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December 7, 2022

Via E-Mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov)  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Attn: Vanessa A. Countryman, Secretary

Re: **File Number SR-FINRA-2022-024**  
SEC Order Instituting Proceedings Under Section 19(b)(2)(B) of the Exchange Act  
(the “**Order**”) to Determine Whether to Disapprove FINRA’s Proposed Changes  
to its Expungement Rules, as Modified by Amendment No. 1

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“**SIFMA**”)<sup>1</sup> appreciates the opportunity to comment on the Order<sup>2</sup> to determine whether to disapprove FINRA’s proposed changes to its expungement rules,<sup>3</sup> as modified by Amendment No. 1<sup>4</sup> (collectively, the “**Proposal**”). The Order requests comment on whether the Proposal is consistent with the Exchange Act and the rules thereunder. As discussed below, SIFMA finds that the Proposal is not in fact consistent with the requirements of the Exchange Act and the rules thereunder and thus, should be either disapproved, or appropriately amended, by the Commission.<sup>5</sup>

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

<sup>2</sup> 87 FR 68779 (Nov. 16, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-11-16/pdf/2022-24959.pdf>.

<sup>3</sup> 87 FR 50170 (Aug. 15, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-08-15/pdf/2022-17430.pdf>.

<sup>4</sup> FINRA Response to Comments and Amendment No. 1 (Nov. 10, 2022), <https://www.sec.gov/comments/sr-finra-2022-024/srfinra2022024-20150592-319706.pdf> (“**FINRA’s Response to Comments**”).

<sup>5</sup> We hereby incorporate by reference our prior comment on the Proposal. SIFMA Comment (File No. SR-FINRA-2022-024) (Sep. 2, 2022), <https://www.sec.gov/comments/sr-finra-2022-024/srfinra2022024-20138245-308330.pdf> (“**SIFMA’s Comment**”).

**The Proposal is inconsistent with the Exchange Act because it improperly attempts to amend existing rules and strictly limit the grounds for granting expungement without providing adequate notice, opportunity for comment, or due process generally.**

FINRA wrongfully asserts that the current grounds for granting expungement under FINRA rules are strictly limited to the three grounds listed in Rule 2080(b)(1) (i.e., error, mistake or falsity), and do *not* also include the grounds listed in Rule 2080(b)(2) (e.g., equitable grounds, including removal of inaccurate or misleading information). FINRA seeks to circumvent the proper rulemaking process and codify its wrongful assertion through the Proposal.

Rules 12805(c) and 13805(c) require an arbitration panel to indicate “which of the Rule 2080 grounds for expungement serve(s) as the basis for [the] expungement order.” In turn, Rule 2080 provides expungement grounds under two separate provisions, Rule 2080(b)(1) and Rule 2080(b)(2).

The plain language of Rule 2080(b)(2) states, “If the expungement relief is based on arbitral findings *other than those described* [in Rule 2080(b)(1)] ....” (emphasis added). This language clearly demonstrates that expungement may be appropriately granted on grounds *in addition to* those listed in Rule 2080(b)(1). Rule 2080(b)(2) goes on to explain what those additional grounds require, stating:

“FINRA .... also may waive the obligation to name FINRA as a party if it determines that: (A) the expungement relief and accompanying findings on which it is based are meritorious; and (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements.”

FINRA’s Proposal, however, asks us to accept the fiction that the language of Rule 2080(b)(2) does not exist, or has no regulatory meaning, and thus, we should read into Rules 12805(c) and 13805(c) regulatory language that does *not* in fact exist (i.e., a limitation to the Rule 2080(b)(1) grounds for granting expungement). FINRA tells us it is OK to accept this fiction because the SEC has previously approved this (unwritten) rule change in the past.<sup>6</sup> That is simply not true. The SEC has never previously approved a Rule 2080(b)(1) limitation, as SIFMA has documented extensively.<sup>7</sup>

The Proposal fails to provide notice, or even acknowledge, that it is proposing a significant rule change to limit the expungement grounds to Rule 2080(b)(1) but instead, wrongfully asserts that such a rule change has already been SEC-approved. The Proposal also fails to solicit any public comment about a Rule 2080(b)(1) limitation, thereby effectively silencing any meaningful opportunity to be heard and to present the case against the propriety of such a limitation.

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<sup>6</sup> FINRA’s Response to Comments at pp. 12-14.

