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May 13, 2014

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
rule-comments@sec.gov

Re: File No. SR-FINRA-2014-020; Proposed Rule Change to Adopt FINRA Rule 2081 (Prohibited Conditions Relating to Expungement of Customer Dispute Information)

Dear Ms. Murphy:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") relating to both investor protection and disclosure.

PIABA submits this comment in support of FINRA's proposal to prohibit firms from conditioning settlement of arbitration claims on a customer's cooperation with, or non-opposition to, a broker's request for expungement. If approved, the proposed rule change contained in Rule Filing File No. SR-FINRA-2014-20 would result in the adoption of new FINRA Rule 2081, prohibiting member firms and associated persons from conditioning or seeking to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer's agreement to consent to, or not to oppose, the firm's or associated person's request to expunge such customer dispute information from the Central Registration Depository ("CRD").

PIABA strongly supports the adoption of proposed Rule 2081. While FINRA has taken steps in the past to discourage the practice of conditioning settlements on the customer's consenting to or not opposing expungement, this practice nonetheless persists and remains a threat to the transparency and integrity of the CRD. By prohibiting this practice, instead of merely discouraging it, FINRA would take an important step toward improving the integrity of the CRD system with respect to the full and fair disclosure of associated persons' history of customer disputes and complaints.

The need for Rule 2081 is demonstrated by research indicating that arbitrators continue to routinely grant requests for expungement following settlements of customer claims, despite FINRA's rule changes intended to make obtaining expungement more difficult. In October 2013, at the time FINRA issued guidance to arbitrators that they should "inquire whether a party conditioned settlement on an agreement not to oppose a request for expungement relief,"¹ PIABA issued its own expungement study ("PIABA Expungement Study").² The PIABA Expungement Study found that for the time period January 1, 2007 through mid-May 2009, expungement was granted in 89 percent of the cases resolved by stipulated awards or settlement, and for the time period mid-May 2009 through the end of 2011, expungement relief was granted in 96.9 percent of the cases resolved by settlements or stipulated awards. In the PIABA Expungement Study, PIABA called for FINRA to take precisely this step – to prohibit firms and brokers from bargaining for or conditioning settlement on obtaining expungement.

Following the news articles reporting the results of the PIABA Expungement Study, U.S. Sen. Edward J. Markey sent FINRA a letter asking it to address this same issue.³ On December 16, 2013, U.S. Sens. Jack Reed and Charles Grassley similarly asked FINRA to address the issues raised by the PIABA Expungement Study.⁴ The current rule proposal addresses one of the issues raised by PIABA and implements one of PIABA's suggestions. Accordingly, PIABA fully supports the rule proposal, which represents a strong and prompt response to some of the issues raised by the PIABA Expungement Study.

Although Rule 2081 represents a significant improvement of the existing rules concerning expungement, in light of the results of the PIABA Expungement Study showing that expungement has been routinely granted in the vast majority of cases resolved by settlement in which there has been an expungement request, PIABA remains concerned that expungements will continue to be granted at unacceptably high rates. According to FINRA's own website:

Expungement is an extraordinary remedy that should be granted only under appropriate circumstances. Information should be expunged only when it has no meaningful investor protection or regulatory value. Once information is expunged from the CRD system, it is permanently deleted a

¹ See SEC Release No. 34-71959; footnote 10.

² The PIABA Expungement Study is available at <http://piaba.org/system/files/pdfs/PIABA%20Expungement%20Study.pdf>.

³ See Letter from Senator Markey to FINRA, dated October 25, 2013, available at http://www.markey.senate.gov/imo/media/doc/2013-10-25_FINRA2.pdf.

⁴ See Letter from Senators Reed and Grassley to FINRA, dated December 16, 2013, available at <http://www.reed.senate.gov/imo/media/doc/FINRA%20letter1.pdf>.

and thus no longer available to the investing public, regulators or prospective broker-dealer employers.⁵

Despite expressing this sentiment, FINRA has not done enough in the past to ensure that expungement is in fact an “extraordinary” rather than a routine remedy. While proposed Rule 2081 will make it easier for customers to have input into expungement requests in cases that are settled, customers should not be the sole gatekeepers of the integrity of the CRD. The rule proposal does not address the fact that historically, expungement has been ordinary relief and been granted far too frequently when customers have not appeared to oppose the request for expungement. FINRA and the SEC must continue to take steps to ensure that information is not improperly removed from the CRD by a flawed process which allows arbitrators to grant expungement without the appropriate checks to ensure that the rules have been followed.

In the PIABA Expungement Study, PIABA suggested additional changes to address the issues raised by the study. PIABA recommended that FINRA significantly improve arbitrator training. Earlier this year, FINRA updated its expungement training for arbitrators.⁶ This training must be mandatory, and should be completed before an arbitrator considers any pending request for expungement. The results must also be monitored by both FINRA and the SEC to ensure that arbitrators understand the important role they play in maintaining the integrity of the CRD. If arbitrators are not informed about the proper procedures for expungement, they likely will continue to routinely grant unopposed expungement requests, as the PIABA Expungement Study shows they have done in the past.

