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SENT VIA: Email [redacted]

DATE: August 9, 2022

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RE: **Official Comment on SR—FINRA—2022—024**

M. McLemore,

When it comes to its relentless attempts aimed at reducing the number of customer dispute disclosures expunged from the CRD® each year, FINRA continues to lose sight of the forest among the trees.

FINRA's website boasts that, "*Of the approximately 35,000 customer dispute information disclosures in the CRD system* [that were] *entered between 2015* [and] *2020, approximately 1,550 or 4%*[,] *have been expunged pursuant to a court order*[,] *as of May 25, 2021*." https://www.finra.org/rules-guidance/key-topics/expungement. When considering the requirement that all complaints alleging a rule violation be reported and disclosed in the CRD®, it is astonishing that only a mere 4% have been found to be without merit and granted expungement.

INTEGRITY OF THE CRD®

FINRA refuses to accept the notion that its own objectives are precisely aligned with those of advisor advocates, including AdvisorLaw. Both seek to improve the integrity of the information contained within the CRD®. Increasing the veracity, accuracy, and usefulness of that information undoubtedly requires culling bad information from time to time. Bad information, as it relates to customer disputes, is typically found in the form of impossible, false, or erroneous allegations. Equally important is culling allegations against associated persons who were not involved in the alleged misconduct. The ongoing removal of the aforementioned bad information is critical to ensuring that investors and others who use the CRD® are able to make informed decisions based on accurate information. *See,* SR-FINRA-2022-024, pp. 6-7 (referencing the balancing of interests of regulators, investors, broker-dealers, and the brokerage community). *Id.,* p. 6 (expressing FINRA's acknowledgment of investors' interest in "having access to **accurate and meaningful information** about associated persons"). *Emphasis added*.

The customer dispute expungement process is premised upon a finding that the information in the CRD® "*is factually impossible, clearly erroneous, or false, or that the associated person was not involved in the alleged misconduct*." *Id.*, pp. 8-9; *see,* 15, 17, 45, 64, 89, 137, 144-146, 173, 192, 217-218, and FN41, and FN42. The determination as to whether the information in the CRD® meets this standard is made by one or more FINRA arbitrators. Simply put, FINRA arbitrators determine whether the information contained in the CRD® "*is factually impossible, clearly erroneous, or false, or*" whether the person seeking expungement "*was not involved in the alleged misconduct.*" That's all there is to it.

In most instances, "*the information*" that the associated person is seeking to have expunged includes allegations that the associated person did something wrong. It is important to note that FINRA does not point to a single identifiable instance or fact showing that the arbitrators granting expungement relief are doing so despite "*the information*" being factually possible, true, or at least not erroneous or that the associated person was actually involved in the misconduct alleged. Perhaps such examples exist, and FINRA is reluctant to publicize them, because doing so would cast doubt on the fairness of FINRA's arbitration forum.

The importance of an independent third party as the factfinder is a tenant of justice that has remained constant for as far back in time as the beginning of American independence. The changes proposed not only seem egregiously punitive to associated persons' ability to clear their names, they also appear to subvert the neutrality and autonomy of arbitrators' ability to determine whether the expungement criteria are met.

ARBITRATOR RANKING & STRIKING:

Narrowly tailoring the rule change to *eliminate the rights* of participants to engage in the arbitrator ranking/selection process appears to be nothing more than FINRA segregating its arbitrators into two categories — one which it trusts to be the finders of fact (the Special Arbitrator Roster), and one which it does not trust (all other arbitrators). The notion of a Special Arbitrator Roster for customer dispute expungement claims strips away a right enjoyed by all other participants in FINRA arbitration proceedings.[1] FINRA attempts to base the removal of this fundamental right on the presumption that expungement requests are not adversarial. *Id.*, p. 46 (FINRA stating that "[t]*he adversarial nature of the proceedings* [outside of the expungement context] *serves to minimize the impact of each party's influence in arbitrator selection.*"). However, "*meaningful opposition to* [ ] *expungement* request[s]" is historically abundant. In 2021, over 13% of straight-in expungement requests were opposed by either the underlying customer or the respondent broker-dealer in its Statement of Answer ("SOA"). *Id.*, p. 72 (FINRA depicting a state regulator's opposition to expungement as "*meaningful*" and implying that the state regulator's "*meaningful opposition* [ ] *might* [ ] *help create a more complete factual record for the panel to rely upon to decide the expungement request.*"); *contra* (FINRA's assertion that the state regulator's involvement "*shall not be material to the determination of whether expungement is appropriate*" on page 66).

As discussed *supra,* FINRA incorrectly assumes that additional opposition is needed in expungement proceedings. However, FINRA wholly ignores the large number of cases where the respondent broker-dealer filed an SOA stating that it did not oppose expungement relief, yet it then proceeded to vigorously oppose the request during the merits hearing. *W. Oliver v. Wells Fargo Clearing Services, LLC*, Case No. 18-00942.

VOLUNTARY WITHDRAWAL:

Eliminating the ability of an associated person to voluntarily withdraw his or her claim without prejudice based on what FINRA admits is its presumption that the associated person is doing so in an effort to obtain a more

[1] Requiring unanimity of a three arbitrator panel is another important departure from the pervasive "*majority rule*" practice of influential decision-making bodies associated with democracy.

impartial panel or arbitrator again shows FINRA's lack of confidence in its arbitrators to discern fact from fiction. *Id.*, pp. 22, and 150. FINRA has offered absolutely no evidence that voluntary withdrawals without prejudice have resulted in subsequent arbitrators or panels granting expungement relief in error. Furthermore, the assumption that withdrawals are motivated by the moving party's desire to obtain a new/different arbitrator or arbitration panel is purely speculative and unsupported by facts or evidence.

