



Securities Industry Association

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January 20, 2004

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549

Re: Release No. 34-48933; File No. SR-NASD-2002-168 -- Expungement of
Information from the Central Registration Depository System

Dear Mr. Katz:

The Arbitration Committee of the Securities Industry Association ("SIA")¹ appreciates the opportunity to offer comments in response to the referenced rule filing by NASD ("Rule Filing"), which seeks input on Amendment No. 2 to NASD's proposed rule changes relating to expungement of customer dispute information from NASD's Central Registration Depository ("CRD").

SIA previously submitted extensive comments to the SEC and NASD on the initial rule proposal, which we incorporate by reference herein. As a threshold matter, we reiterate our support for the objectives of the proposed rule changes and welcome reasonable procedures that ensure that the information contained within the CRD database is complete, accurate and current. Indeed, we believe that many of the changes contained within new Rule 2130 will go a long way in curtailing potential "misuse" of the expungement remedy by those who would intentionally seek to circumvent their reporting obligations.

We continue to have concerns, however, about the court confirmation requirement in light of the new amendments. Specifically, we believe that the additional safeguards imposed by new Rule 2130, as well as enhanced arbitrator training, obviate the need for

¹ The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs more than 800,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2002, the industry generated \$222 billion in domestic revenue and \$304 billion in global revenues. (More information about SIA is available on its home page: www.sia.com)

duplicate court review. Second, we recommend that the Commission to consider the proposed limitations to the expungement remedy in tandem with the NASD's proposed expansions to the Public Disclosure Program ("PD Program"), which NASD filed with the Commission on November 20, 2003.² Finally, we suggest that NASD implement additional procedures to promote more reasonable pleading practices by claimants and their counsel.

I. New Safeguards Imposed by Rule 2130 Amendments Eliminate the Need for Duplicative Court Confirmation

Our chief concern relates to mandatory court confirmation, which we see as a superfluous and resource-inefficient supplement to the newly adopted procedures for obtaining expungement. Having imposed considerable discipline on the expungement process, the additional step of court review and confirmation is unwarranted. As detailed in the Rule Filing, new Rule 2130 significantly curtails potential abuses of the expungement remedy by, *inter alia*, (i) creating specified criteria for granting of expungement relief; (ii) requiring an affirmative determination by the arbitrators as to the appropriateness of that relief;³ (iii) providing for enhanced arbitrator training;⁴ and (iv) mandating NASD and NASAA review of all expungement orders. Under these circumstances, we find that confirmation adds little to investor protection and only serves to delay the rightful vindication of individuals unjustly accused of wrongdoing.

In our view, confirmation proceedings either will become a meaningless exercise in which the court "rubber stamps" the award (particularly if there is no NASD opposition), or a costly adversarial retrial of issues already decided by an arbitration panel.⁵ Clearly, either scenario disserves us all.

Nor can the added associated costs of court confirmation be overstated. Judicial proceedings (even uncontested proceedings) involve filing and service fees, at a minimum. Having finally been exonerated of any wrongdoing by a duly constituted arbitration panel, individuals falsely accused should not have to bear the additional expense of court confirmation to remove the damaging information from their permanent CRD record. In light of the forgoing, we respectfully submit that the court confirmation requirement be rejected, especially since the Code of Arbitration does not obligate

² SR-NASD-2003-168 (November 20, 2003).

³ Under the new proposed amendments, NASD would now require arbitrators to affirmatively determine whether a request for expungement is appropriate. SIA supports this provision, as well as enhanced arbitrator training.

⁴ We are pleased that NASD intends to implement our recommendation that their arbitrators be provided with adequate guidance and training materials on the standards upon which to grant expungement relief.

