



Invested in America

May 14, 2014

Via E-Mail to rule-comments@sec.gov

Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA-2014-020
SIFMA comment on proposed FINRA Rule 2081 (prohibited conditions relating to expungement of customer dispute information) (the “Proposal”)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Proposal. The Proposal calls for the adoption of new FINRA Rule 2081, which would prohibit member firms and associated persons from conditioning or seeking to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer’s agreement to consent to, or not to oppose, the firm’s or associated person’s request to expunge such customer dispute information from the Central Registration Depository (“CRD”) System.

SIFMA supports proposed FINRA Rule 2081.

SIFMA supports proposed FINRA Rule 2081. We believe the proposed rule is appropriately narrowly tailored and designed to discourage the practice of conditioning settlement agreements on expungement relief requests. Thus, we expect the new rule will contribute to the integrity and transparency of the expungement relief process. We also hope that it will help allay any misperception that expungement relief is being requested or granted on other than appropriate grounds, including without limitation those listed in FINRA Rule 2080.

In appropriate cases, and at their discretion, member firms may choose to include specific recitals re: expungement relief sought in connection with settlements.

As a practical matter, following the passage of new FINRA Rule 2081, we fully expect that arbitration claims that agree to settle will continue to include expungement relief requests – perhaps in about the same percentage of cases as existed prior to the passage of the prospective new rule. In order to facilitate compliance with the prospective new rule, and to ensure transparency to the parties, to the

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

arbitrator(s), and to regulators about the circumstances under which expungement relief is requested, member firms may choose, in appropriate cases, and at their discretion, to include recitals in the settlement agreement to the effect that:

- 1) Respondent intends to seek expungement relief;
- 2) Such expungement request was not a condition of the settlement agreement;
- 3) Respondent has not paid any consideration related to the expungement request; and
- 4) Claimant may participate in the hearing on expungement if he/she so chooses.

We would welcome FINRA's views and feedback on the foregoing recitals, and on their anticipated efficacy in facilitating compliance with the new rule, and ensuring transparency for all relevant stakeholders.

SIFMA is concerned with certain FINRA statements that may suggest expanded requirements for expungement relief outside of the rulemaking process.

In three distinct places throughout the Proposal, FINRA raises what could be viewed as a new and significantly expanded requirement for expungement relief, as follows:

- (1) In footnote 5, FINRA states, "While expungement of customer dispute information is an extraordinary measure, FINRA believes that it is nevertheless appropriate where the information being expunged meets one of the criteria specified in Rule 2080 *and has no meaningful investor protection or regulatory value.*" (emphasis added)
- (2) In footnote 10, FINRA cites to its expanded expungement guidance to arbitrators (the "Expanded Guidance"),² in which FINRA states, among other things, "Expungement is an extraordinary remedy that should be granted only under appropriate circumstances. Information should be expunged *only when it has no meaningful investor protection or regulatory value.*" (emphasis added)
- (3) In the text accompanying footnote 16, FINRA states, "FINRA has stated repeatedly that expungement is extraordinary relief that should be granted when the expunged information is unfounded *and has no meaningful regulatory or investor protection value.*" (emphasis added)

Contrary to FINRA's assertion in (3) above, FINRA has *not* repeatedly announced a requirement of "no meaningful regulatory or investor protection value" as an additional or necessary element for granting expungement relief. Rather, FINRA and our industry have long-relied upon, among other things,³ the three bases set forth in FINRA Rule 2080 as appropriate and sufficient grounds for granting expungement relief. Those bases are:

² The Expanded Guidance was published on October 14, 2013, and is available at: <http://www.finra.org/ArbitrationAndMediation/Arbitration/SpecialProcedures/Expungement/>.

³ Persons may also be granted expungement relief under various state and federal laws, and in a civil action based on equitable grounds. See, e.g., NTM 01-65 (October 2001) at p. 565, available at: <http://www.finra.org/Industry/Regulation/Notices/2001/P003744>.

- (1) the claim, allegation or information is factually impossible or clearly erroneous;
- (2) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
- (3) the claim, allegation or information is false.

From the very beginning, FINRA has consistently indicated that these three grounds “warrant the extraordinary relief of expunging information from the CRD system” and that if FINRA “determines that the expungement order meets [one of] the criteria . . . , it will advise the court that it will not oppose expungement.”⁴ It was not until October 2013, when FINRA issued its Expanded Guidance (cited above), that FINRA announced what appears to be a new and expanded requirement for arbitrators, namely that “[i]nformation should be expunged *only when it has no meaningful investor protection or regulatory value.*”

To the extent that this new language is intended to, or in practice may operate to, establish a new requirement or standard for granting expungement relief, we respectfully object to any modification of the requirements for expungement relief outside of the formal rulemaking, public comment, and rule approval process. SIFMA and its members should be given adequate notice and opportunity to formally comment on such a prospective, expansive new requirement.

Our prospective comment would address, for example, under what possible circumstances a claim could be found to be factually impossible, clearly erroneous, or false under FINRA Rule 2080, and yet still have meaningful investor protection or regulatory value, such that it should not be expunged. In another example, our prospective comment would also address the impropriety, unfairness, and irrational outcome of disclosing information about a sales practice violation – because it is found to have investor protection value – on the CRD record of a registered person who was found to be not involved in the violation under FINRA Rule 2080.

To the extent that this new language (“*no meaningful investor protection or regulatory value*”) is not intended to create a new requirement, we respectfully request that FINRA issue clarifying guidance for member firms and arbitrators to the effect that the bases set forth in FINRA Rule 2080 are sufficient – standing alone – for purposes of recommending expungement relief.

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⁴ *Id.* at pp. 565 and 567.

If you have any questions, or would like to further discuss the comments addressed herein, please contact the undersigned at 202.962.7382 or kcarroll@sifma.org.

Sincerely,

A handwritten signature in cursive script that reads "Kevin M. Carroll". The signature is written in black ink and is positioned above a horizontal line.

Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: ***via e-mail to:***

Robert Colby, Chief Legal Officer, FINRA

Linda D. Fienberg, President, FINRA Dispute Resolution

Kenneth L. Andrichik, Senior Vice President, FINRA Dispute Resolution

Richard W. Berry, Senior Vice President, FINRA Dispute Resolution