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Filed Electronically

Ms. Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend the FINRA Codes of Arbitration Procedure and Code of Mediation Procedure To Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations, File No. SR-FINRA-2023-013

Dear Ms. Countryman:

Pickard Djinis and Pisarri LLP¹ submits these comments in response to the above-referenced FINRA proposal (the "Proposal") to amend the FINRA Code of Arbitration Procedure for Customer Disputes ("Customer Code"), the Code of Arbitration Procedure for Industry Disputes, and the Code of Mediation Procedures (together, the "Codes"). The Proposal, which constitutes the eleventh attempt by FINRA to amend the Codes in the past two years alone, continues a concerning trend by FINRA of limiting options for individuals required to seek redress in the FINRA Dispute Resolution Services ("DRS") forum and increasing costs for such individuals with no regulatory justification. We urge FINRA to consider whether its proposed amendments to the Codes, and failure to act on legitimate issues in the DRS forum raised by industry participants, advance its goal of protecting investors and the public interest.

The current limitations in the DRS forum must be viewed in regulatory context. The DRS forum was created in response to Securities and Exchange Commission ("Commission") directive that "more effective, efficient, and economical dispute resolution procedures" be available for disputes between broker-dealers and their customers.² This forum was expressly instructed to consider "simplifying the mechanisms for resolution of customer disputes with brokers and dealers" to protect investors against the pitfalls of litigation, described as "burdensome and complex and. . .

¹ Pickard Djinis and Pisarri LLP is a law firm specializing in securities regulation relating to broker-dealers and their registered persons, investment advisers, and service providers thereto. For over forty years our firm has participated in the FINRA arbitral forum on behalf of member firms, their registered representatives, and clients raising customer complaints about registered persons.

² Securities and Exchange Commission, Implementation of an Investor Dispute Resolution System, Release No. 34-13470 (April 26, 1977)

not cost effective for investors.”³ Above all, the Codes are intended to be “simple and inexpensive.”⁴

However, Proposal seeks to complicate and increase costs related to the DRS forum by prohibiting a non-lawyer (“NAR”) from receiving compensation for representing participants in the DRS forum—effectively ensuring that most participants will need to retain a lawyer before appearing in any DRS proceeding.⁵ FINRA assumes in the Proposal that the proposed amendments will primarily affect investor participants seeking to file a claim against industry members. However, the Proposal does not acknowledge that FINRA submits *all* matters involving its members to the DRS forum, including expungement of false customer complaint information from the Central Registration Depository records of brokers.

The expungement process in its current form is deeply flawed and will be further complicated by the Proposal. The Codes provide that complaints against brokers which are determined by an arbitral panel to be “factually impossible or clearly erroneous” and/or “false” may be “expunged” from BrokerCheck and the Central Registration Depository (“CRD”), but only if the broker, following a positive outcome in the original arbitration, initiates a secondary arbitration to request that the record of the arbitration won by the broker be expunged, generally because the complaints against the broker are “factually impossible or clearly erroneous” and/or “false”. As there is (or should be) limited fact-finding at this stage given that the claims have already been denied or dismissed in the original arbitration, there is no practical reason that the broker must assume additional costs of an attorney in expunging false and damaging allegations from their CRD records.

The Proposal will not only harm industry members undergoing the expungement process. The Codes currently permit the investor(s) involved in the underlying claim to appear in an expungement proceeding with all rights of a named party, including leave to examine witnesses, give testimony, introduce evidence, and make opening and closing statements.⁶ Here, too, the investor must assume the costs of an attorney if they wish to appear in the expungement proceeding. As the investor has no opportunity for a financial award at this stage, there is little incentive for investors to assume such costs and represent their interests before an expungement panel.

Expungement proceedings are particularly costly for participants given the number of pre- and post-hearing matters which must be handled by an advocate. A party seeking expungement must follow the minutely proscribed requirements of Rules 12805 and 13805, including arbitrator selection proceedings; presentation of certain required documents; production of any additional documents which may be required by the panel; and making efforts to ensure the customer has appropriate notice of the proceeding and their right to appear. Additionally, even if the panel agrees that false and erroneous complaints should be expunged, the broker must obtain an

³ *Id.*

⁴ Securities and Exchange Commission, Notice of Filing of Proposed Rule Change by New York Stock Exchange, Inc., Release No. 16038 (July 18, 1979).

⁵ The Proposal indicates that DRS forum participants who would have previously relied on an NAR may instead turn to a securities arbitration clinic (“SAC”) for affordable representation. However, the Proposal also acknowledges that there are currently only ten SACs operating across five states and the District of Columbia, all but one of which are on the East Coast.

⁶ See FINRA Customer Code of Arbitration Rule 12805(c)(5).

order from a court of competent jurisdiction that confirms the arbitration award containing expungement relief. A party initiating an expungement proceeding—again, a proceeding that relates to allegations which have already been dismissed or adjudicated to have no merit—can expect the process to take several months and, should the Proposal be adopted, include legal fees comparable to litigation.

The Proposal must also be viewed in context of a series of changes to the Codes specifically complicating the DRS expungement process. Last year, FINRA adopted amendments to the Codes which time-bar certain claims from being expunged and remove options for brokers to seek simplified proceedings to expunge demonstrably false information.⁷ Now, by ensuring that all expungement matters must be handled by compensated attorneys, FINRA has little ability to credibly claim that the DRS forum remains a simplified and inexpensive alternative to litigation.

