

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90000; File No. SR-FINRA-2020-030]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a 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

September 25, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 22, 2020, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend 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.

Specifically, the proposed rule change would amend the Codes to: (1) Impose requirements on expungement requests (a) filed during an investment-related, customer initiated arbitration (“customer arbitration”) by an associated person, or by a party to the customer arbitration on-behalf-of an associated person (“on-behalf-of request”), or (b) filed by an associated person separate from a customer arbitration (“straight-in request”); (2) establish a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide straight-in requests; (3) establish procedural requirements for expungement hearings; and (4) codify and update the best practices of the Notice to Arbitrators and Parties on Expanded Expungement

Guidance (“Guidance”) that arbitrators and parties must follow.<sup>3</sup> In addition, the proposed rule change would amend the Customer Code to specify procedures for requesting expungement of customer dispute information arising from simplified arbitrations. The proposed rule change would also amend the Codes to establish requirements for notifying state securities regulators and customers of expungement requests.

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

###### (I) Background and Discussion

###### A. Customer Dispute Information in the Central Registration Depository

Information regarding customer disputes involving associated persons is maintained in the Central Registration Depository (“CRD®”), the central licensing and registration system used by the U.S. securities industry and its regulators.<sup>4</sup> FINRA operates the CRD system pursuant to policies developed jointly with NASAA. FINRA works with the SEC, NASAA and other members of the regulatory community to ensure that information submitted and maintained in the CRD system is accurate and complete.

<sup>3</sup> See Guidance, available at <https://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

<sup>4</sup> The concept for the CRD system was developed by FINRA jointly with the North American Securities Administrators Association (“NASAA”). The CRD system fulfills FINRA’s statutory obligation to establish and maintain a system to collect and retain registration information. NASAA and state regulators play a critical role in the ongoing development and implementation of the CRD system.

In general, the information in the CRD system is submitted by registered securities firms, brokers and regulatory authorities in response to questions on the uniform registration forms.<sup>5</sup> These forms are used to collect registration information, which includes, among other things, administrative, regulatory, criminal history, financial and other information about brokers, such as customer complaints, arbitration claims and court filings made by customers (*i.e.*, “customer dispute information”). FINRA, state and other regulators use this information in connection with their licensing and regulatory activities, and member firms use this information to help them make informed employment decisions.

Pursuant to rules approved by the SEC, FINRA makes specific CRD information publicly available through BrokerCheck®.<sup>6</sup> BrokerCheck is part of FINRA’s ongoing effort to help investors make informed choices about the brokers and broker-dealer firms with which they may conduct business. BrokerCheck maintains information on the approximately 3,600 registered broker-dealer firms and 624,000 registered brokers. BrokerCheck also provides the public with access to information about formerly registered broker-dealer firms and brokers.<sup>7</sup> In 2019 alone, BrokerCheck helped users conduct more than 40 million searches of firms and brokers.

The regulatory framework governing the CRD system and BrokerCheck has long contemplated the possibility of expunging certain customer dispute

<sup>5</sup> The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), Form BR (Uniform Branch Office Registration Form), Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration) and Form U6 (Uniform Disciplinary Action Reporting Form).

<sup>6</sup> Section 15A of the Exchange Act requires FINRA to provide registration information to the public. BrokerCheck is one of the tools through which FINRA disseminates this information to the public. There is a limited amount of information in the CRD system that FINRA does not display through BrokerCheck, including personal or confidential information. A detailed description of the information made available through BrokerCheck is available at <http://www.finra.org/investors/about-brokercheck>.

<sup>7</sup> Formerly registered brokers, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or may seek to attain other positions of trust with potential investors. BrokerCheck provides information on more than 17,000 formerly registered broker-dealer firms and nearly 567,000 formerly registered brokers. Broker records are available in BrokerCheck for 10 years after a broker leaves the industry, and brokers who are the subject of disciplinary actions and certain other events remain on BrokerCheck permanently.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

information from these systems in limited circumstances, such as where the allegations made about the broker are factually impossible or clearly erroneous. The expungement framework seeks to balance the competing interests of providing regulators broad access to information about customer disputes to fulfill their regulatory obligations, providing a fair process that recognizes a broker's interest in protecting their reputation and ensuring investors have access to accurate information about brokers.

#### B. FINRA Rules 2080, 12805 and 13805 Governing Expungement of Customer Dispute Information

A broker can seek expungement of customer dispute information by obtaining a court expungement order (1) by going through the FINRA arbitration process (and then obtaining a court order confirming an arbitration award containing expungement) or (2) by going directly to court (without first going to arbitration).

FINRA rules require arbitrators to perform fact-finding before recommending expungement of customer dispute information and to provide information about the basis for the expungement. Specifically, FINRA Rules 12805 and 13805 require arbitrators to hold a recorded hearing regarding the appropriateness of expungement of customer dispute information and to review settlement documents, the amount of payments made to any party and any other terms and conditions of the settlement.<sup>8</sup>

In addition, these rules require arbitrators to indicate whether they have awarded expungement because: (1) The claim, allegation or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (3) the claim, allegation or information is false.<sup>9</sup> The arbitrators are further required to provide a brief written explanation of the reasons for recommending expungement.<sup>10</sup> These

<sup>8</sup> In almost every proceeding, all or a majority of the arbitrators considering an expungement request are public arbitrators. Among other requirements, public arbitrators have never been employed by the securities industry; do not devote 20 percent or more of their professional work to the securities industry or to parties in disputes concerning investment accounts or transactions or employment relationships within the financial industry; and do not have immediate family members or co-workers who do so. See FINRA Rule 12100(aa).

<sup>9</sup> See FINRA Rules 2080, 12805 and 13805.

<sup>10</sup> Although FINRA Rules 12805 and 13805 state that the panel may "grant" expungement of customer dispute information under FINRA Rule

requirements are supplemented with extensive guidance and training, including the Guidance, first published in 2013 and expanded further periodically thereafter.<sup>11</sup> The Guidance provides arbitrators with best practices and recommendations to follow, in addition to the requirements of FINRA Rules 12805 and 13805, when deciding expungement requests.

Regardless of whether expungement of customer dispute information is sought directly through a court or in arbitration, FINRA Rule 2080, which was developed in close consultation with representatives of NASAA and state regulators, requires a broker-dealer firm or broker seeking expungement 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 only after the court orders it to execute the expungement.<sup>12</sup>

#### C. Concerns Regarding Expungement

Some stakeholders of the forum have raised concerns about expungement hearings held after the parties settle the customer arbitration that gave rise to the customer dispute information.<sup>13</sup> In

2080, the panel's decision regarding an expungement request is not the final step in the process. A person seeking expungement must obtain a court order confirming an arbitration award for FINRA to expunge the customer dispute information from the CRD system. Accordingly, FINRA believes the word "recommend" more accurately describes the panel's role in the expungement process. It has been FINRA's longstanding practice to state in expungement awards that the arbitrators "recommend," rather than "grant," expungement. See also *infra* note 132, and accompanying text (stating that the proposed amendments to FINRA Rules 12805(c) and 13805(c) would also provide that the panel would "recommend" rather than "grant" expungement).

<sup>11</sup> See *supra* note 3.

<sup>12</sup> FINRA Rule 2080 also requires that firms and brokers seeking a court order or confirmation of the arbitration award containing expungement name FINRA as a party, and provides that FINRA will challenge the request in court in appropriate circumstances. FINRA may, however, waive the requirement to name it as a party if a firm or broker requests a waiver and FINRA determines that the award containing expungement is based on affirmative judicial or arbitral findings that: (1) The claim, allegation or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (3) the claim, allegation, or information is false. In addition, FINRA has sole discretion "under extraordinary circumstances" to waive the requirement that it be named in a court proceeding if it determines that the request for expungement and accompanying award are meritorious and expungement would not have a material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements. See FINRA Rule 2080(b).

<sup>13</sup> In its Final Report and Recommendations, the FINRA Dispute Resolution Task Force ("Task

Force") included a recommendation to create a special arbitration panel consisting of specially trained arbitrators to decide expungement requests in settled cases and in cases when a claimant did not name the associated person as a respondent in the case. See <http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf>; see also letter from Barbara Black, Professor of Law, University of Cincinnati College of Law (Retired), to Marcia Asquith, Office of the Corporate Secretary, FINRA, dated February 5, 2018 ("Black'") (discussing the Task Force's recommendation) and letter from Joseph Borg, President, NASAA, to Marcia Asquith, Office of the Corporate Secretary, FINRA, dated February 5, 2018 ("NASAA'") (commenting that post-settlement expungement hearings often consist of one-sided presentations of the facts). These and other letters responding to *Regulatory Notice 17-42* (December 2017) ("*Notice 17-42*") are discussed in Item I.I.C. below.

Force") included a recommendation to create a special arbitration panel consisting of specially trained arbitrators to decide expungement requests in settled cases and in cases when a claimant did not name the associated person as a respondent in the case. See <http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf>; see also letter from Barbara Black, Professor of Law, University of Cincinnati College of Law (Retired), to Marcia Asquith, Office of the Corporate Secretary, FINRA, dated February 5, 2018 ("Black'") (discussing the Task Force's recommendation) and letter from Joseph Borg, President, NASAA, to Marcia Asquith, Office of the Corporate Secretary, FINRA, dated February 5, 2018 ("NASAA'") (commenting that post-settlement expungement hearings often consist of one-sided presentations of the facts). These and other letters responding to *Regulatory Notice 17-42* (December 2017) ("*Notice 17-42*") are discussed in Item I.I.C. below.

<sup>14</sup> The Codes provide that no claim shall be eligible for submission to arbitration under the Codes where six years have elapsed from the occurrence or event giving rise to the claim. The panel resolves any questions regarding the eligibility of a claim under this rule. See FINRA Rules 12206(a) and 13206(a) (Time Limitation on Submission of Claims). This six-year eligibility rule applies to all arbitration claims, including those requesting expungement. Thus, if an associated person requests expungement of a CRD disclosure where six years have elapsed since the customer complaint, arbitration or civil litigation was initially reported, the arbitrator or panel should consider whether the claim is eligible for arbitration.

In addition, FINRA Rules 12409 and 13413 (Jurisdiction of Panel and Authority to Interpret the Code) provide that the panel has the authority to interpret and determine the applicability of all provisions under the Codes. Such interpretations are final and binding upon the parties. Together, the rules grant arbitrators the authority to decide whether a claim is eligible for arbitration under the Codes. See *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85-86 (2002) (finding that an arbitrator properly decides issues of eligibility).

Arbitrators should ensure that an expungement claim is eligible under the Codes and arbitrators may decide the eligibility issue on their own, rather than only in response to a party's motion. See *Horst v. FINRA*, No. A-18-777960-C (Dist. Ct. Nevada Oct. 25, 2018) (Order Denying Motion to Vacate Arbitration Award) (ruling that an arbitrator may raise sua sponte the eligibility issue, not only when a party to the arbitration raises it in a motion).

<sup>15</sup> Currently, on rare occasions, straight-in requests are filed against a customer. As discussed below, the proposed amendments would prohibit these filings. See *infra* Item I.I.A.1.(II)A.2., "No Straight-in Requests Against Customers."

dispute information arises from a customer arbitration or customer complaint that was disclosed on the broker's CRD record a number of years prior to the request.<sup>16</sup> Thus, during these expungement hearings, the panel may receive information only from the associated person requesting expungement.

Further, FINRA is concerned that an increasing number of straight-in requests are being heard by a single arbitrator instead of a three-person panel.<sup>17</sup> FINRA believes that most expungement requests should be decided by a three-person panel. Expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions, request evidence and to serve generally as fact-finders in the absence of customer input would help ensure that a complete factual record is created to support the arbitrators' decision in such expungement hearings.

In addition, FINRA is concerned that some associated persons are making second requests to expunge the same customer dispute information that they previously requested be expunged by a court or another arbitration panel. For example, an associated person may have a CRD disclosure that resulted from a customer's arbitration claim, but because the associated person is not named as a party to the customer

<sup>16</sup> Several questions on Forms U4 and U5 require associated persons to disclose certain investment-related, consumer-initiated (i) complaints and (ii) arbitrations and civil litigations, alleging sales practice violations. See Form U4, Question 14I, available at <https://www.finra.org/sites/default/files/form-u4.pdf> and Form U5, Question 7E, available at <https://www.finra.org/sites/default/files/form-u5.pdf>. These disclosures become part of the associated person's CRD record and are made available on BrokerCheck.

<sup>17</sup> An expungement request is a non-monetary or not specified claim. The Codes require that such claims are heard by a panel of three arbitrators, unless the parties agree in writing to one arbitrator. In addition, if a party requesting expungement adds a small monetary claim (of less than \$100,000) to the expungement request, the Codes require that such claims are heard by one arbitrator. See FINRA Rules 12401 and 13401. FINRA has amended the Codes to apply minimum fees to expungement requests, whether the request is made as part of the customer arbitration or the associated person files an expungement request in a separate arbitration. The amendments also apply a minimum process fee and member surcharge to straight-in requests, as well as a minimum hearing session fee to expungement-only hearings. See Securities Exchange Act Release No. 88945 (May 26, 2020), 85 FR 33212 (June 1, 2020) (Order Approving File No. SR-FINRA-2020-005). See also *Regulatory Notice 20-25* (July 2020) (announcing a September 14, 2020 effective date) at <https://www.finra.org/rules-guidance/notices/20-25>.

arbitration ("unnamed person"),<sup>18</sup> the associated person is not able to request expungement in the customer arbitration.<sup>19</sup> When a firm asks, on-behalf-of the unnamed person, that the arbitrators recommend expungement, the unnamed person, as a non-party in the customer arbitration, may subsequently argue that he or she did not receive adequate notice of the expungement request or an opportunity to participate in the earlier proceeding. The unnamed person may then file a new claim to expunge the same disclosure that the firm requested on the unnamed person's behalf, despite the fact that the panel denied the expungement request in the prior matter.

FINRA believes that re-filing an expungement request that has been denied by an arbitration panel undermines the integrity of the arbitration process and the information in the CRD system. Arbitration awards are final and binding on the parties. If an associated person seeks to challenge an arbitration award, the associated person can do so by filing a motion to vacate in court.

In addition, some associated persons make second requests for expungement after withdrawing or deciding not to pursue an expungement request made in a customer arbitration, believing that another panel who has not heard the merits of the claim may be more likely to recommend expungement. FINRA is concerned about this practice of "arbitrator shopping," particularly when associated persons withdraw an original expungement request after the arbitration panel has been made aware of evidence that could result in the denial of the expungement request.

<sup>18</sup> In 2009, the SEC approved amendments to Forms U4 and U5 to require, among other things, the reporting of allegations of sales practice violations made against unnamed persons. See Securities Exchange Act Release No. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) (Order Approving File No. SR-FINRA-2009-008). Specifically, Forms U4 and U5 were amended to add questions to elicit whether the applicant or registered person, though not named as a respondent or defendant in a customer-initiated arbitration, was either mentioned in or could be reasonably identified from the body of the arbitration claim as a registered person who was involved in one or more of the alleged sales practice violations.

<sup>19</sup> If a broker is not named as a party in the customer arbitration, brokers may seek to expunge customer dispute information by: (1) Asking a party to the arbitration, usually the firm, to request expungement on his or her behalf; (2) seeking to intervene in the customer arbitration; (3) initiating a new arbitration in which the unnamed person requests expungement and names the customer or firm as the respondent; or (4) going directly to court (without first going to arbitration).

On December 6, 2017, FINRA published *Notice 17-42*<sup>20</sup> to seek comment on a variety of changes to the process of arbitrating expungement requests, including establishing a roster of arbitrators with additional training and specific backgrounds or experience from which a panel would be selected to decide an associated person's request for expungement of customer dispute information. The arbitrators from this roster would decide straight-in requests. As discussed below in Item I.C., FINRA received 70 comment letters on *Notice 17-42* that reflected a variety of perspectives and different suggestions regarding how to proceed. The proposed rule change is responsive to concerns raised by commenters and would include the following primary changes:

➤ *Expungement Requests in Customer Arbitrations*

○ An associated person named in a customer arbitration would be required to request expungement during the customer arbitration or forfeit the ability to request expungement of that same disclosure in any subsequent proceeding.

○ A named party from a customer arbitration would be permitted to request expungement during the customer arbitration on-behalf-of an unnamed person pursuant to specified conditions and limitations.

○ If a named associated person or party on-behalf-of an unnamed person requests expungement during the customer arbitration and the arbitration closes by award after a hearing,<sup>21</sup> the panel from the customer arbitration would be required to decide the expungement request during the customer arbitration and issue a decision on the request in the award.

○ If a named associated person or party on-behalf-of an unnamed person requests expungement during the customer arbitration and the arbitration closes other than by award or by award without a hearing, an associated person may only pursue an expungement request by filing a straight-in request under the Industry Code against the member firm at which the associated person was associated at the time the dispute arose.

➤ *Expungement Requests Under the Industry Code*

○ All straight-in requests<sup>22</sup> would be required to be filed under the Industry

<sup>20</sup> See <http://www.finra.org/industry/notices/17-42>.

<sup>21</sup> Under the Codes, a "hearing" means the hearing on the merits of the arbitration. See FINRA Rules 12100(o) and 13100(o).

<sup>22</sup> A straight-in request would include a request to expunge customer dispute information filed under the Industry Code: (1) By an associated

Code against the member firm at which the associated person was associated at the time the dispute arose and decided by a panel selected from a roster of arbitrators with enhanced experience and training (“Special Arbitrator Roster”).

- If an associated person withdraws a straight-in request after a panel from the Special Arbitrator Roster is appointed, the case would be closed with prejudice.

- *Special Arbitrator Roster*

- A three-person panel selected from the Special Arbitrator Roster would decide straight-in requests.

- The parties would not be permitted to agree to fewer than three arbitrators from the Special Arbitrator Roster to decide straight-in requests.

- Arbitrators on the Special Arbitrator Roster would be required to be public arbitrators who are eligible for the chairperson roster and who have fully met the following additional qualifications: (1) Evidenced successful completion of, and agreement with, enhanced expungement training provided by FINRA; and (2) service as an arbitrator through award on at least four customer-initiated arbitrations administered by FINRA or by another self-regulatory organization (“SRO”) in which a hearing was held.

- The Neutral List Selection System (“NLSS”) would randomly select the three public chairpersons from the Special Arbitrator Roster to decide straight-in requests. The first arbitrator selected would be the chair of the panel. The parties would not be permitted to stipulate to the use of pre-selected arbitrators.

- An associated person who files a straight-in request would not be permitted to strike any arbitrators selected by NLSS or stipulate to the arbitrator’s removal, but would be permitted to challenge any arbitrator selected for cause. If an arbitrator is removed, NLSS would randomly select a replacement.

- *Time Limitations on Requests for Expungement*

- For customer dispute information reported to the CRD system after the effective date of the proposed rule change, the proposal would provide that

person named in a customer arbitration after the customer arbitration closes other than by award or by award without a hearing; (2) arising from a customer complaint or civil litigation rather than a customer arbitration; or (3) by an associated person who was the subject of a customer arbitration, but unnamed, and where a named party in the customer arbitration did not request expungement on-behalf-of the unnamed associated person, or where a named party made an on-behalf-of request, but the customer arbitration closed other than by award or by award without a hearing.

an associated person would be barred from requesting expungement if: (1) More than two years have elapsed since the close of the customer arbitration or civil litigation that gave rise to the customer dispute information; or (2) there was no customer arbitration or civil litigation involving the customer dispute information, and more than six years have elapsed since the date that the customer complaint was initially reported to the CRD system.

- For customer dispute information reported to the CRD system before the effective date of the proposed rule change, the proposal would require an associated person to request expungement as a straight-in request under the Industry Code: (1) Within two years of the effective date of the proposed rule change for disclosures that arose from a customer arbitration or civil litigation that closed on or prior to the effective date; and (2) within six years of the effective date of the proposed rule change for customer complaints initially reported to the CRD system on or prior to the effective date.

- *Expungement Requests During a Simplified Arbitration*

- If a party requests expungement during a simplified arbitration, the single arbitrator in the simplified arbitration would be required to decide the expungement request, regardless of how the simplified arbitration case closes (e.g., even if the case settles).

- If an associated person does not request expungement during the simplified arbitration, the request may be filed as a straight-in request under the Industry Code against the member firm at which the associated person was associated at the time the dispute arose, and be decided by a three-person panel randomly selected from the Special Arbitrator Roster.

- *Expungement Hearings*

- Establish procedural requirements that arbitrators and parties must follow for expungement hearings.

- *State and Customer Notifications*

- Establish requirements for notifying state securities regulators and customers of expungement requests.

Under the proposed rule change, an associated person would only be permitted to seek expungement of customer dispute information in the arbitration forum administered by FINRA by complying with the requirements of proposed Rules 12805 (expungement requests in a customer arbitration), 13805 (straight-in requests under the Industry Code) or 12800(d) (expungement requests in a simplified customer arbitration).

The proposed rule change, as revised in response to comments on *Notice 17-42*, is set forth in further detail below.<sup>23</sup>

## (II) Proposed Rule Change

The discussion below of the proposed rule change is divided into six areas: (A) Requests for expungement under the Customer Code; (B) straight-in requests under the Industry Code and the Special Arbitrator Roster; (C) limitations on expungement requests; (D) procedural requirements related to all expungement hearings; (E) notifications to customers and states regarding expungement requests; and (F) expungement requests during simplified customer arbitrations.

### A. Requests for Expungement Under the Customer Code

FINRA Rule 12805 provides a list of requirements that arbitrators must meet before they may recommend expungement.<sup>24</sup> The rule does not, however, provide guidance for associated persons on how and when they may request expungement during the customer arbitration, or on when arbitrators must make expungement determinations. The proposed rule change would amend FINRA Rule 12805 to set forth requirements for expungement requests filed by an associated person during a customer arbitration.

#### 1. Expungement Requests During the Customer Arbitration

##### a. By a Respondent Named in a Customer Arbitration

Under current practice, an associated person who is named as a respondent in a customer arbitration (“named associated person”) may request expungement at any time during the customer arbitration or separately from the customer arbitration in a straight-in request.<sup>25</sup> If a named associated person

<sup>23</sup> The proposed rule change would apply to all members, including members that are funding portals or have elected to be treated as capital acquisition brokers (“CABs”), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference.

<sup>24</sup> FINRA Rule 12805 provides that a panel must comply with the following criteria before recommending expungement: (1) Hold a recorded hearing to decide the issue of expungement; (2) review settlement documents, and consider the amount of payments made to any party and any other terms and conditions of the settlement; (3) indicate in the award which of the grounds in FINRA Rule 2080 is the basis for expungement and provide a brief written explanation of the reasons for recommending expungement; and (4) assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement. *See also* FINRA Rule 13805.

<sup>25</sup> There are several ways in which a named associated person may request expungement during

requests expungement during the customer arbitration, does not withdraw the request and the case goes to hearing and closes by award, the panel in the customer arbitration will also decide the expungement request and include the decision as part of the customer's award.<sup>26</sup> If the customer arbitration does not close by award after a hearing (*e.g.*, settles), and the associated person continues to pursue the expungement request, the panel from the customer arbitration may hold an expungement-only hearing as required by FINRA Rule 12805 to decide the expungement request.

Under the proposed rule change, if a named associated person seeks to request expungement of customer dispute information arising from the customer's statement of claim, the named associated person must make the expungement request during the customer arbitration.<sup>27</sup> As discussed below, the request would be subject to limitations on how and when the request may be made.<sup>28</sup> In addition, the Director would be authorized to deny the forum to expungement requests during a customer arbitration that do not arise out of the customer arbitration.<sup>29</sup> If the associated person does not request expungement during the customer arbitration, he or she would forfeit the opportunity to seek expungement of the same customer dispute information in any subsequent proceeding.<sup>30</sup>

a customer arbitration. The request may be included in the answer to the statement of claim that must be submitted within 45 days of receipt of the statement of claim, and may include other claims and remedies requested. *See* FINRA Rules 12303(a) and (b); *see also* FINRA Rules 13303(a) and (b). The expungement request may also be included in other pleadings (*e.g.*, a counterclaim, a cross claim, or a third party claim) and must be filed with the Director of the Office of Dispute Resolution ("Director") through the Party Portal. *See* FINRA Rules 12100(x) and 12300(b). The associated person may also request at any time during the case (outside of a pleading) that the panel consider the person's expungement request during the hearing. Under FINRA Rule 12503, such a request is treated like a motion, which gives the other parties an opportunity to object. If there is an objection, the panel must decide the motion pursuant to FINRA Rule 12503(d)(5). *See also* FINRA Rules 13503 and 13503(d)(5).

