



September 6, 2022

Submitted by Webform (<https://www.sec.gov/cgi-bin/ruling-comments>)

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

RE: File Number SR-FINRA-2022-024: Notice of Filing of a Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information

Dear Mr. DeLesDernier:

On behalf of the North American Securities Administrators Association (“NASAA”),¹ I hereby submit the following comments regarding U.S. Securities and Exchange Commission (“SEC” or the “Commission”) Release No. 34-95455, *Notice of Filing of a Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information* (“the Proposal”).²

Tightening the procedures surrounding expungement proceedings is critical to stopping the continuing and significant threat to the integrity of public records relied upon by investors to decide whom to trust with their financial wellbeing. This threat also extends to securities regulators who depend on accurate information to make regulatory decisions and to firms when making hiring decisions. NASAA supports the Proposal generally but remains concerned, as we have repeatedly expressed in the expungement context, that the fundamental flaws with Rule 2080 will continue to exist even if this Proposal is adopted. NASAA’s position on expungement is clear: expungement is intended to serve as an extraordinary remedy granted solely in extremely limited circumstances.³

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal can be found at <https://www.sec.gov/rules/sro/finra/2022/34-95455.pdf>.

³ See Letter from Lisa Hopkins, NASAA President, to Vanessa Countryman, Secretary, SEC, *Re: File Number SR-FINRA-2020-030: Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change, as modified by Amendment No. 1, to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests* (Jan. 18, 2021), (the “NASAA 2021 Letter”)

The Proposal does not address this issue, nor does it narrow the grounds for expungement.⁴ Our specific comments on the Proposal are as follows.

I. NASAA Welcomes Measures to Limit Arbitrator Shopping.

NASAA supports the proposed procedures designed to prevent brokers from attempting to “arbitrator shop” or request expungement of customer dispute information multiple times using different forums. NASAA is pleased to see that straight-in requests would be time limited and those not in compliance with this requirement would be denied the arbitration forum. NASAA supports requiring a broker⁵ named in a customer complaint to request expungement during the

available at <https://www.nasaa.org/wp-content/uploads/2021/01/2021-01-18-Comment-Letter-SR-FINRA-2020-030-Amendment-No.-1.pdf>; Letter from Lisa Hopkins, NASAA President, to Vanessa Countryman, Secretary, SEC, *Re: File Number SR-FINRA-2020-030: Proposed Rule Change to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster To Decide Certain Expungement Requests* (Oct. 22, 2020), (the “NASAA October 2020 Letter”), available at <https://www.nasaa.org/wp-content/uploads/2020/10/NASAA-Comment-Letter-SR-FINRA-2020-030.pdf>; Letter from Christopher Gerold, NASAA President, to Vanessa Countryman, SEC, *Re: File Number SR-FINRA-2020-005: 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 Apply Minimum Fees to Requests for Expungement of Customer Dispute Information* (March 18, 2020), available at <https://www.nasaa.org/wp-content/uploads/2020/03/NASAA-Comment-Letter-SR-FINRA-2020-005-Expungement.pdf>; Letter from Joseph Borg, NASAA President, to Marcia E. Asquith, EVP, Board and External Relations, *Re: FINRA Regulatory Notice - 17-42 - Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information* (Feb. 5, 2018), (the “17-42 Letter”), available at <https://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Comments-to-FINRA-Regarding-Reg-Notice-17-42-Expungement.pdf>; Letter from William Beatty, NASAA President, to Barbara Black, FINRA Dispute Resolution Taskforce, *Re: NASAA Comments on Expungement of Matters from the Central Registration Depository (“CRD”)* (Aug. 31, 2015), available at <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/NASAA-Expungement-Letter-enclosure.pdf>; Letter from Joseph Borg, NASAA President, to Barbara Sweeney, Secretary, NASD Regulation, Inc., *Re: Request for Comments – 01-65 Proposed Rules and Policies Relating to the Expungement of Information from the Central Registration Depository* (Dec. 31, 2001), available at <http://www.nasaa.org/wp-content/uploads/2011/07/95-Letter.37262-47637.pdf>; Letter from Deborah Bortner, NASAA CRD Steering Committee Co-Chair, to Margaret H. McFarland, Deputy Secretary, SEC, *Re: File No. SR-NASD-2002-168; Proposed Rule 2130 Concerning the Expungement of Customer Dispute Information from CRD* (June 4, 2003), available at <https://www.nasaa.org/wp-content/uploads/2011/07/82-ProposedNASDRule-202130.37775-72237.pdf>; Letter from Karen Tyler, NASAA President, to Nancy M. Morris, Secretary, SEC, *Re: Release No. 34-57572: File No. SR-FINRA-2008-010, Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure To Establish New Procedures for Arbitrators To Follow When Considering Requests for Expungement Relief* (Apr. 24, 2008), available at <http://www.nasaa.org/wp-content/uploads/2011/07/31-Release-No34-57572SR-FINRA-2008-010NASAA.pdf>; Letter from Andrea Seidt, NASAA President, to Elizabeth M. Murphy, Secretary, SEC, *Re: Release No. 34-71959, File No. SR-FINRA-2014-020* (May 14, 2014), available at <https://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Comment-Letter-Release-No-34-71959-File-No-SR-FINRA-2014-020.pdf>.

