

# Editorial Advisors Corner: Legal Risk Management Tip - April 2017

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## What You Need to Know About Expungement

By David Sobel

**T**he bane of every registered person is a bad mark on the Central Registration Depository (BrokerCheck) report. This mark can be caused by a number of things, but it is predominantly the result of a customer complaint. If you have been a registered representative for any number of years, the likelihood of receiving one of these complaints increases. As soon as a customer complaint is received, whether by you or your firm, it must be reported to FINRA. Once shared with FINRA, it is entered onto your BrokerCheck file. The end result has both positive and negative results. Positively, if the complaint is valid it serves as an alert to the public, making people more aware of these complaints. Additionally, from FINRA's perspective, this transparency is vital for investor protection. On the other hand, such complaints can have a negative impact if the complaint is from an angry client who happens to have lost money and is simply blaming the representative. As individuals or companies, we cannot make the decision whether a complaint is valid or not; simply, all complaints must be reported.

If a Form U-5 has been marked with a customer complaint, it can be amended; however, since both the original and the amended entry are visible, it doesn't necessarily resolve the problem. FINRA has set up a procedure by which we can challenge those complaints and have them removed from our records. This process is called *expungement*. When a complaint is expunged, it disappears as if it never happened. However, FINRA does not make it easy to have a complaint expunged. FINRA Rule 2080<sup>1</sup> gives the guidelines on what is required to get an expungement (customer complaints only).

Those guidelines list the three possible reasons for granting an expungement:

- (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.



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But FINRA makes it clear that customer dispute information should be expunged only when it has no meaningful investor protection or regulatory value.<sup>2</sup> Additionally, the request for expungement must be done through the arbitration process.

Let's consider that you are named as a party in a customer arbitration. You could request expungement as part of your remedy, should you win. (On the other hand, if you lose, there is little point in requesting expungement.) Alternatively, you could enter another motion for expungement and have a separate hearing. Remember, the cost of the arbitration is borne by the requesting party. Once the arbitration panel allows the expungement, the decision must be confirmed in court. When the confirmation papers are filed, FINRA must be named as an additional party, along with the customer.

The issue of intra-industry expungement is slightly different. If you have a claim for expungement against your firm for something written on your Form U-5, you can name the firm in a separate action and not have to name any underlying party. Those decisions from the panel go to FINRA for review; and notably, they do not have to be confirmed in court.

Expungement is a complex process that requires careful deliberation. Many variations and procedures exist (which

will be covered in an upcoming JLG legal tip). It is very important to work with counsel throughout the process. For more information on these and other considerations, please contact us at (619) 298-2880 or at [info@jackolg.com](mailto:info@jackolg.com).

#### ENDNOTES

This article is for information purposes and does not contain or convey tax or legal advice. The information herein should not be relied upon in regard to any particular facts or circumstances without first consulting with a lawyer or tax adviser.

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<sup>1</sup> 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](http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=11616&element_id=8468&highlight=2080#r11616).

<sup>2</sup> 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>.

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