



Notice to Clients: Expungement Guidance – 3 Options for a Clean CRD

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Most brokers will encounter customer complaints at one time or another during their career. Many of these complaints cast too wide a net, frequently ensnaring innocent brokers into otherwise wrongful conduct. These allegations can leave an unfounded blemish on brokers' Central Registration Depository (CRD) and BrokerCheck reports. When faced with a potential disclosure event, the only way to avoid publicly available negative information is to pursue an expungement action.

A request for expungement can appear in a pleading (i.e. Statement of Claim or Answer), motion, or settlement agreement but FINRA considers expungement an extreme remedy that will only be granted under limited circumstances. FINRA Rule 2080 lists the narrow grounds for granting such a remedy:

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

Additionally, FINRA advises that “[c]ustomer dispute information should be expunged only when it has no meaningful investor protection or regulatory value,”² urging arbitrators to scrutinize settlement agreements and give more detailed explanations supporting grants of expungement. Needless to say, getting a panel to grant an expungement can be a challenging endeavor.

Two distinct situations exist under which a broker would seek expungement. First, the broker is explicitly named as a respondent in a customer arbitration. Second, the broker is the subject of wrongful allegations in a complaint, without specifically being named as a party to the arbitration. In the former instance, the broker has the option of requesting expungement in his Statement of Answer or in a separate motion. However, in the latter instance, the broker must: (1) intervene to become a party in the existing arbitration; (2) have the respondent brokerage firm request expungement on the broker's behalf; or (3) file a separate action to which the customer or brokerage firm is a party.

¹ The full text of Rule 2080 is available at:

http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=11616&element_id=8468&highlight=2080#r11616

² Notice to Arbitrators and Parties on Expanded Expungement Guidance, FINRA (October 14, 2013), available at <http://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>

Option (1) - Intervention

This option is generally unadvisable because it subjects the broker to the unnecessary liability. Once the broker has intervened, damages could be assessed against the joining broker in favor of the claimant or the initial respondent(s) due to a cross claim. This risk can be avoided by pursuing another method of expungement.

Option (2) - Have the Firm Request the Broker's Expungement

This option is complicated. Assuming that the broker and brokerage firm were able to maintain a working relationship throughout the arbitration process, to facilitate this action FINRA rule 12805(d) requires that all expungement hearing fees be assessed against the party requesting expungement relief. Thus, the cost of the expungement proceeding would be borne by the brokerage firm, not the broker. This will likely compound any previously existing tension between the firm and the broker, and disincentive the firm from requesting expungement on the broker's behalf due to potential non-payment of hearing costs. However, if the broker and firm maintain a strong working relationship, this option could be advisable.

Option (3) - File a Separate Action

Up until recently brokers did not have the option of naming their brokerage firm in an expungement-only proceeding. However, a separate expungement action can now be filed by the broker, naming either the customer or brokerage firm involved in the arbitration. Naming the customer has a low likelihood of success. Customers are generally reluctant to be involved in expungement hearings and without a customer-signed submission agreement the expungement hearing cannot commence. Additionally, even assuming the complaining customer executed a submission agreement, the customer's testimony is not likely to support the broker's case for expungement.

Alternatively, FINRA now allows brokers seeking expungement to file an arbitration claim against a member firm solely for the purpose of seeking expungement. This alleviates the previous requirement of having to name the complaining customer as a respondent. Although the criteria for granting an expungement stays the same in these proceedings, FINRA suggests that the broker provide a copy of the expungement Statement of Claim to the customer(s) in the underlying arbitration, though no formal notice requirement exists. Although each broker's expungement case is unique, this option is generally the best course of action.

Wexler & Burkhart partner Ian J. Frimet has a substantial amount of experience with expungement proceedings ([view Ian's profile](#)). If you are a broker with questions about your expungement eligibility or are seeking to commence an expungement proceeding please do not hesitate to contact Ian at (516) 222-2230 or ifrimet@wbhulaw.com.

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