

**Before the Securities and Exchange Commission**  
**File No. SR-FINRA-2022-024:**

**Proceedings to Determine Whether to Approve or Disapprove**  
**the Proposed Rule Change, as Modified by Amendment No. 1,**  
**to Amend the Code of Arbitration Procedure to Modify the**  
**Current Process Relating to the Expungement of Customer**  
**Dispute Information**

**Comment<sup>1</sup> of Allen Wagner<sup>2</sup>**

Allen Wagner ("Wagner") respectfully submits the following comment to the Securities and Exchange Commission for consideration in reviewing the Financial Industry Regulatory Authority, Inc. ("FINRA") proposed modifications to its current process for expunging customer dispute information from the Central Registration Depository ("CRD") system ("FINRA Proposal").

Wagner's comment is premised on his specific FINRA Dispute Resolution Services ("DRS") personal case, which included Customer participation in Associated Broker Expungement Motions<sup>3</sup>, and in his general legal profession background.

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<sup>1</sup> Pursuant to SEC Release No. 34-96298 (Fed. Reg., vol. 87, no. 220, Nov. 16, 2022, pages 68779-68781).

<sup>2</sup> Former University Counsel, Univ. of Calif. (20 years); and, former Assoc. Gen. Counsel Oracle Corp. (6 years); CA Bar #58551; retired as of 2000.

<sup>3</sup> Wagner's DRS case settled July 1, 2022. Its Expungement Motions hearings concluded on November 28th and are pending before the Arbitration Panel. These comments however are due December 7th; and so, Wagner does not identify the case number or Respondent parties prior to the Panel's decision, although the procedural circumstances are described to support the Comment recommendation.

## I. Overview

Wagner's Comment is directed to both: (i) the CRD language to be expunged and its adequacy to convey the Customer dispute contained in the Customer Statement of Claim, as amended during a DRS Case; and, (ii) the scope of relevancy in an expungement proceeding.

**Specifically**, Wagner recommends the FINRA proposed changes include a provision requiring FINRA DRS Case Arbitrator(s) review the CRD language to **adjudge and determine** its adequacy to succinctly convey the substantive encompass of the "*claim, allegation [and] information*" contained in a Customer Statement of Claim, as amended: (i) when assigned as Arbitrator to the Case, and again, (ii) when adjudicating any expungement issue.

## II. CRD Substantive Encompass Review: Importance and Resolution

### A. CRD Public Purpose and Vulnerable Reliance on Member Firms

The public purpose served by the statute-mandated CRD record is the public availability of the CRD disclosed information to regulatory, retail investor and industry review for informed public awareness.

Since FINRA DRS Arbitration Cases are contractual, the parties **may elect** to keep the Case proceedings confidential. To enable and maintain that election option, FINRA staff and Arbitrators are instructed to treat Case records and procedures confidential.

CRD records however, are publicly available to serve the above-stated public interest; and so, CRD expungement is narrowly limited to a stringent standard of review. But what review is made regarding CRD expressed content; and what impact does the CRD language have on the scope of expungement hearings relevancy?

FINRA member firms ("Members") are required to prepare CRD records and keep them "*current at all times*" by amendment "*not later than 30 days after learning of the facts or circumstances giving rise to the*

*amendment*" (FINRA By-Law Art. V, Sec. 2; and see FINRA Rules 1010, 1013 & 4530).

Wagner's review found no FINRA systematic regulatory review, or FINRA Rule provision allowing *ad hoc* review, of Member decision(s) to not amend or to inadequately amend a CRD.

Further, FINRA Rules and Guidance properly encourage Customer Statements of Claim be focused on factual circumstances of a dispute or controversy, unrestrained by specific legal theory assessment.

And so, the pen of public awareness is in the FINRA Member's hand to report what its Associated Broker(s) are accused of doing (which could be with or without the Member's knowledge/inducement/participation). Such a situation is obviously fraught with inherent conflict of interest.

Yet, apparently no one is comparing what is written with the scope of the Customer accusation; nor is there any apparent FINRA Rule provision for challenging (by Customer or otherwise) what is written by the Member, which constitutes the sole publicly available report/record.

### **B. Wagner's DRS Case Expungement Dilemma**

The Expungement Motions in Wagner's DRS Case demonstrate the manipulation available and the vulnerability of the public interest in seeking access to accurate CRD records of Customer disputes.

The procedural process is summarized:

- Prior to filing a Claim (**initially stated as:** unauthorized transaction), Respondents refused to provide the contract or telephone recording.
- Respondents' Answer and discovery disclosures, premised Wagner amending the Claim (**to include:** deceptive and fraudulent "Bait-and-Switch" misrepresentation, and document forgery).
- The Case settled.
- The CRD language Respondents presented for expungement was **limited to the Claim as initially** filed, and **did not include** the claims added by **amendment several months** earlier.

- Respondents then sought to limit the expungement proceeding scope and Wagner's participation, to the limited CRD language, which they had written, did not amend, and now sought to expunge.
- Wagner argued CRD language is *ab initio* reviewable and should be amended prior to expungement consideration; and, FINRA Rule 2080 review is directed to the Customer's amended Claim, not Respondents' un-amended CRD language.
- The Expungement Motions are currently pending.

During the hearing's discussion the Panel Chair suggested the Arbitrators may conclude their review is limited to the CRD language presented, and Wagner could then take the CRD content issue directly to FINRA.

There is obvious uncertainty where clarity should prevail. The content accuracy of the CRD language and the hearing's scope of relevant review are uncertain to the Arbitrators and participants in expungement proceedings. Since FINRA DRS Case procedural rulings are not publicly disclosed, their determinations are subject to case-by-case manipulation and inconsistent results, to the detriment of the public's interest in being informed.

The situation calls for an explicit FINRA procedural Rule resolution.

### **C. A Proposed Resolution**

There are likely several alternative solutions available, and Wagner's legal experience does not include securities industry procedural questions; nonetheless, his DRS Case experience suggests a direct and efficient possible resolution of both the CRD language accuracy and expungement hearing scope of relevancy, with an enhanced benefit; to wit:

Wagner recommends the FINRA changes include a provision requiring FINRA DRS Case Arbitrator(s) review of the CRD language **to adjudge and determine** its adequacy to succinctly convey the substantive encompass of the "*claim, allegation [and] information*" contained in a Customer Statement of Claim, as amended, both: (i) when assigned as Arbitrator to the Case; and again, (ii) when adjudicating any expungement issue.

The above-recommended resolution:

- Provides an impartial public interest determination of the CRD adequacy to fairly convey what may otherwise be confidential, at both ends of the DRS Case;
- Provides the scope of expungement relevancy is the Customer claim, as amended;
- Provides Arbitrator immediate familiarity with the Customer dispute Claim and its succinct expression.

### **III. Conclusion**

Theoretically, contractual arbitration is an efficient and effective means to fairly resolve disputes as an alternative to judicial litigation; and to do so confidentially, if the parties so elect. If the judicial system were used the records of the proceedings would be public, with limited exception.

Nonetheless, in the securities industry, there is cause to provide and assure public interest remains aware and alert to the nature of arbitration proceedings. There is just cause for concern over **both content and availability** of CRD record information. Content can be adjudged by Arbitrator review at both ends of the DRS Case; and, availability assured by a narrow and stringent standard for expungement.

**Respectfully submitted,**

**Dated: December 7, 2022**

*/s/ Allen Wagner*

**Allen Wagner**

