



May 21, 2012

Submitted via pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: Response FINRA Requests for Comment to Regulatory Notice 12-18 on Proposed New *In re* Expungement Procedures for Persons Not Named in a Customer Initiated Arbitration

Dear Ms. Asquith:

The Real Estate Investment Securities Association (“REISA”)¹ submits this letter in response to the FINRA Requests for Comment to Regulatory Notice 12-18 on Proposed New *In re* Expungement Procedures for Persons Not Named in a Customer-Initiated Arbitration (“Notice 12-18”). We appreciate the opportunity to comment on Notice 12-18, and at the present time, our comments will focus on the following issues:

1. Sufficiency of the 180 day notice requirement in Rule 13807(c). The proposed 180 day notice requirement does not provide sufficient time to protect the interests of members and provide due process when they have become an unnamed person because of the arbitrary action and unproven allegations of a plaintiff or claimant. REISA believes that extending the notice time period to one year does not affect the integrity of the process, but enhances it and provides members the ability to protect their livelihood and reputation.
2. Conditions under which FINRA should provide documents, defined as tapes, digital or other recordings or transcripts, to an unnamed person. Rule 13807(l)(1)(A)(i) permits the unnamed person to obtain the documents by request. It does not burden the unnamed person with obtaining a subpoena to get documents and it does not burden FINRA with automatically providing documents that may not be

¹REISA is a national trade association that influences over 20,000 real estate securities professionals who offer and manage alternative investments. These alternative investments typically include, but are not limited to non-traded REITs, real estate partnerships, real estate income and development funds, business development companies, tenant-in-common interests, oil and gas interests, equipment leasing, and other securitized real estate investments. REISA has more than 800 active members, which include broker dealers, sponsors/issuers, Registered Investment Advisers, registered representatives and other alternative investment professionals. REISA works to maintain the integrity and reputation of the industry by promoting the highest ethical standards to its members and provide education, legislative and regulatory advocacy, and networking opportunities. REISA connects members directly to key industry experts providing timely trends and education and helping create a diversified portfolio for their clients.



wanted by the unnamed person. REISA believes that providing the documents to the unnamed person upon such person's request is the most expedient and cost effective process for FINRA and its members.

These issues are discussed in more detail below.

REISA supports FINRA's efforts to provide timely and remedial action to those licensed persons who are involved in FINRA arbitrations. REISA also understands that the effectiveness of those efforts and its effect upon members who are considered unnamed persons under the rules depends upon FINRA and the language of the new rules as set forth in Notice 12-18. In order to avoid any undue burdens and meet the intent of the changes in the new rules, FINRA must consider the burdens of both the procedural and financial requirements for unnamed persons who were not named as a party in the arbitration, but were the "subject of" allegations regarding sales practice violations.

1: Sufficiency of the 180-day notice requirement in Rule 13807(c).

According to Notice 12-18, FINRA's purpose for the *In re* expungement rules and forms is to provide unnamed persons with a remedy to seek redress concerning allegations that could impact their livelihoods, balanced against the protections in the expungement rules, which are designed to ensure the integrity of the CRD records upon which the public relies.

In reviewing the rules, it is critical to keep in mind is that it is not difficult for a member to become an "unnamed person" whose livelihood is impacted. Rule 12100(z) defines an "unnamed person" as a member who is identified in the body of a civil litigation complaint or an arbitration claim "**or could reasonably be identified from the text of those claims** as the subject of an allegation of sales practice violations." Emphasis added. FINRA has received numerous inquiries from unnamed persons who want these disclosures expunged from their CRD records on the basis of unfounded allegations or mistaken identity. If members miss the deadline of 180 days for filing the Notice of Intent to File a claim for expungement, they are denied relief on procedural grounds and not because their case has merit. Therefore, it is critical that unnamed persons be provided with sufficient notice to be able to take action to protect their livelihood.

The rationale behind the proposal for a 180-day notification limitation is intended to provide notice to the arbitration panel of the potential for an *In re* expungement action and to allow them to consider the evidence during the underlying arbitration for possible relevance to the *In re* claim. The issue to be determined is whether that limited timeframe outweighs the potential loss of due process and protection of the member's livelihood and reputation. Both civil cases and arbitrations record their proceedings; therefore, the evidence would be available for review at any time. If the *In re* expungement action took place after the arbitration, the information would still be available for review by the panel.



This is a particularly volatile time for FINRA members, especially those involved with privately placed securities and non-traded programs. Numerous broker-dealers have gone out of business, changed their business model or been acquired or sold. The business and employment of many FINRA members have been disrupted. Members are working harder than ever with fewer resources to meet the demands of the enhanced regulatory environment and the volatile capital markets. Without an expungement, a member may suffer a permanent or significant impact upon their livelihood, perhaps without cause. As a result, REISA respectfully requests that FINRA consider increasing the notice period to one year so that a member is not denied an expungement purely on procedural issues rather than the merits of the case.

2: Conditions under which FINRA should provide documents, defined as tapes, digital or other recordings or transcripts, to an unnamed person.

FINRA has proposed three alternatives for providing the unnamed person the documents from an arbitration as they relate to an *In re* expungement:

- The first alternative is that FINRA will automatically provide the documents to the unnamed person.
- The second is a requirement that the unnamed person subpoena FINRA for them.
- The third alternative is currently proposed in Rule 13807(l)(1)(A)(i) which permits the unnamed person to request the documents.

Given the cost of seeking expungement relief, REISA believes that unnamed persons should be provided documents upon request. According to the proposed rules, the unnamed person is responsible for a \$750 nonrefundable fee to seek expungement relief. In addition, the unnamed person will also be required to pay \$450 per session for more than one arbitration hearing session. Although Rule 13807(g) allows for the Director to defer or waive payment of all or part of the filing or hearing session fees upon a showing of financial hardship, there currently is no criteria as to how a determination of financial hardship is made. In addition, registered persons are required under FINRA Rule 2080 to obtain a court order directing expungement or confirming an arbitration award containing an expungement directive. When you take into account all of these fees, plus attorney's fees, the expungement process can quickly become a very expensive endeavor without adding the requirement for obtaining the documents pursuant to a subpoena. The alternative of requiring FINRA to automatically provide the documents to unnamed persons encumbers FINRA with an obligation to provide documents at FINRA's expense, which the unnamed person may not need or request. REISA believes that requiring documents to be provided upon request is the most effective solution.



Conclusion

REISA believes in the importance of procedures related to the accurate dissemination of information about FINRA members to the public and the industry and the integrity of the *In re* expungement process. However, the impact upon FINRA and its members needs to be carefully considered.

Consequently, REISA strongly believes that the period for an unnamed person to file a notice of intent to seek expungement should be increased from 180 days to one year in order to protect their access to an *In re* expungement. REISA also believes that the most effective and efficient means of the provision of documents to the unnamed person in an *In re* expungement proceeding is that the documents are provided to the unnamed person upon that person's request to FINRA.

REISA appreciates the opportunity to provide its perspective and comments on the new rules as provide in Notice 12-18. REISA looks forward to a continued dialogue with FINRA on these and other important issues for the protection of investors and the efficacy of FINRA rules as they apply to all those involved in arbitrations and civil litigation.

Sincerely,



Daniel Oschin
President, Real Estate Investment Securities Association (REISA)