmation of an arbitration award containing expungement relief and (ii) further clarify, in response to comments, the grounds on which FINRA arbitrators may recommend expungement pursuant to proposed Rules 12805(c) and 13805(c).

The Commission published the Proposal for public comment in the Federal Register on October 1, 2020 and received eight comments in response to the

¹ See Securities Exchange Act Release No. 90000 (September 25, 2020), 85 FR 62142 (October 1, 2020) (Notice of Filing of File No. SR-FINRA-2020-030).

Proposal.² On December 18, 2020, FINRA responded to the comments and filed Partial Amendment No. 1 to the Proposal to propose amendments based on the comments received by the SEC.³

On December 28, 2020, the SEC published a notice and order in the Federal Register to solicit comments on the Proposal as modified by Partial Amendment No. 1 and to institute proceedings pursuant to Section 19(b)(2)(B) of the Securities Exchange Act of 1934 in the above-referenced rule filing to determine whether to approve or disapprove the proposed rule change as modified by Partial Amendment No. 1.⁴ The SEC received nine comment letters in response to the Order.⁵ On

² See Letter from Steven B. Caruso, Maddox Hargett & Caruso, P.C., to Vanessa Countryman, Secretary, SEC, dated September 28, 2020; letter from Dochter D. Kennedy, President & Founder, AdvisorLaw, LLC, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated October 22, 2020; letter from Benjamin P. Edwards, Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated October 12, 2020; letter from Lisa Hopkins, President, North American Securities Administrators Association, Inc., to Vanessa Countryman, Secretary, SEC, dated October 22, 2020; letter from Amanda Skrelja, Paige Guarino, William Lapadula, and Zachary Dukoff, Legal Interns & Elissa Germaine, Supervising Attorney, John Jay Legal Services, Inc., Elizabeth Haub School of Law, PACE University, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated October 22, 2020; letter from Kevin M. Carroll, Managing Director and Associate General Counsel, SIFMA, to Vanessa A. Countryman, Secretary, SEC, dated October 22, 2020 (“SIFMA”); letter from Ruben Huertero, Legal Intern & Christine Lazaro, Director of the Securities Arbitration Clinic and Professor of Clinical Legal Education, St. John’s University School of Law, to Vanessa Countryman, Esq., Secretary, SEC, dated October 22, 2020; and letter from David P. Meyer, President, Public Investors Advocate Bar Association, to Brent J. Fields, Secretary, SEC, dated October 23, 2020.

³ See FINRA Response to Comments, dated December 18, 2020 (“Response Letter”) and Partial Amendment No. 1 to SR-FINRA-2020-030 filed on December 18, 2020 (“Partial Amendment No. 1”), available at <https://www.finra.org/rules-guidance/rule-filings/sr-finra-2020-030>.

⁴ See Securities Exchange Act Release No. 90734 (December 18, 2020), 85 FR 84396 (December 28, 2020) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove File No. SR-FINRA-2020-030) (“Order”).

⁵ See Letter from Benjamin P. Edwards, Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated January 19, 2021; letter from

April 9, 2021, FINRA responded to the comments and filed Partial Amendment No. 2 to the Proposal to propose amendments based on the additional comments received by the SEC.⁶

FINRA Rule 2080

FINRA Rule 2080(a), which was developed in close consultation with representatives of the North American Securities Administrators Association (“NASAA”) and state regulators, requires members or associated persons seeking expungement of customer dispute information from the CRD system to obtain an order of a court of competent jurisdiction directing such expungement or confirming an award containing expungement. FINRA will expunge customer dispute information from the CRD system only after the court orders it to execute the expungement.

FINRA Rule 2080(b) requires members or associated persons to name FINRA when they petition a court for expungement relief or seek judicial confirmation of an arbitration award containing expungement relief, and describes two circumstances under which FINRA will waive this requirement. Specifically, under FINRA Rule 2080(b)(1), FINRA may waive the requirement that it be named if it determines the expungement relief “is based on” one of three enumerated “affirmative arbitral or judicial findings that:

Julius Z. Frager, to SEC Commission, dated January 7, 2021; letter from Professor Lisa Miller, CEO, Lex Law Corporation, to Vanessa Countryman, Secretary, SEC, dated January 7, 2021; letters from Lisa Hopkins, President, North American Securities Administrators Association, Inc., to Vanessa Countryman, Secretary, SEC, dated January 18, 2021 and January 28, 2021; letter from Kevin M. Carroll, Managing Director and Associate General Counsel, SIFMA, to Vanessa A. Countryman, Secretary, SEC, dated January 19, 2021 (“SIFMA 2”); letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Vanessa A. Countryman, Secretary, SEC, dated February 1, 2021; letter from David P. Meyer, President, Public Investors Advocate Bar Association, to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated February 2, 2021; and letter from Jason R. Doss, President and Celiza Brangança, Vice-President, the PIABA Foundation, Inc., to J. Matthew DeLesDernier, Assistant Secretary, SEC, dated January 19, 2021. PIABA Foundation is a separate entity from PIABA.

⁶ See FINRA Response to Comments, dated April 09, 2021 and Partial Amendment No. 2 to SR-FINRA-2020-030 filed on April 09, 2021, available at <https://www.finra.org/rules-guidance/rule-filings/sr-finra-2020-030>.

- (A) the claim, allegation or information is factually impossible or clearly erroneous;
- (B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
- (C) the claim, allegation or information is false.”