<sup>26</sup> Under the Codes, a customer's or claimant's damage request determines whether a single arbitrator or a three-person panel will consider and decide an arbitration case. *See* FINRA Rules 12401 and 13401. For ease of reference, when discussing expungement requests during customer arbitrations under proposed Rule 12805, unless otherwise specified, the rule filing uses the term "panel" to mean either a panel or single arbitrator.

<sup>27</sup> *See* proposed Rule 12805(a)(1)(A).

<sup>28</sup> *See also* *infra* Item II.A.1.(II)C., "Limitations on Expungement Requests."

<sup>29</sup> *See* proposed Rules 12203(b) and 12805(a).

<sup>30</sup> *See* proposed Rule 12805(a).

FINRA is proposing to require that a named associated person request expungement during the customer arbitration because, if the arbitration closes by award after a hearing, the panel from the customer arbitration will be best situated to decide the related issue of expungement. Requiring the named associated person to request expungement in the customer arbitration increases the likelihood that a panel will have input from all parties and access to all of the evidence, testimony and other documents to make an informed decision on the expungement request.

FINRA recognizes that this requirement could result in some named associated persons filing expungement requests to preserve their right to make a request, regardless of the potential outcome. FINRA believes that the potential costs that would be incurred by associated persons, arbitrators and the forum if named associated persons file expungement requests to preserve the ability to request expungement are appropriate given the potential benefit of having customer input and a complete factual record for the panel to decide an expungement request. In addition, certain aspects of the proposed rule change may limit the filing of requests without regard to the potential outcome. For example, under the proposed rule change, named associated persons would be permitted to request expungement no later than 30 days before the first scheduled hearing.<sup>31</sup> This proposed amendment would provide the named associated person with a reasonable amount of time to consider, likely after receiving any discovery from the claimant, whether to file the request because it could meet one or more of the FINRA Rule 2080(b)(1) grounds for expungement.<sup>32</sup>

#### i. Method of Requesting Expungement

The proposed rule change would limit how and when expungement requests may be made during the customer arbitration. Under the proposed rule change, if a named associated person requests expungement during the customer arbitration, the request must be included in the answer or a pleading requesting expungement.<sup>33</sup> If the request is included in the answer, it must be filed within 45 days of receipt of the customer's statement of claim in

<sup>31</sup> *See* proposed Rule 12805(a)(1)(C); *see also* *infra* Item II.A.1.(II)A.1.a.i., "Method of Requesting Expungement."

<sup>32</sup> In addition, FINRA notes that the SEC has approved changes to FINRA rules to apply minimum fees to expungement requests. *See* *supra* note 17.

<sup>33</sup> *See* proposed Rule 12805(a)(1)(C)(i).

accordance with existing requirements under the Codes.<sup>34</sup> If the named associated person requests expungement in a pleading requesting expungement, the request must be filed no later than 30 days before the first scheduled hearing begins.<sup>35</sup>

FINRA believes the proposed rule change would provide a reasonable amount of time for the requesting party to make an informed decision about whether to request expungement while also providing the parties with reasonable case-preparation time, since the expungement issues will overlap with the issues raised by the customer's claim.

In addition, the proposed filing deadline would provide the Director a reasonable amount of time to notify state securities regulators of the expungement request.<sup>36</sup> If a named associated person seeks to request expungement after the 30-day filing deadline, the panel would be required to decide whether to grant an extension and permit the request or whether to deny the request for expungement.<sup>37</sup>

#### ii. Required Contents of an Expungement Request

Under the proposed rule change, a request for expungement by a named associated person in a customer arbitration must include the applicable filing fee under the Codes.<sup>38</sup> In addition, a named associated person would be required to provide the CRD number of the party requesting expungement, each CRD occurrence number that is the subject of the request and the case name and docket number that gave rise to the disclosure, if applicable.<sup>39</sup>

The proposed rule change would also require the party requesting expungement to explain whether expungement of the same customer dispute information was (i) previously requested and, if so (ii) how it was

<sup>34</sup> *See* *supra* note 25.

<sup>35</sup> *See* proposed Rule 12805(a)(1)(C)(i).

<sup>36</sup> *See* proposed Rule 12805(b); *see also* *infra* Item II.A.1.(II)E.3., "State Notification of Expungement Requests."

<sup>37</sup> *See* proposed Rule 12805(a)(1)(C). The proposed amendments would provide that if the expungement request is not filed in a pleading no later than 30 days before the first scheduled hearing, then FINRA Rule 12309(b) would require the associated person to file a motion pursuant to FINRA Rule 12503, seeking an extension of the 30-day deadline to file the expungement request.

<sup>38</sup> *See* proposed Rule 12805(a)(1)(C)(ii)a.; *see also* *supra* note 17.

<sup>39</sup> *See* proposed Rule 12805(a)(1)(C)(ii)b.–d. An occurrence is a disclosure event that is reported to the CRD system via one or more Disclosure Reporting Pages. Each occurrence contains details regarding a specific disclosure event. An occurrence can have as many as three sources reporting the same event: Forms U4, U5 and U6.

decided.<sup>40</sup> This requirement would assist with implementation of the proposed prohibition on parties making second requests for expungement, discussed in more detail below.<sup>41</sup> This proposed requirement is also consistent with language in the existing Guidance stating that arbitrators should ask a party requesting expungement whether an arbitration panel or a court previously denied expungement of the customer dispute information at issue and, if there was a prior denial, to deny the expungement request.<sup>42</sup>

Under the proposed rule change, if an expungement request fails to include any of the proposed requirements for requesting expungement, the request would be considered deficient and would not be served unless the deficiency is corrected.<sup>43</sup> These requirements would help ensure that FINRA, the panel and the parties understand who is requesting expungement and which disclosure is the subject of the request. Further, if the disclosure arose from a customer arbitration, the case name and docket number would provide the panel that is considering the expungement request with information about the dispute that gave rise to the disclosure that the party is seeking to expunge.

FINRA believes these proposed requirements for parties requesting expungement are necessary for the timely and orderly consideration of expungement requests as well as to maintain the integrity of the data in the CRD system.

#### b. Expungement Requests by a Party Named in the Customer Arbitration On-Behalf-Of an Unnamed Person

The Codes do not specifically address expungement requests by a party named in a customer arbitration on-behalf-of an unnamed person.<sup>44</sup> Under current practice, a party to a customer arbitration may file an on-behalf-of request for expungement during the customer arbitration. If the party (typically, a firm) files the request and

the customer arbitration closes by award after a hearing, the panel will decide the expungement request and include the decision in the award. If the customer arbitration does not close by award after a hearing (e.g., settles), either the requesting party or the unnamed person could ask the panel to consider and decide the expungement request before it disbands. In this circumstance, the panel from the customer arbitration will hold a separate expungement-only hearing to decide the expungement request.

The proposed rule change would codify the ability of a party in the customer arbitration to file an on-behalf-of request during a customer arbitration.<sup>45</sup> Under the proposed rule change, a party to a customer arbitration may file an on-behalf-of request that seeks to expunge customer dispute information arising from the customer's statement of claim, provided the request is eligible for arbitration under proposed Rule 12805.<sup>46</sup> Filing an on-behalf-of request would be permissive, not mandatory.<sup>47</sup> However, as discussed below, if the named party and the unnamed person agree to such a request, FINRA would require them to sign a form consenting to the on-behalf-of request which would help ensure that the unnamed person is fully aware of the request and that the firm is agreeing to represent the unnamed person for the purpose of requesting expungement during the customer arbitration.<sup>48</sup>

#### i. Method of Requesting Expungement On-Behalf-Of an Unnamed Person

The unnamed person would be required to consent to the on-behalf-of request in writing.<sup>49</sup> In particular, the party filing an on-behalf-of request would be required to submit a signed Form Requesting Expungement on Behalf of an Unnamed Person ("Form") and a statement requesting expungement with the Director.<sup>50</sup> The

proposed rule change would not require that an on-behalf-of request be included in an answer or pleading requesting expungement (although it could be), since the request seeks relief on-behalf-of a person who is not a party to the arbitration. However, the party making the request would be required to serve the request, which would include the Form, on all parties no later than 30 days before the first scheduled hearing.<sup>51</sup>

FINRA believes that requiring submission of the Form would help address the issue of an unnamed person not being notified of the on-behalf-of request. As discussed above, FINRA is concerned that some associated persons are filing arbitration claims seeking expungement of the same customer dispute information that was the subject of a previous denial by a panel of an on-behalf-of request. By signing the Form, the unnamed person would be consenting to the on-behalf-of request and agreeing to be bound by the panel's decision on the request.<sup>52</sup> In addition, the Form would provide that, if the customer arbitration closes by award after a hearing, the unnamed person would be barred from filing a request for expungement for the same customer dispute information in a subsequent proceeding, and the unnamed person's signature would serve as acknowledgement of this consequence.

#### ii. Required Contents of an On-Behalf-Of Expungement Request

Under the proposed rule change, an on-behalf-of request would be required to include the same elements as a request for expungement by a named associated person during a customer arbitration.<sup>53</sup> Thus, the party requesting expungement on-behalf-of an unnamed person (typically, the firm) would be required to provide the applicable filing fee, the CRD number of the unnamed person, each CRD occurrence number that is the subject of the request and the

expunged and the party requesting expungement on the unnamed person's behalf must sign the Form.

<sup>51</sup> See proposed Rule 12805(a)(2)(C)(iii). The 30-day deadline is the same as the proposed deadline for a named associated person to request expungement in a customer arbitration.

<sup>52</sup> By signing the Form, the unnamed person would also be agreeing to maintain the confidentiality of documents and information from the customer arbitration to which the unnamed person is given access and to adhere to any confidentiality agreements or orders associated with the customer arbitration. See proposed Rule 12805(a)(2)(D). Failure of the unnamed person to comply with this provision could subject the unnamed person to a claim for damages by an aggrieved party.

<sup>53</sup> See proposed Rule 12805(a)(1)(C)(ii); see also *supra* Item II.A.1.(II)A.1.a.ii., "Required Contents of an Expungement Request."

<sup>40</sup> See proposed Rule 12805(a)(1)(C)(ii)e.

<sup>41</sup> See *infra* Item II.A.1.(II)A.1.b.i., "Method of Requesting Expungement On-Behalf-Of an Unnamed Person."

<sup>42</sup> See *supra* note 3.

<sup>43</sup> See proposed Rule 12307(a)(8)-(11) (setting forth reasons a claim may be deficient).

<sup>44</sup> The proposed rule change would define an unnamed person as "an associated person, including a formerly associated person, who is identified in a Form U4, Form U5, or Form U6, as having been the subject of an investment-related, customer-initiated arbitration claim that alleged that the associated person or formerly associated person was involved in one or more sales practice violations, but who was not named as a respondent in the arbitration claim." See proposed Rule 12100(ff).

<sup>45</sup> See proposed Rule 12805(a)(2).

<sup>46</sup> See proposed Rule 12805(a)(2)(B).

<sup>47</sup> See proposed Rule 12805(a)(2)(A).

<sup>48</sup> A customer complaint can be reported to the CRD system via a Form U4 or Form U5. Pursuant to FINRA Rule 1010, an associated person should be made aware of the filing of a Form U4 and any amendments thereto by the associated person's member firm. In addition, Article V, Section 3 of the FINRA By-Laws of the Corporation requires that a member firm provide an associated person a copy of an amended Form U5, including one reporting a customer complaint involving the associated person. FINRA also provides several methods for associated persons and former associated persons to check their records (e.g., by requesting an Individual CRD Snapshot or online through BrokerCheck).

<sup>49</sup> See proposed Rule 12805(a)(2)(A).

<sup>50</sup> See proposed Rule 12805(a)(2)(C)(ii). The unnamed person whose CRD record would be

case name and docket number that gave rise to the disclosure, if applicable. In addition, as discussed above, the party requesting expungement would be required to include the Form, signed by the unnamed person whose CRD record would be expunged and the party filing the request.

### c. Deciding Expungement Requests During Customer Arbitrations

The proposed amendments would require that if there is a request for expungement by a named associated person or on-behalf-of an unnamed person during a customer arbitration, the panel from the customer arbitration must decide the expungement request if the customer arbitration closes by award after a hearing.<sup>54</sup> If the customer arbitration closes other than by award (e.g., settles) or by award without a hearing, the panel would not consider the expungement request.<sup>55</sup> Instead, the associated person would have the option of filing a request to expunge the same customer dispute information as a new claim under proposed Rule 13805 against the member firm at which he or she was associated at the time the customer dispute arose.<sup>56</sup> A panel from the Special Arbitrator Roster would decide such an expungement request, as discussed in more detail below.<sup>57</sup>

#### i. Panel Decides the Expungement Request if the Customer's Claim Closes by Award After a Hearing

Currently, if a named associated person requests expungement, or a party files an on-behalf-of request, and the customer's claim closes by award after a hearing, the panel may consider and decide the expungement request during the customer arbitration and issue its decision in the award. If, however, the party requesting expungement does not raise the issue of expungement during the hearing, the panel will not decide the request and may deem it withdrawn without prejudice.<sup>58</sup> In this instance, the

associated person has the option to file the request again at a later date.

Under the proposed rule change, if, during the customer arbitration, a named associated person requests expungement or a party files an on-behalf-of request, and the customer's claim closes by award after a hearing, the panel in the customer arbitration would be required to consider and decide the request for expungement during the customer arbitration and issue a decision on the expungement request in the award.<sup>59</sup> The panel would be required to decide the request even if the requesting party withdraws the request or fails to present a case in support of the request. In this instance, the panel must deny the expungement request with prejudice.<sup>60</sup> This requirement would foreclose the ability of associated persons to withdraw expungement requests to avoid having their requests decided by the panel who heard the evidence on the customer's arbitration claim, and then seeking to re-file the request and receive a new list of arbitrators and a potentially more favorable decision.

#### ii. Panel Does Not Decide Expungement if the Customer's Claim Closes Other Than by Award or by Award Without a Hearing

Currently, if a named associated person requests expungement or a party files an on-behalf-of request and the customer arbitration does not close by award after a hearing (e.g., settles) and the associated person or requesting party, if it is an on-behalf-of request, continues to pursue the expungement request, the panel from the customer arbitration will hold a separate expungement-only hearing to consider and decide the expungement request. If the named associated person or party requesting expungement does not request that the panel hold a separate, expungement-only hearing, the panel may deem the request withdrawn without prejudice, and the associated person has the option to file the request again at a later date.

The proposed rule change would provide that if, during a customer arbitration, a named associated person requests expungement or a party files an on-behalf-of request and the customer arbitration closes other than by award or

by award without a hearing, the panel from the customer arbitration would not be permitted to decide the expungement request.<sup>61</sup> Instead, the associated person would be required to seek expungement by filing a request to expunge the same customer dispute information as a straight-in request under proposed Rule 13805, where a panel from the Special Arbitrator Roster would decide the request.<sup>62</sup>

As discussed above, expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions, request evidence and to serve generally as fact-finders in the absence of customer input would help ensure that a complete factual record is created to support the arbitrators' decision in such expungement hearings.

FINRA believes this is the right approach because the panel selected by the parties in the customer arbitration has not heard the full merits of the case and, therefore, may not bring to bear any special insights in determining whether to recommend expungement. In addition, customers or their representative have little incentive to participate in an expungement hearing once their case has settled. Requiring that an associated person file the expungement request as a straight-in request under the Industry Code to be heard and decided by a three-person panel selected from the Special Arbitrator Roster would strengthen the expungement framework. As discussed in more detail below, this corps of specially trained arbitrators would follow the procedures set forth in proposed Rule 13805 and make a decision about whether FINRA Rule 2080(b)(1) grounds exist to recommend expungement, keeping in mind the importance of maintaining the integrity of information in the CRD system.

### 2. No Straight-In Requests Against Customers

The proposed amendments would prohibit an associated person from filing a straight-in request against a customer.<sup>63</sup> Currently, straight-in requests are rarely filed against a customer.<sup>64</sup> FINRA does not believe that

<sup>54</sup> See proposed Rule 12805(a)(1)(D)(i) and (a)(2)(E)(i).

<sup>55</sup> See proposed Rules 12805(a)(1)(D)(ii) and (a)(2)(E)(ii).

<sup>56</sup> See *supra* note 54. Under the Codes, a "member" includes any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated, suspended, cancelled, revoked, the member has been expelled or barred from FINRA or the member is otherwise defunct. See FINRA Rules 12100(s) and 13100(q); see also Securities Exchange Act Release No. 88254 (February 20, 2020), 85 FR 11157 (February 26, 2020) (Order Approving File No. SR-FINRA-2019-027).

<sup>57</sup> See *infra* Item II.A.1.(II)B.2., "Panel from the Special Arbitrator Roster Decides Requests Filed Under the Industry Code."

<sup>58</sup> See FINRA Rules 12702 and 13702.

<sup>59</sup> See proposed Rules 12805(a)(1)(D)(i) and 12805(a)(2)(E)(i).

<sup>60</sup> See proposed Rules 12805(a)(1)(D)(i) and 12805(a)(2)(E)(i). A party requesting expungement on-behalf-of an unnamed person may withdraw or not pursue an expungement request only with the written consent of the unnamed person. Under such circumstances, the panel would deny the expungement request with prejudice. See proposed Rule 12805(a)(2)(E)(i).

<sup>61</sup> See proposed Rules 12805(a)(1)(D)(ii)a. and 12805(a)(2)(E)(ii)a.

<sup>62</sup> See *infra* Item II.A.1.(II)B.2., "Panel from the Special Arbitrator Roster Decides Requests Filed Under the Industry Code."

<sup>63</sup> See proposed Rules 12805(a)(1)(D)(ii)c. and 12805(a)(2)(E)(ii)c.

<sup>64</sup> From January 2016 through June 2019, FINRA is able to identify 5,718 requests to expunge customer dispute information. Of those, 3,114 were

customers should be compelled to participate in a separate proceeding to decide an expungement request after the customer has resolved his or her arbitration claim or civil litigation, or submitted his or her customer complaint. Accordingly, the proposed amendments would prohibit an associated person from filing a straight-in request against a customer.

### 3. No Intervening in Customer Arbitrations To Request Expungement

The proposed amendments would also prohibit unnamed persons from intervening in a customer arbitration and requesting expungement.<sup>65</sup> If the associated person is neither a party to the arbitration nor the subject of an on-behalf-of request by another party to the arbitration, the associated person should not be able to intervene in the customers' arbitration to request expungement. In these circumstances, the associated person's conduct is unlikely to be fully addressed by the parties during the customer arbitration, and FINRA does not believe that the customer should have the presentation of their case interrupted by an associated person's intervention to request expungement. In addition, there have been instances in customer arbitrations in which the unnamed person learns that the customer's arbitration case is nearing conclusion. The associated person (or his or her representative) then files a motion to intervene in the case to ask the panel to consider recommending expungement. As an unnamed person, the individual is not a party to the case and, therefore, has not made any arguments in support of the expungement request. Further, if the motion is granted, the parties to the case will be required to wait for a decision on the expungement request (which may necessitate another hearing) before their dispute is resolved, causing delay and additional cost to the parties.

Accordingly, under the proposed rule change, associated persons would be prohibited from intervening in a customer arbitration and requesting expungement. Instead, the unnamed person would have the option to file the request as a new claim under proposed Rule 13805, where a panel from the Special Arbitrator Roster would decide the request.<sup>66</sup>

filed as straight-in requests; 66 of the straight-in requests were filed solely against a customer. See *infra* Item II.B.2., "Economic Baseline."

<sup>65</sup> See proposed Rule 12805(a)(2)(E)(iii).

<sup>66</sup> See *infra* Item II.A.1.(II)B.2., "Panel from the Special Arbitrator Roster Decides Requests Filed Under the Industry Code."

### B. Straight-In Requests and the Special Arbitrator Roster

Under the proposed rule change, all requests to expunge disclosures arising from customer complaints or civil litigations would be required to be made as straight-in requests under proposed Rule 13805.<sup>67</sup> In addition, an associated person could request expungement of customer dispute information arising from a customer arbitration under proposed Rule 13805 if: (1) The associated person is named in the arbitration or is the subject of an on-behalf-of request and the customer arbitration closes other than by award or by award without a hearing; or (2) the associated person is the subject of a customer arbitration, but is neither named in the arbitration nor the subject of an on-behalf-of request, and the customer arbitration closes for any reason. If an associated person requests expungement under proposed Rule 13805, a three-person panel selected from the Special Arbitrator Roster in accordance with proposed Rule 13806, would decide the expungement request.<sup>68</sup>

#### 1. Filing a Straight-In Request Under the Industry Code

##### a. Applicability

Under the proposed rule change, an associated person requesting expungement of customer dispute information under the Industry Code must make a straight-in request by filing a statement of claim in accordance with FINRA Rule 13302 against a member firm at which he or she was associated at the time the customer dispute arose, unless the request is ineligible for arbitration under proposed Rule 13805(a)(2).<sup>69</sup> Thus, the only way to request expungement of customer dispute information under the Industry Code would be to file the request under proposed Rule 13805.

The requirement that the associated person file the straight-in request against the member firm at which he or she was associated at the time the customer dispute arose would help ensure that there is a connection between the respondent firm and the subject of the expungement request. For example, the firm at which the person requesting expungement was associated

<sup>67</sup> See proposed Rule 13805(a)(1).

<sup>68</sup> See *infra* Item II.A.1.(II)B.2.a. and b. (discussing eligibility requirements for and composition of the Special Arbitrator Roster).

<sup>69</sup> See proposed Rule 13805(a)(1). FINRA Rule 13302 provides, in relevant part, that to initiate an arbitration, a claimant must file with the Director a signed and dated Submission Agreement, and a statement of claim specifying the relevant facts and remedies requested through the Party Portal.

at the time the dispute arose should have knowledge of the dispute and access to documents or other evidence relating to the dispute. In addition, the proposed requirement would help ensure that the panel from the Special Arbitrator Roster would be able to request evidence from a member firm with information that is relevant to the expungement request. If the requisite connection is not present, the Director would be authorized to deny the forum to the request.<sup>70</sup>

#### b. Required Contents of Straight-In Requests

The required contents of a straight-in request would be the same as those required for expungement requests filed under proposed Rule 12805.<sup>71</sup> Thus, the associated person's straight-in request would be required to contain the applicable filing fee;<sup>72</sup> the CRD number of the party requesting expungement; each CRD occurrence number that is the subject of the request; the case name and docket number that gave rise to the disclosure, if applicable; and an explanation of whether expungement of the same customer dispute information was previously requested and, if so, how it was decided.<sup>73</sup> In addition, as discussed below, the proposed rule change would impose limitations on when such requests may be made.<sup>74</sup>

#### 2. Panel From the Special Arbitrator Roster Decides Requests Filed Under the Industry Code

If a straight-in request is filed in accordance with proposed Rule 13805, a three-person panel selected from the

<sup>70</sup> See proposed Rule 13203(b).

<sup>71</sup> See *supra* Item II.A.1.(II)A.1.a.ii., "Required Contents of an Expungement Request."

<sup>72</sup> FINRA would not assess a second filing fee when an associated person files a straight-in request if the associated person or the requesting party in the case of an on-behalf-of request, had previously paid the filing fee to request expungement of the same customer dispute information during a customer arbitration.

<sup>73</sup> See proposed Rule 13805(a)(3).

<sup>74</sup> See *infra* Item II.A.1.(II)C., "Limitations on Expungement Requests." As discussed in more detail below in Item II.A.1.(II)C., the straight-in request would be ineligible for arbitration under the Industry Code if: (1) A panel held a hearing to consider the merits of the associated person's request for expungement of the same customer dispute information; (2) a court previously denied the associated person's request to expunge the same customer dispute information; (3) the customer arbitration, civil litigation or customer complaint that gave rise to the customer dispute information is not concluded; (4) more than two years has elapsed since the customer arbitration or civil litigation that gave rise to the customer dispute information has closed; or (5) there was no customer arbitration or civil litigation that gave rise to the customer dispute information and more than six years has elapsed since the date that the customer complaint was initially reported to the CRD system. See proposed Rule 13805(a)(2).