⁴ See FINRA Rule 2080(b), Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2080>.

⁵ For purposes of this letter, NASAA uses the term “broker” in the same way that the Proposal uses the term “associated person.”

customer arbitration or forfeit the opportunity to request expungement.⁶ NASAA has long taken the position that expungement hearings are largely one-sided and supports requiring brokers to make their request to arbitrators that have had the opportunity to hear the customer's side of the story.

II. The Requirements for Special Roster Panel Decisions Should Be Strengthened.

In NASAA's March 18, 2020 comment letter regarding SR-FINRA-2020-005, NASAA took the position that expungement decisions by three-person arbitration panels should be unanimous.⁷ NASAA, therefore, supports this aspect of the Proposal. However, NASAA also recommends that decisions to expunge records should only be reached when the evidence presented in support of expungement meets a clear and convincing standard of proof. Such an evidentiary standard would be consistent with the extraordinary nature of expungement.

III. Providing Greater State Access to Arbitration Proceedings Is Helpful, But Is Not a Solution to Preserve Public Records.

As expressed in our January 18, 2021 comment letter on SR-FINRA-2020-030, NASAA appreciates that the current Proposal would provide state securities regulators with earlier notice of expungement requests.⁸ NASAA will continue to discuss this process with FINRA, including the procedures regarding when and how state securities regulators could appear in certain proceedings. We look forward to working with FINRA to implement a technological solution to make the expungement notification process to NASAA and states as efficient as possible.

The Proposal also sets out a framework by which state securities regulators could participate in expungement proceedings in straight-in requests.⁹ While NASAA greatly appreciates any opportunity to appear to advocate for the preservation of public records, state participation in such proceedings would be limited by resources and state-specific procedural hurdles that could inhibit the ability to appear. Therefore, while NASAA is thankful for this aspect of the Proposal, its limited utility must be recognized.

To relegate the preservation of public records to matters of advocacy undermines the goal that expungement should be an extraordinary remedy that would be allowed only in limited circumstances. The degree to which such records are preserved for all stakeholders should not turn on the varying abilities of any party – state regulator, authorized representative or customer – to appear to make an argument. Doing so will continue to lead to inconsistent results that have no relationship to the importance of this information.

⁶ See Proposal at 22.

⁷ See the NASAA October 2020 Letter, *supra* note 3.

⁸ See the NASAA 2021 Letter, *supra* note 3.

⁹ See Proposal at 62.

Further, the interest in preserving public records is equally present in expungement proceedings that immediately follow customer dispute proceedings. However, in most cases customers will not advocate for the preservation of public records, nor should they be expected to. Instead, the Proposal assumes that expungement outcomes will be better in contested proceedings. Whether that turns out to be true to a certain degree does not overcome the fact that the preservation of public records would be left to chance. Again, NASAA expects to see a continuation of inconsistent, illogical and dangerous records purges as a result.

