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**VIA EMAIL**

Financial Industry Regulatory Authority  
Attn: Marcia E. Asquith  
Office of the Corporate Secretary  
1735 K Street, NW  
Washington, DC 20006-1506  
pubcom@finra.org

**Re: FINRA Regulatory Notice 17-42, December 6, 2017**

Dear Ms. Asquith:

We write in response to FINRA's request for comment on proposed amendments to the Codes of Arbitration Procedure relating to requests to expunge customer dispute information, as set forth in Regulatory Notice 17-42, dated December 6, 2017 (the "Proposal").

This law firm represents financial advisers and broker dealers on legal matters concerning the financial services industry, including FINRA Dispute Resolution arbitration proceedings. FINRA Dispute Resolution plays an essential role as an impartial arbiter of disputes involving the financial services industry, and the organization's function as a protector of the rights of customers is especially important. One significant manner by which FINRA Dispute Resolution protects the integrity of and ensures due process and fairness to the participants in the process, including the financial advisers and their customers, is through the expungement process. The expungement process contemplates and ensures that information reported on the Central Registration Depository ("CRD") is a truthful, accurate and reliable indicator of a financial adviser's history.

Member firms are required to report any and all customer complaints of alleged industry sales practice violations, regardless of their truth or falsity, before it is determined by either the

firm or a FINRA Dispute Resolution arbitration panel whether such complaints ultimately have merit. Often, such complaints subject a financial adviser to considerable expense and inconvenience, despite the fact that the customer has alleged no wrongdoing by that individual financial adviser. Although this process may result initially in the inclusion of misleading and inaccurate disclosures on a financial adviser's CRD record, FINRA's current expungement procedures ensure that those misleading (and at times, completely false) customer complaints are removed from the CRD record in order to provide an accurate record. Current FINRA Rule 2080 not only ensures a fair process for financial advisers but, more importantly, it ensures the accuracy and reliability of the CRD system.

The Proposal purportedly seeks to fill a perceived regulatory need of increased customer participation. While that is a worthy goal, it is one which has already been addressed by FINRA's September 2017, Notice to Arbitrators and Parties on Expanded Expungement Guidance. Since the dissemination of this Notice, arbitrators have been ordering customer notification and have sought participation from those customers. The proposed creation of an Expungement Arbitrator Roster is also a sensible proposal that will ensure only arbitrators experienced in the intricacies of the expungement rules make these important decisions.

However, most of the proposed amendments would not only fail to increase customer participation, but instead would needlessly increase the expense and decrease the accessibility to the expungement process which is plainly prejudicial to the financial adviser. The logical result of this decreased accessibility would be a corresponding decrease in expungement requests by financial advisers whose CRD records include false, misleading or inaccurate customer claims. Correspondingly, the CRD system would therefore be less accurate and would not adequately serve customers' needs.

Specifically, the following proposed amendments would make expungement less accessible to financial advisers:

1. In-Person Hearing Requirement

The requirement of an in-person hearing will significantly increase the cost to financial advisers. This increased cost, in attorneys' fees as well as work time lost by the financial advisers, will do nothing to improve the process. Stated differently, there is no demonstrable evidence that the current telephonic hearings fail to administer a fair outcome. The added cost will make it more onerous for those with false or incorrect disclosures to expunge such matters from their CRD records. As such, fewer financial advisers will seek expungement of misleading disclosures, and inaccuracies will necessarily remain in the CRD records.

2. Three-Person Panel Requirement

Similarly, the requirement of a three-person panel will also significantly increase the cost for financial advisers seeking expungement. The time necessary to rank and choose a Panel for these matters would increase threefold under this proposed rule change. In addition to the added

expense, such a requirement would significantly delay the process. All cynicism aside, other than the increase in filing fee revenues for FINRA Dispute Resolution, who would benefit from this proposed change?

Instead, by creating an Expungement Arbitrator Roster, FINRA can ensure that expungement requests are heard by arbitrators who are skilled and experienced in the nuances of the expungement rules.

### 3. Higher Burden of Proof

The Proposal, if enacted, would alter the purpose of Rule 2080 in a way which is counter to FINRA's stated goal of "maintaining a CRD system that provides public investors and regulators access to accurate information about firms and brokers..." See FINRA Notice to Members 04-16. As stated above, we fail to see the demonstrable evidence of failures in the current system. While the consequence to the financial adviser is plainly evident, it is not at all clear how the public would be better protected.

The proposed requirement that an arbitrator find expungement appropriate under both Rule 2080(b)(1)(A) *AND* Rule 2080(b)(1)(B) is not only unduly burdensome, but also alters Rule 2080 beyond its stated goal. This is a notable departure from the current provision which, pursuant to Rule 2080(b)(1)(A), already requires the Arbitrator to make a specific, reasoned determination regarding the propriety of expungement. Rule 2080(b)(1)(B) provides a safeguard by allowing for expungement of customer complaints in situations where fairness dictates such a result even if none of the Rule 2080(b)(1)(A) elements strictly apply. While it is the rare situation in which expungement would be appropriate under (A) but not (B), Rule 2080 purposely leaves open such a possibility in order to ensure the integrity of the CRD system.

Further, the standard for a finding under Rule 2080(b)(1)(B) would become more onerous under the Proposal – changing the requirement from a finding of "meritorious" requests that pose "no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements" to requiring a finding that "the customer dispute information has **no investor protection or regulatory value.**" (emphasis added). The Proposal thus contradicts the stated goal of maintaining an accurate CRD System, which depends on the removal of false, misleading and inaccurate disclosures.

### 4. One-Year Statute of Limitations

Limiting to one year the time to file expungement requests that do not result in an arbitration claim would also constitute an unnecessarily harsh restriction on the rights of financial advisers who are subjects of misleading CRD disclosures. FINRA's stated goal for the Proposal is to increase customer participation; however, to the extent such participation may be limited due to stale expungement requests, a one year limit is unnecessary. State law statutes of limitation, which are enacted for similar reasons, primarily provide from three to six years to file an action. FINRA's proposal of a fraction of that time unduly prejudices financial advisers.

Additionally, such a short period is a disservice to all participants in the process, including customers, who necessarily rely on the integrity of the CRD system. A one year time limit for filing expungement claims would reduce the number of financial advisers filing expungement claims. As such, false, inaccurate and misleading disclosures, which imply wrongdoing on the part of a financial adviser when no such wrongdoing in fact occurred, would remain on the CRD record, making the CRD system less accurate and eroding customer confidence. Repeating a common theme from above, the Proposal fails to demonstrate flaws in the current system warranting this limitation.

### Conclusion

Financial advisers seeking expungement of customer disputes on their CRD record are entitled to, and have come to expect, fair treatment by the FINRA Dispute Resolution system. It is therefore axiomatic that fair treatment of individual financial advisers serves investors by ensuring that expungement claims are thoroughly and objectively analyzed and that any disclosures allowed to remain on the CRD record truthfully and accurately reflect the misconduct they imply. The proposed amendments threaten the accuracy of this system, thus fundamental fairness dictates the rejection of the Proposal.

For all the reasons set forth above, we strongly recommend that the Proposal be rejected.

Very truly yours,



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John D. Stewart  
Baritz & Colman LLP