



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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March 18, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F St. NE
Washington, DC 200549-1090

RE: FINRA Proposed Rule Change to Apply Minimum Fees to Requests for Expungement of Customer Dispute Information – File No. SR-FINRA-2020-005

Dear Ms. Countryman:

I write on behalf of the Public Investors Advocate Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors. Since its formation in 1990, PIABA has promoted the interests of the public investor in all dispute resolution forums, while also advocating for public education regarding investment fraud and securities industry misconduct. Our members and their clients have a fundamental interest in the rules promulgated by the Financial Industry Regulatory Authority (“FINRA”) that relate to investor protection.

We appreciate the opportunity to comment on FINRA’s proposed rule changes to the FINRA Code of Arbitration for Customer Disputes and the FINRA Code of Arbitration for Industry Disputes in regard to the fee structure for requests for the expungement of customer dispute information. While PIABA supports FINRA’s current proposal to apply minimum fees to requests for the expungement of customer dispute information, it is disappointed that FINRA has chosen to only focus on fees for expungement requests, rather than on the host of other proposed rules that were part of FINRA’s request for comments on expungement filed over two years ago.¹ FINRA’s other proposed rules, such as codifying current FINRA guidance that expungement should be limited only to information that has “no meaningful investor protection or regulatory value;” a specially trained arbitrator pool to consider expungement requests; strict time limitations on expungement requests; requiring a recommendation for expungement be granted by a unanimous three arbitrator panel; and requiring parties seeking expungement to appear in person or via videoconference at the expungement hearing are all more impactful to investor protection and limiting the improper abuse of the expungement process than FINRA’s current proposal regarding minimum fees for expungement requests.² While FINRA does note that it “is separately developing other changes to the current expungement framework, including codifying as rules the Notice to Arbitrators and Parties on Expanded Expungement Guidance,”³ PIABA believes that FINRA should have

¹ See FINRA Regulatory Notice 17-42, *Expungement of Customer Dispute Information* (December 2017).

² PIABA submitted extensive comments to FINRA regarding proposed expungement rules revisions during the comment period for FINRA Regulatory Notice 17-42. See PIABA Comment Letter to Marcia Asquith, FINRA Regulatory Notice 17-42, *Expungement of Customer Dispute Information* (February 2, 2018), attached as Exhibit A. FINRA did not attach PIABA’s comment letter to this rule filing because it deemed our letter “not applicable to this filing.” See SEC Release No. 34-88251; File No. SR-FINRA-2020-005 (February 20, 2020), 11172.

³ See SEC Release No. 34-88251; File No. SR-FINRA-2020-005 (February 20, 2020), fn3.

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prioritized these other important rules proposals concerning expungement, rather than moving forward first on minimum expungement fee proposals.

As discussed in greater detail below, while PIABA supports FINRA's request to amend its rules to apply minimum fees to requests for the expungement of customer dispute information it believes that FINRA's proposal should be revised to require that all requests for the expungement of customer dispute information be heard before a three-person arbitration panel.

A. FINRA's Proposed Revision of Expungement Request Fees.

PIABA agrees with FINRA that associated persons and member firms are taking advantage of the current fee structure and avoiding paying proper fees associated with requests for expungement. In particular, the practice of adding a small monetary claim to a request for expungement in a "straight in" expungement request⁴ is a particularly egregious abuse of the process. FINRA details how under the current FINRA arbitration rules a party seeking expungement can add a small monetary claim to its expungement request and ensure that its filing and hearing session fees are decreased by over 96% and also ensure that the expungement request is heard by a single arbitrator rather than a three arbitrator panel.⁵ Disturbingly, this abusive process has become the norm. According to FINRA, parties seeking expungement added a small monetary claim in 2,356 requests for expungement – representing 76% of straight in expungement requests - between January 2016 and June 2019.⁶

FINRA's proposal primarily seeks to address these abusive tactics by requiring fees for expungement requests be assessed at least as much as a non-monetary claim, thereby removing the benefit of adding a small monetary claim. Thus, FINRA proposes that: (1) filing fees for expungement requests be assessed at the higher of the non-monetary fee or the claim amount; (2) that a minimum member surcharge equal to a non-monetary claim be assessed against the applicable member firm in straight-in expungement requests; (3) that hearing sessions fees for expungement requests be at least equal to a non-monetary claim; and (4) that process fees for straight-in expungement requests be assessed against the applicable member firm at least equal to non-monetary claims. PIABA agrees with these proposed rules and with the disincentivizing of adding nominal monetary claims to expungement requests.