While FINRA, state regulators and other stakeholders work to find an approach to expungement that overcomes the flaws of one-sided advocacy that characterize many arbitration proceedings, a better form of protection – one designed to ensure that expungement is an extraordinary remedy and that public records are preserved to the greatest extent possible – would be to impose stricter limitations into the process itself.

One way to do that would be to insert a presumption against expungement into the arbitration codes. Doing so would serve as a constant reminder to arbitrators that an expungement request is not a matter to be taken lightly. It could also serve as a criterion that would need to be factored into an arbitration decision. A further structural layer of protection would be to strengthen the presumption against expungement by imposing an affirmative burden on the requesting party to establish his or her right to expungement by clear and convincing evidence. Structural barriers would offer more consistent preservation of public records.

If the Proposal is adopted, NASAA asks FINRA to monitor and report on expungement decision trends periodically to determine if expungement rates and grounds for decision improve materially.

IV. Proposed Improvements to Customer Access Should Be Further Enhanced.

NASAA supports those parts of the proposed rule changes designed to facilitate customer attendance and participation. However, NASAA recommends that the proposed language be amended to make clear that customers would have the opportunity and ability to participate in all aspects of the hearing. This would mean that customers could attend the entire hearing, introduce arguments, and make their points at any time they deem appropriate. NASAA wants to ensure that a practice cannot develop under which arbitrators relegate customer participation to an early portion of the hearing, and thereby stifle customer participation in response to arguments and records introduced at other points in the proceeding. NASAA also recommends that the Proposal be changed to state that FINRA will “deliver” the relevant documents to customers upon request, rather than simply provide them with “access.”

V. A Decision Not to Appear Must Be Given No Weight.

FINRA states in the Proposal that it believes a decision by a customer or state regulator's representative not to participate in an expungement hearing should not be given any evidentiary weight.¹⁰ NASAA agrees with this position and therefore believes that the proposed rule text should be changed to state clearly that arbitrators must give no weight to such decisions.

VI. FINRA Should Strengthen the Ability of Arbitrators to Obtain Information.

Arbitrators should have access to the information needed to make informed decisions, and NASAA therefore supports changes to the current process that would authorize arbitrators to obtain the documents and evidence needed to evaluate expungement requests. FINRA has proposed, and NASAA supports, the codification of the ability of the panel to request documentation from the party requesting expungement. However, the Proposal is unclear about what repercussions, if any, would follow if the broker fails to produce the requested items. NASAA suggests that FINRA consider the failure to produce requested documents to be grounds for denial of the expungement request with prejudice to re-apply for expungement. If the broker is granted the opportunity to reapply, NASAA worries this could be used as another means to arbitrator shop.

VII. FINRA Should Strengthen the Written Decision Requirement.

NASAA supports requiring arbitrators to explain their rationale for granting expungement relief. However, NASAA urges FINRA to strengthen this aspect of the Proposal by requiring the arbitrators to provide a fulsome explanation of how a request meets expungement's extraordinary standard, including an explanation of how the arbitrators determined that the requesting party's uncontested assertions accurately reflected the truth of the matter. Imposing such a requirement would be the best way to ensure that the arbitrators reasonably considered all the facts. NASAA also recommends that FINRA endeavor to review these explanations to make certain that special roster panels are performing as expected. Further, these explanations would provide FINRA with a baseline to consider determining if a special panel model is better suited for all expungement requests.

¹⁰ See Proposal at 59.

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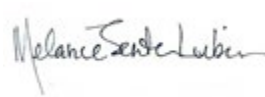
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IX. Conclusion

As set out above, NASAA supports the Proposal generally. However, we continue to have significant reservations that, even with these changes, the Proposal falls well short of addressing the misuse of expungement. Such misuse is likely to continue until such time as the current standards are rewritten and applied in the limited manner in which they were initially designed. We look forward to continuing to work with FINRA to collect data to understand how effective the proposed changes are and to pursue further improvements accordingly.

Should you have any questions about this letter, please contact either the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,

A handwritten signature in cursive script, reading "Melanie Senter Lubin", enclosed in a thin black rectangular border.

Melanie Senter Lubin
NASAA President and
Maryland Securities Commissioner