Think It's Hard to Get Records Expunged? Wait Until the New Rules Kick In! Merrill Lynch, Wells Fargo and Other FAs Cry Foul

By Rita Raagas De Ramos November 28, 2018

Time is running out for brokers who may want to have their disclosure records expunged under **Finra**'s current rules, which are expected to undergo serious changes that will make the process costlier and more complex for advisors, warns law firm **Shustak Reynolds & Partners**.

"From my perspective and our clients' perspective, I think that the system as it exists today is already overly cumbersome. For somebody who has a very innocuous disclosure, something that really has nothing to do with performance or aptitude as a financial advisor, you have to jump through a whole bunch of hoops to get the disclosure potentially removed," says **George Miller**, a San Diego, Calif.-based partner at Shustak Reynolds & Partners.

Miller expects the new expungement rules to be finalized next year, based on the comment period for the new proposals having ended in February and his experience monitoring Finra's rulemaking process.

Miller also expects the new expungement rules to be either "as proposed" or "with some subtle changes" to the proposals, such as potentially some leeway to the prescribed time frame for seeking expungements.

When asked to comment for this article, a Finra spokesman tells FA-IQ the self-regulator is still reviewing and considering the comments it has received on the proposals.

In December Finra requested comments on the proposed changes to its expungement process and rules, including arbitrator experience, timeframes involved in the process and how the cases are resolved.

Finra wants to change the timeframe for seeking the expungement of records. For a registered individual who is a named party in an arbitration case, the proposed changes would require that individual to file an expungement request no later than 60 days before the first scheduled hearing session; otherwise other parties could object to the request.

Where is the innocent until proven guilty status we are all guaranteed under the law when it comes to Finra's disclosure and expungement rules?
Roger Deal
Sequoia Wealth Partners

If that case closes with an award, arbitrators would be required to decide on the expungement request within the underlying case. If that case closes with a settlement or by other means, the individual would be given a year to file a new expungement request.

Finra wants to establish a roster of arbitrators with additional training and specific backgrounds or experience from which a panel would be selected to decide requests for expungement cases. Finra wants the Neutral List Selection System it uses to assign arbitrators to cases to randomly select three public chairpersons from a special expungement arbitrator roster to decide an expungement request.

To qualify for that roster, public arbitrator chairpersons must: complete an enhanced expungement training; be admitted to practice law in at least one jurisdiction; and have five years of experience in litigation, federal or state securities regulation, administrative law, service as a securities regulator, or service as a judge.

Finra also wants to require a unanimous agreement from the three-person special arbitrator panel for an expungement request to be granted.

Shustak Reynolds & Partners' Miller believes the expungement statistics are key to Finra's motivation in making the rules tougher for those seeking to get disclosures removed from their records. Expungements were granted in 87.8% of cases involving stipulated awards or settled customer claims between 2012 and 2014, according to an October 2015 study from the **Public Investors Arbitration Bar Association**.

"In the past 10 years we've seen increasing guidance to arbitrators that expungement should only be granted in extreme cases," says Miller, who has also served as an arbitrator.

We are currently reviewing and considering the comments received in response to the expungement rules notice.
Spokesman
Finra

But **Dennis Concilla**, Columbus, Ohio-based head of **Carlile, Patchen & Murphy**'s securities litigation and regulation practice group, says "the main reason over 80% of the expungement cases that are filed are granted is the lawyers who typically succeed are very selective in the cases they take on."

Not surprisingly, many advisors who submitted their comments on the proposed changes balked at the proposals.

Many are calling out what they perceive to be the injustice perpetrated by making disclosure records publicly available, whether they are true or not.

"We live in a society where we are supposed to be considered innocent until proven guilty," says **Roger Deal**, owner and managing executive of **Sequoia Wealth Partners**. "Where is the innocent until proven guilty status we are all guaranteed under the law?"

Many are clamoring for the opposite of what Finra is proposing. They want more leeway to seek and obtain expungement.

Michael Di Silvio, a financial advisor and managing director for investments at **Di Silvio Financial Group** of Wells Fargo Advisors wants a swift and affordable process for expunging meritless claims.

Juan Braschi, a senior financial advisor at **LBDL Group** of Merrill Lynch, says in his more than 30 years in the industry, he has "seen the scale tilt from rogue brokers to rogue clients and lawyers to the abusive state in which we are now."

Like many advisors who shared their sentiments with Finra, Braschi says very few professionals are as regulated as brokers and it has become easier for "rogue clients and lawyers" to file complaints and gain financial settlements on claims regardless of their merit.

"Finra should open their eyes and stop suffocating and overregulating advisors and make clients and their lawyers more liable," he says. "Finra needs to balance the scale."

Scott Brookes, director of retirement plan services at **Sharkey Howes & Javer**, says he has been "unfairly saddled with a client's non-investment related complaint" that was added to his record and never removed even though it was settled as allegedly advised by his broker-dealer firm to avoid legal fees.

"I am still stinging from the fact that 10 years later, this is still on my record and that there is now consideration to permanently prevent the fair removal of meritless claims that are over a year old," he says.

“Making it even harder for those who may be falsely accused without any recourse is a travesty,” he adds. “Finra has an obligation to protect both the consumer and the advisor equally.”

Taking away the ability to expunge records older that 12 months “is just plain wrong,” says **Jeff Speicher**, an investment officer at **Speicher Financial Group** of Wells Fargo Advisors.

“These changes [to the expungement rules] are going to negatively affect the next generation of advisors much more than those of us who are now established,” he says.

“To make it more expensive, more rigorous and arbitrarily apply a time limit to the correction of the official record is completely unreasonable,” says **Barrick Smart**, CEO of **Smart Investments Advisory**. “The truth shouldn’t have a time limit; it shouldn’t cost more.”

George Miller

Stacie Weiner, a financial advisor at RBC Wealth Management, says she’s “disgusted” Finra has proposed increasing the current $1,500 fee per expungement complaint by more than $1,000.

The current fee “is extortion, but to raise that fee any further is unconscionable,” she says. “It’s behavior expected of loan sharks.”

Jay Higgenbotham, a wealth management advisor at Merrill Lynch, says he’s still haunted by disclosures on his record related to funds offered by **Morgan Keegan**, which “crashed” during the 2007-2008 global financial crisis.

“None of the clients named me in their complaints, which were driven by excessive advertising by plaintiff lawyers, and my employer elected to settle the cases for economic reasons rather than fight them, which would have kept them off of my record,” he says.

AdvisorLaw agrees with the creation of the expungement arbitration roster but disagrees with the time limit and unanimous decision, among other things. AdvisorLaw says it advocates “for the interests of the advisor – never for the investor or broker-dealer” firms.

Steve Caruso, chairman of the **National Arbitration and Mediation Committee**, agrees with many of the proposals, including having an expungement arbitration roster, limiting the timeframe to seeking an expungement to one year maximum and requiring a unanimous vote to expunge. NAMC recommends rules, regulations and procedures governing the conduct of arbitration, mediation and other dispute resolution matters before Finra.

Finra has said it doesn’t comment on the replies it gets from its requests to comment, particularly when rulemaking or amendments to rules are in progress.