Special Arbitrator Roster pursuant to proposed Rule 13806 would be required to hold an expungement hearing, decide the expungement request and issue an award.<sup>75</sup> The proposed amendments would also provide that if the associated person withdraws or does not pursue the request, the panel would be required to deny the expungement request with prejudice.<sup>76</sup> This requirement would foreclose the ability of associated persons to withdraw expungement requests to avoid having their requests decided by the panel, and then seeking to re-file the request with the hope of obtaining a potentially more favorable panel.

The proposed rule change would include several requirements to help ensure that arbitrators on the Special Arbitrator Roster have the qualifications and training to decide straight-in requests.

#### a. Eligibility Requirements for the Special Arbitrator Roster

Arbitrators on the Special Arbitrator Roster would be public arbitrators who are eligible for the chairperson roster.<sup>77</sup> Public arbitrators are not employed in the securities industry and do not devote 20 percent or more of their professional work to the securities industry or to parties in disputes concerning investment accounts or transactions or employment relationships within the financial industry.<sup>78</sup> Arbitrators are eligible for the chairperson roster if they have completed chairperson training provided by FINRA and: (1) Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least one arbitration administered by an SRO in which hearings were held; or (2) have served as an arbitrator through award on at least three arbitrations administered by an SRO in which hearings were held.<sup>79</sup> These requirements would help ensure that the persons conducting the expungement hearing are impartial and experienced in managing and conducting arbitration hearings in the forum.<sup>80</sup>

<sup>75</sup> See proposed Rule 13805(a)(4).

<sup>76</sup> See *supra* note 75.

<sup>77</sup> See proposed Rule 13806(b); see also FINRA Rule 12400(c).

<sup>78</sup> See *supra* note 8.

<sup>79</sup> See FINRA Rule 12400(c). For purposes of this proposed rule change, public arbitrators who are eligible for the chairperson roster would include those arbitrators who have met the chairperson eligibility requirements of FINRA Rule 12400(c), regardless of whether they have already served as a chair on an arbitration case.

<sup>80</sup> The Task Force suggested that the arbitrators on its recommended special arbitration panel be chair-qualified, in part because of the training that

Further, the public chairpersons must have evidenced successful completion of, and agreement with, enhanced expungement training provided by FINRA.<sup>81</sup> FINRA currently provides an Expungement Training module for arbitrators.<sup>82</sup> This training, however, would be expanded for arbitrators seeking to qualify for the Special Arbitrator Roster. This would allow FINRA to further emphasize, with the subset of arbitrators on the Special Arbitrator Roster, the unique, distinct role they play in deciding whether to recommend a request to expunge customer dispute information from a broker's CRD record, and that expungement should be granted in limited circumstances and only if one or more of the grounds in FINRA Rule 2080(b)(1) is met.

Under the proposed amendments, arbitrators on the Special Arbitrator Roster would also be required to have served as an arbitrator through award on at least four customer-initiated arbitrations administered by FINRA or by another SRO in which a hearing was held.<sup>83</sup> FINRA believes that if an arbitrator has served on four arbitrations through to award, it would indicate that the arbitrator has gained the knowledge and experience in the forum to conduct hearings.<sup>84</sup>

#### b. Composition of the Panel

The proposed amendments would require that three randomly-selected

arbitrators must complete before they can be added to the chairperson roster. See FINRA's "Advanced Arbitrator Training," available at <https://www.finra.org/arbitration-mediation/advanced-arbitrator-training>. See also *supra* note 13.

<sup>81</sup> See proposed Rule 13806(b)(2)(A).  
<sup>82</sup> See *supra* note 80. FINRA requires arbitrators to take mandatory online training that focuses on the Guidance. In addition, among other tools, FINRA provides Neutral Workshops (an online discussion on specific arbitration topics) and articles in *The Neutral Corner* (a quarterly publication that provides arbitrators and mediators with updates on important rules and procedures within the FINRA arbitration forum) to keep arbitrators informed about the expungement process and to emphasize the critical role that arbitrators play in maintaining the relevancy and integrity of disclosure information in the CRD system and BrokerCheck. See Neutral Workshop Audio and Video Files, Spring 2019 Neutral Workshop: Expungement of Customer Dispute Information, <https://www.finra.org/arbitration-mediation/neutral-workshop-audio-and-video-files>; *The Neutral Corner*, <https://www.finra.org/arbitration-mediation/neutral-corner-view>.

<sup>83</sup> See proposed Rule 13806(b)(2)(B). The hearing requirement would exclude hearings conducted under the special proceeding option of the simplified arbitration rules. See FINRA Rule 12800(c)(3)(B).

<sup>84</sup> In 2019, 85 percent of FINRA customer arbitrations closed other than by award. See Dispute Resolution Statistics, "How Arbitration Cases Close," available at <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics>.

members of the Special Arbitrator Roster decide all expungement requests filed under proposed Rule 13805.<sup>85</sup> As discussed above, expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions, request evidence and generally to serve as fact-finders in the absence of customer input would help ensure that a complete factual record is created to support the arbitrators' decision in such expungement hearings.<sup>86</sup>

To minimize the potential for party influence in the arbitrator selection process, the proposed rule change would require NLSS randomly to select the three public chairpersons from the Special Arbitrator Roster to decide an expungement request filed by an associated person.<sup>87</sup> The parties would not be permitted to agree to fewer than three arbitrators. The associated person would not be permitted to strike any arbitrators selected by NLSS nor stipulate to their removal,<sup>88</sup> but would be permitted to challenge any arbitrator selected for cause.<sup>89</sup> If an arbitrator is removed, NLSS would randomly select a replacement.<sup>90</sup>

FINRA believes that the current process for selecting arbitrators—striking and combining ranked lists—would not be appropriate to use to select arbitrators to decide straight-in requests.<sup>91</sup> In arbitrations outside of the expungement context, the parties are typically adverse, which means that during arbitrator selection, each side may rank arbitrators on the lists whom they believe may be favorable to their case.<sup>92</sup> The adversarial nature of the proceedings serves to minimize the impact of each party's influence in arbitrator selection.<sup>93</sup> In contrast, a

<sup>85</sup> See proposed Rule 13806(b)(1).

<sup>86</sup> See *supra* Item II.A.1.(I)C, "Concerns Regarding Expungement" (discussing the importance of having a three-person panel decide straight-in requests).

<sup>87</sup> See proposed Rule 13806(b)(1). The first arbitrator selected would be the chair of the panel. See proposed Rule 13806(b)(3).

<sup>88</sup> The parties also would not be permitted to stipulate to the use of pre-selected arbitrators (*i.e.*, arbitrators that the parties find on their own to use in their cases). See proposed Rule 13806(b)(1).

<sup>89</sup> See proposed Rule 13806(b)(4). In addition, before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, either upon request of a party or on the Director's own initiative. See FINRA Rule 12407(a).

<sup>90</sup> See proposed Rule 13806(b)(4); see also FINRA Rules 12402(g) and 12403(g).

<sup>91</sup> See generally FINRA Rules 12402 and 12403.

<sup>92</sup> See *infra* note 189.

<sup>93</sup> Once the parties have ranked the arbitrators, the Director creates a combined ranked list of

straight-in request filed by an associated person against a firm may not be adversarial in nature. In addition, typically the customer or customer's representative will not appear at the expungement hearing.

FINRA recognizes that the proposed arbitrator selection process for straight-in requests would limit the associated person and member firm's input on arbitration selection. However, the arbitrators on the Special Arbitrator Roster would have the experience, qualifications and training necessary to conduct a fair and impartial expungement hearing in accordance with the proposed rules, and to render a recommendation based on a complete factual record developed during the expungement hearing. FINRA believes that the higher standards that the arbitrators must meet to serve on the Special Arbitrator Roster should mitigate the impact of the absence of party input on the selection of arbitrators. In addition, associated persons and member firms would still be permitted to challenge any arbitrator for cause.<sup>94</sup>

### C. Limitations on Expungement Requests

Currently, Rules 12805 and 13805 do not address when a party would not be permitted to file an expungement request in the forum.<sup>95</sup> The Guidance, however, describes several circumstances in which an expungement request should be ineligible for arbitration. The proposed rule change would incorporate the limitations contained in the Guidance as well as add time limits to when an associated person may file a straight-in request.

#### 1. Limitations Applicable to Both Straight-In Requests and Expungement Requests During a Customer Arbitration

The Guidance provides that if a panel or a court has issued an award or decision denying an associated person's expungement request, the associated person may not request expungement of the same customer dispute information in another arbitration. In particular, the Guidance states that arbitrators should ask a party requesting expungement whether an arbitration panel or a court previously denied expungement of the customer dispute information at issue

arbitrators based on the parties' numerical rankings. The Director appoints the highest-ranked available arbitrator from the combined list. See FINRA Rules 12402(e) and (f) and 12403(d) and (e).

<sup>94</sup> See proposed Rule 13806(b)(4).

<sup>95</sup> But see *supra* note 14 (describing time limits that apply to all arbitration claims, including expungement requests).

and, if there has been a prior denial, the arbitration panel must deny the expungement request.<sup>96</sup>

The proposed rule change would codify the Guidance by providing that an associated person may not file a request for expungement of customer dispute information if (1) a panel held a hearing to consider the merits of the associated person's expungement request for the same customer dispute information or (2) a court of competent jurisdiction previously denied the associated person's request to expunge the same customer dispute information.<sup>97</sup> These proposed amendments would prevent an associated person from forum shopping, or seeking to return to the arbitration forum administered by FINRA, to garner a favorable outcome on his or her expungement request.<sup>98</sup>

#### 2. Limitations Applicable to Straight-In Requests Only

As discussed below, under the proposed amendments, three additional limitations would apply to straight-in requests.

##### i. No Straight-In Request if a Customer Arbitration Has Not Concluded

The Guidance provides that an associated person may not file a separate request for expungement of customer dispute information arising from a customer arbitration until the customer arbitration has concluded. The proposed rule change would codify and expand upon the Guidance by providing that an associated person may not file a straight-in request under proposed Rule 13805 if the customer arbitration, civil litigation or customer complaint that gave rise to the customer dispute information has not closed.<sup>99</sup>

The proposed rule change would prevent an associated person from obtaining a decision on an expungement request while the customer arbitration is still ongoing. This change would help ensure that a decision in the customer arbitration is issued before the decision on the expungement request and avoid

<sup>96</sup> See *supra* note 3.

<sup>97</sup> See proposed Rules 12805(a)(1)(B) and 13805(a)(2)(A). The proposed rule change would require that the requesting party provide information about previous expungement requests and how such requests were decided. See, e.g., proposed Rule 12805(a)(1)(C)(ii).

<sup>98</sup> FINRA notes that if a panel holds a hearing that addresses the merits of an associated person's request for expungement, the Director may deny the forum to any subsequent request by the associated person or another party on behalf of the associated person to expunge the same customer dispute information. See FINRA Rules 12203(a) and 13203(a); see also proposed Rules 12203(b) and 13203(b).

<sup>99</sup> See proposed Rule 13805(a)(2)(A)(iii).

the possibility of inconsistent awards. The proposed amendment would also help ensure that the arbitrators who will decide the straight-in request are able to consider the final factual record from the customer arbitration.

##### ii. Time Limits Applicable to Disclosures Arising After the Effective Date of the Proposed Rule Change

FINRA is aware that a number of expungement requests are filed many years after a customer arbitration closes or the reporting of a customer complaint in the CRD system.<sup>100</sup> To encourage timelier filing of expungement requests, the proposed amendments would establish time limits for expungement requests that are specifically tied to the closure of customer arbitrations and civil litigations, or the reporting of customer complaints in the CRD system, as applicable.<sup>101</sup> The proposed time limits should help encourage customer participation in expungement proceedings and help ensure that straight-in requests are brought before relevant evidence and testimony becomes stale or unavailable.<sup>102</sup>

##### a. Two Years From the Close of a Customer Arbitration or Civil Litigation

Under the proposed rule change, an associated person would be required to file a straight-in request within two years of the close of the customer arbitration or civil litigation that gave rise to the customer dispute information.<sup>103</sup> A two-year period would provide a reasonable amount of time for associated persons and their firms to gather the documents, information and other resources required to file the expungement request. In addition, the two-year period would help ensure that the expungement hearing is held close enough in time to the customer arbitration, when information regarding the customer arbitration is available and in a timeframe that could increase the

<sup>100</sup> See *infra* Item I.B.3.D., "Time Limits for Straight-in Requests—Quantitative Description."

<sup>101</sup> FINRA Rules 12206 and 13206 provide that no claim shall be eligible for submission to arbitration where six years have elapsed from the occurrence or event giving rise to the claim. Under these Rules, the panel has discretion to determine if the claim, including an expungement request, is eligible for arbitration. See *supra* note 14. As discussed below, if the proposed rule change is approved by the Commission, this six-year eligibility rule would continue to apply to requests to expunge customer dispute information that arose prior to the effective date of the proposed rule change.

<sup>102</sup> All customers from a customer arbitration or civil litigation, and all customers who initiated a customer complaint, would be notified of the expungement request and encouraged to attend and provide their input. See proposed Rule 13805(b)(1)(A).

<sup>103</sup> See proposed Rule 13805(a)(2)(A)(iv).

likelihood for the customer to participate if he or she chooses to do so. The shorter timeframe, therefore, could provide panels with more complete factual records on which to base their expungement decisions. At the same time, it would allow the associated person time to determine whether to seek expungement by filing a straight-in request.

#### b. Six Years From the Date a Customer Complaint Is Reported to the CRD System

Under the proposed rule change, an associated person would be prohibited from filing a straight-in request to expunge a customer complaint where more than six years has elapsed since the customer complaint was initially reported to the CRD system and there was no customer arbitration or civil litigation that gave rise to the customer dispute information.<sup>104</sup>

Consistent with FINRA's current eligibility rules,<sup>105</sup> FINRA believes that six years from the date a customer complaint is initially reported to the CRD system should provide a reasonable amount of time for the associated person to bring an expungement claim. The six-year period would allow firms to complete their investigation of the customer complaint and close it in the CRD system; for the complaint to evolve, or not evolve, into an arbitration; and for the associated person to determine whether to proceed with a request to expunge the complaint. The proposed six-year time limit would also provide a reasonable time limit to encourage customer participation and help ensure the availability of evidence related to customer complaints.

#### iii. Time Limits Applicable to Disclosures Arising On or Prior to the Effective Date of the Proposed Rule Change

If the Commission approves the proposed rule change, the proposal would also establish time limits for requests to expunge customer dispute information arising from customer arbitrations and civil litigations that close, and for customer complaints that were initially reported to the CRD system, on or prior to the effective date of the proposed rule change.

Specifically, the proposed amendments would provide that if an expungement request is otherwise eligible under the six-year limitation period of FINRA Rule 13206(a), an associated person would be permitted to

file a straight-in request under the Industry Code if: (1) The request for expungement is made within two years of the effective date of proposed rule change, and the disclosure to be expunged arises from a customer arbitration or civil litigation that closed on or prior to the effective date;<sup>106</sup> or (2) the request for expungement is made within six years of the effective date of the proposed rule change, and the disclosure to be expunged arises from a customer complaint initially reported to the CRD system on or prior to its effective date.<sup>107</sup>

#### 3. Director's Authority To Deny the Forum

If an associated person files an expungement request that is ineligible for arbitration under proposed Rules 12805 and 13805, the proposed rule change would give the Director the express authority to deny the use of FINRA's arbitration forum to decide the request.<sup>108</sup> If the expungement request is ineligible for arbitration because a court or panel has decided previously an expungement request related to the same customer dispute information, the Director would deny the forum with prejudice as the request would be an attempt to receive a second decision on a request that had been decided previously on the merits. The Director would also deny the forum with prejudice if an expungement request is ineligible under the proposed time limitations.

If the request is ineligible because a customer arbitration that involves the same customer dispute information is not concluded, the Director would deny the forum without prejudice so that the associated person could file the request (or a party could file an on-behalf-of request) in the customer arbitration or as a straight-in request after the customer arbitration concludes.

#### D. Procedural Requirements Relating to All Expungement Hearings

The Codes currently provide a list of requirements panels must follow in order to decide an expungement request.<sup>109</sup> In addition, the Guidance provides best practices that arbitrators should follow when deciding expungement requests. To guide further the arbitrators' decision-making, the proposed rule change would expand the

<sup>106</sup> See proposed Rule 13805(a)(2)(B)(i).

<sup>107</sup> See proposed Rule 13805(a)(2)(B)(ii).

<sup>108</sup> See proposed Rules 12203(b) and 13203(b).

The panel would continue to have the authority to resolve any questions regarding eligibility of such claims under Rules 12206 and 13206, as applicable. See *supra* note 14.

<sup>109</sup> See *supra* note 24.

expungement hearing requirements currently in FINRA Rules 12805 and 13805 to incorporate the relevant provisions from the Guidance. The proposed amendments would apply to all expungement hearings.<sup>110</sup>

#### 1. Recorded Hearing Sessions

The Codes require a panel that is deciding an expungement request to hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement.<sup>111</sup> Consistent with current practice, the proposed rule change would add the ability to hold a recorded hearing session by video conference.<sup>112</sup> Further, the proposed rule change would clarify that a panel would not be limited in the number of hearing sessions it should hold to decide the expungement request.<sup>113</sup>

#### 2. Associated Person's Appearance

The proposed rule change would require the associated person who is seeking expungement of the customer dispute information to appear personally at the expungement hearing.<sup>114</sup> A party requesting expungement on behalf of an unnamed person would also be required to appear at the hearing. The panel would determine whether an appearance should be by telephone, in person, or by video conference.

As the associated person is requesting the permanent removal of information from his or her CRD record, FINRA believes the associated person whose CRD record would be expunged must personally participate in the expungement hearing to respond to questions from the panel and those customers who choose to participate. Rather than restrict the method of appearance, FINRA is proposing to provide the panel with the authority to decide which method of appearance would be the most appropriate for the particular case. FINRA believes that

<sup>110</sup> See proposed Rules 12805(c) and 13805(c).

The proposed procedural requirements for expungement hearings would apply to all expungement hearings, including hearings held during a customer arbitration or simplified arbitration (see *infra* Item II.A.1.(II)F., "Expungement Requests During Simplified Customer Arbitrations") that consider an expungement request, and expungement hearings conducted by a panel from the Special Arbitrator Roster.

<sup>111</sup> See FINRA Rules 12805(a) and 13805(a).

<sup>112</sup> See proposed Rules 12805(c)(1) and 13805(c)(1).

<sup>113</sup> See *supra* note 112.

<sup>114</sup> See proposed Rules 12805(c)(2) and 13805(c)(2). The requirement to appear personally at the expungement hearing would also apply to an unnamed person who seeks to have his or her customer dispute information expunged.

<sup>104</sup> See proposed Rule 13805(a)(2)(A)(v).

<sup>105</sup> See *supra* note 14.

providing flexibility as to the method of appearance would encourage appropriate fact-finding by the arbitrators and generally strengthen the process.

### 3. Customer's Participation During the Expungement Hearing

The Guidance states that it is important to allow customers and their representatives to participate in the expungement hearing if they wish to do so.<sup>115</sup> Specifically, the Guidance provides that arbitrators should:

- Allow the customers and their representatives to appear at the expungement hearing;
- Allow the customer to testify (telephonically, in person, or other method) at the expungement hearing;
- Allow the representative for the customer or a *pro se* customer to introduce documents and evidence at the expungement hearing;
- Allow the representative for the customer or a *pro se* customer to cross-examine the broker or other witnesses called by the party seeking expungement; and
- Allow the representative for the customer or a *pro se* customer to present opening and closing arguments if the panel allows any party to present such arguments.

The proposed rule change would codify these provisions of the Guidance. The proposed rule change would make clear that all customers whose customer arbitrations, civil litigations and customer complaints gave rise to the customer dispute information that is a subject of the expungement request have a right to representation and are entitled to appear at the expungement hearing.<sup>116</sup> The proposed rule change would provide that the customer can appear by telephone, in person, by video conference or other means convenient to the customer and customer's representative.<sup>117</sup> By providing customers with options for how to participate in hearings, FINRA

<sup>115</sup> The Guidance directs arbitrators to permit customers and their counsel to participate in the expungement hearing. *See supra* note 3. FINRA Rules 12208 and 13208 permit a party to be represented *pro se*, by an attorney or by a person who is not an attorney. The proposed amendments would replace the term "counsel" with "representative." *See also* Securities Arbitration—Should You Hire an Attorney? (Jan. 3, 2019), <https://www.finra.org/investors/insights/securities-arbitration>.

<sup>116</sup> *See* proposed Rules 12805(c)(3)(A) and 12805(c)(4); *see also* proposed Rules 13805(c)(3)(A) and 13805(c)(4). The proposed rule change would make clear that customers also have the option to provide their position on the expungement request in writing in lieu of attending the hearing.

<sup>117</sup> *See* proposed Rules 12805(c)(3)(B) and 13805(c)(3)(B).

seeks to make it easier for customers to participate and, thereby, encourage customer participation. Customer participation during an expungement hearing provides the panel with important information and perspective that it might not otherwise receive.

In addition, the proposed rule change would provide that customers must be allowed to testify at the expungement hearing and be questioned by the customer's representative.<sup>118</sup> If a customer testifies, the associated person or a party requesting expungement on-behalf-of an unnamed person would be allowed to cross-examine the customer.<sup>119</sup> Similarly, the customer or customer's representative would be permitted to cross-examine the associated person or party requesting expungement on-behalf-of an unnamed person and any witnesses called by the associated person or party requesting expungement on-behalf-of an unnamed person during the expungement hearing.<sup>120</sup> If the customer introduces any evidence at the expungement hearing, the associated person or party requesting expungement on-behalf-of an unnamed person could object to the introduction of the evidence, and the panel would decide any objections.<sup>121</sup> The customer or customer's representative would also be permitted to present opening and closing arguments if the panel permits any party to present such arguments.<sup>122</sup> FINRA believes the proposal strikes the right balance of allowing the customer to participate fully in the hearing and giving the associated person or party requesting expungement on-behalf-of an unnamed person the opportunity to substantiate arguments in support of the expungement request.

### 4. Panel Requests for Additional Documents or Evidence

Arbitrators on the panel do not conduct their own research when hearing an arbitration case; instead, they review the materials provided by the parties. If they need more information, they can request it from the parties.<sup>123</sup> In deciding an expungement request, particularly in cases that settle before an evidentiary hearing or in cases where the customer does not participate in the

<sup>118</sup> *See* proposed Rules 12805(c)(5)(A) and 13805(c)(5)(A).

<sup>119</sup> *See supra* note 118.

<sup>120</sup> *See* proposed Rules 12805(c)(5)(C) and 13805(c)(5)(C).

<sup>121</sup> *See* proposed Rules 12805(c)(5)(B) and 13805(c)(5)(B).

<sup>122</sup> *See* proposed Rules 12805(c)(5)(D) and 13805(c)(5)(D).

<sup>123</sup> *See* proposed Rules 12805(c)(6) and 13805(c)(6).

expungement hearing, the arbitrator's role as fact-finder is critical. Given this significant role, arbitrators must ensure that they have all of the information necessary to make a fully-informed decision on the expungement request on the basis of a complete factual record. Thus, the proposed rule change would codify the ability of arbitrators to request from the associated person, or other party requesting expungement, any documentary, testimonial or other evidence that they deem relevant to the expungement request.<sup>124</sup>

### 5. Review of Settlement Documents

Current FINRA Rule 12805(b) provides that, in the event the parties from the customer arbitration settle their case, the panel considering the expungement request must review the settlement documents and consider the amount of payments made to any party and any other terms and conditions of the settlement.<sup>125</sup> The proposed rule change would retain this requirement.<sup>126</sup>

In addition, the Guidance encourages arbitrators to inquire and fully consider whether a party conditioned a settlement of the arbitration upon agreement not to oppose the request for expungement in cases in which the customer does not participate in the expungement hearing or the requesting party states that a customer has indicated that he or she will not oppose the expungement request. The proposed rule change would codify this language in the Guidance.<sup>127</sup> Conditioned settlements violate FINRA Rule 2081 and may be grounds to deny an expungement request.<sup>128</sup>

<sup>124</sup> *See supra* note 123. The Guidance also suggests that arbitrators should ask the associated person seeking expungement or the party seeking expungement on an associated person's behalf to provide a current copy of the BrokerCheck report for the person whose record would be expunged, paying particular attention to the "Disclosure Events" section of the report. *See supra* note 3. FINRA continues to encourage arbitrators to request a current copy of the associated person's BrokerCheck report.

