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October 22, 2020

By Electronic Mail – rule-comments@sec.gov

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

RE: File Number SR—FINRA—2020—030

Mr. DeLesDernier,

Thank you for the invitation to submit the herein contained written data, views, and arguments concerning the above-referenced proposed rule change.

AdvisorLaw is unique, in that it *exclusively* advocates for, and actively represents, the interests of individual brokers, Investment Advisor Representatives, and other associated persons. In preparing these comments, AdvisorLaw reviewed the "*Text of the Proposed Rule Change*" published by the Financial Industry Regulatory Authority ("FINRA" or "SRO"), as well as the Federal Register Notice, referred to by the Securities and Exchange Commission (the "SEC" or "Commission") as "*File No.* SR*—FINRA—2020—030*" (hereafter, the "Proposal"). In addition to the 557-page Text of the Proposed Rule Change and approximately 34-page Proposal, other relevant and related publications were reviewed and are referenced herein by AdvisorLaw.

The following is a good-faith summary of what appears to be an overreach by the SRO which drastically under values the negative impacts of the Proposal on associated persons and the integrity of the information contained within the CRD system.

The Commission has recently held that "*access to FINRA's arbitration forum to seek expungement*" is "*a fundamentally important service that* [FINRA] *offers*." *See Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 WL 4569083 (Aug. 6, 2020) (holding that the FINRA action Edmark challenges here—denying a request to use FINRA's arbitration forum on the ground that an expungement claim is ineligible for arbitration—is a prohibition of access to SRO services for which the Commission has jurisdiction under Exchange Act Section 19(d)(2)). *See also*, Eric David Wanger, Exchange Act Release No. 79008, 2016 WL 5571629, at *4 (Sept. 30, 2016) (explaining that a prohibition or limitation of access "involves a denial or limitation of 'the applicant's ability to utilize one of the fundamentally important services offered by the SRO"). The immediate Proposal, on its face, appears to be nothing more than an end-run around the Commission's holding.

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If implemented, the Proposal will have lasting and substantial negative effects on associated persons as well as the integrity of the information contained within the CRD system. Thereby reducing the reliability of the CRD system for all stakeholders (e.g., state and other regulators, investors, member firms, and associated persons). Examples and explanations of these negative effects are discussed throughout the remainder of this correspondence.

1. Inconsistencies Created by the Proposal:

a. Three Arbitrators (Sometimes)

FINRA seeks to justify the importance of having expungement decisions decided by a three-arbitrator panel (rather than a single arbitrator) at various points throughout the Proposal. The logic offered largely consists of language recycled from their prior SR—2020—005:

> "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 and request evidence would help ensure that a complete factual record is developed to support the arbitrators' decision at such expungement hearings." *Id.,* p. 11167 at 2.A.1.(II)(iii).

The only meaningful difference of the Proposal's retread can be found appended to the list of purported benefits. One finds the additon of "and to serve generally as fact-finders in the absence of customer input." SR—2020—030, p. 62148 at II.C.(II)A(1)(c)(ii). Personally, I thought this was implied in the original language.

The Regulator provides no support for the assertion that, for some reason, a sole arbitrator is unable to adequately ensure that the factual record is complete and discharge his or her duties appropriately. The implication of FINRA's above assertion is that the current and historic arbitrations fell short of adhering to the Guidance[1], which "*directs arbitrators to ensure that they have all of the information necessary to make an informed and appropriate recommendation on expungement*."

Regardless of whether the Commission subscribes to FINRA's regurgitated rendition of the importance of having a three-arbitrator panel, the dischord of the Proposal's proceedure in expungement requests made in a simplified arbitration is difficult to ignore. FINRA states that "the [single/sole] arbitrator would be required to decide an expungement request once it is filed by the associated person." Proposal, p. 62155 at II.C.(II)F(1)(a). The SRO offers no explanation as to why, in the scenario of a simplified arbitration proceeding, it is no longer critical that a three-arbitrator panel be seated for the purposes of ruling on expungement relief. To say nothing of their abandonment of the requirement that it be an arbitrator qualified purusant to the proposed Special Arbitrator Roster critera.

b. Special Arbitrator Roster (Sometimes)

[1] FINRA's Notice to Arbitrators and Parties on Expanded Expungement Guidance, Sep. 2017. *See also,* Proposal, FN3 at p. 1.