NON-PARTY PARTICIPATION:
Historically, FINRA has allowed (and under the proposed changes, will continue to allow) non-party investors to participate in expungement proceedings. The Proposed Rule Change allocates several pages to FINRA's attempt to justify the involvement of yet another non-party in the proceedings — state regulators. The practice of allowing non-parties to participate in arbitration proceedings without the non-parties submitting to the forum's jurisdiction is riddled with problems.

First and foremost, non-parties who commit perjury cannot be sanctioned or reprimanded. The complete absence of a mechanism through which the forum or arbitrator(s) can hold non-party participants accountable creates an environment where non-parties are given a platform from which they can, should they wish, broadcast lies without the risk of being held accountable for the resulting harm.

Secondly, FINRA seeking the involvement of state regulators in expungement proceedings, despite acknowledging that their involvement "*shall not be material to the determination of whether expungement is appropriate*[,]" seems disingenuous, at a minimum. *Id.*, p. 66. The regulator spends, literally, hundreds of pages trying to convince readers that it endeavors to make the expungement process more "*efficient*" and "*fair*" for everyone involved. *Id.*, pp. 5-6, 46, 78, 83, 117-118, 134, 175, 206, 212, and FN7. Yet the proposition that state regulators be involved and be given all of the rights of parties to the proceedings completely contradicts the assertion that FINRA wishes to improve efficiency. One may only surmise that FINRA wishes to include state regulators in customer dispute expungement proceedings on the off chance that they "*provide meaningful opposition to the expungement request*[.]" *Id.*, p. 72. Which begs the question, is FINRA simply trying to make the expungement process more complicated and costly? Doesn't increasing the barriers to the process only act to preserve the bad information in the CRD System that is desperately in need of being culled?

TIME LIMITATIONS:
The amount of time that passes after allegations are cast has absolutely nothing to do with whether the allegations are "*factually impossible, clearly erroneous, or false,* [n]*or whether the associated person was not involved in the alleged misconduct*." SR-FINRA-2022-024 pp. 8-9; *see,* pp. 15, 17, 45, 64, 89, 137, 144-146, 173, 192, 217-218, FN41, and FN42. When contemplating implementing a time limitation, considerations are much less complicated than FINRA implies. The allegations are either true or false. If the allegations are impossible, they are also false. The associated person was either involved in the alleged misconduct, or he or she was not. It is that simple. Absent a decision reached after a hearing on the merits of the allegations, the allegations must not be "*presumably*" true. A principle that seems to have been lost by FINRA is that the accused is innocent until proven guilty. UN General Assembly art. 11 (Declaration of Human Rights). An appropriate and just remedy would consist of removing all allegations that never rose to the level of a hearing on the merits, after the possibility of a hearing on the merits expires.

THIRD PARTY REQUESTS:
The Proposed Rule Change allocates a reasonable portion of its nearly 300 pages to discussion of expungement requests made by parties on behalf of an "*unnamed person*." *Id.*, pp. 30-36, 37, *et seq*. These "*on behalf of*"

requests are strange, in that the "*unnamed person*" is simply an associated person that is "*subject of*" the complaint – rather than a "*party to*" it.

As proposed, FINRA would largely do away with the ability of the "*unnamed person*" to intervene in an arbitration premised on allegations by a customer that the "*unnamed person*" violated one or more sales practices. *Id.*, p.166, at 2; *see also,* FN62, and FN42 *citing,* Securities Exchange Act Release No. 59916 (May 13, 2009) ("*requir*[ing] *broker-dealer firms to report allegations of sales practice violations made against an associated person in an arbitration or civil litigation even when the associated person is not a named party in the proceeding*"). In short, the "*unnamed person*" that is saddled with a disclosure alleging that he or she violated sales practices will no longer be able to intervene and seek to clear his or her character and reputation. The justification offered by FINRA is that allowing the "*unnamed person*" to defend the allegations against him or her could cause the customer's "*presentation of their case* [to be] *interrupted or delayed.*" *Id.*, p. 166.

As proposed by FINRA, the "*unnamed person*" would be required to file his or her expungement request separately and subsequent to the arbitration between the customer who made the complaint and the "*unnamed person's*" broker-dealer. FINRA fails to mention that prohibiting the "*unnamed person*" from intervening to clear his or her own name results in potentially-false allegations remaining in the CRD® for upwards of a year.

CONCLUSION:
Although due process is largely nonexistent for associated persons entangled in the FINRA Dispute Resolution forum, FINRA's latest Proposed Rule Change seeks to strip away the few remaining remnants of fairness and equity. In its simplest form, expungement is the process through which an associated person seeks to have false allegations removed from the (very) public record. A reasonable standard used to determine whether allegations warrant expungement is in place — namely, FINRA Rule 2080. In light of the abysmal 4% of customer dispute disclosures that were expunged during the five-year period ending 2020 and the complete absence of any example or evidence showing that expungement was granted in error, there is no reasonable basis upon which to advocate for the changes proposed by FINRA.

I appreciate your time and attention to this matter. Should you have any questions or concerns, please feel free to contact me directly.

Respectfully,

Dochtor D. Kennedy
President & Founder
AdvisorLaw, LLC