<sup>125</sup> The panel should review all settlement documents related to the customer dispute information the associated person is seeking to be expunged, regardless of whether the associated person was a party to the settlement.

<sup>126</sup> *See* proposed Rules 12805(c)(7) and 13805(c)(7).

<sup>127</sup> *See* proposed Rules 12805(c)(7) and 13805(c)(7).

<sup>128</sup> FINRA Rule 2081 provides that no member firm or associated person shall condition or seek to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer's agreement to consent to, or not to oppose, the member's or associated person's request to expunge such customer dispute information from the CRD system. *See also* Prohibited Conditions Relating to Expungement of Customer Dispute

## 6. Awards

Current FINRA Rules 12805(c) and 13805(c) require that the panel indicate in the arbitration award which of the FINRA Rule 2080 grounds for expungement serves as the basis for its expungement recommendation and provide a brief written explanation of the reasons for its finding that one or more FINRA Rule 2080 grounds for expungement applies to the facts of the case. The proposed rule change would retain this requirement, but would remove the word “brief” to indicate to the panel that it must provide enough detail in the award to explain its rationale for recommending expungement.<sup>129</sup> As the Guidance suggests, the explanation must be complete and not solely a recitation of one of the FINRA Rule 2080 grounds or language provided in the expungement request.

In addition, the proposed rule change would incorporate language from the Guidance that the panel’s explanation should identify any specific documentary, testimonial or other evidence relied on in recommending expungement.<sup>130</sup>

The proposed rule change would also make clarifying revisions to FINRA Rules 12805(c) and 13805(c). The proposed amendments would indicate that the FINRA Rule 2080 grounds that the panel must indicate serve as the basis for the expungement order are the grounds found in paragraph (b)(1) of FINRA Rule 2080.<sup>131</sup> The proposed amendments would also provide that the panel would “recommend” rather than “grant” expungement.<sup>132</sup>

## 7. Forum Fees

The proposed rule change would retain the current requirements in FINRA Rules 12805(d) and 13805(d) that addresses how forum fees are assessed in expungement hearings.<sup>133</sup> Specifically, the panel must assess against the parties requesting expungement all forum fees for each

Information FAQ, <https://www.finra.org/arbitration-mediation/faq/prohibited-conditions-relating-expungement-customer-dispute-information>.

<sup>129</sup> In addition, all awards rendered under the Codes, including awards recommending expungement, must comply with the requirements of FINRA Rules 12904 or 13904.

<sup>130</sup> See proposed Rules 12805(c)(8) and 13805(c)(8).

<sup>131</sup> See *infra* note 238, and accompanying text.

<sup>132</sup> The word “recommend” more accurately describes the panel’s role in the expungement process, consistent with FINRA’s longstanding practice to state in expungement awards that the arbitrators “recommend,” rather than “grant,” expungement. See *supra* note 10.

<sup>133</sup> See proposed Rules 12805(c)(9) and 13805(c)(9).

hearing in which the sole topic is the determination of the appropriateness of expungement.

## E. Notifications to Customers and States Regarding Expungement Requests

### 1. Associated Person Serves Customer With Statement of Claim

The Guidance suggests that when a straight-in request is filed against a firm, arbitrators order the associated person to provide a copy of the statement of claim to the customers involved in the customer arbitration that gave rise to the customer dispute information. This helps ensure that the customers know about the expungement request and have an opportunity to participate in the expungement hearing or provide a position in writing on the associated person’s request. The proposed rule change would codify this practice in the Industry Code by requiring that the associated person provide all customers whose customer arbitrations, civil litigations and customer complaints gave rise to the customer dispute information that is a subject of the expungement request with notice of the expungement request by serving a copy of the statement of claim requesting expungement.<sup>134</sup> The panel would be authorized to decide whether extraordinary circumstances exist that make service on the customers impracticable.<sup>135</sup>

Given the associated person’s personal interest in obtaining expungement, FINRA believes that the panel should review all documents that the associated person used to inform the customers about the expungement request as well as any customer responses received. Accordingly, the proposed amendments would require the associated person to file with the panel all documents provided by the associated person to the customers, including proof of service, and any responses received by the associated person from a customer.<sup>136</sup> The proposed requirement would help ensure that the associated person does not attempt to dissuade a customer from participating in the expungement hearing.

<sup>134</sup> See proposed Rule 13805(b)(1)(A). The associated person would be required to notify the customer before the first scheduled hearing session is held so that the customer would be aware of the expungement request in advance and could plan to participate once he or she is notified of the time and place of the hearing. See FINRA Rule 13100(p) (providing that a hearing session could be a hearing or prehearing conference).

<sup>135</sup> See proposed Rule 13805(b)(1)(A).

<sup>136</sup> See proposed Rule 13805(b)(1)(C).

## 2. Notification to Customers of Expungement Hearing

To help ensure that the customer is notified about the expungement hearing, the proposed rule change would provide that the Director shall notify all customers whose customer arbitrations, civil litigations and customer complaints gave rise to the customer dispute information that is a subject of the expungement request, of the time, date and place of the expungement hearing using the customer’s current address provided by the party seeking expungement.<sup>137</sup> The associated person would be required to provide a current address for the customer, or the expungement request would be considered deficient and would not be served.

### 3. State Notification of Expungement Requests

The proposed rule change would require FINRA to notify state securities regulators, in the manner determined by FINRA, of an expungement request within 30 days after receiving a complete request for expungement.<sup>138</sup> The proposed amendments would help ensure that state securities regulators are timely notified of the expungement requests.<sup>139</sup>

## F. Expungement Requests During Simplified Customer Arbitrations

Customer arbitrations involving \$50,000 or less, called simplified arbitrations, are governed by FINRA Rule 12800. FINRA Rule 12800 provides customers with expedited procedures to make the FINRA forum economically feasible for these smaller claims. Simplified arbitrations are decided on the pleadings and other materials submitted by the parties, unless the customer requests a hearing.<sup>140</sup> Further, a single arbitrator from the chairperson roster is appointed to consider and decide simplified arbitrations, unless the parties agree in writing otherwise.<sup>141</sup>

<sup>137</sup> See proposed Rule 13805(b)(2). This requirement would apply to straight-in requests filed under the Industry Code; notice to customers would not be necessary for requests filed under proposed Rule 12805 of the Customer Code as the customer would be a named party.

<sup>138</sup> See proposed Rules 12805(b) and 13805(b)(3).

<sup>139</sup> FINRA would make this notification in connection with expungement requests under the Customer and Industry Codes. Such notification could be achieved by notifying NASAA of the expungement requests.

<sup>140</sup> See FINRA Rule 12800(a).

<sup>141</sup> See FINRA Rule 12800(b). The parties could agree to have a three-person panel decide the simplified case. For ease of reference, when discussing expungement requests in simplified arbitrations under the proposed rule change, the rule filing uses the term “arbitrator,” unless

The customer who files a simplified arbitration determines how the claim will be decided. In particular, the customer has the option of having the case decided in one of three ways: (1) Without a hearing (referred to as “on the papers”), where the arbitrator decides the case on the pleadings or other materials; (2) in an “Option One” full hearing, in which prehearings and hearings on the merits take place pursuant to the regular provisions of the Code; or (3) in an “Option Two” special proceeding, whereby the parties present their case in a hearing to the arbitrator in a compressed timeframe, so that the hearings last no longer than one day.<sup>142</sup>

Currently, named associated persons and parties requesting expungement on-behalf-of unnamed persons request expungement during simplified arbitrations. FINRA Rule 12800 does not, however, expressly address how an expungement request should be filed or considered during a simplified arbitration. The proposed amendments would codify an associated person’s ability to request expungement when named as a respondent in a simplified arbitration, and for other parties to request expungement on-behalf-of an unnamed person. The proposed rule change would also establish procedures for requesting and considering expungement requests in simplified arbitrations that are consistent with the expedited nature of these proceedings.<sup>143</sup>

#### 1. Requesting Expungement

The proposed rule change would permit a named associated person to request expungement, or a party to file an on-behalf-of request, during a simplified arbitration. Unlike in a non-simplified arbitration, if expungement is not requested during the simplified arbitration, the associated person would be permitted to request it as a straight-in request filed under the Industry Code.<sup>144</sup>

##### a. By a Named Associated Person During the Simplified Arbitration

Under the proposed rule change, an associated person named as a respondent in a simplified arbitration

otherwise specified, to mean either a panel or single arbitrator.

<sup>142</sup> See FINRA Rule 12800(c).

<sup>143</sup> Under the proposed rule change, an associated person would not be permitted to request expungement in a simplified arbitration administered under the Industry Code, FINRA Rule 13800. All expungement requests under the Industry Code must be filed in accordance with proposed Rule 13805.

<sup>144</sup> See *infra* Item II.A.1.(II)F.1.c., “When No Expungement Request is Made in a Simplified Arbitration.”

could request expungement during the arbitration of the customer dispute information arising from the customer’s statement of claim, provided the request is eligible for arbitration.<sup>145</sup>

If a named associated person requests expungement during a simplified arbitration, the proposed rule change would require the request to be filed in an answer or pleading requesting expungement and include the same information required as a request filed in a non-simplified arbitration.<sup>146</sup> Because of the expedited nature of simplified arbitrations, if the named associated person requests expungement in a pleading other than answer, the request must be filed within 30 days after the date that FINRA notifies the associated person of arbitrator appointment,<sup>147</sup> which is the last deadline provided to the parties in a simplified arbitration to submit any additional documents before the case is submitted to the arbitrator.<sup>148</sup>

To limit arbitrator shopping, the arbitrator would be required to decide an expungement request once it is filed by the associated person.<sup>149</sup> If an associated person withdraws or does not pursue the request after filing, the arbitrator would be required to deny the request with prejudice so that it could not be re-filed.<sup>150</sup>

##### b. By a Party On-Behalf-Of an Unnamed Person

Under the proposed amendments, the requirements for a party to file an on-behalf-of request during a simplified arbitration would be the same as the requirements for a named associated person filing an expungement request during a simplified arbitration, with one

<sup>145</sup> See proposed Rule 12800(d)(1)(A). The limitations that apply to expungement requests filed by a named associated person under proposed Rule 12805(a)(1)(B) would apply to these requests. See *supra* Item II.A.1.(II)C., “Limitations on Expungement Requests.”

<sup>146</sup> See proposed Rules 12800(d)(1)(B)(i) and 12805(a)(1)(C)(ii). Thus, the associated person’s expungement request would be required to contain the applicable filing fee; the CRD number of the party requesting expungement; each CRD occurrence number that is the subject of the request; the case name and docket number that gave rise to the disclosure, if applicable; and an explanation of whether expungement of the same customer dispute information was previously requested and, if so, how it was decided.

<sup>147</sup> FINRA would notify state securities regulators, in the manner determined by FINRA, of an expungement request within 30 days after receiving a complete expungement request. See proposed Rule 12800(f)(1).

<sup>148</sup> FINRA notifies the parties when an arbitrator has been appointed. FINRA informs the parties that they have 30 days from the date of notification to submit additional documents or other information before the case is submitted to the arbitrator.

<sup>149</sup> See proposed Rule 12800(e)(1).

<sup>150</sup> See proposed Rule 12800(d)(1)(C).

A named party would only be able to file an on-behalf-of request during a simplified arbitration with the consent of the unnamed person. As with on-behalf-of requests filed in customer arbitrations under proposed Rule 12805(a)(2), the unnamed person who would benefit from the expungement request must consent to such filing by signing the Form.<sup>151</sup>

##### c. When No Expungement Request Is Made in a Simplified Arbitration

If expungement is not requested during the simplified arbitration under proposed Rule 12800(d), the associated person would be able to file a straight-in request under proposed Rule 13805 and have the request decided by a three-person panel randomly selected from the Special Arbitrator Roster.<sup>152</sup> The request would be subject to the limitations on whether and when such requests may be filed under the Industry Code.<sup>153</sup>

Due to the expedited nature of simplified proceedings, FINRA believes that the associated person should be able to seek expungement separately under the Industry Code and have his or her expungement request decided by a panel randomly selected from the Special Arbitrator Roster. In simplified arbitrations, there may be less discovery, and the customer may dictate the extent of the evidence presented to the arbitrator. The customer may, for example, determine to have the arbitration decided on the papers. Because there may be less information available for the arbitrator to evaluate an expungement request during a simplified arbitration—even when the simplified arbitration results in an award—the associated person would retain the ability to choose to file the request as a straight-in request under the Industry Code.

#### 2. Deciding Expungement Requests During Simplified Arbitrations

If a named associated person or party on-behalf-of an unnamed person requests expungement during a simplified arbitration, the arbitrator would be required to decide the expungement request, regardless of how

<sup>151</sup> See proposed Rule 12800(d)(2). The request must also meet the same requirements as an on-behalf-of request filed under proposed Rule 12805(a)(2). See proposed Rules 12805(a)(1)(C)(ii), 12805(a)(2)(C)(ii) and 12805(a)(2)(D); see also *supra* Items II.A.1.(II)A.1.b., “Expungement Requests By a Party Named in the Customer Arbitration On-Behalf-Of an Unnamed Person.”

<sup>152</sup> See proposed Rules 12800(e)(2), 13805 and 13806.

<sup>153</sup> See proposed Rule 13805(a)(2); see also *supra* Item II.A.1.(II)C., “Limitations on Expungement Requests.”

the simplified arbitration case closes (e.g., even if the case settles).<sup>154</sup>

Under the proposed rule change, how and when the expungement request is decided would depend on which option the customer selects to decide the simplified arbitration.

#### a. No Hearing or Option Two Special Proceeding

If the customer opts not to have a hearing or chooses an Option Two special proceeding, the arbitrator would decide the customer's dispute first and issue an award.<sup>155</sup> After the customer's dispute is decided, the arbitrator must hold a separate expungement-only hearing to consider and decide the expungement request and issue a separate award.<sup>156</sup>

The arbitrator would decide the customer's dispute first and issue an award to minimize any delays in resolving the customer arbitration and any delays in potential recovery that a customer may be awarded. Further, because the customer arbitration may not be as fully developed when an "on the papers" or special proceeding is requested, the arbitrator must hold a separate expungement-only hearing to ensure that he or she has access to sufficient evidence to make a fully-informed decision on the expungement request. The Director would notify all customers whose simplified customer arbitrations and customer complaints gave rise to the customer dispute information that is a subject of the expungement request, of the time, date and place of the expungement hearing.<sup>157</sup>

#### b. Option One Hearing

If the customer chooses to have a full "Option One" hearing on his or her claim and it closes by award, the arbitrator would be required to consider and decide the expungement request during the customer arbitration and include the decision in the award.<sup>158</sup> This process would be the same as deciding an expungement request during a non-simplified customer arbitration that closes by award after a hearing, where the customer's claim and

expungement request are addressed during the customer arbitration. As there would be a more complete factual record from the full hearing on the merits of the customer case, the arbitrator could decide the customer dispute and the expungement request after the hearing concludes.

If the customer arbitration closes other than by award or by award without a hearing, the arbitrator would be required to hold a separate expungement-only hearing to consider and decide the expungement request and issue the decision in an award.<sup>159</sup> The arbitrator would need to conduct a separate expungement hearing to develop a complete factual record in order to make a fully-informed decision on the expungement request.<sup>160</sup>

Given the generally less complex nature of simplified arbitrations, FINRA does not believe that it is necessary for a panel from the Special Arbitrator Roster to decide an expungement request if a simplified customer arbitration closes other than by award or by award without a hearing. However, if the Commission approves the proposed rule change, FINRA will continue to monitor expungement requests and decisions in simplified arbitrations to determine if such requests should be decided by the Special Arbitrator Roster, particularly if the customer chooses to have his or her case decided on the papers or in a special proceeding.

#### G. Non-Substantive Changes

FINRA is also proposing to amend the Codes to make non-substantive, technical changes to the rules impacted by the proposed rule change. For example, the proposed rule change would require the renumbering of paragraphs and the updating of cross-references in the rules impacted by the proposed rule change. In addition, the title of Part VIII of the Customer Code would be amended to add a reference to "Expungement" proceedings. Similarly, the title of Part VIII of the Industry Code would be amended to add a reference to "Expungement Proceedings" and "Promissory Note Proceedings." FINRA believes the proposed changes to the titles would more accurately reflect the contents of Part VIII of the Customer and Industry Codes. FINRA is also proposing to re-number current FINRA Rule 13806 (Promissory Note Proceedings) as new FINRA Rule 13807, without substantive change to the current rule language.

If the Commission approves the proposed rule change, FINRA will

announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 120 days following publication of the *Regulatory Notice* announcing Commission approval of the proposed rule change.

#### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>161</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The proposed rule change seeks to balance the important investor protection objectives of maintaining the integrity and accuracy of the information in the CRD system and BrokerCheck with the interest of brokers and firms in the fairness and accuracy of the disclosures contained in the systems.

The proposed rule change will enhance the current expungement framework and improve the efficiency of the FINRA arbitration forum by codifying the Guidance as rules that arbitrators and parties must follow. In addition, when an associated person files a claim against a firm for the sole purpose of requesting expungement, these cases can be complex to resolve, particularly if the customer or customer's representative does not participate in the hearing. Having three arbitrators available to ask questions, request evidence and generally to serve as fact-finders in the absence of customer input will help ensure that a complete factual record is created to support the arbitrators' decision in such expungement hearings. In addition, the proposed rule change will help ensure that arbitrators who will decide these requests meet heightened qualifications and have completed enhanced expungement training. FINRA believes that by requiring a three-person panel from the Special Arbitrator Roster to decide expungement requests filed under the Industry Code, the proposed rule change will help ensure expungement is recommended in limited circumstances.

The proposed rule change will foreclose a practice that has emerged in the existing expungement process where parties seek expungement after a prior denial by a court or panel of a request

<sup>154</sup> See proposed Rule 12800(e)(1).

<sup>155</sup> See proposed FINRA Rule 12800(e)(1)(A).

<sup>156</sup> See *supra* note 155. The arbitrator must conduct the expungement hearing pursuant to proposed Rule 12805(c). The expungement award must meet the requirements of proposed Rule 12805(c)(8), and forum fees would be assessed pursuant to proposed Rule 12805(c)(9).

<sup>157</sup> See proposed Rule 12800(f)(2). The Director would also notify these customers of the expungement hearing, if the associated person opts to file the request under the Industry Code after the simplified case closes.

<sup>158</sup> See proposed Rule 12800(e)(1)(B)(i).

<sup>159</sup> See proposed Rule 12800(e)(1)(B)(ii).

<sup>160</sup> See *supra* note 156.

<sup>161</sup> 15 U.S.C. 78o-3(b)(6).

to expunge the same customer dispute information, or where parties withdraw or do not pursue an expungement request and then make another request for expungement of the same customer dispute information. The proposed rule change imposes procedures and requirements around when and how a party may request expungement, and expressly provides that omission of certain of the requirements will make the expungement request deficient. Further, the proposed rule change provides the Director with express authority to deny the forum if an expungement request is ineligible for arbitration under the proposed rules. Thus, FINRA believes the proposed rule change will add more transparency to the expungement process.

Moreover, the proposed rule change seeks to protect investors and the public interest by notifying customers of expungement requests filed under the Industry Code. Although a straight-in request will be filed against a firm, customers whose disputes are a subject of the request will be notified and encouraged to participate in the expungement hearing. Such notifications will make clear to arbitrators and parties the rights of customers who choose to participate in these hearings. The customers' input will provide the panel with additional insight on the customer dispute and help create a complete factual record, which will result in more informed decisions on expungement requests. FINRA believes this enhancement, which will encourage and facilitate customer participation in expungement hearings, will help to maintain the integrity of the information in the CRD system.

Further, the process of requesting expungement during a simplified arbitration will be codified to help ensure that customers are aware of their rights under the process and how an expungement request will affect (and not affect) their arbitration claims. By expressly incorporating the practice of requesting expungement during simplified proceedings, the proposed amendments add consistency to the rules and provide more guidance to the arbitrators and the parties requesting expungement.

The proposed rule change will also help ensure that state securities regulators have knowledge of expungement requests by requiring notification to the states, in the manner determined by FINRA, after FINRA receives a complete expungement request.

For these reasons, the proposed rule change represents a significant step

towards addressing concerns with the current expungement framework. FINRA believes the proposed rule change will improve the expungement framework by incorporating the Guidance, establishing a Special Arbitrator Roster and addressing gaps that have emerged in the existing expungement framework. In addition, FINRA believes these changes will help to maintain the accuracy and integrity of the information in the CRD system and BrokerCheck, while also protecting brokers from the publication of false allegations against them.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### Economic Impact Assessment

FINRA has undertaken an economic impact assessment to analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.

##### 1. Regulatory Need

The proposed rule change would address concerns relating to the expungement process that are not consistent with the regulatory intent to permit expungement in limited circumstances. The concerns include the potential impact of the absence of customers and their representatives from an expungement hearing which may result in the arbitrator or panel receiving information only from the associated person. The concerns also include associated persons having their straight-in requests heard by a single arbitrator instead of a three-person panel, and the selection of arbitrators to hear these requests. Lastly, the concerns include requests to expunge the same customer dispute information in multiple proceedings. The proposed rule change would also codify and expand upon the provisions of the Guidance to help ensure that arbitrators and parties are adhering to these procedures for all expungement requests, and to encourage and facilitate customer participation in expungement hearings.

##### 2. Economic Baseline

The economic baseline for the proposed rule change includes the

current provisions under the Codes that address the process for parties to seek expungement relief. In addition, because arbitrators are generally believed to be adhering to the best practices and recommendations that are a part of the Guidance, the economic baseline also includes the Guidance.<sup>162</sup> The proposed rule change is expected to affect associated persons and other parties to expungement requests including member firms, customers and arbitrators. The proposed rule change may also affect users of customer dispute information contained in the CRD system and displayed through BrokerCheck.<sup>163</sup>

The customer dispute information contained in the CRD system is submitted by registered securities firms and regulatory authorities in response to questions on the uniform registration forms.<sup>164</sup> The information can be valuable to current and prospective customers to learn about the conduct of associated persons.<sup>165</sup> Current and prospective customers may not select or remain with an associated person or a member firm that employs an associated person with a record of customer disputes. Similarly, member firms and other companies in the financial services industry may use the information when making employment decisions.<sup>166</sup> In this manner, the customer dispute information contained in the CRD system (and displayed through BrokerCheck) may positively or negatively affect the business and professional opportunities of associated persons. Where the information is reliable, it also provides for customer

<sup>162</sup> See *supra* note 3.

<sup>163</sup> Users of customer dispute information include investors; member firms and other companies in the financial services industry; individuals registered as brokers or seeking employment in the brokerage industry; and FINRA, states and other regulators.

<sup>164</sup> See *supra* note 5 and accompanying text for additional discussion of the uniform registration forms and the information contained in the CRD system. Some of the information may involve pending actions or allegations that have not been resolved or proven.

<sup>165</sup> Recent academic studies provide evidence that the past disciplinary and other regulatory events associated with a firm or individual can be predictive of similar future events. See Hamad Qureshi & Jonathan Sokobin, *Do Investors Have Valuable Information About Brokers?* FINRA Office of the Chief Economist Working Paper, Aug. 2015; see also Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct*, *Journal of Political Economy* 127, no. 1 (February 2019): 233–295.

<sup>166</sup> Customer dispute information submitted to the CRD system and displayed through BrokerCheck may have other uses. For example, investors may use the information when deciding with whom to do business. FINRA, states and other regulators also use the information to regulate brokers.

protections and information useful for member firms.

Any negative impact on the business and professional opportunities of associated persons may be appropriate and consistent with investor protection, such as when the customer dispute information has merit. Any such negative impact may be inappropriate, however, if, for example, the customer dispute information is factually impossible, clearly erroneous, or false. Regardless of the merit, associated persons have an incentive to remove customer dispute information from the CRD system and its public display through BrokerCheck.

An associated person, or a party on-behalf-of an unnamed person, typically begins the process to remove customer dispute information from the CRD system by filing an expungement request in FINRA arbitration. FINRA is able to identify 6,928 requests to expunge customer dispute information in FINRA arbitration from January 2016 through December 2019 (the “sample period”). More than one expungement request can be made in a single arbitration, and multiple expungement requests may relate to the same arbitration, civil litigation or complaint if the dispute relates to more than one associated person.