<sup>7</sup> SIFMA’s Comment at pp. 3-4 and Appendix A thereto. *See also* SIFMA comment to SEC, File No. SR-FINRA-2020-030 (Oct. 22, 2020), <https://www.sec.gov/comments/sr-finra-2020-030/srfinra2020030-7936006-224670.pdf>, at pp. 2 – 5; SIFMA comment to SEC, File No. SR-FINRA-2020-030 (Jan. 19, 2021), <https://www.sec.gov/comments/sr-finra-2020-030/srfinra2020030-8262491-227963.pdf>, at pp. 2 – 4; and SIFMA comment to SEC, File No. SR-FINRA-2020-030 (May 6, 2022), <https://www.sec.gov/comments/sr-finra-2020-030/srfinra2020030-20127953-289501.pdf>.

**The Proposal is inconsistent with the Exchange Act because it fails to provide any cost-benefit analysis, or other justification, to support limiting the grounds for granting expungement to those under Rule 2080(b)(1).**

Rule 2080(b)(2) provides a catch-all, equitable ground for granting expungement, where the relief sought is meritorious, and where granting expungement would have no material adverse effect on investor protection, CRD integrity, or regulatory requirements. Rule 2080(b)(2) thus covers situations where it would be fair and appropriate to grant expungement, but the situation is not covered by one of the narrow Rule 2080(b)(1) grounds (i.e., error, mistake or falsity).

There are many situations where granting expungement would be fair and appropriate under Rule 2080(b)(2), but that would not qualify under the Rule 2080(b)(1) grounds. SIFMA identified several representative situations in our most recent comment letter, including one where a financial advisor was simply complying with FINRA Rule 2165 in order to protect a senior retail customer, but triggered a CRD-reportable customer complaint by doing so (i.e., no good deed goes unpunished).<sup>8</sup>

There are many other examples as well because CRD is *allegation*-driven. A mere sales practice *allegation* is sufficient to trigger CRD reporting. There is no requirement to show that the customer's complaint has substantive *merit*, or is not *inaccurate* or *misleading*. Consequently, we see many FINRA arbitrations result in awards of zero against the financial advisor, and yet the associated customer complaint often remains on the advisor's CRD for his or her career.

FINRA offers no cost-benefit analysis or other principled reason why the grounds for expungement should be strictly limited to the Rule 2080(b)(1) grounds – other than to repeatedly parrot that doing so would “protect the integrity of the information in the CRD system.”<sup>9</sup> It is unclear what FINRA means by that. FINRA is required to balance the following three interests: (i) the integrity of CRD information; (ii) investor protection, and (iii) financial advisors' interest in protecting their business reputations and opportunities.

Limiting the expungement grounds to Rule 2080(b)(1), however, would neither serve, nor balance, any of these important interests. To the contrary, it would undermine each, as follows:

- The integrity of CRD information would suffer because inaccurate or misleading information could no longer be expunged from the system. FINRA previously acknowledged that it is appropriate to expunge such information;<sup>10</sup>
- Investor protection would suffer because as FINRA acknowledges, inaccurate or misleading information in CRD has no investor protection value;<sup>11</sup> and
- Financial advisors would have a diminished ability and opportunity to adequately protect their business reputations and business opportunities by seeking to expunge inaccurate or misleading information on their CRD records.

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<sup>8</sup> SIFMA's Comment at pp. 5-6.

<sup>9</sup> FINRA's Response to Comments at pp. 12, 13 and 16.

<sup>10</sup> FINRA Notice 99-54 (July 1999) at p. 2.

<sup>11</sup> *Id.*

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For all the foregoing reasons, the Proposal is inconsistent with:

- Section 19 of the Exchange Act because: (i) pursuant to Section (b)(1), it fails to provide a “statement of the basis and purpose of” its proposed Rule 2080(b)(1) limitation, and fails to provide the public with a meaningful “opportunity to submit written data, views, and argument concerning” its proposed limitation; and (ii) pursuant to Section (d)(1), it fails to provide notice that FINRA seeks to “limit[] [financial advisors] in respect to access to [expungement] services offered by [FINRA];” and
- Section 15A of the Exchange Act because: (i) pursuant to Section (b)(6), it fails “to promote just and equitable principles of trade” or “to protect investors and the public interest”; (ii) pursuant to Section (b)(8), it fails to “provide a fair procedure” in connection with limiting financial advisors “access to [expungement] services offered by [FINRA]”; and (iii) pursuant to Section (b)(8), it imposes a “burden on competition not necessary or appropriate....”

Accordingly, the Proposal should be either disapproved, or otherwise amended to restore the status quo and continue to allow the Rule 2080(b)(2) grounds for granting expungement.

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Thank you for the opportunity to further comment. If you have any questions or would like to further discuss these issues, please contact the undersigned.

Sincerely,



Kevin M. Carroll  
Managing Director and  
Associate General Counsel

cc: **via e-mail to:**  
Robert L.D. Colby, Chief Legal Officer, FINRA  
Richard W. Berry, Executive Vice President and Director FINRA-DR  
Emily Westerberg Russell, Chief Counsel, Division of Trading and Markets