⁵ This could entail, for example, the filing of longer and more substantial briefs, production of extensive arbitration hearing records, oral arguments and subsequent appeals.

prevailing parties to seek court confirmation as a prerequisite to other arbitrator ordered relief.⁶

II. The Commission Should Consider This Rule Filing in Concert with Recent Public Disclosure Program

The Committee continues to advocate the simultaneous consideration of these amendments with NASD's proposed expansions to the PD Program. As detailed in our prior submissions, SIA's concerns about the propriety of the proposed amendments are heightened further still in light of NASD's efforts to significantly expand the information it currently makes available to the public,⁷ including certain information that NASD has traditionally excluded as irrelevant, potentially inflammatory or outdated. This includes, among other things, "stale" customer complaints reported during the lifetime of the registered person⁸ -- irrespective of how old or incorrect.⁹ Now that the NASD has filed the proposed rule amendments with the Commission, we urge the Commission to consider these filings in tandem, and in particular how the proposed limitations on the expungement remedy and the proposed changes to the PD Program will interact.

III. NASD Should Adopt Additional Measures to Promote Responsible Pleading Practice

Finally, we hope that the Commission will support our recommendation that NASD implement better control measures to promote more responsible pleading by claimants and their counsel. One of the inherent flaws with the CRD system is that it captures all written customer complaints irrespective of merit or factual basis. As a result, the system is subject to potential abuses by the disgruntled customers or unscrupulous claimant's counsel. Experience shows that many claims and complaints contain a garden variety of alleged wrongful acts, including fraud, churning, unauthorized trading and conversion of funds, without prior sufficient knowledge of all facts to

⁶ Finally, it is important to note that the debate over the expungement remedy arose when the North American Securities Association ("NASAA") raised concerns that some states consider CRD data to be a "state-record" and therefore not subject to arbitrator-directed expungement, absent a court order. (See Notice to Members 99-09). As a result, and because the CRD data-base is joint-venture between NASD and NASAA, the state-record argument has become an impediment to any proposed alternative to court-confirmation, no matter how well-reasoned. SIA has long questioned the legitimacy of the state record objection and we are pleased that it may no longer be a viable concern. (See Rule Filing, at page 74672). Accordingly, we think it is time to reconsider this additional procedural step. especially since the Code of Arbitration does not obligate prevailing parties to seek court confirmation as a prerequisite to other arbitrator ordered relief.

⁷ SR-NASD-2003-168; See also NASD *Notice to Members* 02-74.

⁸ This commonly refers to customer initiated complaints that are more than 24 months old and were neither settled nor pursued in arbitration or litigation.

⁹ As with the expungement proposal, SIA provided extensive comments with respect to the NASD's Public Information Review Initiative, raising both privacy and due process concerns. See SIA Comment Letter, dated January 6, 2003, which we incorporate by reference herein.

substantiate the claim. Moreover, registered persons, particularly those that service clients on “teams” are often named in a complaint even though they had no involvement with the transaction in dispute.

Therefore, we think it both prudent and fair that NASD implement meaningful safeguards to ensure that claimants and/or lawyers who engage in this practice (a) understand the significant consequences of what they are doing and (b) have a reasonable, good faith basis for naming the particular registered person. One option worthy of consideration is to require claimants and their counsel to attest at the time the statement of claim is filed that there is a good-faith basis for naming the registered person(s).¹⁰

At a minimum, we strongly suggest that NASD provide additional investor education material to the initial claim packet sent to customers preparing to file a claim that clearly explains the implications of naming a particular registered person and explains the potential damaging implications. Not only will these measures help promote more responsible pleading practice, they will ultimately enhance the integrity of the CRD system, and in turn the quality of information upon which regulators, investors and firms all rely.

IV. Conclusion

While the integrity of the CRD information is vitally important to all who rely on the system -- including broker-dealers -- it is equally important that wrongly accused registered persons have the ability to expeditiously and inexpensively remove false information from their permanent professional record. We therefore urge the Commission to restore awards containing expungement provisions to the rightful status of every other arbitration award without need for further review by a court and consider the recommendations we present above.

SIA appreciates the opportunity to provide comments on the proposed amendments to expungement procedures. If we can provide any further information or clarification of points made in this letter, please contact me or Amal Aly, Associate General Counsel, at (212) 618-0568.

Sincerely,

¹⁰ This could be accomplished through either: (i) modification of the Uniform Submission Agreement to include a separate signature line, whereby a Claimant would certify to a good-faith basis for naming the individual registered representative as a Respondent; or (ii) a requirement that claimants attest in writing that they have read the materials provided by the NASD and have a good-faith basis for naming an individual Respondent.

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