Among the 6,928 expungement requests, 3,203 requests (46 percent) were made during a customer arbitration, and 3,725 requests (54 percent) were filed as a straight-in request.<sup>167</sup> The 3,203 expungement requests made during a customer arbitration include 2,936 requests made during a non-simplified customer arbitration and 267 requests made during a simplified customer arbitration. The 3,725 requests to expunge customer dispute information disclosures filed as a straight-in request include 3,657 requests in arbitrations filed solely against a member firm or against a member firm and a customer, and 68 requests in arbitrations filed solely against a customer. In the 3,203 expungement requests made during a customer arbitration, the associated person was a named party in 1,504 of the requests (47 percent), and an unnamed party in 1,699 of the requests (53 percent).

Among the expungement requests during the sample period, FINRA is able to identify 82 requests to expunge the same customer dispute information in a

subsequent arbitration.<sup>168</sup> For purposes of this analysis, FINRA limited the identification of additional expungement requests to those requests where both the initial request and the subsequent request were made during the sample period. Additional subsequent expungement requests may have been filed during the sample period if the initial expungement request was made prior to the sample period (*i.e.*, before January 2016). The 82 requests to expunge the same customer dispute information in a subsequent arbitration can, therefore, be considered a lower bound for the number of these requests during the sample period. The proposed rule change would foreclose associated persons from filing additional requests.

As of December 2019, 5,159 of the 6,928 expungement requests were made in an arbitration that closed. Among the 5,159 expungement requests, 2,255 requests (44 percent) were made during a customer arbitration and 2,904 requests (56 percent) were filed as a straight-in request. The 2,255 expungement requests made during a customer arbitration include 2,015 requests made during a non-simplified customer arbitration and 240 requests made during a simplified customer arbitration. The 2,904 requests filed as a straight-in request include 2,838 requests in arbitrations filed solely against a member firm or a member firm and a customer, and 66 requests in arbitrations filed solely against a customer. Under the proposed rule change, an associated person would be prohibited from filing a straight-in request against a customer.

An arbitrator or panel made a decision in arbitrations relating to 3,722 of the 5,159 requests in arbitrations that closed, and made no decision in arbitrations relating to the remaining 1,437 requests. A single arbitrator made

<sup>168</sup> Eighty of the 82 subsequent expungement requests relate to previous requests in another arbitration that were withdrawn or otherwise not pursued by the associated person or party that filed the request. For the two remaining subsequent expungement requests, one relates to a previous request on behalf of an unnamed person that was denied, and the other to a previous request that was determined by the panel to be ineligible for arbitration. An arbitrator or panel recommended expungement in 60 of the 82 subsequent expungement requests and denied eight. One of the granted requests relates to the previous request that was denied. Another of the granted requests relates to the previous request that was deficient and therefore not decided. Seven subsequent expungement requests were withdrawn or deficient and, therefore, not decided. In addition, seven subsequent expungement requests were still pending as of the end of the sample period. In 42 of the 82 subsequent expungement requests, the associated person was an unnamed party in the first arbitration.

a decision in arbitrations relating to 2,692 of the 3,722 requests, and a two- or three-person panel made a decision in arbitrations relating to the remaining 1,030 requests. For the customer arbitrations, the decision by an arbitrator or panel may relate to the arbitration, an expungement request, or both. For the straight-in requests, the decision would relate to the expungement request only. In arbitrations where no decision on the merits of the customer case or an expungement request was made, the requests were either not eligible (as determined by the arbitrator or panel), withdrawn, or otherwise not pursued by the associated person or party that filed the request.

As detailed in the next paragraph, the percentage of expungement requests that are recommended is higher when the arbitrator or panel receives information only from the associated person or other party requesting expungement. The arbitrator or panel is likely to receive information only from the party requesting expungement when (1) the customer arbitration does not close by award after a hearing (*e.g.*, settles), or (2) an associated person files a straight-in request against a member firm. In both circumstances, the customer and his or her representative have little incentive to participate in an expungement hearing.

Among the 3,722 expungement requests in arbitrations where an arbitrator or panel made a decision, 2,874 resulted in an arbitrator or panel recommending expungement (77 percent). Among the 3,722 expungement requests, 976 requests were made during a non-simplified or simplified customer arbitration, and 2,746 requests were filed as a straight-in request. An arbitrator or panel recommended expungement in response to 595 of the 976 requests (61 percent) made during a customer arbitration. This includes 168 of the 369 requests (46 percent) made during a customer arbitration that closed by award after a hearing, and 427 of the 607 expungement requests (70 percent) made during a customer arbitration that closed by award without a hearing or other than by award. An arbitrator or panel recommended expungement in 2,279 of the 2,746 requests filed as a straight-in request (83 percent).<sup>169</sup>

<sup>169</sup> Among the 976 expungement requests during a non-simplified or simplified customer arbitration, a single arbitrator made a decision in arbitrations relating to 306 requests, and a two- or three-person panel made a decision in arbitrations relating to 670 requests. In addition, among the 2,746 straight-in requests, a single arbitrator made a decision in arbitrations relating to 2,386 requests and a two- or

<sup>167</sup> Sixteen requests to expunge customer dispute information were made during industry arbitrations that were not straight-in requests. To simplify the analysis, we exclude these 16 requests from the sample.

A recommendation for expungement in FINRA arbitration is not the final step in the expungement process. If the arbitrator or panel recommends expungement, then the firm or associated person must confirm the arbitration award in a court of competent jurisdiction and serve the confirmed award on FINRA.<sup>170</sup> As of July 2020, FINRA had removed 2,641 customer dispute information disclosures from the CRD system from the possible 2,874 requests (92 percent) in which an arbitrator or panel recommended expungement. Firms or associated persons may have not yet sought or obtained a court order for the remaining disputes.

Approximately one-third of the 2,641 customer dispute information disclosures (965, or 37 percent) that were expunged were submitted to the CRD system from 2014 to 2019. The 965 customer dispute information disclosures reflect three percent of the total number of customer dispute information disclosures submitted to the CRD system during this period of time (approximately 37,000). The remaining 1,676 customer dispute information disclosures were submitted to the CRD system prior to 2014. The number of customer dispute information disclosures expunged during the sample period that were submitted to the CRD system prior to 2014 suggests that associated persons may yet still expunge customer dispute information disclosures submitted to the CRD system during or prior to the sample period. The three percent of expunged customer dispute information disclosures should therefore be considered a lower bound for the rate at which customer dispute information disclosures are expunged.

A firm or associated person can also initiate a proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. From January 2016 through December 2019, the expungement of 138 customer dispute information disclosures were sought directly in court. As of July 2020, court proceedings had concluded for 118 of those disclosures and proceedings remained ongoing for 20 disclosures. Among the 118 disclosures for which the court proceeding had concluded, 86 disclosures were ordered expunged by a court and 32 disclosures were not ordered to be expunged. FINRA will

three-person panel made a decision in arbitrations relating to 360 requests. See *infra* note 190 for a discussion of the percentage of expungement requests recommended between two- or three-person panels and one-person panels.

<sup>170</sup> See *supra* note 10.

challenge these requests in court in appropriate circumstances.

### 3. Economic Impact

#### A. Overview

The proposed rule change would codify the best practices described in the Guidance.<sup>171</sup> The best practices include the prohibition on the filing of an expungement request if (1) an arbitration panel or court of competent jurisdiction previously denied a request to expunge the same customer dispute information, or (2) the customer dispute information arises from a customer's arbitration that has not concluded. Based on FINRA staff observations, arbitrators are generally believed to be adhering to these best practices and, therefore, codifying them should not result in new material economic impacts. Codifying the best practices in the Guidance should, however, clarify among parties how the practices should be applied, including what is permitted during the expungement hearing and the responsibilities of the parties and the arbitrator or panel when expungement is requested. Codifying the Guidance may also help inform customers more generally of the practices that the forum has implemented to encourage and facilitate customer participation in expungement hearings. In addition, parties may incur fewer costs from the codification of the practices, including the costs from actions or decisions (e.g., requesting expungement of customer dispute information that was previously denied in another arbitration or court) that would be denied by an arbitration panel pursuant to the Guidance.

The proposed rule change would also introduce other changes to the Codes that expand upon or that are not a part of the Guidance. In particular, the proposed rule change would restrict when an associated person is permitted to request expungement in FINRA arbitration. The proposed rule change would also require an arbitrator or panel from a customer arbitration that closes by award after a hearing, from a simplified customer arbitration, or a panel from the Special Arbitrator Roster to decide an expungement request. Finally, the proposed rule change would address the participation by associated persons and customers in expungement hearings. These changes may result in new material economic benefits and costs. These economic effects are discussed in further detail below.

<sup>171</sup> See *supra* note 3.

#### B. Expungement Requests During Customer Arbitrations

The proposed rule change would set forth requirements for expungement requests during customer arbitrations. The proposed rule change would establish different requirements for non-simplified customer arbitrations and simplified customer arbitrations, and for an associated person named or unnamed to a (non-simplified or simplified) customer arbitration.

##### i. Expungement Requests by Named Associated Persons During Non-Simplified Customer Arbitrations

The proposed rule change would require an associated person named in a non-simplified customer arbitration to request expungement during the customer arbitration regarding the conduct that gave rise to the arbitration. Otherwise, the associated person would forfeit the opportunity to seek expungement of the same customer dispute information in any subsequent proceeding. The arbitrator or panel from a non-simplified customer arbitration would decide an expungement request if the arbitration closes by award after a hearing.<sup>172</sup>

The proposed rule change would help ensure that, if possible, the arbitrator or panel from a non-simplified customer arbitration, with input from all parties and access to all evidence, testimony and other documents, would decide an expungement request. These arbitrators or panels would be best situated to decide the related issue of expungement, and thereby help ensure that expungement recommendations and the customer dispute information contained in the CRD system and displayed through BrokerCheck reflect the conduct of associated persons.

An associated person named in a non-simplified customer arbitration may lose the ability to request expungement of the customer dispute information arising from the arbitration. A named associated person who does not request expungement during a non-simplified customer arbitration (or within the required time) would lose the ability to seek expungement relief.<sup>173</sup> Because the named associated person may lose the ability to assess information that arises as a part of arbitration before they are required to request expungement,

<sup>172</sup> See *supra* Item II.A.1.(II)A.1.a., "Expungement Requests During the Customer Arbitration, By a Respondent Named in a Customer Arbitration."

<sup>173</sup> Under the proposed rule change, a party that does not file or serve an expungement request at least 30 days before the first scheduled hearing begins could file a motion seeking an extension. The motion, however, may be opposed by another party and denied.

associated persons may incur costs to preserve their right to request expungement by filing a request with or without the expectation that the arbitrator or panel would recommend expungement. FINRA believes, however, that the proposed rule change would mitigate these potential costs by providing associated persons a reasonable amount of time (*i.e.*, within 45 days of receipt of the customer's statement of claim if the request is included in an answer, or 30 days before the first scheduled hearing begins if the request is included in a pleading) during the arbitration to consider whether to file a request. Parties may also incur other, indirect costs if, for example, the deadline to request expungement during a non-simplified customer arbitration causes them to incur costs to expedite the filing of the expungement request or constrains their ability to engage in other activities (*i.e.*, incur opportunity costs).

#### ii. Expungement Requests During a Non-Simplified Customer Arbitration That Close Other Than by Award or by Award Without a Hearing

Associated persons who request expungement during a non-simplified customer arbitration (either as a named party or as an unnamed party that consents to an on-behalf-of request) that closes other than by award or by award without a hearing (and would have otherwise had their expungement request decided as part of the customer arbitration) would incur additional costs to file a straight-in request.<sup>174</sup>

Associated persons may incur delays in receiving a decision on the request, and may incur additional legal fees and forum fees to resolve the straight-in request. The member firms with which the associated persons were associated at the time the customer dispute arose would also incur additional legal and forum fees. These costs would be imposed by the proposed rule change if the expungement requests would have otherwise been decided as part of the non-simplified customer arbitration. These costs would not be imposed by the proposed rule change, however, if regardless of the proposed rule change associated persons would have filed a

<sup>174</sup> Associated persons who would otherwise request expungement as a counterclaim during an industry arbitration, which is rare, or who would otherwise intervene in a customer arbitration and have an expungement request decided during the arbitration, would instead be required to file a straight-in request under proposed Rule 13805. These associated persons and member firms with which the associated persons were associated would incur similar costs.

straight-in request after the close of the non-simplified customer arbitration.

The additional costs for an associated person to resolve a straight-in request after the close of a non-simplified customer arbitration (that closes other than by award or by award without a hearing) may reduce the likelihood that the parties settle a customer arbitration.<sup>175</sup> In particular, the associated person may factor the cost to resolve a separate straight-in request into the decision regarding whether to settle the arbitration or have the case decided by the arbitrator or panel to the arbitration. In addition, even if the parties continue to settle the dispute, the associated person may subtract the cost to resolve a separate straight-in request from the potential settlement amount.

An associated person (or a party on behalf of an associated person) who files a straight-in request would incur the minimum hearing session fee of \$1,125 for each session the panel conducts to decide the expungement request.<sup>176</sup> The member firm at which the broker was associated at the time the customer dispute arose would also be assessed a minimum surcharge fee of \$1,900 and a minimum process fee of \$3,750. The fees associated with non-monetary claims would help ensure that costs to the forum for administering expungement requests are allocated as intended to the party or parties requesting expungement and, as applicable, the member firms at which the broker was associated at the time the customer dispute arose.

#### iii. Expungement Requests by Unnamed Persons in Non-Simplified Customer Arbitrations and by Named and Unnamed Persons in Simplified Customer Arbitrations

The proposed rule change would not require an unnamed person in a non-simplified customer arbitration, an associated person named in a simplified customer arbitration, or an unnamed person in a simplified customer arbitration to request expungement of the customer dispute information during the customer arbitration. Instead,

<sup>175</sup> FINRA notes, however, that the determination regarding whether to settle a customer arbitration can depend on a number of factors, including the parties' respective estimates of the additional costs they would incur to continue the customer arbitration, the value that the associated person places on expungement, the associated person's estimate of the likelihood that he or she could obtain expungement in the customer case compared to in a straight-in request and the cost that they estimate the associated person would incur to pursue the straight-in request.

<sup>176</sup> The associated person would not, however, incur an additional filing fee to file the straight-in expungement request. *See infra* Item ILC.8.

similar to today, these associated persons may wait until after the customer arbitration has concluded to request expungement as a straight-in request.<sup>177</sup>

The option to wait until after the customer arbitration has concluded to request expungement is not a benefit created by the proposed rule change, but is instead currently permitted under the Codes. FINRA believes that an associated person who is not named in a non-simplified customer arbitration, or an associated person who is either named or not named in a simplified customer arbitration, should be able to seek expungement as a straight-in request and have their request decided by a panel from the Special Arbitrator Roster.

Associated persons who are not required and choose not to request expungement during the customer arbitration may also incur additional costs. Any incremental costs from not filing an expungement request during a customer arbitration, however, are not imposed by the proposed rule change. Instead, they are borne at the discretion of the parties who make the determination of when to request expungement, and are similar to the costs they would incur under the Codes today.

#### iv. Time Limit for Requesting Expungement in Simplified and Non-Simplified Customer Arbitrations

A named associated person or a party on-behalf-of an unnamed person would be required to request expungement in a simplified customer arbitration within 30 days of the date that FINRA provides notice of arbitrator appointment.<sup>178</sup> A named associated person or a party requesting expungement on-behalf-of an unnamed person in a non-simplified customer arbitration would be required to request expungement no later than 30 days before the first scheduled hearing.<sup>179</sup>

<sup>177</sup> This requirement would help ensure that the panel from the Special Arbitrator Roster is aware of the outcome of the arbitration when deciding the request.

<sup>178</sup> The proposed rule change would require that if the named associated person or party on-behalf-of an unnamed person requests expungement in a pleading other than an answer, the request must be filed within 30 days after the date FINRA provides the associated person with notice of arbitrator appointment, which is the last deadline provided to the parties in a simplified arbitration to submit additional documents before the case is submitted to the arbitrator. *See* proposed Rules 12800(d)(1)(B)(i) and 12800(d)(2)(B)(i).

<sup>179</sup> *See* proposed Rules 12805(a)(1)(C)(i) and 12805(a)(2)(C)(iii). The proposed rule change also provides that FINRA would notify state securities regulators, in the manner determined by FINRA, of an expungement request within 30 days of receiving

Associated persons who do not request expungement within these time limits may incur additional costs that may include costs arising from delays in receiving a decision on the request and legal and forum fees. The member firms with which the brokers were associated at the time the customer dispute arose would also incur additional legal and forum fees. These costs would be imposed by the proposed rule change.

### C. Time Limits for Filing Straight-In Requests

The proposed rule change would also set forth requirements for an associated person to file a straight-in request. For customer dispute information reported to the CRD system after the effective date of the proposed rule change, the proposed rule change would require an associated person to file a straight-in request within two years of a customer arbitration or civil litigation closing, or, if no customer arbitration or civil litigation, within six years from the initial reporting of the customer complaint to the CRD system.<sup>180</sup>

The proposed rule change would also require a two-year time limit for requests to expunge customer dispute information that arose from a customer arbitration or civil litigation that closed on or prior to the effective date of the proposed rule change or a six-year time limit to request expungement of customer dispute information arising from a customer complaint initially reported to the CRD system on or prior to the effective date of the proposed rule change.<sup>181</sup> These time limits would begin from the effective date of the proposed rule change.

Arbitrators on the Special Arbitrator Roster would have the experience, qualifications and training necessary to decide straight-in requests. These time limits may increase customer participation in the proceedings and the likelihood that the panel from the Special Arbitrator Roster receives the relevant evidence and testimony to decide an expungement request. The time limits would help ensure that the expungement hearing is held close in time to the customer arbitration or civil litigation, or the events that led to the customer dispute information disclosure, and foreclose the option of

an associated person to choose the timing of a straight-in request to potentially reduce the likelihood of customer participation. Similar to other amendments proposed herein, an increase in customer participation may provide a panel from the Special Arbitrator Roster with additional information to decide an expungement request and help ensure the accuracy of the customer dispute information contained in the CRD system and displayed through BrokerCheck.

These time limits, however, may constrain an associated person from filing a straight-in request.<sup>182</sup> Associated persons who would otherwise delay the filing of a straight-in request may incur additional costs to file a straight-in request within the required time limits (e.g., opportunity costs, as described above). These time limits may also constrain an associated person from filing more than one expungement request in the same straight-in request. For example, associated persons may lose the ability to delay the filing of a straight-in request to expunge a complaint from a particular customer until other customers make additional complaints, if the filing of the straight-in request to expunge the complaint of the first customer would be time barred. Instead, an associated person may be required (as a result of the time limits) to file more than one straight-in request.

Associated persons who are restricted from including more than one request to expunge customer dispute information in the same straight-in request would incur additional legal and forum fees for each straight-in request or not seek expungement for all of the disclosures. The member firm at which the associated person was associated at the time the customer disputes arose would incur additional legal and forum fees if the associated person were to file multiple, separate straight-in requests.

### D. Time Limits for Straight-In Requests—Quantitative Description

As discussed as part of the Economic Baseline, 3,725 expungement requests were filed as straight-in requests during the sample period. The following estimates demonstrate that the majority of these straight-in requests would not have been permitted under the proposed time limits, and associated persons may not have been able to include more than

one expungement request in the same straight-in request. The estimates, however, do not take into account the potential change in the behavior of associated persons; associated persons would have incentive under the proposed amendments to file the straight-in requests within the time limits or otherwise lose the ability to make or file a request.<sup>183</sup>

Among the 3,725 expungement requests filed as a straight-in request, 1,140 requests followed a (non-simplified or simplified) customer arbitration (of the same underlying dispute). Two-hundred ninety of the 1,140 requests (25 percent) were filed as a straight-in request within the two-year time limit and would have been permitted under the proposed rule change. The remaining 850 requests (75 percent) were filed as a straight-in request after the two-year time limit and would not have been permitted. The median time from the close of the customer arbitration to the filing of the straight-in request was six years.

The 3,725 expungement requests filed as a straight-in request also include 2,585 requests that did not follow a (non-simplified or simplified) customer arbitration (of the same underlying dispute). Among the 2,585 requests, 813 requests (31 percent) were filed as a straight-in request within six years from the initial reporting of the disclosure to the CRD system and would have been permitted under the proposed rule change. The remaining 1,772 requests (69 percent) were filed as a straight-in request after the six-year time limit and would not have been permitted.

As discussed above, more than one expungement request can be made in a single arbitration, and the time limits may limit the ability of an associated person to include multiple expungement requests in the same straight-in request. The 3,725 expungement requests filed as a straight-in request relate to 1,778 arbitrations. Associated persons included more than one request to expunge customer dispute information in 810 of the 1,778 arbitrations. Under the proposed time limits, associated persons would not have been able to include all expungement requests in at least 225 of the 810 arbitrations.

a complete request for expungement. See proposed Rule 12805(b). State securities regulators would, therefore, have additional time to review the request and decide whether to oppose expungement if confirmation of an expungement recommendation is later sought in court.

<sup>180</sup> See proposed Rules 13805(a)(2)(A)(iv) and 13805(a)(2)(A)(v).

<sup>181</sup> See proposed Rules 13805(a)(2)(B)(i) and 13805(a)(2)(B)(ii).

<sup>182</sup> If the Commission approves the proposed rule change, FINRA expects that a number of associated persons would file a straight-in request to expunge customer dispute information reported to the CRD system prior to or soon after the effective date of the proposed rule change to help ensure that they are not constrained from seeking expungement because of the proposed time limitations.

<sup>183</sup> The following estimates also do not take into account the number of straight-in requests of customer dispute information arising from a previous (non-simplified or simplified) customer arbitration which, under the proposed rule change, may have been decided as part of the customer arbitration.

### E. Arbitrators or Panels Deciding Expungement Requests

The proposed rule change would require that the arbitrator or panel from a non-simplified customer arbitration decide expungement requests during the arbitration if the arbitration closes by award after a hearing.<sup>184</sup> In addition, the proposed rule change would require the arbitrator from a simplified customer arbitration to decide expungement requests if there is a full hearing, or in a separate expungement-only hearing after the simplified arbitration closes if the arbitration is decided “on the papers” or in a special proceeding.<sup>185</sup> The proposed rule change would also require a randomly selected panel from the Special Arbitrator Roster to decide straight-in requests.<sup>186</sup>

The proposed rule change is not structured to increase or decrease the likelihood that an arbitrator or panel recommends expungement in any individual hearing except as it relates to the merits of the request. The proposed rule change is structured, however, to place an arbitrator or panel in a better position to determine whether to recommend expungement of customer dispute information, and thereby help ensure the accuracy of the customer dispute information contained in the CRD system and displayed through BrokerCheck. Under the proposed rule change and in general, the arbitrator or panel that decides a request would either hear the full merits of the customer case or have additional training and qualifications when they are likely to receive information only from the party requesting expungement. In addition, panels from the Special Arbitrator Roster would be able to request evidence from the member firm at which the associated person was associated at the time the customer dispute arose.

The proposed rule change is also structured to reduce the potential influence of associated persons and member firms on the selection of the arbitrator or panel that decides an expungement request. First, a panel from the Special Arbitrator Roster would be randomly selected to decide a straight-in request, thereby decreasing the extent to which an associated person and member firm with which the associated person was associated at the time the customer dispute arose may

together select arbitrators who are more likely to recommend expungement.<sup>187</sup>

Second, the proposed rule change would foreclose the option for an associated person to withdraw a request and seek expungement of the same customer dispute information in a subsequent arbitration.<sup>188</sup> Associated persons may exercise this option if they believe that they have a higher probability of obtaining an expungement recommendation with a different arbitrator or panel in another arbitration, and in particular if the associated person files a straight-in request against the member firm with which the broker was associated at the time the customer dispute arose. To the extent that the associated person and his or her employer’s interests are aligned and both seek to increase the likelihood that expungement is recommended, they would together be expected to select arbitrators who may be more likely to recommend expungement.<sup>189</sup> Though these proposed amendments are consistent with the regulatory intent to permit expungement in limited circumstances, it may decrease the likelihood that associated persons are able to obtain an award recommending expungement.

In general, under the proposed rule change, a three-person panel would consider and decide expungement

<sup>187</sup> See *supra* Item II.A.1.(II)B.2.b., “Straight-in Requests and the Special Arbitrator Roster, Composition of the Panel.”