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FINRA admits that there is currently "extensive guidance and training, including the Guidance (FN1), first published in 2013 and expanded further periodically thereafter." The SRO goes on to indicate that it "currently provides an Expungement Training module for arbitrators." Proposal, p. 62150 at 2.A.1.(I)C. Despite the seeming breadth of guidance and training for arbitrators tasked with deciding claims requesting expungement relief, the Proposal seeks to impose qualification factors beyond completion of FINRA's Advanced Arbitrator Training.

Subsequent to making the case for how important it is that a Special Arbitrator Roster ("SAR") be created and implemented, FINRA goes on to explain how the proposed changes will affect cases under various scenarios under which expungement relief is requested.

i. By a Respondent named in a customer arbitration – The Proposal requires that the associated person who is named in the customer-initiated arbitration request expungement relief during the arbitration. The request for expungement "must be included in the answer or a pleading." Proposal, p. 62146 at 2.A.1.(II)A.1.(a)(i). Which means the expungement relief is requested after the arbitrators are ranked by the parties and empaneled. Thus, the arbitrator(s) empaneled to hear the customer-initiated arbitration would be deciding the associated person's request for expungement. At no point does the SRO indicate that the panel would consist of arbitrators on the SAR. **[Parties are allowed to rank and strike arbitrators. Arbitrators are not chosen from a newly-created SAR. Additional forum fees are paid by member firm and associated person.]**

ii. By a party named in the customer arbitration on-behalf-of an unnamed person – Notwithstanding the glaring conflicts of on-behalf-of requests, the Proposal declares that these expungement requests "would not require that an on-behalf-of request be included in an answer or pleading requesting expungement [ ]. However, the party making the request would be required to serve the request [ ] on all parties no later than 30 days before the first scheduled hearing." Proposal, p. 62147 at II.1.(II)A.1.(b)(i). Yet again, the parties to the arbitration are able to rank and strike arbitrators in this scenario. Additionally, the members of the arbitration panel presiding over the customer-initiated arbitration do not appear to be on the SAR. **[Associated person is excluded from ranking and striking arbitrators. Arbitrators are not chosen from a newly-created SAR. Additional forum fees are paid by member firm and associated person.]**

1. Also note the duplicative nature of forum fees: "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." Proposal, p. 62148 at A.1.(II)1.(ii)(c). Which means that, pursuant to SR—2020—007, the member firm would be assessed fees in both the customer-initiated arbitration and the subsequent straight-in request by the associated person.

iii. Straight-in requests against customers – disallowed under the proposal.

iv. Intervening in customer arbitrations by associated person –

1. Prohibited from requesting expungement relieve when intervening.
   a. despite the SRO indicating how important it is to have arbitrators who are aware of the facts of the underlying case.

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v. Straight-in requests against the member firm –
   1. Arbitrators are assigned from the SAR. **[Parties are prohibited from ranking or striking arbitrators. Arbitrators are assigned from newly-created SAR. Recently-increased forum fees are paid by parties.]**

By distilling all of the Proposal down to how and when the SAR will be implemented reveals that arbitrators from the SAR will only be deciding straight-in requests.

c. Same Arbitration Panel as Underlying Customer Arbitration (Sometimes)

FINRA clearly asserts that it "believes that most expungement requests should be decided by a three-person panel." Proposal, p. 62144 at II.A.1.(I)C. However, a closer reading calls that purported assertion into question.

On one hand, FINRA maintains that the panel assigned to hear a customer-initiated arbitration will remain empaneled to decide an expungement request by a named party. Proposal, p. 62146 at II.A.1.(II)A.1.(a). "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 evidence, testimony and other documents to make an informed decision on the expungement request." Proposal, at *Id*. *See also,* (p. 62148 at II.A.1.(II)A.1.(c), where the SRO states that, "if, during the customer arbitration, a named associated person requests expungement or a party files 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**.") (emphasis added).

The SRO goes further to state that the costs which will be borne by the associated person in order to preserve his or her right to request expungement are warranted by the "potential benefit of having customer input and a complete factual record for the panel to decide an expungement request." Proposal, p. 62146 at II.A.1.(II)A.1.(a). Suggesting that value is added by including customer input when considering expungement.

