



Invested in America

January 19, 2021

Via E-Mail to 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-2020-030**
SEC Order Instituting Proceedings Under Section 19(b)(2)(B) of the Exchange Act (the “**Order**”)¹ to Determine Whether to Disapprove FINRA’s Proposed Rule Change to Amend the Code of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Arbitration Requests (the “**Proposal**”),² as Modified by Amendment No. 1 (“**Amendment No. 1**”)³

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“**SIFMA**”)⁴ appreciates the opportunity to comment on the Order. The Order requests comment on whether the Proposal, as modified by Amendment No. 1, is consistent with the Exchange Act. For the reasons stated below, we recommend that the Proposal, as modified by Amendment No. 1, be disapproved as inconsistent with the requirements of the Exchange Act, among other things. We hereby incorporate by reference all of our prior comments and recommendations on the Proposal.⁵ We further comment and recommend as follows:

¹ 85 Federal Register 84396 (December 28, 2020), available at https://www.finra.org/sites/default/files/2020-12/SR-FINRA-2020-030-Notice_of_Filing_Amendment_No.1.pdf.

² 85 Federal Register 62142 (October 1, 2020), available at <https://www.finra.org/sites/default/files/2020-10/SR-FINRA-2020-030-federal-register-notice.pdf>.

³ Available at <https://www.finra.org/sites/default/files/2020-12/sr-finra-2020-030-amendment1.pdf>.

⁴ 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>.

⁵ See <https://www.sec.gov/comments/sr-finra-2020-030/srfinra2020030-7936006-224670.pdf>.

The Proposal Limits the Grounds for Granting Expungement to the Three Grounds Listed in Rule 2080(b)(1), and Excludes Other Grounds, Including, Without Limitation, Those Listed in Rule 2080(b)(2), in Violation of the Exchange Act.

The Proposal would amend FINRA Rules 12805(c)(8) and 13805(c)(8) to require the arbitrator or panel to “indicate in the arbitration award which of the Rule 2080**(b)(1)** grounds for expungement serve(s) as the basis for its expungement recommendation.” (emphasis added). The arbitrator or panel must also “provide a written explanation of the reason(s) for its finding that one or more Rule 2080**(b)(1)** grounds for expungement apply....” (emphasis added).⁶

Currently, an associated person is free to seek expungement on equitable grounds, including, without limitation, those listed in Rule 2080**(b)(2)** (i.e., the request is meritorious and granting expungement would not adversely affect investor protection, CRD system integrity, or regulatory requirements).⁷ Under the Proposal, however, a panel would be strictly limited in granting expungement to one of the three grounds listed in Rule 2080(b)(1) (i.e., error, mistake or falsity). An associated person could no longer request expungement on equitable grounds because the panel would no longer have authority to grant it on those grounds.

The Proposal offers no explanation or justification for strictly limiting the grounds for granting expungement. The Proposal violates Section 19(b)(1) of the Exchange Act because it failed to provide a “statement of the basis and purpose of” this limitation, and it failed to provide the public with a meaningful “opportunity to submit written data, views, and argument concerning” this limitation. The Proposal also violates Section 19(d)(1) of the Exchange Act because it failed to give required notice and opportunity to comment on the proposed expungement grounds limitation, which explicitly “limits [associated persons] in respect to access to services offered by [FINRA]....”⁸

In its defense, FINRA erroneously asserts that existing FINRA Rules *already* limit expungement to the three grounds listed in Rule 2080(b)(1) and thus, the Proposal is merely a *clarifying revision*.⁹ In its response to comments,¹⁰ FINRA reiterates this erroneous assertion and as authority cites three sources:

- The plain text of FINRA Rules 12805, 13805 and 2080;

⁶ FINRA Rule 2080(b)(1) lists the following three grounds for granting expungement: (i) error, (ii) mistake, or (iii) falsity.

⁷ See, e.g., *Lickiss v. FINRA*, A134179 (Cal. App. 1st, 2012) (a court may exercise its equitable jurisprudence to decide whether and under what circumstances expungement relief is appropriate), available at <https://caselaw.findlaw.com/ca-court-of-appeal/1610198.html#.X34IDVBp9HI.mailto>.

⁸ For these same reasons, the Proposal is also inconsistent with the requirements of the Administrative Procedure Act, among other things.

⁹ Proposal at 62154.

¹⁰ See FINRA response to comments (December 18, 2020), at p. 13, fn 38, available at [File No. SR-FINRA-2020-030 \(Proposed Rule Change to Amend the FINRA Code of Arbitration Procedure for Customer Disputes and the FINRA Code of Arbitration Procedure for Industry Disputes to Modify the Current Process Relating to the Expungement of Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests\) \(sec.gov\)](#).

- The SEC’s preamble text approving then new Rules 12805 and 13805;¹¹ and
- FINRA Regulatory Notice 08-79 (announcing the SEC’s approval of new FINRA Rules 12805 and 13805).¹²

None of these three sources, however, support FINRA’s erroneous assertion.

The plain text of FINRA Rules 12805, 13805, and 2080 does not limit the grant of expungement to the grounds in Rule 2080(b)(1).