PIABA also recommended that FINRA ensure that arbitrators have made the appropriate inquiry of brokers during expungement hearing at which customers do not appear. Such inquiry should include (1) inquiring of the broker whether there are other pending customer complaints; (2) examining the broker’s CRD; (3) inquiring whether the broker has been the subject of any regulatory proceedings and if so, the outcome; and (4) inquiring whether the broker has previously requested expungement relief and if so, the number of times it was granted or denied. While the answers to these questions would not be dispositive of individual expungement requests, the information elicited would likely permit arbitrators to make a decision concerning expungement with a more complete picture of the broker’s history of customer complaints and other transgressions.

⁵ See “Notice to Arbitrators and Parties on Expanded Expungement Guidance”, <http://www.finra.org/ArbitrationAndMediation/Arbitration/SpecialProcedures/Expungement/index.htm>.

⁶ See The Neutral Corner, Volume 1, 2014, available at <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p469117.pdf>.

Lastly, PIABA recommended that FINRA play a more active role in arbitrators' rulings on motions for expungement relief. It is important that FINRA review and critically assess all motions for expungement relief, particularly those made in cases resolved by settlement. Currently, FINRA only reviews expungements after they have been granted by arbitrators and only with respect to a broker's confirmation of the arbitration award. In its response to Senators Reed and Grassley, FINRA pointed out that it "has an active and ongoing litigation program to oppose expungement in court cases where FINRA determines its rules would be violated, and where FINRA believes there is a meaningful chance of success that outweighs the negative impact if the case is lost."⁷ As an example, FINRA cited to one case, *Schall v. FINRA*, in which it claimed it "vigorously" opposed confirmation of an arbitration award granting expungement:

This case arose from a settled arbitration case between a broker and his former firm, which was settled and included expungement relief for multiple customer complaints, arbitrations and lawsuits. Notwithstanding the findings made by the arbitrators in the award, FINRA vigorously opposed confirmation, on the ground that the arbitrators failed to comply with FINRA rules, and that they exceeded their authority in ordering expungement of customer complaints involving other employers who were not parties to the arbitration, and of a customer arbitration that at the time of the award was pending before a different arbitration panel.⁸

Despite the arbitrators' gross violation of FINRA rules, the court confirmed the arbitration award and ordered expungement, "holding that arbitration awards cannot be overturned by courts except under very, very limited circumstances, even where the arbitrators may have been wrong."⁹ Shockingly, despite FINRA's acknowledged failure by the *Schall* arbitrators to follow FINRA rules and the arbitrators' blatantly overreaching their authority, it appears these arbitrators are still actively serving in the FINRA pool of arbitrators.¹⁰

This case makes it clear that FINRA cannot wait until the confirmation stage to become involved in the expungement process. At that time, it is too late to ensure that the arbitrators are fully informed and follow the process set forth in the FINRA rules, and it may also be too late to prevent expungement of information from the CRD, even in

⁷ See FINRA letter to Senators Reed and Grassley, dated January 6, 2014 at page 8, available at <http://www.grassley.senate.gov/issues/upload/Ketchum-FINRA-Response-to-Senators-Reed-and-Grassley-1-6-14.pdf>.

⁸ Id.

⁹ Id.

¹⁰ The arbitrators in *Jason Schall v. UBS Financial Services, Inc.*, FINRA-DR No. 09-03582 continue to appear on lists of potential arbitrators in filed cases. In fact, two of the arbitrators have continued to consider and grant expungement requests in other cases. One of the arbitrators granted expungement following a settlement on June 6, 2012 in FINRA-DR No. 11-00486. Another of the arbitrators granted expungement in two separate cases within a month of one another in 2013, in FINRA-DR No 10-05827 on April 28, 2013 and in FINRA-DR No. 11-04165 on May 28, 2013.

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cases where FINRA believes expungement is not appropriate. Because of courts' hesitance to vacate arbitration awards, FINRA must be involved during the initial expungement request to have any meaningful impact.

Both FINRA and the state securities regulators should have the right to appear at hearings where expungement requests are being considered and should have the right to oppose such requests. In cases resolved by settlement, FINRA must require that the broker provide it with the settlement agreement, and it should review the agreement along with the motion for expungement relief, to ensure that such a request is proper. In addition, FINRA should provide the same documents to the state securities regulators for all states in which the broker is registered, and the state in which the case was filed. It is simply not realistic to expect minimally trained, part-time arbitrators, such as many of those in the FINRA pool, to act effectively to prevent expungement in inappropriate cases without active supervision from FINRA staff.

PIABA thanks the Commission for the opportunity to comment on this important rule proposal. PIABA fully supports the current rule proposal. PIABA hopes that both FINRA and the SEC will continue to take steps to ensure that the integrity of the information contained within the CRD is maintained. This information is important to investor protection and expungement must be what it was intended to be – extraordinary relief.

Very truly yours,



Jason Doss
PIABA, President