



December 7, 2022

Submitted by SEC Webform (<http://www.sec.gov/rules/sro.shtml>)

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

**RE: File No. SR-FINRA-2022-024: 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 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, Inc. (“NASAA”),<sup>1</sup> I am submitting a comment letter regarding U.S. Securities and Exchange Commission Release No. 34-96298, *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 to Modify the Current Process Relating to the Expungement of Customer Dispute Information* (the “Amended Proposal”).<sup>2</sup>

## I. Introduction

The Amended Proposal would further change FINRA Rules 12805 and 13805 to: (1) state that all customers whose customer arbitrations, civil litigations or customer complaints are a subject of the expungement request are entitled to attend and participate in all aspects of the prehearing conferences and the expungement hearing; and (2) state that a panel shall not give any evidentiary weight to a decision by a customer or an authorized representative not to attend or participate in an expungement hearing when making a determination as to whether expungement is appropriate. Last, the Amended Proposal would modify the proposed rule change to prohibit an

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<sup>1</sup> 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.

<sup>2</sup> The Amended Proposal is available at <https://www.sec.gov/rules/sro/finra/2022/34-96298.pdf>.

associated person from filing a claim requesting expungement of customer dispute information if the claim is associated with a customer arbitration or civil litigation in which a panel or court of competent jurisdiction previously found the associated person liable. NASAA supports the first two planks of the amendment, and suggests an expansion of the third to further protect the integrity of records maintained in the Central Registration Depository (“CRD”).

## **II. NASAA Supports the Proposed Change to Ensure that Customers Can Participate in All Aspects of Expungement Proceedings.**

In our comment letter in response to the original proposal,<sup>3</sup> NASAA recommended “that the proposed language [regarding customer participation rights] 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.”<sup>4</sup> FINRA’s proposed change would accomplish this objective.

## **III. NASAA Supports the Proposed Change to Prevent Arbitration Panels from Giving Evidentiary Weight to the Decision of a Customer or Authorized Representative Not to Participate in a Proceeding.**

In our comment letter on the original proposal, NASAA noted that FINRA stated in the proposal preamble that a decision not to participate should not be given evidentiary weight in an arbitration panel’s decision. We agreed, and we suggested that the rule text should state the limitation specifically.<sup>5</sup> FINRA’s proposed change does just that.

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<sup>3</sup> Letter from Melanie Lubin, NASAA President, to J. Matthew DeLesDernier, SEC Assistant Secretary, *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* (Sept. 6, 2022), <https://www.nasaa.org/wp-content/uploads/2022/09/2022-09-06-NASAA-Comment-Letter-on-SR-FINRA-2022-024.pdf>.

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

<sup>5</sup> *Id.* at 5.

#### **IV. NASAA Recommends that the Third Proposed Change be Expanded to Prevent Associated Persons from Seeking Expungement of Customer Dispute Information That Is Made Part of Any Regulatory Finding.**

NASAA agrees with the premise of FINRA's proposed change to prevent associated persons from seeking expungement of customer dispute information that is associated with a customer arbitration or civil litigation in which a panel or court of competent jurisdiction previously found the associated person liable. As FINRA explained in its response to comments on the original proposal:

*"Thus, if an associated person is found liable in a customer arbitration, FINRA considers the associated person legally bound by the award and the Director will decline the use of the FINRA arbitration forum if the associated person then requests expungement of customer dispute information that is associated with the customer arbitration in which the associated person was found liable. FINRA considers such expungement requests a collateral attack on the binding arbitration award. A collateral attack is not contemplated under FINRA rules and is contrary to FINRA's Codes of Arbitration Procedure."<sup>6</sup>*

NASAA believes that customer dispute information that forms the basis for a finding of liability in any setting should not be subject to expungement. While FINRA phrases the proposed change in terms of arbitral and civil litigation findings, the same logic applies to regulatory proceedings that find liability based on customer dispute information; namely, expungement of such information would constitute a "collateral attack" on such findings. Associated persons should therefore be prevented from seeking expungement of customer dispute information that forms the basis for a finding of liability in all of the contexts in which such information forms part of a regulatory record, such as state regulatory proceedings, proceedings brought by the SEC, or self-regulatory proceedings. Accordingly, NASAA recommends that the proposed change to the language of Rule 13805(a)(2)(A)(iv) should be expanded as follows:

*"a panel, ~~or~~ court of competent jurisdiction, securities regulator, or self-regulatory organization previously found the associated person liable in a customer arbitration, ~~or~~ civil litigation, administrative proceeding, or self-regulatory proceeding associated with the same customer dispute information"*

NASAA's recommended language would further protect the integrity of information in CRD, in particular the information that forms the bases for administrative and self-regulatory proceedings.

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<sup>6</sup> Letter from Mignon McLemore, FINRA Associate General Counsel, to Vanessa Countryman, SEC Secretary, *Re: File No. SR-FINRA-2022-024, Response to Comments and Amendment No. 1* (Nov. 10, 2022) at 28 (emphasis added), <https://www.finra.org/sites/default/files/2022-11/FINRA-2022-024-Response-to-Comments-11-10-2022.pdf>.

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## V. Conclusion

For the reasons described above, NASAA supports the first two planks of the proposed amendment and recommends an expansion of the third to further protect the integrity of information in the CRD system. 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,



Andrew Hartnett  
NASAA President and  
Deputy Commissioner,  
Iowa Insurance Division