The plain text of FINRA Rules 12805, 13805 and 2080 does *not* limit the grant of expungement to the grounds in Rule 2080(b)(1). Rather, Rules 12805 and 13805 require the arbitration award to specify “which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order” The Rule 2080 grounds, in turn, include both 2080(b)(1) and 2080(b)(2). In fact, Rule 2080(b)(2) explicitly contemplates that “expungement relief [may be] based on judicial or arbitral findings *other than those [in Rule 2080(b)(1)]....*” (emphasis added). Thus, under the plain text of current FINRA Rules, expungement may be appropriate under *not only* Rule 2080(b)(1) grounds, *but also* under grounds other than Rule 2080(b)(1), including without limitation equitable grounds.

A misstatement in the SEC’s preamble text approving then new FINRA Rules 12805 and 13805 did not have the effect of amending the plain text or meaning of the new rules.

In early 2008, FINRA filed with the SEC its proposal to create then new FINRA Rules 12805 and 13805. Nowhere in its proposal did FINRA state or argue that the grounds for expungement should be limited to those under Rule 2080(b)(1).¹³ Because the plain text of the proposed new rules did not limit the expungement ground to those under Rule 2080(b)(1), and because FINRA did not say it was doing so, none of the commenters on the proposal, or the public generally, had notice or opportunity to comment on this important point. Likewise, because FINRA never requested the change in its proposal, the SEC in approving new Rules 12805 and 13805 never addressed whether or why it would be appropriate to limit expungement to the Rule 2080(b)(1) grounds, and the SEC never in fact approved such a change.

As discussed above, and quite unfortunately, however, in the preamble text in the SEC’s order approving the new rules, the SEC misstated that new Rules 12805 and 13805 require the arbitration award to indicate “which of the grounds for expungement in [Rule 2080](b)(1)(A)-(C) serves as the

¹¹ Securities Exchange Act Release No. 58886 (October 30, 2008), 73 FR 66086, 66087 (November 6, 2008), available at [SR-FINRA-2008-010 Approval Order](#) (stating that new Rules 12805 and 13805 require the panel to indicate “which of the grounds for expungement in [Rule 2080](b)(1)(A)-(C) serves as the basis for the expungement....”) (emphasis added).

¹² FINRA Reg. Notice 08-79 (December 2008), available at [Regulatory Notice 08-79 \(finra.org\)](#) (repeating the SEC’s statement that the panel must indicate “which of the grounds for expungement in [Rule 2080](b)(1)(A)-(C) serves as the basis for their expungement order....”) (emphasis added).

¹³ Securities Exchange Act Release No. 57572 (March 27, 2008), 73 FR 18308 (April 3, 2008), available at [NOF-FINRA-2008-010](#) (stating that the purpose of the new rules was to ensure expungement occurs only when arbitrators find and document one of the grounds specified in Rule 2080 (formerly known as Rule 2030)).

basis for the expungement....”¹⁴ (emphasis added). This was a misstatement because it did not accurately describe the plain text of the rules proposed by FINRA, or FINRA’s stated rationale and intent for proposing the rules. Most importantly, this simple misstatement does not operate as an SEC approval of a rule change that FINRA neither gave notice of, nor requested.

A FINRA notice that repeats a misstatement made in the SEC order approving new FINRA Rules 12805 and 13805 does not have the force or effect of rulemaking.

About a month after the SEC’s order approving new FINRA Rules 12805 and 13805 (which contained the SEC misstatement), FINRA issued Regulatory Notice 08-79 to announce the new rules. Remarkably, FINRA’s notice repeated the same misstatement contained in the SEC’s order approving, thereby misstating, now for the second time, that expungement relief is limited to the grounds in Rule 2080(b)(1).¹⁵ It should go without saying that a misstatement made in the preamble to an SEC rulemaking approval, repeated in a FINRA regulatory notice, does not have the force or effect of rulemaking, and does not change existing rules.

If FINRA persists in its erroneous assertion that current FINRA rules already limit the expungement grounds to those under Rule 2080(b)(1), then the SEC should retroactively deem FINRA Rules 12805 and 13805 to be in violation of Section 19 of the Exchange Act, given that neither FINRA nor the SEC has ever discussed, explained or justified – or provided notice and opportunity for public comment on – why limiting expungement relief to the Rule 2080(b)(1) grounds is fair or appropriate.

The Proposal Should Amend the Text of the Proposed Rule Change to Explicitly Clarify and Reaffirm that a Member Firm or Associated Person May Seek Expungement Relief in Court.

As stated in our comment letter, the plain language of the proposed rule change is susceptible to a reasonable, plain English reading, whereby member firms and associated persons would be precluded from seeking expungement relief in court, as they are now allowed to do under current FINRA rules. In its response to comments, FINRA assures us that no, that is not their intention; firms and associated persons may continue to seek expungement relief in court under the proposed rule change.¹⁶ If that is the case, then FINRA should make our recommended edits to the proposed rule language to clarify this point – so that ten or fifteen years from now, we do not find ourselves in the same position as we do today with respect to the grounds for expungement issue (discussed *supra*) – where the plain language of a FINRA rule, and FINRA’s interpretation of what that rule states, are inconsistent and thus create regulatory uncertainty.

* * *

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.

¹⁴ 73 FR at 66087.

¹⁵ FINRA Reg. Notice 08-79 at 3.

¹⁶ FINRA response to comments at fn 55 and accompanying text.

Sincerely,

A handwritten signature in black ink that reads "Kevin M. Carroll". The signature is written in a cursive style with a long horizontal stroke at the end.

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