

## PIABA REPORT: DATA SHOW THAT FINRA EFFORTS TO SLOW EXPUNGEMENT OF BROKER MISCONDUCT HAS FAILED

*Expungement Still Granted in Roughly Nine out of 10 Cases Where It is Sought; Independent National Review by FINRA of Expungement Requests Urged.*

**WASHINGTON, D.C.//October 20, 2015**//Despite steps taken by FINRA to curb abuses, brokers seeking to expunge misconduct from their records continued to get such relief in roughly nine out of 10 cases (87.8 percent) that were resolved by stipulated award or settlement from 2012-2014, according to a new report from the nonprofit Public Investors Arbitration Bar Association (PIABA). In response, PIABA is urging FINRA to undertake “wholesale change” in its approach to dealing with broker misconduct expungements, including an independent national review by the self-regulatory organization of all such requests.

Attorney Joe Peiffer, president, PIABA, said: **“The bottom line from our new data is clear: FINRA’s efforts have failed to assure that expungement relief is an extraordinary remedy granted only in cases in which the customer dispute information requested to be expunged has no meaningful investor protection or regulatory value.”**

Attorney Scott Ilgenfritz, PIABA board member and lead author of the expungement study, said: **“Far from being an extraordinary remedy granted only when the expunged information has no meaningful investor protection or regulatory value, since 2007, expungement relief has been granted in the overwhelming majority of settled customer cases. FINRA’s attempts to address this problem through the adoption of rules, arbitrator training, and guidance to arbitrators have failed.”**

Highlights of the new PIABA report includes the following:

- **Broker expungement is a longstanding problem.** In its earlier 2013 expungement study, PIABA reviewed expungement requests in FINRA securities arbitration proceedings filed between January 1, 2007, and December 31, 2011, by investors against securities broker/dealers and/or individual brokers. For cases filed between January 1, 2007, and May 17, 2009, expungement relief was granted to stockbrokers following the settlement of the customers' claims in 89 percent of the cases in which expungement relief was sought. For cases filed between May 18, 2009, and December 31, 2011, expungement relief was granted to stockbrokers following the settlement of the customers' claims in 96.9 percent of the cases in which expungement relief was sought.
- **FINRA responded in 2013-2014 to concerns raised by PIABA and others.** In its 2013 expungement study, PIABA made certain recommendations to FINRA to attempt to address the alarming statistics arising from the analysis of the SAC data. The expungement issue also was highlighted by Seth E. Lipner in the Fordham Journal of Corporate and Financial Law. In response to all the scrutiny, FINRA took certain actions. In 2013, FINRA increased arbitrator guidance and training concerning requests for expungement relief by stockbrokers and the role that arbitrators play in deciding whether to grant such relief. Then, in February 2014, FINRA proposed a rule change to prohibit member firms and associated persons from conditioning or seeking to condition settlement of a customer dispute on, or to otherwise compensate a customer for, the customer's agreement to consent to, or not to oppose, a member's or associated person's request to expunge such customer dispute information from the CRD system.
- **Data through 2014 show the FINRA “reforms” not working.** To attempt to determine the effect of FINRA's actions and to see whether there has been any meaningful change in the rate of the granting of expungement relief to stockbrokers following the settlement of customer claims, PIABA undertook a new analysis of awards mentioning the term "expungement" in 833 cases filed between January 1, 2012, and December 31, 2014. The results of the analysis of the statistics regarding expungement relief sought in cases involving stipulated awards or settled customer claims remains alarming. For such cases filed in 2012, expungement relief was granted in 86.5 percent of the cases. For such cases

filed in 2013, expungement relief was granted in 89.8 percent of the cases. And, finally, for such cases filed in 2014, expungement relief was granted in 91.7% of the cases. Overall, for the settled cases filed between January 1, 2012, and December 31, 2014, in which expungement relief was sought, expungement was granted in 87.8 percent of such cases – virtually unchanged from the levels seen in the 2013 PIABA report.

Attorney Hugh Berkson, incoming president, PIABA, said: **“A wholesale change needs to occur with respect to the handling of broker requests for expungement relief in settled customer cases. PIABA believes that FINRA needs to take several additional actions that would address and correct the clearly broken current system of review and determination of broker expungement requests in settled customer cases. Implementing the foregoing suggestions would better assure the accuracy and integrity of the customer dispute information in the CRD system and would address the interests of all parties affected by requests for expungement relief in settled customer cases: investors, regulators, member firms, and brokers.”**

PIABA believes that FINRA should take a number of key steps, including the following:

- ***FINRA should propose a rule change to make its national hearing officers the impartial adjudicators of requests for expungement relief in settled customer cases.*** For all such proceedings, a FINRA enforcement attorney should be assigned to review and investigate a broker's request for expungement relief and to oppose the request, if appropriate. The standard for determining whether an expungement request is to be granted should be whether the information the broker seeks to expunge has no meaningful investor protection or regulatory value. Customers must be allowed to testify (by telephone if requested) and offer documentary evidence in opposition to expungement relief if they so desire, or to submit a statement or declaration with or without exhibits setting forth the customer's position with respect to the request for expungement relief.
- ***FINRA should improve disclosure and raise the bar in expungement cases.*** FINRA should also seek approval from the SEC of amended procedures with respect to the handling of post-settlement expungement relief requests, including: (a) FINRA should provide prompt notice to state securities regulators of a broker request for expungement relief in a settled customer case to provide state regulators with the opportunity to oppose the requested expungement relief; (b) the costs of such proceedings should be borne by the broker seeking expungement relief through filing fees and hearing fees; (c) either a rebuttable presumption should be established that the facts alleged in the customer's statement of claim are true or brokers should be required to meet a "clear and convincing evidence" burden of proof to obtain expungement relief; and (d) a time limit should be imposed on the ability of brokers to seek expungement relief with respect to customer dispute information in the CRD system, such as no longer than one year from the date of the resolution of the customer's claim.
- ***FINRA should further improve education of arbitrators.*** PIABA believes arbitrators should continue to hear and determine broker expungement requests in cases tried on the merits. FINRA should continue its efforts to require arbitrator training and to provide guidance to arbitrators with respect to the review and determination of expungement requests by brokers following final, contested evidentiary hearings of customers' claims. That training and guidance should include education concerning the meaning and application of the new expungement standard: that the information sought to be expunged has no meaningful investor protection or regulatory value.

## **ABOUT PIABA**

Public Investors Arbitration Bar Association is an international, not-for-profit, voluntary bar association of lawyers who represent claimants in securities and commodities arbitration proceedings and securities litigation. The mission of PIABA is to promote the interests of the public investor in securities and commodities arbitration, by seeking to protect such investors from abuses in the arbitration process, by seeking to make securities arbitration as just and fair as systemically possible and by educating investors concerning their rights. For more information, go to [www.piaba.org](http://www.piaba.org).

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**EDITOR'S NOTE:** A streaming audio replay of the news event will be available on the Web at <http://www.piaba.org/> as of 5 p.m. EDT on October 20, 2015.