

RICHARD P. RYDER, Esq.
P.O. Box 112
Maplewood, NJ 07040

May 5, 2014

Office of the Secretary,
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: File No. SR-FINRA-2014-020

Dear Deputy Secretary O'Neill:

The Commission has before it a rule proposal from FINRA to add a restriction on the ability of broker-dealers and associated persons to negotiate a settlement with customers of existing disputes. FINRA's intent is to prevent industry parties from "buying" expungements, by purchasing the cooperation of the customer, or his/her forbearance, in the process that leads to expungement. I have no difficulty with the concept, but I think the current language will prove overbroad and will lead to confusion and distortions in the settlement process. As expungements are primarily obtained through arbitration, that is the process to which I will direct my remarks.

Negotiations are delicate matters. Just as the markets are fine-tuned, high-strung and sensitive and should be regarded as a place where regulators tread lightly, settlement negotiations are also more art than science. FINRA's footprint, in this case, is far too large and tramples on the ability of those who want to seek expungement to pursue that already precarious route. I am thankful to the Commission for permitting the public this opportunity to comment and for accepting my comments on this proposal.

I am a former NASD Director of Arbitration and am currently President of the Securities Arbitration Commentator, Inc., a newsletter and Award database service that focuses on securities/commodities arbitration. I can see at least two ways in which the current proposal's language could unreasonably tie the hands of a respondent in arbitration who wants to settle a dispute, but who also needs to request expungement of the arbitrators. In my view, and I think this view would be broadly held, a respondent should be able openly and legitimately to ask a claimant, in the course of the settlement process, to stipulate to the issue of expungement relief being withheld from the anticipated settlement for the purpose of further proceedings (the "stipulation question"). This is a necessary step in pursuing expungement relief. Without that stipulation, the arbitrators will have no agreement upon which to rely in proceeding with expungement hearings.

Respondents should also have the right to ask the settling claimant whether s/he intends to be present at the expungement proceedings. A great deal of time and expense could be saved in having the answer to this simple question; it would certainly be fair to ask in any

other setting. In my opinion, counsel should also be able to inquire whether an attending claimant intends to oppose the relief or join in favor (the “attendance questions”). Claimant may refuse to say, but respondent should be able to address these questions without fear of violating Rule 2081. FINRA makes it clear in the “Purpose” section of its rule proposal that its prohibitions apply to oral as well as written agreements and to post-settlement consents, as well as those that occur in the settlement process.

The stipulation question is the more worrisome. Arbitration is a creature of contract. Arbitrators derive their power to decide a dispute through the parties’ agreement to submit that dispute to them for resolution. Once the parties advise the arbitrators that they have settled their dispute, the arbitrators are *functus officio*, i.e., they are without power to continue in their duties.¹ When parties settle their merits dispute, report that settlement to that arbitrators, and advise the arbitrators of the open question of expungement relief, the arbitrators decide the broker’s expungement request and issue a Stipulated Award. FINRA Dispute Resolution itself refers to this Award as a “Stipulated” Award. The reason for that designation is that the parties have stipulated in their settlement agreement that the question of expungement relief remains open for the arbitrators to decide.

That right – to condition the settlement on the claimant’s agreement to ask the arbitrators to consider the question of expungement relief -- must be preserved. Without a stipulation of the parties to the existing dispute, the current panel would not have the power to proceed. The broker would have to commence a separate arbitration proceeding before a different panel at a substantial waste of time, expense and collateral consequences. FINRA should make it clear that a respondent retains the right to condition a settlement upon a stipulation that the parties will request the arbitrators to consider the remaining or outstanding issue of expungement relief.

Maybe FINRA will respond that the proposal does not prohibit such a stipulation, but (1) the language of proposed Rule 2081 can be easily read to prohibit such a stipulation; and (2) the broad tone of Rule 2081 connotes that expungement should not be raised as an issue during settlement talks or even after a settlement is concluded. Counsel will be

¹ FINRA states in its proposal that brokers “seek expungement pursuant to FINRA Rule 2080....” It should be understood that there is no set path for obtaining expungement relief contained in FINRA’s Arbitration Rules. There are post-Award procedures that expungement seekers must follow in the Conduct Rules (Rule 2080) and procedures arbitrators must follow, once an expungement request comes before them (Rule 12805). But, the issue of expungement eligibility is presented to the arbitrators through agreement or stipulation of the parties.

Indeed, FINRA has put the horse before the cart here. Its Board approved a rule proposal in 2013, an “In Re Expungement Proceeding” provision, that would add to the forum’s arbitration rules a set path for brokers to follow in pursuing expungement relief. Were that provision in place, a broker could pursue expungement within the instant arbitration, despite a settlement of all other claims, and do so without a stipulation from the claimant. As the rules are currently silent, a stipulation remains necessary.

extremely anxious of getting their brokerage clients in trouble without some clarification here of what is not only disallowed, but what remains that is allowed.

A stipulation is a joint request of the parties directed to the tribunal. The language of the proposed rule states: “No member ... shall condition ... settlement ... on the customer’s agreement to consent to, or not to oppose, the ... request to expunge” Why can’t it just read, “expungement of” after “oppose, the”? As formulated, the proposed rule seems to prohibit respondents not only from seeking a customer’s agreement to abstain or to agree to expungement relief, but also to abstain or agree to a “request” – presumably one that will be made to the arbitrators -- for expungement relief. There should be no restraint upon a claimant stipulating to a request for expungement consideration; the prohibited activity should focus on consents (or non-oppositions) relating to the ultimate relief.

Moving to the attendance questions, we see FINRA taking aim at a wrongful activity using blunderbuss language, without indicating what may be preserved for discussion on the tender subject of expungement relief. We would like to see FINRA answer whether a respondent may inquire, without fear of violating proposed Rule 2081, as to a claimant’s attendance at the expungement hearings, and what claimant’s stance will be on the issue of expungement relief. If not permitted before settlement, may these questions be asked post-settlement, so long as no compensation is offered?

Should a claimant want to attend an expungement hearing in order to favor expungement relief for the broker (yes, this happens, often in product cases, where the customer blames the firm, not the unnamed broker), may the broker (or his firm) agree to reimburse the expenses of attendance – or is that too close to “compensation”? These concrete questions relate to general practice and should not be deflected with the response that they can be answered on a case-by-case basis after rule approval.

FINRA has chosen to intervene, not in a brokerage activity, but in a legal process, and to set restraints on a dynamic and sensitive interaction between conflicting parties with opposing interests. It should be obliged, at least, to address what it is not prohibiting and what may yet be discussed between claimant and respondent in the course of the settlement negotiations and subsequent expungement hearings.

Respectfully submitted,

Richard P. Ryder