<sup>188</sup> This includes the requirement for an unnamed person to provide written consent to an on-behalf-of request for it to proceed, thereby preventing an unnamed person from subsequently arguing that they were unaware of an expungement request on their behalf. See proposed Rule 12805(a)(2)(A). This also includes the requirement that a case be closed with prejudice if an associated person withdraws a straight-in request after a panel from the Special Arbitrator Roster is appointed (unless the panel decides otherwise). See proposed Rule 13805(a)(4). In the sample period, an associated person withdrew 155 of the 2,904 straight-in requests (five percent) filed in cases that closed. The 155 straight-in requests include 118 requests where an arbitrator or panel was appointed.

<sup>189</sup> A recent academic study finds evidence that suggests parties can use previous expungement decisions to predict the potential likelihood that an arbitrator would recommend expungement. See Colleen Honigsberg & Matthew Jacob, “Deleting Misconduct: The Expungement of BrokerCheck Records,” November 2018, <https://www-cdn.law.stanford.edu/wp-content/uploads/2018/11/SSRN-id3284738.pdf>. The study also finds evidence that suggests both successful and unsuccessful expungement attempts predict future broker misconduct. An unsuccessful expungement attempt is associated with an approximately four times higher probability of future misconduct. Although expungement decisions are based on the information available at the time of the request, including the facts and circumstances of the arbitration, this finding suggests that the decisions being made by arbitrators are related to the potential future harm posed by the requesting broker.

requests during non-simplified customer arbitrations that close by award after a hearing and straight-in requests. Expungement decisions by a three-person panel may differ from expungement decisions by a single arbitrator. In addition, the decisions may differ depending on the arbitrators selected and the interaction among the arbitrators when deciding an expungement request. The extent to which a three-person panel would decide an expungement request differently than a single arbitrator, however, is not known.<sup>190</sup> As discussed above, expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions, request evidence and to serve generally as fact-finders in the absence of customer input would help ensure that a complete factual record is created to support the arbitrators’ decision in such expungement hearings.

### F. Arbitrators or Panels Deciding Expungement Requests—Quantitative Description

As discussed as part of the Economic Baseline, 5,159 of the 6,928 expungement requests sought during the sample period were filed in an arbitration that closed. Among the 5,159 expungement requests, 4,521 requests (88 percent) would have required a panel from the Special Arbitrator Roster. The 4,521 requests include 2,456 expungement requests made during a non-simplified customer arbitration that closed by award without a hearing or other than by award, and 2,065 requests that were filed as a straight-in request but did not relate to a previous (non-simplified or simplified) customer arbitration.

An arbitrator or panel from a (non-simplified or simplified) customer arbitration would have been required to decide 590 of the 5,159 expungement requests (11 percent). The 590 expungement requests include 292 requests made during a non-simplified customer arbitration that closed by

<sup>190</sup> Among the 2,746 expungement requests filed as a straight-in request where an arbitrator or panel made a decision, a similar percentage of requests was recommended by a two- or three-person panel (306 of 360 requests, or 85 percent) as was recommended by a one-person panel (1,973 of 2,386 requests, or 83 percent). In addition, among the 976 expungement requests during a non-simplified or simplified customer arbitration where an arbitrator or panel made a decision, a similar percentage of requests was recommended by a two- or three-person panel (422 of 670 requests, or 63 percent) as was recommended by a one-person panel (173 of 306 requests, or 57 percent).

<sup>184</sup> See proposed Rules 12805(a)(1)(D)(i) and 12805(a)(2)(E)(i).

<sup>185</sup> See proposed Rule 12800(e)(1).

<sup>186</sup> See proposed Rule 13806(b)(1).

award after a hearing, 240 expungement requests made during a simplified customer arbitration, and 58 requests filed as a straight-in request to expunge customer dispute information arising from a previous non-simplified customer arbitration that closed by award after a hearing.

Finally, a panel from the Special Arbitrator Roster, or an arbitrator from a simplified customer arbitration, would have been required to decide the remaining 48 arbitration requests that relate to customer dispute information arising from a previous simplified customer arbitration. The arbitrator or panel that would have decided the request is dependent on whether an associated person, or a party on-behalf-of an associated person, would have requested expungement during the simplified arbitration.

#### G. Participation in Expungement Hearings

The proposed rule change would require an associated person to appear personally at an expungement hearing.<sup>191</sup> This requirement would provide the arbitrator or panel the opportunity to ask questions of an associated person to better assess his or her credibility. An associated person would be permitted to cross-examine and seek information from customers who testify.<sup>192</sup> This may provide associated persons with the opportunity to substantiate their arguments in support of their expungement request.

Associated persons may incur additional costs to appear at an expungement hearing. The additional costs may depend on the method of appearance (*i.e.*, by telephone, videoconference, or in person), which, under the proposed rule change, would be determined by the arbitrator or panel. For example, associated persons who would otherwise not appear in person may incur additional costs under the proposed rule change if they are so required. The additional costs include the time and expense to appear, and other direct and indirect costs (*e.g.*, opportunity costs) associated with the associated person's appearance.

The proposed rule change would also help encourage customer participation in an expungement hearing. As noted above, the proposed rule change would require that a named associated person request expungement during a non-simplified customer arbitration and that the arbitrator or panel decide the

expungement request if the arbitration closes by award after a hearing. In addition, an expungement request during a non-simplified customer arbitration would be considered and decided by the arbitrator or panel from that arbitration.

Further, the proposed time limits for filing straight-in requests may increase customer participation during these arbitrations. The proposed rule change would also provide customers the option to appear at an expungement hearing using whichever method is convenient for them. The proposed rule change would also codify elements of the Guidance that permit the customer to testify, cross-examine the associated person and other witnesses, present evidence at the hearing and make opening and closing arguments.<sup>193</sup>

#### H. Impact on Business and Professional Opportunities

As a result of the proposed rule change, associated persons may determine that the additional costs to seek expungement relief are higher than the anticipated benefits. In addition, although the proposed rule change is intended to help ensure arbitrators recommend expungement when appropriate as it relates to the merits of the request, an arbitrator or panel may be less likely to recommend expungement depending on the information that becomes available for the reasons described above. This may cause associated persons not to seek expungement where expungement is likely (or unlikely) to be recommended.

Associated persons who no longer seek, or are not able to expunge customer dispute information from the CRD system and its display through BrokerCheck, or are delayed in doing so, may experience a loss of business and professional opportunities. The loss of business and professional opportunities by one associated person, however, may be the gain of another. Associated persons who may benefit in this regard include those who still determine that the additional costs to seek expungement relief under the proposed rule change is less than the anticipated

benefits and continue to seek expungement of customer dispute information, and other associated persons who do not have similar disclosures.

A firm or associated person can also initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. The proposed rule change may incent firms or associated persons to initiate an expungement proceeding directly in a court of competent jurisdiction without first going through any arbitration proceeding. For some firms and associated persons, the anticipated costs to first go through arbitration may be greater than the similar costs to proceed directly in a court of competent jurisdiction. Firms and associated persons who would otherwise first go through arbitration as a result of the proposed rule change may incur additional costs to seek expungement relief.

The number of firms or associated persons who would instead initiate an expungement proceeding directly in a court of competent jurisdiction is dependent not only on the additional costs under the proposed rule change, but the costs a firm or associated person would expect to incur in the different forums to initiate an expungement proceeding. This information is generally not available, and accordingly the potential effect of the proposed rule change on direct-to-court expungement requests is uncertain.

#### I. Other Economic Effects

Finally, the proposed rule change may have other marginal economic effects. First, the prohibition of a subsequent expungement request would decrease the potential inefficient allocation of resources resulting from a subsequent request that would have resulted in the same decision (*i.e.*, denial) as the first. The resources of the forum allocated to the additional expungement request could instead be used for other claims or requests that were not previously adjudicated or for other purposes.<sup>194</sup>

Second, the proposed rule change may increase the efficiency of the forum by requiring that a party provide certain information when filing an expungement request. The information includes identification of the customer dispute information that is the subject of the request, and whether expungement of the same customer dispute information was previously requested

<sup>191</sup> See proposed Rules 12805(c)(2) and 13805(c)(2).

<sup>192</sup> See proposed Rules 12805(c)(5)(A) and 13805(c)(5)(A).

<sup>193</sup> Other amendments to the proposed rule change would also help encourage customer participation. For example, the proposed rule change would allow customers to be represented at an expungement hearing and thereby mitigate any potential concern they may have regarding a direct confrontation with the associated person. In addition, the proposed rule change provides that FINRA would notify the customer of the time and place of the expungement hearing. Customers would still retain the option to participate in the expungement hearing or provide their position on the expungement request in writing. The costs to participate would therefore be borne at the customers' discretion.

<sup>194</sup> The resources relate to the specific costs to administer the claim, as well as the overall attendant costs to administer the forum.

and, if so, how it was decided. This would increase the efficiency of the forum by enabling FINRA to identify and track a request through the expungement process, and by alerting arbitrators and FINRA to another expungement request of the same customer dispute information. The efficiency of the forum would also increase by requiring an unnamed person to consent to an on-behalf-of expungement request in writing. This would help ensure that an unnamed person is aware of the request and prevent another expungement request by the unnamed person of the same customer dispute information.

In addition, the proposed rule change may affect the value of the customer dispute information to describe the conduct of associated persons. The change in the value of the information depends on the merit of the disclosures that would have otherwise been expunged. The merit of these disclosures also depends on many factors which are difficult to predict. These factors include the incentive of parties to file an expungement request under the proposed rule change, the decisions by the arbitrator or panel to recommend expungement dependent on the information that is available, and the merit of the customer dispute information that would have otherwise been sought to be expunged.

As stated above, the proposed rule change is not structured to increase or decrease the likelihood that an arbitrator or panel recommends expungement in any individual hearing except as it relates to the merits of the request. The proposed rule change may, however, reduce the incentive for an associated person to request expungement even when warranted. The effect of the proposed rule change on the extent to which the customer dispute information available in the CRD system (and its public display through BrokerCheck) accurately describes the conduct of associated persons is, therefore, uncertain.

#### 4. Alternatives Considered

Alternatives to the proposed rule change include amendments that were proposed in *Notice 17-42*. *Notice 17-42* proposed to restrict when a party can file or serve an expungement request during a customer arbitration to 60 days before the first hearing session begins. Although 60 days would provide a customer with more time to address an expungement request, 60 days may further restrict a party from seeking expungement during a customer arbitration relative to the 30 days before the first scheduled hearing begins in the

proposed rule change. FINRA believes that the proposed 30-day period would provide customers with enough time to address an expungement request, and FINRA with sufficient time to notify the states of the request. FINRA also believes that 30 days would reduce the potential that parties would lose their ability to file an expungement request during an arbitration.

*Notice 17-42* also proposed that an arbitrator or panel find that the customer dispute information has “no investor protection or regulatory value,” and that there must be a unanimous rather than a majority decision by a panel to recommend expungement. These proposed amendments may increase the difficulty for an associated person to receive an expungement recommendation, and thereby deter an associated person from seeking expungement. After considering the comments, FINRA has determined not to propose that the panel must find “no investor protection or regulatory value” to recommend expungement. FINRA agrees with some commenters that the standard may, if codified into rule language, create confusion among arbitrators and the potential for inconsistent application among different arbitrators and panels.<sup>195</sup> A majority decision is also consistent with what is required for other decisions in customer and industry arbitrations. FINRA also believes that the overall proposal, coupled with the existing standards in FINRA Rule 2080, would be sufficient to help preserve in the CRD system information that is valuable to investors and regulators, while allowing associated persons to remove information that is inaccurate.

Another alternative to the proposed rule change includes different time limits for an associated person to file a straight-in request. Although shorter (longer) time limits may increase (decrease) customer participation in the proceedings and the likelihood that the panel from the Special Arbitrator Roster receives the relevant evidence and testimony to decide an expungement request, shorter (longer) time limits may further (less) constrain an associated

<sup>195</sup> FINRA notes that in its Order approving NASD Rule 2130 (now FINRA Rule 2080), which describes the current findings that arbitrators must make to recommend expungement, the SEC stated that “it believes the proposal strikes the appropriate balance between permitting members and associated persons to remove information from the CRD system that holds no regulatory value, while at the same time preserving information on the CRD system that is valuable to investors and regulators.” See Securities Exchange Act Release No. 48933 (December 16, 2003) 68 FR 74667, 74672 (December 24, 2003) (Order Approving File No. SR-NASD-2002-168).

person from filing a straight-in request or including more than one expungement request in the same straight-in request. FINRA believes that the time limits proposed herein would facilitate customer participation but also provide associated persons sufficient opportunity to file a straight-in request.

#### C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In December 2017, FINRA published *Notice 17-42*, requesting comment on proposed amendments to the expungement process including establishing a roster of arbitrators with additional training and specific backgrounds or experience from which a panel would be selected to decide an associated person’s request for expungement of customer dispute information. The arbitrators from this roster would decide expungement requests where the customer arbitration is not resolved on the merits or the associated person files a straight-in request to expunge customer dispute information. FINRA received 70 comments in response to *Notice 17-42*.<sup>196</sup> A copy of *Notice 17-42* is attached [sic] as Exhibit 2a. A list of comment letters received in response to *Notice 17-42* is attached [sic] as Exhibit 2b and copies of the comment letters are attached [sic] as Exhibit 2c.

In general, individual commenters supported some aspects of the proposal and raised concerns with others. A summary of the comments and FINRA’s responses are discussed below.

#### 1. Requirement To Request Expungement During a Customer Arbitration

In *Notice 17-42*, FINRA proposed that an associated person who is named as a party in a customer arbitration must request expungement during the arbitration or be prohibited from seeking to expunge the customer dispute information arising from the customer’s statement of claim during any subsequent proceeding under the Codes.

NASAA and PIABA supported the proposed limitation. NASAA stated that the limitation would help ensure timelier expungement requests and help avoid requests made years after the underlying customer arbitration has closed. PIABA stated that it did not believe that requiring associated persons to request expungement during the customer arbitration would result in more expungement requests because the

<sup>196</sup> All references to commenters are to the comment letters as listed in Exhibit 2b.

rule proposal contained “heightened standards applicable to expungement requests” and a “clear process for requesting expungement following the close of the customer case,” which may cause “associated persons [to] be more deliberate in making expungement requests.”

Some commenters opposed the limitation for a variety of reasons.<sup>197</sup> Cornell stated that it “could lead associated persons to request expungement in every dispute in order to preserve the right to request expungement.” Keesal stated that these additional expungement requests could result in increased expenses to associated persons and member firms and “could impede the goals of protecting investors and ensuring that FINRA arbitration remains an expedient and cost-effective forum.” Herskovits expressed a concern that an associated person “may be unaware of the important rights he is waiving by failing to file a request for expungement in the underlying arbitration.” Saretsky, responding to FINRA’s concern that customers and documents may be unavailable when an associated person files a separate expungement request years after the customer arbitration closed, stated that customers can be located through counsel or internet searches, and that securities industry rules mandate the retention of important customer and account records for several years. JonesBell and Behr stated that the requirement to request expungement during the customer arbitration should apply only to named associated persons who have also appeared in the arbitration.

FINRA believes that requiring an associated person who is named in a customer arbitration to request expungement during that arbitration or be prohibited from doing so should help limit expungement requests filed years after the customer arbitration concludes, facilitate customer participation in expungement hearings and help ensure that relevant evidence does not become stale or unavailable.<sup>198</sup> The proposed requirement would also help ensure that the panel that has heard the merits of the customer’s claim at a hearing would decide the expungement request. Accordingly, FINRA believes that all associated persons who are named in non-simplified arbitrations should be required to request expungement during the arbitration, and that the requirement should not depend on whether the

associated person has chosen to enter an appearance in response to the complaint. In addition, FINRA notes that if the named associated person requests expungement, under the proposed rule change, the associated person would be required to appear at the expungement hearing.

The proposed amendments would also provide a detailed framework governing the expungement process, which should help ensure that both associated persons and customers are aware of their rights.

FINRA acknowledges commenters’ concerns that the proposed limitation could potentially result in an increase in the number of expungement requests and their associated costs. To address this concern, as well as the related concern that the requirement could result in expungement requests by associated persons simply to preserve their right to request expungement, FINRA has modified the proposed rule to allow the associated person to make the request 30 days before the hearing in the customer arbitration.<sup>199</sup> This should provide sufficient time during the customer arbitration for the associated person to evaluate whether an expungement request is warranted and help avoid unnecessary expungement requests.

## 2. Deadline To File Expungement Request During a Customer Arbitration

In *Notice 17–42*, FINRA proposed that an expungement request made in a pleading during a customer arbitration must be made no later than 60 days before the first hearing session begins. Three commenters opposed the proposal, stating that the 60-day filing deadline was an impractical or unnecessary restriction that could cause an associated person to miss the deadline and, therefore, an opportunity to file a request.<sup>200</sup> These commenters suggested that the proposal retain the status quo, which allows an associated person to request expungement up to and during any hearing. One commenter, Keesal, supported a deadline of 60 days before the first scheduled hearing date, provided, however, that the associated person “has appeared in [the] Underlying Customer Case.” Keesal stated that this would “ensure[ ] that all participants” were “on notice of the issues to be addressed and determined at the evidentiary hearing.” SIFMA stated that the proposed requirement “to file for expungement 60 days prior to the first

scheduled hearing date” was impractical and would require the payment of expungement fees even though a large portion of cases settle within 60 days of the hearing.

After considering the comments, FINRA does not believe that it is necessary to require a 60-day filing deadline. Instead, the proposed rule change would require that an expungement request be filed no later than 30 days before the first scheduled hearing.<sup>201</sup> This should provide the parties with sufficient case preparation time, as the expungement issues will overlap with the issues raised by the customer’s claim. If a named associated person seeks to request expungement after the 30-day filing deadline, the panel would be required to decide whether to grant an extension and permit the request.<sup>202</sup> The purpose of the deadline is to provide the parties other than the associated person with sufficient notice that expungement will be addressed at the hearing.

In addition, FINRA has determined that requiring the party to request expungement at least 30 days before the first “hearing session,” which is typically the initial pre-hearing conference (“IPHC”) rather than the first hearing on the merits, may not provide the requesting party with sufficient time to make an informed decision about whether to request expungement.<sup>203</sup> Therefore, FINRA has modified the proposal to require that an expungement request must be made 30 days before the first scheduled “hearing” begins to provide time for the requesting party to make a better-informed decision.<sup>204</sup>

## 3. Panel From the Customer Arbitration Decides Expungement Requests Where the Customer Arbitration Closes by Award After a Hearing

In *Notice 17–42*, FINRA proposed that if the customer arbitration closes by award, the panel from the customer arbitration would consider and decide the expungement request during the customer arbitration.

Some commenters disagreed with this aspect of the proposal and suggested

<sup>201</sup> See *supra* Item II.A.1.(II)A.1.a.i., “Method of Requesting Expungement.”

<sup>202</sup> See *supra* note 37.

<sup>203</sup> The term “hearing session” means any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference. See FINRA Rules 12100(p) and 13100(p). The IPHC is scheduled after the panel is appointed. During the IPHC, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree, however, to forgo the IPHC. See generally FINRA Rules 12500 and 13500.

<sup>204</sup> Under the Codes, a “hearing” means a hearing on the merits. See *supra* note 21.

<sup>197</sup> See Behr, Cornell, Herskovits, JonesBell, Keesal and Saretsky.

<sup>198</sup> See *supra* Item II.B.3.D., “Time Limits for Straight-in Requests—Quantitative Description.”

<sup>199</sup> See *supra* Item II.A.1.(II)A.1.a.i., “Method of Requesting Expungement.”

<sup>200</sup> See Behr, JonesBell and SIFMA.

that a panel selected from the Special Arbitrator Roster should decide all expungement requests, even if the customer arbitration was decided by an award.<sup>205</sup> For example, PIABA stated that a panel from the Special Arbitrator Roster should decide the expungement request separate from the customer's claim because the "decision a panel is asked to make with respect to expungement is different than deciding whether or not to find liability on a customer claim" and because it is "unfair to require a customer to participate in a potentially lengthy expungement hearing that they did not ask for." Grebenik stated that the expungement request should be evaluated separately by an independent panel because the arbitrator may "have bias" and "has heard comments and issues from the customer [about] the actual claim." AdvisorLaw stated that all expungement requests should receive the "same level of review and consideration by a specially trained arbitration panel."

Cornell expressed a concern that the proposed requirement could "transform hearings designed to determine the merits of a customer dispute into lengthy expungement hearings." Cornell proposed, as an alternative, that the same panel from the customer arbitration make the expungement determination, but do so in a separate proceeding to avoid inconveniencing the customer.

Keesal questioned whether the proposed requirement that the panel from the customer arbitration decide the expungement request if the customer arbitration "closes by award" would require the panel to decide an expungement request if the cases closes as a result of an order dismissing the case.

In response to the comments, FINRA is clarifying that the panel from the customer arbitration would be required to decide the expungement request and include its decision in the award if the arbitration "closes by award after a hearing" instead of where the arbitration "closes by award." FINRA believes that where the panel from the customer arbitration has heard the parties' presentation of the evidence about the customer's claim, that same panel is best situated to decide the expungement request. In addition, it would generally be more efficient and less costly for the panel from the

customer arbitration to decide the expungement request in these circumstances. Although FINRA Rule 2080(b)(1) requires the panel to make a separate, different determination than its determination on the merits of the customer's claim, the evidence offered with respect to both determinations should generally overlap. Accordingly, FINRA does not believe that it would overly burden the parties if, when the customer arbitration closes by award after a hearing, the panel must also decide the expungement request in addition to the merits of the customer's claim.

#### 4. Qualifications of Arbitrators on the Special Arbitrator Roster

In *Notice 17-42*, FINRA proposed that to qualify for the Special Arbitrator Roster, a public chairperson would be required to: (i) Have completed enhanced expungement training; (ii) be admitted to the practice of law in at least one jurisdiction; and (iii) have five years' experience in litigation, federal or state securities litigation, administrative law, service as a securities regulator or service as a judge. Commenters generally supported the proposed requirements,<sup>206</sup> but were split on whether the members of the Special Arbitrator Roster should be required to be attorneys.<sup>207</sup> One commenter, Black, did not oppose the proposed qualifications but suggested that they would likely result in fewer eligible arbitrators for straight-in requests. PIABA stated that the Special Arbitrator Roster should be made up of attorneys because it would be difficult for FINRA, in some areas of the country, to alternatively fill the Special Arbitrator Roster with local chair-qualified arbitrators that had served on three arbitrations through award. PIABA also stated that arbitrators with legal training may be better equipped to make the distinction between the FINRA Rule 2080 grounds for expungement and deciding the merits of the underlying claim. Keesal, in contrast, stated that there was no rationale for allowing non-attorneys to decide expungement requests made during the customer

arbitration, but not brought as a stand-alone claim.

Some commenters also expressed concerns that the arbitrators on the Special Arbitrator Roster were not required to have securities industry experience.<sup>208</sup> FSI stated that without this background "it may be difficult to appreciate whether information has regulatory significance or investor protection value." AdvisorLaw stated that "[r]equiring all expungement arbitrators to have a minimum of five years' experience with the financial services industry [would be] appropriate considering the complexity of expungement requests in cases involving customer dispute information." In contrast, Public Citizen suggested that at least one FINRA employee who meets the requirements of the Special Arbitrator Roster be a member of every three-person panel that considers an expungement request.

After considering the comments, FINRA has determined not to propose requiring that the members of the Special Arbitrator Roster be attorneys; instead, they would be required to be public arbitrators who have evidenced successful completion of, and agreement with, enhanced expungement training, and have served as an arbitrator through award on at least four customer-initiated arbitrations.<sup>209</sup> FINRA believes that the non-attorneys on its roster who meet these qualifications and complete enhanced expungement training should be appropriately knowledgeable and experienced to decide straight-in requests. The requirement that the arbitrators on the Special Arbitrator Roster be public arbitrators should help ensure that the arbitrators are free of bias. The requirement that they have served on four cases through to award would help ensure that the members of the Special Arbitrator Roster have the necessary knowledge and experience to conduct hearings in the forum.

<sup>208</sup> See AdvisorLaw, Behr, FSI and JonesBell. Behr and JonesBell also criticized the proposal as allowing claimants' attorneys "whose business is the litigation of customer complaints" to serve on the Special Arbitrator Roster. FINRA notes, however, that the proposal requires that arbitrators on the Special Arbitrator Roster be public arbitrators, and that FINRA's definition of public arbitrators excludes, among other persons, those who devote 20 percent or more of their professional time to representing parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry. See FINRA Rules 12100(aa) and 13100(x); see also *supra* note 8.