On the other hand, the Proposal prohibits the panel who presided over the customer arbitration to rule on a request for expungement if the "customer arbitration closes other than by award or by award without hearing." Proposal, p. 62148 at II.A.1.(II)A.1.(c)(ii). The SRO seeks to justify this by stating that, "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." *Id*. One glaring fact that is not included by FINRA is that the arbitrators being disbanded know infinitely more about the facts and details of the case than the soon-to-be new arbitration panel. To mention nothing of how the duplicative forum fees incurred and unnecessary delay in reaching a decision prejudices the associated person. It is also important to note here that the vast majority of customer-initiated arbitrations are closed "other than by award or by award without a hearing." *Supra*, 3.

2. Monetary Benefits of the Proposal Enjoyed by FINRA

By requiring associated persons to request expungement of customer dispute disclosure information during the underlying customer arbitration, the SRO ensures that they receive the recently increased $1,575 filing fee at the time the expungement request is made. Regulatory Notice 20-25, p. 3(C). In addition, FINRA ensures that they collect the $1,900 Member Surcharge and $3,750 Process Fee at the time the request is made. *Id*., p. 4. Further, the SRO will be entitled to charge and collect Hearing Session fees of $1,125 for any hearings "in which the sole topic is the determination of a request for expungement relief." *Id*.

FINRA reports that the vast majority of customer-initiated arbitrations within FINRA's Dispute Resolution Forum (83% in 2020) are disposed of in a manner other than by award. FINRA, Dispute Resolution Statistics, FINRA.org, Oct. 2020, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics. The Commission should take notice of what this means in light of the Proposal's very narrow circumstances under which the panel from the customer arbitration decides on the expungement relief requested; addressed *Supra*. Namely, 83% of customer arbitrations will trigger the requirement that associated persons requesting expungement relief file a straight-in "request to expunge the same customer dispute information." These subsequent straight-in requests will require payment of duplicative filing fees, another member surcharge and process fee, as well as additional hearing session fees. Proposal, at II.A.1.(II)A.1.(c)(ii).

To summarize what is explained above, 83% of customer-initiated arbitrations are resolved by means other than an arbitration award. In many instances, an associated person is required to request arbitration in the customer arbitration; or lose his or her right in the future. In preserving that right by making the request, the associated person (and the member firm) will incur substantial fees (discussed s*upra*). 83% of the time a subsequent straight-in request will be required to get an arbitrator or arbitration panel to rule on the request for expungement. When making the subsequent straight-in request the associated person (and member firm) will again incur substantial fees[2].

The prohibition against an associated person seeking expungement customer dispute disclosure information when intervening in a customer-initiated arbitration has similar effects on the amount of forum fees assessed and collected by the SRO. But rather than bore the Commission with more tedious math, I will simply highlight the fact that the associated person intervening in the customer arbitration presumably has the most at stake in the matter. *Supra,* at 3.

In summary, the Proposal does a fantastic job of ensuring that member firms and associated persons are compelled to pay substantial and duplicative fees to FINRA.

3. Purpose and Use of the CRD System

The purpose of FINRA's CRD system is peppered throughout the immediate Proposal; in addition to countless other publications by the SRO. FINRA specifically states that "arbitration claims and court

[2] Member Surcharge fees for expungement requests are $3,750 each. Processing Fees for expungement requests are $1,900 each. Filing fees for expungement requests are $1,900 each. Hearing Session fees for expungement hearings are $1,125 per hearing.

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filings by customers (i.e., 'customer dispute information')", as a component of the CRD system, serves two primary purposes. Proposal, p. 62142 at 2.A.1.(I)A. The first purpose mentioned is "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." The second, is aimed at "help[ing] investors make informed choices about the brokers and broker-dealer firms with which they may conduct business." In short, FINRA correctly highlights the fact that customer dispute disclosure information is considered by regulators, employers, and investors. More pointedly, the information contained within the CRD system regarding customer complaints has an ongoing and permanent impact on the effected associated persons' careers from several perspectives (e.g., licensure, employment, client retention, and client acquisition).

FINRA's correct observation (above) is all the more reason to make great strides to ensure the accuracy and truthfulness of the customer dispute disclosure information contained within the CRD system. One may argue that the duration of and degree to which customer dispute information impacts associated persons makes associated persons the group who has the most at stake in ensuring the accuracy of the information.