Under this provision, FINRA reviews member and associated persons’ waiver requests, and, if it determines that the arbitral or judicial forum based its expungement recommendation on one of the three enumerated findings in FINRA Rule 2080(b)(1), it may waive the requirement that it be named a party when the member or associated person seeks to obtain the required court order.

FINRA Rule 2080(b)(2), in contrast, provides FINRA the ability, “in its sole discretion and under extraordinary circumstances,” to waive the obligation to name FINRA as a party if it—rather than the arbitral or judicial forum—“determines that: (A) the expungement relief and accompanying findings on which it is based are meritorious; and (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements.”

FINRA Rule 2080(b)(2) allows FINRA to exercise this authority “if the expungement relief is based on judicial or arbitral findings other than those” described in FINRA Rule 2080(b)(1). This provision addresses the potential that an extraordinary circumstance could arise in which it would be appropriate for FINRA to waive the requirement that it be named as a party for a reason other than one of the three grounds in Rule 2080(b)(1).⁷

FINRA is not proposing to amend FINRA Rule 2080 at this time. However, FINRA will consider if additional clarification to the application of FINRA Rule 2080 may be warranted.

FINRA Rules 12805 and 13805

⁷ Securities Exchange Act Release No. 47435 (March 4, 2003), 68 FR 11435 (March 10, 2003) (Notice of Filing and Amendment No. 1 of File No. SR-NASD-2002-168) (describing how under proposed subsection (b), FINRA would “retain discretion not to oppose expungement relief in exceptional cases where the basis for the expungement does not fall within one of the three standards,” and would “exercise such discretion only if it determines that the expungement is meritorious and would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements.”)

FINRA Rules 12805 and 13805, both currently and in the Proposal, set forth requirements for arbitrators when considering requests to expunge customer dispute information from the CRD system.

Current FINRA Rules 12805(c) and 13805(c) state that FINRA arbitrators, when making an expungement recommendation, must “indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order.” FINRA’s longstanding view, which is consistent with the SEC’s order approving FINRA Rules 12805 and 13805,⁸ is that the “grounds” on which a FINRA arbitrator may recommend expungement are the three grounds in FINRA Rule 2080(b)(1).⁹ Accordingly, and consistent with expungement being an extraordinary remedy, the Proposal clarifies in proposed Rules 12805(c) and 13805(c) that the grounds for recommending expungement that the panel must indicate in its award are the grounds in FINRA Rule 2080(b)(1).¹⁰

In its comment letters, SIFMA stated that the Proposal should not limit the grounds for recommending expungement to those contained in FINRA Rule 2080(b)(1), but that associated persons “should be free to seek expungement on equitable grounds, including, without limitation, those listed in Rule 2080(b)(2) (i.e., the request is meritorious and granting expungement would not adversely affect investor protection, CRD system integrity, or regulatory requirements.)”¹¹

As discussed above and in the Response Letter, the two factors described in FINRA Rule 2080(b)(2)(A) and (B) are not grounds for a FINRA arbitrator to recommend expungement. Those are factors for FINRA to consider in determining whether to waive the requirement that it be named as a party when a member or associated person petitions a court for expungement relief or seeks judicial confirmation of an arbitration award containing expungement relief.

⁸ Securities Exchange Act Release No. 58886 (October 30, 2008), 73 FR 66086 (November 6, 2008) (Order Approving Proposed Rule Change to Adopt FINRA Rules 12805 and 13805) (stating that new Rules 12805 and 13805 require the arbitration panel to indicate “which of the grounds for expungement in Rule [2080](b)(1)(A)-(C) serves as the basis for the expungement”).

⁹ See Regulatory Notice 08-79 (December 2008) (stating that “[t]he arbitration panel must indicate which of the grounds for expungement under Rule [2080](b)(1)(A)-(C) serve as the basis for their expungement order, and provide a brief written explanation of the reasons for ordering expungement”).

¹⁰ See Proposed Rules 12805(c)(8) and 13805(c)(8).

¹¹ See SIFMA 2; see also SIFMA.

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In addition, although FINRA Rule 2080(b)(2) refers to “arbitral findings other than those” described in FINRA Rule 2080(b)(1), this does not mean that arbitrators can recommend expungement on any grounds, as SIFMA suggests. Instead, FINRA Rule 2080(b)(2) recognizes that a rare circumstance may exist in which an arbitrator recommends expungement for reasons other than one of the grounds in FINRA Rule 2080(b)(1) and that under such circumstances the rule authorizes FINRA “in its sole discretion and under extraordinary circumstances,” to determine to waive the requirement that it be named as a party.

As FINRA’s long-standing view is that FINRA arbitrators must identify one or more of the three grounds in FINRA Rule 2080(b)(1) when recommending expungement and this has been clearly communicated to arbitrators,¹² FINRA believes it is appropriate to make the clarification as proposed in Rules 12805(c)(8) and 13805(c)(8).

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If you have any questions, please contact me on 202-728-8151, email: Mignon.McLemore@finra.org.

Sincerely,

/s/ Mignon McLemore

Mignon McLemore
Associate General Counsel
Office of General Counsel

¹² See supra notes 8, 9; FINRA Dispute Resolution Service Arbitrators Guide, p. 74, at <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf> (explaining that “FINRA Rule 2080 establishes procedures to ensure that expungement occurs only when the arbitrators find and document one of [the three grounds that are listed in FINRA Rule 2080(b)]”); see also Notice to Arbitrators and Parties on Expanded Expungement Guidance, at <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>. FINRA’s Basic Arbitrator Training also explains that expungement may occur only after the arbitrators find and document one of these three grounds.