

*Argument #8*—NASD Rule 2110 (“just and equitable principles of trade”) should be strengthened to prevent the use of unwarranted criteria for expungement or a new rule should be adopted that states that a member may not seek expungement unless one of the standards is met.<sup>14</sup>

*Argument #9*—Expungements generally will increase because of the additional criteria and such an increase is clearly detrimental to investors.<sup>15</sup>

*Argument #10*—A conflict will be created in cases when it is in the investor’s interest to settle (through an arbitration award containing expungement criteria), but the investor’s counsel will be averse to admitting to have filed a claim warranting expungement (e.g., a defamatory claim).<sup>16</sup>

*Argument #11*—Pro se investors will be unable to meet the heightened formal pleading requirements established by the proposed standards.<sup>17</sup>

*Argument #12*—The status quo is not unfair and altering the status quo would place member and associated records in a privileged class relative to other classes of public records (i.e., civil actions are not expungeable from the public record).<sup>18</sup>

*Argument #13*—The court confirmation process will be an insufficient safeguard relative to the added expungement criteria, because the NASD does not have the resources to put forth serious opposition to expungements at the court confirmation level.<sup>19</sup>

*Argument #14*—CRD information is considered to be part of the states’ books and records. NASAA and the states currently insist that only “factually impossible” claims are expungeable and, thus, an expansion of the expungement criteria would conflict with the states’ books and records laws.<sup>20</sup>

*Argument #15*—Investors already view the NASD arbitration process with suspicion and adding criteria for expungement will serve to exacerbate this perception.<sup>21</sup>

*Argument #16*—The integrity of the CRD will be negatively affected by the proposal.<sup>22</sup>

*Argument #17*—The court confirmation process is still too burdensome on members and associated persons and this burden should be eased, rather than increased.<sup>23</sup>

*Argument #18*—The proposal evidences a general lack of respect for arbitrators. Moreover, it will undermine the integrity of arbitrators by limiting their decision-making ability.<sup>24</sup>

*Argument #19*—The proposal should not be acted upon in isolation, instead it should be combined with NASD NtM 02–74 regarding expanding the amount of information that brokers must report, generally.<sup>25</sup>

*Argument #20*—The proposal would automatically convert the NASD into an adversary of members at the court confirmation level. Furthermore, the proposal will create a systemic prejudice on the part of NASDR against members.<sup>26</sup>

*Argument #21*—The court confirmation process will require a rehearing of the issues and recalling of witnesses. Such rehearing and recalling will not only be inefficient, but could result in the confirming court making different findings from those made in the underlying arbitration proceeding. This could create confusion as to the status of the underlying arbitration decision.<sup>27</sup>

*Argument #22*—The current system of disclosing unproven allegations is inequitable and making it more difficult for members and associated persons to remove such allegations from their CRD records is “doubly unfair.”<sup>28</sup>

#### *B. Amendment No. 2*

In Amendment No. 2, the NASD addressed a number of the comments received by the Commission in response to the publication of the notice in the **Federal Register**. As noted above, some commenters expressed concern that the mere existence of an NASD rule governing expungement could

encourage registered persons to seek expungements and make expungement easier to obtain. NASD noted its belief that this is not a legitimate concern. NASD stated that these commenters may not have considered the fact that NASD currently expunges information from the CRD system when ordered to do so by a court of competent jurisdiction, and that court-ordered expungements currently are not subject to any NASD limitations or standards.<sup>29</sup> Under the 1999 moratorium, registered persons seeking expungement relief need only obtain a court order to expunge or court confirmation of an arbitration award granting expungement relief. Under the proposed rule, NASD stressed that it will have the opportunity to review the basis for expungement and to oppose an expungement in court unless there is a specific finding that the expungement meets one of the prescribed standards.

In Amendment No. 2, NASD discussed a concern raised by commenters that arbitrators should have sole authority and complete discretion to order expungement. They suggested that NASD’s and the States’ proposed role in the court confirmation process would undermine arbitrators’ credibility. In response, NASD argued that, to the contrary, the critical element in the proposal is NASD’s reliance on fact finders, especially arbitrators, to find that the expungement relief is based on one of the standards in the proposed rule. Also of note, NASD stated in Amendment No. 2 that NASD Dispute Resolution will provide training to arbitrators regarding the standards for expungement that will trigger the NASD waiver of opposition. Under proposed Rule 2130, NASD asserted that it will rely on arbitrators’ findings and waive participation in the court confirmation process if arbitrators have appropriately awarded expungement.

Other commenters contended that the proposed procedures will be economically prohibitive. In response, NASD recognized that the additional step of naming NASD as a party may involve additional costs. In an effort to minimize costs to the parties, NASD may waive participation in the court confirmation process before filing with the court if the parties give NASD a copy of the award to review and the

<sup>14</sup> See PIABA Comment; G&N Comment; and NASAA Comment.

<sup>15</sup> See G&N Comment and SO&G Comment.

<sup>16</sup> See G&N Comment.

<sup>17</sup> See G&N Comment.

<sup>18</sup> See Estell Comment; Sherman Comment; Mangano Comment; Miller Comment; and M&P Comment.

<sup>19</sup> See G&N Comment; Estell Comment; Mason Comment; Jamieson Comment.

<sup>20</sup> See Estell Comment; Mason Comment; and Sherman Comment.

<sup>21</sup> See Estell Comment; Sherman Comment; and Mangano Comment.

<sup>22</sup> See Mason Comment; Sachs Comment; SO&G Comment; M&P Comment; and W&H Comment.

<sup>23</sup> See SIA Comment.

<sup>24</sup> See SIA Comment; Jamieson Comment; Partnervest Comment; McGinnis Comment; Finance 500 Comment; and Form Letter Comment.

<sup>25</sup> See SIA Comment and Jamieson Comment.

<sup>26</sup> See Partnervest Comment; McGinnis Comment; Finance 500 Comment; and Form Letter Comment.

<sup>27</sup> See SIA Comment; Partnervest Comment; McGinnis Comment; Finance 500 Comment; and Form Letter Comment.

<sup>28</sup> See Eastmann Comment; McQuade Comment; Fired Broker Comment; Marchetta Comment; Macias Comment; djs Comment; LaVoice Comment; Kus Comment; Haburjak Comment; and Aldendifer Comment.

<sup>29</sup> NASD has, since the inception of the CRD system, executed expungements involving customer dispute information based on a court order or (since the imposition of the moratorium in 1999 on expungements based solely on arbitration awards) court confirmation of an arbitration award directing expungement. These court orders included expungement relief granted in cases involving both settlements and hearings on the merits.