<sup>209</sup> See proposed Rule 13806(b)(2)(B). In addition, to qualify for the Special Arbitrator Roster, the arbitrators must be chairpersons and, therefore, will have completed the training that arbitrators must complete before they can be added to the chairperson roster. See also *supra* note 80.

<sup>205</sup> See AdvisorLaw, Georgia State, Grebenik, PIABA, St. John's, Tinklenberg and UNLV. In addition, St. John's "strongly agree[d] with requiring associated or unnamed persons to wait until the conclusion of a customer's case to file an expungement request."

<sup>206</sup> See, e.g., SIFMA (supporting the proposal, and stating that more highly qualified and trained arbitrators should lead to a more efficient and fair process); NASAA (supporting the proposal, and stating that the extent to which the panels truly appreciate the nuanced regulatory issues related to expungement largely depended on the content and effectiveness of the proposed enhanced expungement training).

<sup>207</sup> See AdvisorLaw, FSI, Gocek, Keesel, Osiason, Rodriguez and White (all opposing the requirement that members of the Special Arbitrator Roster be attorneys). *But cf.* Cornell, Georgia State, NASAA, PIABA, Schlein, SIFMA, St. John's and Tinklenberg (all supporting the requirement).

Although FINRA believes that a sufficient number of arbitrators on its roster would meet these additional qualifications, if the Commission approves the proposed rule change, FINRA would engage in efforts to recruit arbitrators for the Special Arbitrator Roster. FINRA notes that its Office of Dispute Resolution has embarked on an aggressive campaign to recruit new arbitrators, with a particular focus on adding arbitrators from diverse backgrounds, professions and geographical locations.<sup>210</sup> FINRA's commitment and focus on this critical initiative have resulted in increases in under-represented categories of arbitrators.<sup>211</sup> FINRA believes its continued commitment to this important initiative will help the forum improve the quality, depth and diversity of its public chairperson roster.

##### 5. Special Arbitrator Roster Decides Expungement Requests if the Customer Arbitration Closes Other Than by Award or by Award Without a Hearing

In *Notice 17-42*, FINRA proposed that if the customer arbitration closes other than by award (e.g., the parties settle the arbitration), the panel in that arbitration would not decide the associated person's expungement request. Instead, the associated person would be permitted to file an expungement request as a new claim under the Industry Code against the member firm at which he or she was associated at the time of the events giving rise to the customer dispute.

The SEC Investor Advocate supported the proposal because FINRA's data showed that where the arbitration case was not decided on the merits, the expungement rate was "simply too high for an *extraordinary* remedy." (emphasis in original). NASAA also supported the proposal, stating that "post-settlement expungement hearings often consist of a one-sided presentation of the facts" because "investors and their counsel have little incentive to participate after the customer's concerns have been resolved."

Some commenters disagreed with the proposal to require the associated person to file a new arbitration under the Industry Code if the customer arbitration closes other than by award, as inefficient or burdensome on associated persons.<sup>212</sup> As an alternative,

SIFMA suggested that the panel from the customer arbitration decide the request; but, to address FINRA's concern for greater training and increased qualifications for those arbitrators determining expungement, SIFMA suggested that the proposed rule change require that at least one arbitrator on every three-person panel be selected from the Special Arbitrator Roster at the inception of each customer arbitration.

Saretsky stated that associated persons should be able to name the customer, and that the "minor inconvenience" to the customer was outweighed by the harm to the associated person. PIABA stated that it would be "inappropriate" to name customers. St. John's "support[ed] allowing the proposed expungement process to proceed without the customer having to be named a party to the request."

Schlein expressed concerns that a former employing member firm may have "little or no economic incentive to cooperate in an expungement proceeding," and that it "would also be difficult for the panel to elicit potentially relevant facts" where the "economic and reputational interests of the associated person and the employer are aligned." Schlein also stated that an "aggrieved customer has no economic incentive to participate in an expungement proceeding that occurs only after the underlying case has concluded." Schlein also expressed concern that expungement requests would be referred to the Special Arbitrator Roster even if the matter settled on the eve of hearing, when it may be more efficient and promote investor protection to require the existing panel to hear the expungement request. Schlein stated that "FINRA could ameliorate the possibility that a panel might receive one-sided information" by (i) providing the expungement panel with significant filings from the underlying customer dispute, (ii) permitting the panel to review the parties' settlement papers and (iii) giving the associated person, firm, and the customer the right to provide the panel with transcripts of the underlying customer proceeding.

FINRA believes that where there has not been a hearing on the merits of the

customer's claim, the members of the Special Arbitrator Roster, who would be public chairpersons who have served on at least four customer arbitrations in which a hearing was held and received enhanced expungement training, would be better situated to decide expungement requests than the panel from the customer arbitration. FINRA does not believe that requiring the associated person to file a new arbitration under the Industry Code would unduly burden the associated person—instead of presenting evidence related to the expungement request to the arbitrators in the customer arbitration in a separate expungement hearing, they would instead present the evidence supporting the expungement request to a panel randomly selected from the Special Arbitrator Roster.

FINRA shares commenters' concerns that the factual record could be less well-developed where a straight-in request is filed against a member firm and the associated person or member firm's interests are aligned, or where the customer does not participate. FINRA does not believe, however, that the customer should be named as a respondent or be required to participate in an expungement proceeding after the customer's claim has been resolved (e.g., after the claim is settled). Instead, the proposed rule change addresses concerns that straight-in requests filed against the member firm may be non-adversarial or lack customer participation by, among other things (i) requiring that straight-in requests be decided by three randomly selected public chairpersons with enhanced training and experience,<sup>213</sup> (ii) requiring the panel to review the settlement documents,<sup>214</sup> (iii) granting the panel the explicit authority to request from the associated person, the member firm at which he or she was associated at the time the customer dispute arose or other party requesting expungement, any documentary, testimonial or other evidence that it deems relevant to the expungement request,<sup>215</sup> and (iv) including provisions to encourage and facilitate customer participation in expungement hearings.<sup>216</sup>

In response to commenters' concerns, FINRA has modified the language in the proposed rule change to require that a straight-in request be filed against the

<sup>210</sup> See Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA, <https://www.finra.org/arbitration-mediation/our-commitment-achieving-arbitrator-and-mediator-diversity-finra>.

<sup>211</sup> See *supra* note 210.

<sup>212</sup> See Behr, Herskovits, JonesBell, Saretsky and SIFMA. Herskovits also stated that "[financial

advisors] will respond to the proposed rule by filing a counterclaim or cross claim for expungement in the customer arbitration, thus preventing the customer arbitration from closing before a hearing is held on expungement or the [financial advisors'] other claims for relief." FINRA notes, however, that under the proposed rule change, a request for expungement relief would not prevent a customer arbitration from closing.

<sup>213</sup> See *supra* Item II.A.1.(II)B.2.b., "Straight-in Requests and the Special Arbitrator Roster, Composition of the Panel."

<sup>214</sup> See proposed Rules 12805(c)(7) and 13805(c)(7).

<sup>215</sup> See proposed Rules 12805(c)(6) and 13805(c)(6).

<sup>216</sup> See *supra* Item II.A.1.(II)D.3., "Customer's Participation during the Expungement Hearing."

member firm at which he or she was associated “at the time the customer dispute arose,” consistent with the language used in other FINRA rules, instead of “at the time of the events giving rise to the customer dispute.”<sup>217</sup>

#### 6. Three Randomly Selected Arbitrators Decide Straight-In Requests

In *Notice 17-42*, FINRA proposed that the NLSS would randomly select three public chairpersons to serve on the Special Arbitrator Roster who would decide the request for expungement, and that the first arbitrator selected would be the chairperson. The parties would not be permitted to agree to fewer than three arbitrators or to the use of pre-selected arbitrators. The associated person seeking expungement would not be permitted to strike any arbitrators, but would be able to challenge a selected arbitrator for cause.

PIABA and AdvisorLaw supported the proposed random selection of three arbitrators. PIABA stated that the random selection of three arbitrators would “reduce the risk of arbitrators being concerned about ruling against an associated person for fear they may not be selected for another panel.”

Other commenters opposed the proposed rule change. SIFMA expressed concerns that not permitting parties to rank and strike arbitrators would remove the parties’ involvement and input.<sup>218</sup> SIFMA also stated that there was no compelling need to use three rather than a single arbitrator, and that the proposal would increase the financial burden on registered representatives seeking expungement. Walter stated that a single FINRA-qualified arbitrator with the special qualifications would be “more than qualified to make a determination as to expungement” and that “[h]aving to coordinate the schedules of three arbitrators will delay the processing and will impose unnecessarily high additional costs on all parties involved.”<sup>219</sup> Tinklenberg opposed the three-person panel requirement because of the associated costs. Baritz stated that the three-person panel requirement

would increase expenses to associated persons and the “time necessary to rank and choose a panel,” and “significantly delay the process.”

Keesal opposed the random selection of three arbitrators as unfair to associated persons, and suggested that FINRA “randomly select a minimum of 12 proposed arbitrators to serve on an expungement case, from which the associated person and anyone else involved in the case can rank and strike the proposed panelists.”

FINRA notes that since straight-in requests may be complex, may not be actively opposed by another party and the customer or customer’s representative typically does not appear at the hearing, having three arbitrators from the Special Arbitrator Roster available to ask questions and request evidence would help ensure that a complete factual record is developed to support the arbitrators’ decision. In addition, FINRA believes that requiring two out of three randomly selected public chairpersons with enhanced training and qualifications to agree that expungement is appropriate in straight-in requests should help FINRA maintain the integrity of its CRD records and ensure that expungement is recommended in limited circumstances and only when one of the FINRA Rule 2080(b)(1) grounds applies.

FINRA does not believe that selecting three rather than one arbitrator would overly burden the parties during the proceeding or result in undue delay. As the parties would not be permitted to rank or strike these arbitrators, this should shorten the average length of the proceeding.<sup>220</sup> In addition, pursuant to FINRA Rule 13403, FINRA would send the lists generated by the NLSS to all parties at the same time, within approximately 30 days after the last answer is due, regardless of the parties’ agreement to extend any answer due date.

FINRA recognizes that the proposed random arbitrator selection process would limit party input on arbitrator selection. However, the arbitrators on the Special Arbitrator Roster would have the experience, qualifications and training necessary to conduct a fair and impartial expungement hearing in accordance with the proposed rules, and to render a recommendation based on a complete factual record developed during the expungement hearing.

<sup>220</sup> Under the Codes, the lists of ranked arbitrators must be completed and returned to the Director no more than 20 days after the date the Director sends the lists to the parties. *See, e.g.*, FINRA Rules 12403(c)(3) and 13404. However, the parties may agree to extend the due date. *See* FINRA Rules 12105 and 13105.

FINRA believes that the higher standards that the arbitrators must meet to serve on the Special Arbitrator Roster should mitigate the impact of the absence of party input on the selection of arbitrators. In addition, associated persons and member firms would still be permitted to challenge any arbitrator for cause.<sup>221</sup>

#### 7. Simplified Arbitrations

In *Notice 17-42*, FINRA proposed to require that an associated person or unnamed person wait until the conclusion of a customer’s simplified arbitration case to file an expungement request, which would be filed under the Industry Code against the member firm at which he or she was associated at the time the customer dispute rose and would be heard by a panel selected from the Special Arbitrator Roster.

Some commenters supported the proposal.<sup>222</sup> PIABA stated that it would address a flaw in the current process, whereby a hearing is held to consider expungement even if the customer has not requested a hearing under FINRA Rule 12800, and that it would eliminate delays in securing an award because the arbitrator is considering the request for expungement. PIABA also stated that a single arbitrator should not be permitted to decide an expungement request in a simplified arbitration because the goals of the proposed amendments should not be affected simply because the misconduct involved \$50,000 or less.<sup>223</sup> The SEC Investor Advocate stated that it would be easier for a broker to convince one arbitrator to recommend expungement. St. John’s stated that “separating the expungement request from the underlying customer case” should result in “faster decisions in simplified cases.”

Some commenters opposed the proposed change and stated that the arbitrator who heard the evidence in the underlying simplified customer arbitration would be most qualified to determine an expungement request, and that it was unfair to impose the burden of a subsequent arbitration on the associated person in this circumstance.<sup>224</sup>

After considering the comments, FINRA has revised the proposed rule change to provide that if a party requests expungement during a simplified arbitration, the single arbitrator from the simplified arbitration would be required to decide the

<sup>221</sup> *See* proposed Rule 13806(b)(4).

<sup>222</sup> *See* NASAA, PIABA, The SEC Investor Advocate, St. John’s and UNLV.

<sup>223</sup> *See also* UNLV.

<sup>224</sup> *See* Behr, JonesBell and Keesal.

<sup>217</sup> *See, e.g.*, FINRA Rules 12901(a)(1)(C) and 13903(b); *see also* Kessal.

<sup>218</sup> SIFMA also proposed that “to preserve arbitrator neutrality and foster greater transparency,” FINRA make publicly available all training materials, communications with arbitrators regarding expungement, and documents related to the addition, removal or exclusion of any arbitrators from the roster. FINRA notes that making such communications and documents publicly available could have a chilling effect on arbitrator recruitment and communications. FINRA does, however, make expungement training materials publicly available. *See supra* note 82.

<sup>219</sup> *See also* Saretsky.

expungement request, regardless of how the simplified arbitration case closes (e.g., even if the case settles).<sup>225</sup> FINRA believes that it is appropriate for the single arbitrator in a simplified arbitration case to decide expungement requests, regardless of how the underlying case closes, due to the lower monetary requirement and generally less complex nature of these cases. To address concerns that customers should not be required to participate in a hearing addressing expungement requests in simplified arbitrations, the proposed rule change would require arbitrators to hold a separate expungement-only hearing after the customer's dispute is decided to consider the expungement request if the customer elects to have his or her claim decided on the papers or through an Option Two special proceeding. The arbitrator would be required to issue a subsequent, separate award in connection with the expungement-only hearing.<sup>226</sup>

#### 8. Fees That Parties Will Incur To File a New Claim Under the Industry Code To Request Expungement

Some commenters expressed concerns that if an associated person were required to file a separate claim under the Industry Code to request expungement after the customer arbitration closes other than by award, the member firm and associated person would be assessed the filing fee, member surcharge and process fees twice, in both the underlying customer arbitration and the separate straight-in request.<sup>227</sup> SIFMA stated that this could increase the costs of expungement and have the "indirect effect of increasing the costs of settlement, potentially discouraging settlement in smaller cases due to the increased costs associated with expungement."

FINRA believes that it is appropriate to assess the member surcharge and process fee for straight-in requests because they are separate arbitrations before a separate panel of specially trained arbitrators. The member firm, having not previously paid a member surcharge and process fee for the expungement request, would be assessed these fees when and if a straight-in request is filed. FINRA would not, however, assess a second filing fee when an associated person files a straight-in request if the associated person, or the requesting party if it is an on-behalf-of request, has previously paid the filing fee to request

expungement of the same customer dispute information during a customer arbitration.

#### 9. Arbitrators "Recommend" Rather Than "Grant" Expungement

In *Notice 17-42*, FINRA requested comment on whether to revise FINRA Rules 12805 and 13805 to state that the panel may "recommend" rather than "grant" expungement if the FINRA Rule 2080 standards are satisfied. Several commenters supported the revision as a clarifying change that would more accurately reflect the panel's role in the expungement process.<sup>228</sup> For example, PIABA stated that after the panel recommends expungement, under FINRA Rule 2080 the member or associated person "must obtain an order from a court of competent jurisdiction confirming the arbitration award containing expungement relief." AdvisorLaw and Tinklenberg opposed the proposed rule change, with AdvisorLaw stating that "grant" should be retained because "[i]t has long been established that the decisions made in arbitration are final and binding upon the parties," and that "[c]hanging the language of the Rule from the word 'grant' to 'recommend' may lessen the perceived binding effect of the decision."<sup>229</sup>

FINRA believes that "recommend" more accurately captures the panel's authority in the expungement process. Pursuant to FINRA Rule 2080, FINRA will only expunge customer dispute information after a court of competent jurisdiction enters an order requiring it to do so. Accordingly, the proposed rule change would change the word "grant" to "recommend" in proposed Rules 12805 and 13805.<sup>230</sup>

#### 10. Unanimity of Decision

In *Notice 17-42*, FINRA proposed that to recommend expungement, a three-person panel of arbitrators would be required to agree unanimously to recommend expungement. Some commenters opposed the unanimity requirement as making it too difficult to obtain expungement or because it was inconsistent with the ability of a customer to prevail by a majority decision.<sup>231</sup> SIFMA, for example, stated that the unanimity requirement would "impinge upon the fundamental fairness of the expungement process in

providing an effective balance to the allegation-based complaint reporting regime and will have a significant impact on registered representatives' ability to protect their livelihoods and reputations." JonesBell and Behr stated that "t[o] require a unanimous decision on any expungement request obviously would give a single individual sitting on a three-member panel the power to prevent, for improper reason or no good reason at all, a meritorious request that a false or erroneous claim be removed from a representative's CRD record."

Other commenters supported requiring a unanimous decision to recommend expungement.<sup>232</sup> For example, PIABA stated that the unanimity requirement would help ensure that expungement was an extraordinary remedy that is only granted when it has no meaningful investor protection or regulatory value. The SEC Investor Advocate stated that the requirement would provide greater "assurance that only meritless complaints are expunged," and expressed hope "that this requirement will encourage brokers to only seek expungement when the underlying customer dispute information is meritless." Cornell stated that the "unanimity requirement protects public investors by ensuring that the threshold for expungement is high," and that, "given the history of abuse of the expungement process," would "help[] to ensure that when expungement is granted, the expungement is legitimate."

After considering the comments, FINRA has determined to allow arbitrators to recommend expungement through a majority decision, consistent with what is required for other decisions in customer and industry arbitrations.<sup>233</sup> FINRA believes that requiring a majority of arbitrators to agree that expungement is appropriate should be sufficient to help preserve in the CRD system information that is valuable to investors and regulators, while allowing associated persons a reasonable mechanism to remove information that is inaccurate. FINRA notes, however, that if the SEC approves the proposed rule change, FINRA will continue to monitor the expungement process to determine if additional changes are needed.

<sup>228</sup> See Black, Cornell, Georgia State, Gocek, Keasal and PIABA.

<sup>229</sup> See also Wellington.

<sup>230</sup> See *supra* note 10.

<sup>231</sup> See AdvisorLaw, Behr, Gocek, Hagenstein, Higgenbotham, Janney, JonesBell, Keasal, Leven, Mahoney, Saretsky, SIFMA, Smart, Speicher, Tinklenberg and White.

<sup>232</sup> See Black, Cornell, Georgia State, Liebrader, NASAA, PIABA, Public Citizen, The SEC Investor Advocate and UNLV. In addition, Wellington stated that if an expungement was endorsed unanimously, the term "grant" should be retained, there should be little or no cost to the requesting party, and the associated person should not have to obtain a court order directing the expungement.

<sup>233</sup> See FINRA Rules 12904(a) and 13904(a).

<sup>225</sup> See proposed Rule 12800(e)(1).

<sup>226</sup> See proposed Rule 12800(e)(1)(A).

<sup>227</sup> See Janney, Keasal and SIFMA.

### 11. No Investor Protection or Regulatory Value

In *Notice 17-42*, FINRA proposed to require that a panel find that customer dispute information has “no investor protection or regulatory value” to recommend expungement. Several commenters opposed the requirement.<sup>234</sup> For example, Herskovits stated that the standard was vague and opened the possibility of inconsistent rulings among different panels. FSI stated that the proposal was “confusing as it is difficult to imagine a scenario where information that is false, clearly erroneous, factually impossible or did not involve the advisor, would have regulatory or investor protection value.” SIFMA stated that the requirement was redundant in light of the current high standards in FINRA Rule 2080(b)(1), may have the effect of discouraging meritorious expungement claims, was already incorporated into the Guidance and would transform the traditional role of arbitrators as fact-finders and require them to make a policy determination in each case. Keesal stated that the change would unnecessarily complicate the expungement process to the detriment of associated persons with no corresponding investor protection value. Saretsky proposed that arbitrators instead be required to find that the customer dispute had no “reasonable” investor protection or regulatory value.

NASAA expressed a concern with the proposal because it would allow arbitrators, rather than regulators, to make the finding. The SEC Investor Advocate expressed the same concern, and suggested that FINRA provide a framework on how the standard should be interpreted and applied to avoid disparate interpretations and outcomes. Schlein stated that arbitrators “should receive supplemental training on the proposed new standard,” and that FINRA should also “offer training or instructional materials to judges” who will be required to confirm an expungement award.

Other commenters supported the requirement.<sup>235</sup> For example, PIABA suggested that arbitrators should be required to make the finding because in practice arbitration panels “often believe that the Rule 2080 standards are easily met” and “do not grasp the fact that” a claim may not be factually impossible or false even though a customer has not met his or her burden of proof for purposes of establishing liability or rebutting an affirmative

<sup>234</sup> See Baritz, FSI, Gocek, Herskovits, Janney, Keesal, Saretsky, SIFMA and White.

<sup>235</sup> See Cornell, Liebrader, PIABA, St. John’s and UNLV.

defense. St. John’s stated that the proposed requirement would “help strengthen investor protection by improving confidence in the accuracy of the CRD system and BrokerCheck.” Cornell stated that the requirement would allow the panel to look beyond the claim and at the associated person’s record as a whole, including other customer dispute information, which would protect public investors. Liebrader stated that “[t]oo many legitimate claims disappear from public view in the largely uncontested expungement process.”

After considering the comments, FINRA has determined not to propose that the panel must find “no investor protection or regulatory value” to recommend expungement. FINRA agrees with some commenters that the standard may, if codified into rule language, create confusion among arbitrators and the potential for inconsistent application among different arbitrators and panels.<sup>236</sup> FINRA also believes that the overall proposal, coupled with the existing standards in FINRA Rule 2080, would be sufficient to help preserve in the CRD system information that is valuable to investors and regulators, while allowing associated persons to remove information that is inaccurate.

### 12. Panel Must Identify One of the FINRA Rule 2080(b)(1) Grounds for Expungement

In *Notice 17-42*, FINRA clarified in proposed Rules 12805 and 13805 that the FINRA Rule 2080 grounds for expungement that the panel must identify to recommend expungement are the grounds stated in paragraph (b)(1) of FINRA Rule 2080. In response to *Notice 17-42*, PIABA supported clarifying “that an arbitration panel may not recommend expungement on grounds other than those set forth in Rule 2080.” Keesal, however, viewed FINRA’s proposal as “remov[ing] the arbitrator’s ability to grant expungement relief based on judicial or arbitral findings other than those listed in Rule 2080(b)(1).”<sup>237</sup>

<sup>236</sup> FINRA notes that in its Order approving NASD Rule 2130 (now FINRA Rule 2080), which describes the current findings that arbitrators must make to recommend expungement, the SEC stated that “it believes the proposal strikes the appropriate balance between permitting members and associated persons to remove information from the CRD system that holds no regulatory value, while at the same time preserving information on the CRD system that is valuable to investors and regulators.” See Securities Exchange Act Release No. 48933 (December 16, 2003) 68 FR 74667, 74672 (December 24, 2003) (Order Approving File No. SR-NASD-2002-168).

<sup>237</sup> See also Baritz; compare SIFMA (stating that “FINRA already imposes high standards in order for

FINRA notes that under current FINRA Rule 12805, arbitrators are required to base their expungement recommendations on one of the three grounds listed in FINRA Rule 2080(b)(1).<sup>238</sup> Accordingly, the proposed rule change clarifies in proposed Rules 12805 and 13805 that the grounds for expungement that the panel must indicate in its award are the grounds in FINRA Rule 2080(b)(1).<sup>239</sup>

### 13. Time Limits for Straight-In Requests

In *Notice 17-42*, FINRA proposed that for customer arbitrations, associated persons must file straight-in requests within one-year from the date the customer arbitration closed. For customer complaints, FINRA proposed that associated persons must file straight-in requests within one-year from the date that a member firm initially reported the complaint to the CRD system. For customer arbitrations that close and customer complaints that are reported prior to the effective date of the proposed rule change, the associated person would have six months from the effective date of the rule, if approved by the Commission, to file the expungement request.