The SRO imposes upon its member firms the requirement to timely and accurately report certain information to the CRD system[3]. When it comes to customer dispute disclosure information, the affected associated person is afforded one opportunity to seek expungement through the FINRA Dispute Resolution arbitration forum. See, Guidance (*supra,* FN1) (stating that, "[w]hen an arbitration panel or court has issued an award or decision denying a broker's expungement request, the broker nay not request expungement in another arbitration case. Therefore, arbitrators should ask a party requesting expungement whether an arbitration panel or court previously denied expungement of the customer dispute information at issue. If there has been a prior denial, the arbitration panel must deny the expungement request and contact FINRA staff for assistance."). Despite the implication within the Proposal that there are currently no controls in place to stop multiple expungement requests of a single disclosure, the Guidance has prohibited it for years. In addition, the forms required to be populated by the arbitrators overseeing the cases requires that they ensure no prior attempts to expunge have been made.

Acknowledging the existence of information contained within the CRD system which is factually impossible, clearly erroneous, or otherwise deserving of expungement is a settled matter. Such findings are abundant and have been made not only by FINRA's arbitrators, but also by hundreds of courts in thousands of proceedings across the United States. To contend that all of the customer dispute disclosure information in the CRD system is accurate, truthful, and complete would be an insult to our nation's judicial system. That being said, ongoing procedures aimed at culling misinformation are critical to improving the integrity of the CRD system. One of these critical ongoing procedures is the customer dispute disclosure expungement process.

[3] FINRA Rule 1122 states that ""[n]o member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notices there.""

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4. The Act

Section 15A(b)(6) states (in part) that FINRA rules must be "*designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest*." It is nearly impossible to identify any aspect of the Proposal which can be construed "*to protect investors and the public interest.*" Aside from the SRO noting that customers need not be bothered with an attending a hearing for an intervening or party-to request for expungement, the Proposal lacks any attempt to protect investors and the public interest. To the contrary, the implications of creating economic and procedural barriers to expungement relief only serve to slow the removal of information which would qualify for expungement. Note that the SRO unequivocally acknowledges the importance of ensuring that "*accurate and complete*" information is contained within the CRD system. Yet the Proposal will undoubtedly result in fewer associated persons' ability to seek expungement of "*factually impossible, clearly erroneous, or false*" information. If incorporated, the very mechanism by which such information is routinely pruned from the CRD system will be underutilized—resulting in the overpopulation of "*factually impossible, clearly erroneous, or false*" information amid the CRD system.

Along the same lines, the Proposal suggests that we cannot assume that the arbitrators overseeing expungement hearings are competent. The arbitrator training, guidance, and FINRA Rules governing expungement currently do not result in consistent and appropriate outcomes. I submit that the problem may not lie in the aforementioned framework, but rather FINRA's relentless desire to discourage associated persons from expunging baseless accusations from the CRD system must be quelled. To that end, one must consider the size and scope of the customer dispute disclosure information being expunged from the CRD system. On page 62159 of the Proposal, FINRA points out that, the percentage of customer dispute disclosures which were expunged from the CRD System from 2014 to 2019, "reflect[s] **three percent of the total number** of customer dispute information disclosures submitted to the CRD system during this period of time (approximately 37,000)." (emphasis added) i.e., the 557-page proposal is based upon the premise that a mere three percent of customer disputes being found to qualify for expungement is too many.

I encourage the Commission to approve FINRA's request to codify the prohibition against associated persons requesting expungement of the same occurrence a second time, if and when the prior request was arbitrated and decided on the merits by a hearing in which the associated person (through his or her counsel independent of the member firm's representation) participated. The Proposal's initiative to require an explanation for granting expungement relief should be approved with the caveat that an explanation is required for denials as well. The associated persons seeking expungement relief are entitled to more than just, "request for expungement is denied."

In addition to the opinions and viewpoints expressed above, I vehemently urge the Commission to reject the SRO's proposed arbitrary time limitations. As the accuracy of the information contained within the CRD system has no relationship to the age of that information. Likewise, the Commission should not allow FINRA to strip associated persons of their right to rank and strike arbitrators. As such, the Proposal's request for approval to appoint arbitrators should be denied. On behalf of the licensed professionals whom I represent, I pose the question of how the immediate Proposal aligns with FINRA's purported mission to protect investors and safeguard market integrity? The Commission would be well within its purview to demand that FINRA shift from a policy of tolerance, when it comes to false or

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misleading information in the CRD system, to a policy of action to rid the CRD system of baseless, untrue, derogatory, misleading, and harmful information.

On behalf of AdvisorLaw and the community of licensed professionals whom we represent, I ask that the Commission consider the points contained herein. Likewise, I encourage those interested in additional clarification or expansion of the above views and arguments to contact me with questions or requests.

I appreciate your time and attention to this correspondence.

Respectfully,

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