If FINRA is determined to submit brokers undergoing expungement to costs and commitments similar to litigation, FINRA should ensure that the expungement process is not undermined by other FINRA processes which are deeply outdated. Currently, the expungement process is essentially made irrelevant by FINRA's subsequent publication of records of the original arbitration against the broker and arbitration awards ordering expungement in a wholly separate Arbitration Awards Online forum ("AAO") maintained by FINRA. The information disclosed in the AAO identifies the broker by name, employment, and CRD record, and, in records of both the original proceeding and arbitration proceeding, describes the allegations against the broker—concealing that such allegations have been disproven and ordered expunged from the CRD and Broker-Check for the sake of the public interest. The awards are not required to contain any description of *why* the customer complaint was determined to have no merit. Frequently, original arbitrations are disposed of by a Motion to Dismiss, which is made by an advocate and granted after Claimant's case-in-chief, before Respondent(s) present their own case, meaning that an award in such a case will not reflect any defense by Respondent(s) and may imply that the case was decided on technical or other unpersuasive grounds. We are unaware of any other expungement forum requiring the retention of legal advocates which results in the continued widespread publication of expunged materials.

Oddly, this gap in the FINRA rules exists only with respect to the expungement process. We note that FINRA has, through the rulemaking process, provided for expungement and redaction of certain disciplinary action orders and settlements—actions in which actual fault was found against a financial professional, but FINRA has determined that a public record of such wrongdoing would hold no value to investors. A broker who has been found to have committed misconduct is, therefore, more likely to present a clean online record to investors than a broker who has demonstrated before three separate sets of factfinders that claims brought against the broker were false. We note that participants undergoing the FINRA disciplinary forum may not be represented by an NAR⁸; we suggest that, should the Proposal bring the expungement process in line with the disciplinary process with respect to party representation, FINRA should ensure that available remedies are also constant across processes.

⁷ See SR-FINRA-2022-024, Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments Nos. 1 and 2, To Amend the Codes of Arbitration Procedure To Modify the Current Process Relating to the Expungement of Customer Dispute Information (April 12, 2023).

⁸ See FINRA Rule 9141, requiring that brokers in disciplinary proceedings must either represent themselves or retain an attorney at law.

Our firm has firsthand experience with the costs and frustrations of the expungement process. Several years ago, we represented a financial services professional in an expungement proceeding related to customer complaints made against the individual over thirty years ago, which have remained prominent in the broker's online profile due to republication online by FINRA. Notwithstanding that the broker in question had prevailed in original arbitration, the customer complaint information in the AAO and lack of detail in the original awards failing to explain why the complaints were determined to have no merit directly led to a loss of business for the financial professional. After the nearly yearlong process of arbitration, the financial professional found that his online profile continues to be dominated by records of his compulsory participation in the DRS forum.

Because FINRA has never sought and the Commission has never approved a FINRA rule setting forth FINRA authority to remove information in the AAO, there is no mechanism available to remove information from the AAO. This system is therefore clogged with decades-old records about arbitral awards, including those which have been expunged and hold no value to investors. The AAO has become near-unworkable as a tool for the public interest.

This deficiency in DRS' arbitral process causes serious confusion to investors seeking information on their broker or prospective broker. While the AAO is intended to assist investors in evaluating the disciplinary records of financial professionals, the current system allows genuine findings of misbehavior by brokers to be lost in a crowded field of outdated awards and complaints sufficiently demonstrated to be false. The issues with the AAO have become so extreme that FINRA, before allowing investors to access the AAO, advises investors to "perform independent research" to determine if the information they are viewing on the AAO is accurate.⁹ However, FINRA provides no additional information as to how such research may be performed. In acknowledging that its own forum is so flawed as to be untrustworthy but taking no steps to correct the deficiencies, FINRA DRS has only served to eliminate a key tool meant to assist investors in selecting investment professionals.

We respectfully request that, rather than submit the FINRA expungement process to yet another rule change chipping away at the very purpose for which the forum was created, the Commission and FINRA consider how the expungement process may be amended to better serve both industry members and the general public. FINRA has advised us that, because its current Code of Arbitration Procedures provides that "all awards shall be made publicly available," it considers itself powerless to remove or redact records regarding expunged information from the AAO unless and until its procedures are corrected by a FINRA Rule amendment initiated by the SEC. On March 18, 2021, our firm submitted a Petition for Proposed Rulemaking to the Securities and Exchange Commission.¹⁰ Were it adopted in our proposed form by the Commission, the rule would amend the FINRA Code of Arbitration to provide that awards regarding information expunged from CRD will be removed or redacted from the AAO. This three-year-old petition has not yet been acted on by the SEC or addressed

⁹ See FINRA, Arbitration Awards Online, available at <https://www.finra.org/arbitration-mediation/arbitration-awards>.

¹⁰ See Petition for Rulemaking 4-770, Request to amend Financial Industry Regulatory Authority ("FINRA") Rules 12904 and 13904 to allow FINRA to cease publication of expunged arbitration awards and to redact identifying information in expunged arbitration awards (March 18, 2021).

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by FINRA, despite it having become increasingly relevant in light of the massive overhauls to the Codes proposed by FINRA in the last five years.

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We appreciate the opportunity to submit these comments. We would be happy to supply any additional information you may desire about the matters discussed above. Kindly contact the undersigned at 202.223.4418 if we can be of further assistance.

Respectfully submitted,

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