Some commenters opposed the proposed time limitations as unwarranted or too short.<sup>240</sup> For example, SIFMA stated that the one-year time limitation is unnecessary because the general six-year period to file all claims also applies to expungement requests. SIFMA also stated that the one-year time limitation is insufficient for firms to properly investigate and respond to customer complaints, and would create inefficiency by requiring the filing of requests to expunge customer complaints that would then be stayed if they evolved into an arbitration. SIFMA also requested “further guidance on the extended time period that will be afforded registered representatives who have eligible claims for expungement

arbitrators to recommend expungement,” and that “FINRA Rule 2080(b)(1) requires a finding either that: (i) the claim or allegation is factually impossible or clearly erroneous; (ii) the registered person was not involved in the alleged sales practice violation, forgery, theft, misappropriation or conversion of funds, or (iii) the claim, allegation, or information is false”.

<sup>238</sup> See *Regulatory Notice 08-79* (December 2008) (stating that “[t]he arbitration panel must indicate which of the grounds for expungement under Rule 2130(b)(1)(A)–(C) serve as the basis for their expungement order, and provide a brief written explanation of the reasons for ordering expungement”).

<sup>239</sup> See proposed Rules 12805(c)(8) and 13805(c)(8).

<sup>240</sup> See AdvisorLaw, Barber, Baritz, Behr, Brookes, FSI, Glenn, Grebenik, Herskovits, Higgenbotham, JonesBell, Keesal, Leven, Saretsky, SIFMA, Smart, Speicher, Stephens and Walter.

that would become ineligible if the rule proposals were implemented.”<sup>241</sup> JonesBell and Behr stated that an associated person may be unaware that a member firm “has reported a customer complaint on his or her CRD.”<sup>242</sup> FSI stated that associated persons should have three years to file expungement requests to provide them with time to assess how the information will impact their business, which may not be immediately apparent. Keesal stated that because customers may wait up to six years to file an arbitration claim under FINRA Rule 12206 after making a customer complaint, the proposed time limits would be unfair and would increase the frequency of requests, as the associated person would have to make a second expungement request if the customer complaint was later the subject of an arbitration claim. Saretsky stated that the time restriction was unnecessary because arbitrators are “free to weigh the evidentiary value (if any) of an associated person’s undue delay.” Herskovits stated that FINRA’s concern about document retention was “misplaced” because SEC and FINRA rules “generally mandate the preservation of most records for 3 to 6 years (and many firms preserve documents for longer periods of time).” Grebenik expressed concerns with the proposed time limits because there were “thousands of advisors who have customer disputes and do not know about the expungement process.”

Other commenters supported the time limits.<sup>243</sup> For example, UNLV stated that the proposed time limit would ensure “that relevant evidence is available and increases investors’ ability to participate.” In response to other commenters’ suggestion that brokers may not be aware of a customer complaint, Cornell stated that “public investors should not be penalized for the failure of firms to implement streamlined notification and recordkeeping procedures,” and that “it is not too much to ask that the associated person follow up as to disposition by the firm.”

PIABA “strongly support[ed] a definite cut-off date for requests for expungement,” and stated that a customer is “far more likely to participate in an expungement hearing when it takes place in close proximity

to the resolution of the underlying arbitration proceeding.” PIABA also stated that a more stringent time limit would lead to higher quality evidence, which becomes less reliable and available with the passage of time. PIABA stated that when the arbitration results in an award, a shorter timeframe of 90 days is preferable because significant time will already have passed from the filing of the customer’s arbitration claim, and because 90 days matches the deadline to file a motion to vacate an arbitration award under the Federal Arbitration Act. PIABA also stated that, because member firms and associated persons control the date that information is reported in the CRD system, the time limit for customer complaints should run from the shorter of the date the firm initially reported the complaint in the CRD system or a month after the associated person receives notice of the complaint.

After considering the comments, FINRA believes that adjustments to the originally proposed time limitations are warranted to provide sufficient time for associated persons to determine whether to seek expungement of customer dispute information. Accordingly, FINRA has revised the proposal to provide for a two-year period to file an expungement request when a customer arbitration or civil litigation that gives rise to customer dispute information closes.<sup>244</sup> The two-year period would help ensure that the expungement hearing is held close in time to the customer arbitration or civil litigation, when information regarding the customer arbitration is available and in a timeframe that would increase the likelihood for the customer to participate if he or she chooses to do so. At the same time, it would allow the associated person time to determine whether to seek expungement.

For customer complaints where no customer arbitration or civil litigation gave rise to the customer dispute information, the proposed rule change would provide for six years from the date that the customer complaint was initially reported to the CRD system for the associated person to file the expungement request.<sup>245</sup> Six years would allow firms time to complete investigations of customer complaints and close them in the CRD system and for the complaints to evolve, or not evolve, into an arbitration. Thus, the revised proposal would help avoid unnecessary duplicative requests to expunge customer complaints that subsequently evolve into arbitrations or

civil litigations, while providing reasonable time limits to encourage customer participation and help ensure the availability of evidence. The proposed six-year time limitation is also consistent with FINRA’s general eligibility rule, which provides that no claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.<sup>246</sup>

The proposed rule change makes similar revisions to the time limits described in *Notice 17-42* to seek to expunge customer dispute information that arose prior to the effective date of the proposed rule change. For customer dispute information arising from customer arbitrations or civil litigations that closed on or prior to the effective date of the proposed rule change, the expungement request would be required to be made within two years of the effective date of the proposed rule change.<sup>247</sup> For customer complaints initially reported to the CRD system on or prior to the effective date of the proposed rule change, where no customer arbitration or civil litigation gave rise to the customer dispute information, the expungement request would be required to be made within six years of the effective date of the proposed rule change.<sup>248</sup>

#### 14. Effect of Withdrawal of Expungement Request

In *Notice 17-42*, FINRA proposed that if the associated person withdraws an expungement request after the panel is appointed in a straight-in request, the case would be closed with prejudice, unless the panel decides otherwise. AdvisorLaw supported the proposal, stating that it would “create safeguards, and prevent an associated person from simply withdrawing their case and refile in hopes of drawing a more favorable pool of randomly selected arbitrators.”

Under the proposed rule change, for expungement requests during customer arbitrations and straight-in requests, if the associated person withdraws or does not pursue the expungement request (or the party, with the written consent of the unnamed person, withdraws or does not pursue the request), the panel would be required to deny the expungement request with prejudice.<sup>249</sup> These requirements would foreclose the ability of associated persons withdrawing expungement requests to avoid having

<sup>241</sup> See also AdvisorLaw (stating that providing six months where the customer arbitration closes on or prior to the effective date of the proposed rule change was arbitrary and creates an unjustifiable distinction between cases that close prior to the rules and those that close after).

<sup>242</sup> See *supra* note 48.

<sup>243</sup> See Cornell, Georgia State, PIABA, Public Citizen and Schlein.

<sup>244</sup> See proposed Rule 13805(a)(2)(A)(iv).

<sup>245</sup> See proposed Rule 13805(a)(2)(A)(v).

<sup>246</sup> See *supra* note 14.

<sup>247</sup> See proposed Rule 13805(a)(2)(B)(i).

<sup>248</sup> See proposed Rule 13805(a)(2)(B)(ii).

<sup>249</sup> See proposed Rules 12805(a)(1)(D)(i), 12805(a)(2)(E)(i) and 13805(a)(4).

their requests decided by the panel, and then seeking to re-file the request and receive a new list of arbitrators and a potentially more favorable panel and decision.

#### 15. Associated Person's Appearance Required at the Expungement Hearing

In *Notice 17-42*, FINRA proposed that an associated person seeking to have his or her CRD record expunged would be required to appear at the expungement hearing either in person or by video conference. Five commenters supported the proposal, stating generally that this would allow the arbitrators to better assess the associated person's demeanor and credibility.<sup>250</sup> UNLV also stated that requiring videoconferencing would carry minimal costs given its widespread availability at FINRA's regional offices and other venues. NASAA stated that the broker should be required to appear in-person, "given the extraordinary relief the broker is seeking." Georgia State also supported requiring an associated person to appear in person at the hearing, and stated that appearance by video conference should only "be permitted, if at all, in those simplified cases where a hearing did not take place."

Six commenters preferred to allow the associated person to appear by telephone.<sup>251</sup> SIFMA, for example, stated that there appeared to be no basis for allowing customers, but not associated persons, to appear by telephone, and that the proposal would "greatly increase the cost of expungement through attendant travel costs and loss of productivity." Three commenters stated that the arbitrators should decide the method of appearance.<sup>252</sup> White, for example, stated that telephonic testimony "might be acceptable in limited circumstances," and suggested that "arbitrators can make this determination and the Rule should not limit their flexibility to do so."

After considering the comments, the proposed rule change would allow the panel to determine the method of appearance by the associated person—by telephone, in person or by video conference.<sup>253</sup> As the associated person is requesting the permanent removal of information from his or her CRD record, FINRA believes the associated person should personally participate in the expungement hearing to respond to questions from the panel and those customers who choose to participate.

Rather than restrict the method of appearance, the panel would have the authority to decide which method of appearance would be the most appropriate for the particular case.<sup>254</sup> FINRA believes that providing flexibility as to the method of appearance would encourage appropriate fact-finding by the arbitrators and generally strengthen the process.

#### 16. Customer Notification

In *Notice 17-42*, FINRA proposed that when an expungement request is filed separately from the customer arbitration, FINRA would notify the parties from the customer arbitration or the customer who initiated the complaint that is the subject of the request about the expungement request. PIABA supported the proposed customer notification requirement. Georgia State recommended "additional notifications to the investor about the expungement hearing."

The proposed rule change modifies the proposal in *Notice 17-42* to add an additional notification to help ensure that customers receive timely notice of both the expungement request and the expungement hearing. The associated person would be required to serve all customers whose customer arbitrations, civil litigations and customer complaints gave rise to customer dispute information that is a subject of the expungement request with notice of the request by serving on the customers a copy of the statement of claim requesting expungement before the first scheduled hearing session is held.<sup>255</sup> The Director would then notify the customers of the time, date and place of the expungement hearing using the customers' current address provided by the party seeking expungement.<sup>256</sup>

#### 17. Customer Participation During the Expungement Hearing

In *Notice 17-42*, FINRA proposed that, consistent with the Guidance, all customers in the customer arbitration or who filed a customer complaint would be entitled to appear at the expungement hearing. At the customer's option, the customer could appear by telephone.

In response to *Notice 17-42*, PIABA and The SEC Investor Advocate stated that FINRA should codify all of the customer rights provided in the Guidance, including, for example, allowing the customer or their counsel

to introduce documents and other evidence and to cross-examine the broker or other witnesses called by the broker seeking expungement.<sup>257</sup>

FINRA agrees that the customer rights contained in the Guidance should be codified, as reflected in the proposed rule change.<sup>258</sup> In addition to incorporating the customer rights contained in the Guidance, the proposed rule change also clarifies that the customer may be represented and states that the customer may appear at the expungement hearing by telephone, in person, or by video conference. In addition, if a customer testifies, the associated person or other person requesting expungement would be allowed to cross-examine the customer. If the customer introduces any evidence at the expungement hearing, the associated person or party requesting expungement could object to the introduction of the evidence, and the panel would decide any objections. The proposed rule change would allow and encourage customers to participate fully in the expungement hearing, while providing the associated person with a reasonable opportunity to rebut evidence introduced by the customer.<sup>259</sup>

#### 18. State Notification

In response to *Notice 17-42*, NASAA requested "earlier notices to state regulators of an expungement request to better facilitate regulator involvement where appropriate."<sup>260</sup> The proposed rule change provides that FINRA would notify state securities regulators, in the manner determined by FINRA, of the associated person's expungement request within 30 days after receiving a complete request for expungement, so that the states are timely notified of the request.<sup>261</sup>

#### 19. Unnamed Persons

In *Notice 17-42*, FINRA proposed to codify the ability of a party in a customer arbitration to request expungement on behalf of an unnamed person. AdvisorLaw stated that it opposed the practice and suggested that FINRA prohibit it entirely as there

<sup>257</sup> See also St. John's.

<sup>258</sup> See proposed Rules 12805(c) and 13805(c).

<sup>259</sup> In response to the *Notice 17-42*, White stated that if the customer chooses to object to the expungement request, "it would be helpful if it was mandated that the customer participate in the hearing or file a substantive statement or brief opposing expungement." Schlein stated that FINRA should consider requiring the associated person to "bear the cost of the customer's attendance if the customer wishes to participate in person." FINRA believes that these requirements would be unduly burdensome and, therefore, has determined not to propose them as requirements.

<sup>260</sup> See also The SEC Investor Advocate.

<sup>261</sup> See proposed Rules 12805(b) and 13805(b)(3).

<sup>250</sup> See Black, Caruso, Cornell, PIABA and UNLV.

<sup>251</sup> See Baritz, Gocek, Grebenik, Keesal, SIFMA and Tinklenberg.

<sup>252</sup> See AdvisorLaw, Robbins and White.

<sup>253</sup> See proposed Rules 12805(c)(2) and 13805(c)(2).

<sup>254</sup> See *supra* note 253.

<sup>255</sup> See proposed Rule 13805(b)(1)(A); see also *supra* note 134.

<sup>256</sup> See proposed Rule 13805(b)(2); see also *supra* note 137.

would be an “inherent conflict” of interest for the firm’s counsel because the interest of the member (who is the counsel’s client) and the associated person rarely align. AdvisorLaw also suggested that the associated person’s consent may be compromised “in the likely scenario where the member firm is providing financial assistance for the legal representation, as the associated person may agree under financial duress.” NASAA supported codifying the practice, but noted that it would “require cooperation between firms and their associated persons” and that FINRA would have to develop “robust, mandated notification procedures.”<sup>262</sup>

FINRA notes that under the proposed rule change, filing an on-behalf-of request would be permissive, not mandatory. In addition, FINRA would require the party and the unnamed person to sign a form consenting to the on-behalf-of request to help ensure that the unnamed person is fully aware of the request and that the firm is agreeing to represent the unnamed person for the purpose of requesting expungement during the customer arbitration, regardless of how the arbitration closes.<sup>263</sup>

#### 20. No Interventions by Associated Persons To Request Expungement

In *Notice 17–42*, FINRA proposed to foreclose the option of an unnamed person to intervene in a customer arbitration to request expungement. Keesal opposed this proposal, stating that intervention “often can be economical, given that the evidence on the merits (or lack thereof) of the customer’s complaint will be presented at the evidentiary hearing and that same evidence will provide the basis for expungement relief.”<sup>264</sup>

FINRA believes that where no party to the arbitration has filed a claim against the associated person or requested expungement on his or her behalf, the associated person’s conduct is less likely to be addressed fully by the parties during the customer arbitration. In those circumstances, FINRA believes that the associated person should not be able to intervene in the customer arbitration, and that any expungement request should be decided separately by the Special Arbitrator Roster.<sup>265</sup>

<sup>262</sup> See NASAA (noting support for this change along with the proposal in the *Notice 17–42* that would prevent an unnamed associated from filing an arbitration claim seeking expungement against an investor).

<sup>263</sup> See proposed Rules 12805(a)(2)(C)(ii) and 12805(a)(2)(D).

<sup>264</sup> See also Behr and JonesBell.

<sup>265</sup> See proposed Rule 12805(a)(1)(E)(iii); see also *supra* Item II.A.1.(II)A.3, “No Intervening in Customer Arbitrations to Request Expungement.”

#### 21. Application of Expungement Framework to Customer Complaints

In *Notice 17–42*, FINRA proposed to allow an associated person to file an arbitration against a member firm for the sole purpose of seeking expungement of a customer complaint and have the request decided by the Special Arbitrator Roster. In response to *Notice 17–42*, NASAA stated that it objected to “expanding the scope of Rule 2080 to apply to all information related to [non-arbitrated] customer complaints.” NASAA stated that today, the expungement process is used to expunge customer complaints that are not the subject of arbitration, but believed that this practice was “beyond the scope originally intended with the rules” and that codification would “further embed a flawed process that does not afford regulators the ability to preserve information already considered to have regulatory value and provide investor protection.” The SEC Investor Advocate also indicated that it did not believe that “now is the time to expand the Rule 2080 expungement process to claims that do not result in arbitration,” and that it would “prefer to see the results of the new process before introducing an entirely new class of complaints to the mix.”

FINRA notes that customer complaints have always been within the contemplated scope of FINRA Rule 2080. In proposing and adopting predecessor NASD Rule 2130, and in proposing to adopt FINRA Rule 2080 without material change, FINRA defined “customer dispute information” as including “customer complaints, arbitration claims, and court filings made by customers, and the arbitration awards or court judgments that may result from those claims or filings.”<sup>266</sup> The proposed amendments would continue to allow associated persons to file a claim in arbitration against a member firm for the sole purpose of seeking expungement of a customer complaint that is reported in the CRD system.

#### 22. Other General Comments in Response to Notice 17–42

##### A. Personal Experiences With the Expungement Process

Some commenters opposed the proposal as set forth in *Notice 17–42*

<sup>266</sup> See *Notice to Members 04–16* (March 2004); 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); Securities Exchange Act Release No. 59771 (April 15, 2009), 74 FR 18411 (April 22, 2009) (Notice of Filing and Amendment No. 1 of File No. SR–FINRA–2009–016).

because of their experiences with what they considered to be meritless customer arbitration claims.<sup>267</sup> In addition, a number of commenters described their personal experiences with the customer complaint and expungement process or generally criticized the current process and the proposed rule change as unfair.<sup>268</sup> FINRA acknowledges and appreciates the commenters’ concerns and has considered them in connection with the proposed rule change as a whole.

##### B. General Perspectives on the Proposed Rule Change

Some commenters also offered more general perspectives on the rule proposal as set forth in *Notice 17–42*. The SEC Investor Advocate, while generally supporting the proposed rule change, expressed a concern that the proposed amendments may cause brokers to seek to avoid the FINRA Rule 2080 process entirely, and instead request expungement directly in a court of competent jurisdiction. FINRA notes that today, a broker can seek expungement by going through the FINRA arbitration process or by going directly to court.<sup>269</sup>

SIFMA stated that FINRA already has in place a robust set of rules and expanded guidance to safeguard the expungement process, and that there did not appear to be any empirical justification for the additional regulations contained in the proposal, such as that expungements are too numerous or are being improperly granted.

PIABA stated that FINRA should only promulgate rules that facilitate removal of customer dispute information from the CRD system in the most extraordinary of circumstances. NASAA supported the proposal as an “important first step” that “add[ed] beneficial requirements and limitations related to the procedure of expungement.”

FINRA appreciates the commenters’ differing perspectives. FINRA’s review suggests that the percentage of expungement requests that are

<sup>267</sup> See Anzaldúa, Barber, Braschi, Brookes, Burrill, Christ, Decker, Di Silvio, Gamblin, Glenn, Harmon, Harris, Higgenbotham, Isola, Joyce, Leven, Lindsey, Ram, Rosser, Scrydloff, Skafo, Slaughter, Stephens, Stewart, Tinklenberg, Walter, Weinerf and Zanolli.

<sup>268</sup> See e.g., Higgenbotham (describing CRD disclosures “related to funds offered by my employer [that] crashed during the 2007–2008 Financial Crisis”); see also AdvisorLaw (providing a hyperlink to an online petition that requested signatures to “support a balanced, cost and time effective, expungement process,” and collecting associated comments).

<sup>269</sup> See FINRA Rule 2080; see also *supra* note 12 (describing the requirement to name FINRA as a party when brokers seek expungement in court).

recommended is higher when the arbitrator or panel receives information only from the associated person or other party requesting expungement.<sup>270</sup> FINRA believes that the expungement process that would be established by the proposed rule change would help ensure that expungement is recommended in limited circumstances, while providing associated persons with a reasonable framework to seek expungement of information on their CRD records by establishing one or more of the grounds set forth in FINRA Rule 2080(b)(1).

### C. Alternatives to the CRD Disclosure and Expungement Framework

Several commenters suggested alternatives to the current CRD disclosure and expungement framework.<sup>271</sup> For example, Mahoney stated that where an arbitration panel renders an award denying a customer's claims against an associated person, "the associated person should automatically have their CRD record expunged of all references to the complaint." Mahoney also stated that FINRA should not subject associated persons who are not named in a customer complaint, but were determined by member firms to have been involved in the sales practice violation(s), to disclosure and expungement standards that "create an unprecedented rebuttable presumption of liability."<sup>272</sup> In contrast, St. John's suggested that associated persons be prohibited from seeking expungement if there has been a finding of liability in the arbitration.

PIABA stated that although it supported the proposed rule change, expungement requests would be best handled separate from the arbitration and determined by FINRA itself rather than arbitrators. NASAA proposed further reform to the expungement process built around several principles including, for example, increased regulatory participation that allows for a regulatory determination regarding the merits of the expungement request.

FINRA appreciates the commenters' suggestions. As indicated by the proposed rule change, FINRA believes that revising the current expungement process as set forth in the proposed rule change, particularly the establishment of a panel of arbitrators randomly selected from the Special Arbitrator Roster to consider and decide straight-

in requests, would best help achieve the goal that expungement should be recommended in limited circumstances. However, FINRA welcomes continued engagement to discuss further ways to enhance the expungement process.

### D. Other Comments

In response to *Notice 17-42*, Public Citizen stated that the explanation of expungement decisions that arbitrators write should be made public to ensure transparency. FINRA notes that arbitrators are required to provide a brief written explanation of the reasons for recommending expungement in the arbitration award.<sup>273</sup> The proposed rule change would retain this requirement, but would remove the word "brief" to indicate to the arbitrators that they must provide enough detail in the award to explain their rationale for recommending expungement.<sup>274</sup> As the Guidance suggests, the explanation must be complete and not solely a recitation of one of the FINRA Rule 2080 grounds or language provided in the expungement request.<sup>275</sup>

In addition, FINRA makes arbitration awards publicly available in the FINRA Arbitration Awards Online database (which provides arbitration awards rendered in FINRA's arbitration forum as well as other forums).<sup>276</sup> To provide information to the public, BrokerCheck links directly to the FINRA Arbitration Awards Online database. When a broker's BrokerCheck record includes a reportable arbitration award, the BrokerCheck record provides a hyperlink directly to the relevant document.

PIABA stated that removal of customer dispute information from the CRD system diminishes the ability of reputation to police business misconduct because of "FINRA's embrace of widespread pre-dispute arbitration agreements," and because records from FINRA proceedings are not available to the public on the same terms as public court proceedings. As discussed above, the proposed rule change is intended to help preserve in CRD information that is valuable to

investors and regulators, while allowing associated persons a reasonable mechanism to remove information that is inaccurate.

Keesal suggested that orders from other respected arbitration forums, such as the American Arbitration Association ("AAA"), should be afforded the same weight as arbitral findings from arbitrators in FINRA-administered arbitration, provided that (1) the arbitrators make written, factual findings as the basis for expungement under FINRA Rule 2080 and (2) the requirements of FINRA Rule 12805 are satisfied. FINRA appreciates the commenter's suggestion and would consider how to treat arbitration awards recommending expungement in accordance with the proposed rule change from other recognized arbitration forums, such as AAA or JAMS, if the proposed rule change is approved by the Commission.

In addition, Keesal requested that FINRA provide guidance to associated persons and registration personnel regarding the meaning and effect of an expunged claim in the context of licensing and registration questionnaires. Although the impact on licensing and registration questionnaires is outside the scope of the proposed rule change, FINRA will consider whether additional guidance is appropriate.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

<sup>270</sup> See *supra* Item II.B.2., "Economic Baseline."

<sup>271</sup> See Barber, Baumgardner, Burrill, Butt, Chepucavage, Commonwealth, Harmon, Harris, Mahoney, Penzell, PIABA, Stewart, Tinklenberg and Wellington.

<sup>272</sup> See also FSI.

<sup>273</sup> See FINRA Rule 12805.

<sup>274</sup> See proposed Rules 12805(c)(8) and 13805(c)(8).

<sup>275</sup> See *supra* note 3.

<sup>276</sup> Arbitration Awards Online is available at <http://www.finra.org/arbitration-and-mediation/arbitration-awards>. This database enables users to perform Web-based searches for FINRA and historical NASD arbitration awards. Also available through the database are historical awards for the New York Stock Exchange, the American Stock Exchange, the Philadelphia Stock Exchange, the Chicago Board Options Exchange, the Pacific Exchange/ARCA and the Municipal Securities Rulemaking Board.

• Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2020-030 on the subject line.

*Paper Comments*

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2020-030. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons

submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2020-030 and should be submitted on or before October 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>277</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>277</sup> 17 CFR 200.30-3(a)(12).