PIABA also agrees with FINRA's proposal that filing fees be assessed for all expungement requests, including those made during an existing customer arbitration. Currently, a member firm or associated person that requests expungement during a customer-initiated arbitration is not required to pay a filing fee. However, as FINRA Notes:

A request for expungement is a claim that a party is requesting the arbitrators to decide. Under the Codes, if a party files a claim or adds a claim in an answer to a statement of claim, the respondent must pay all required filing fees. As an expungement request is also a claim, the party requesting this relief should also pay a filing fee.⁷

PIABA agrees that a request for expungement made by a respondent in a customer-initiated arbitration is equivalent to a non-monetary counterclaim and should be assessed a filing fee consistent with that. We further agree that this fee is commensurate with arbitrators' "unique and distinct role" in the expungement process and the additional steps arbitrators are required to take in deciding expungement requests. PIABA further believes that requiring the payment of a filing fee at the time an expungement request is made would discourage the frivolous addition of such requests by respondents in statements of answer.

⁴ FINRA defines a "straight in" expungement request as a separately filed arbitration seeking expungement, as contrasted to expungement requests made by associated persons during the pendency of a FINRA customer arbitration.

⁵ See SEC Release No. 34-88251; File No. SR-FINRA-2020-005 (February 20, 2020), 11167, fn24.

⁶ *Id.* at 11169-70.

⁷ SEC Release No. 34-88251; File No. SR-FINRA-2020-005 (February 20, 2020), 11167.

B. FINRA Rules Should Require That all Expungement Requests are Heard by a Three Person Arbitration Panel.

Throughout the rule filing, FINRA acknowledges the desirability of expungement requests to be heard before a three-person arbitration panel, rather than a single arbitrator. FINRA first states:

FINRA believes that most expungement requests should be decided by a three-person panel. Expungement requests may be complex to resolve, particularly straight-in requests where customers typically do not participate in the expungement hearing. Thus, having three arbitrators available to ask questions and request evidence would help ensure that a complete factual record is developed to support arbitrators' decision at such expungement hearings.⁸

FINRA later speculates that the proposed rule change *should* result in more three-person arbitration panels hearing expungement requests, noting: "The proposed rule change should also result in more expungement requests being heard by a three-person panel. A three-person panel will help ensure a complete factual record to support the arbitrators' decision, particularly in straight-in requests that often do not include customer participation and can be complex to resolve."⁹

However, in discussing the economic impact of the proposed rule changes, after first stating that that the proposed rules would "trigger a three-person panel for all straight in requests," FINRA admits that the "impact of this change may be small because parties may still jointly agree to a single arbitrator."¹⁰

In other words, considering that virtually all straight in expungement requests are between registered representatives and their present/former employing member firms who have aligned interests in favor of expungement, there is no mechanism in the proposed rules that would prevent these aligned parties from simply agreeing to have the expungement matter heard by a single arbitrator, irrespective of the fact the filing fees would now be higher. Moreover, since, unlike FINRA's prior broader expungement rules proposal, FINRA's current rules proposal does not alter or revise FINRA's default Neutral List Selection System, a registered representative and member firm that agreed to have a straight-in expungement request heard by a single arbitrator would be able to collectively strike eight out of the ten arbitrators listed on a generated list, virtually assuring the most favorable arbitrator possible will preside over the expungement request.

As such, contrary to FINRA's assertion, given current FINRA rules permitting parties to agree to a single arbitrator, there is no reason to believe that there will be a material increase in the number of expungement requests heard by a panel of three arbitrators under FINRA's current rules proposal.

PIABA believes that rather than hoping that the new rules "should" result in more expungement requests are heard before three-person arbitration panels, FINRA should *require* this under the revised arbitration rules. As FINRA noted, there are worthwhile reasons for expungement requests to be heard before a three-person arbitration panel, rather than a single arbitrator, and as such FINRA should close the remaining loophole in its rules and ensure that all such expungement requests are adjudicated by three-person arbitration panels.¹¹

⁸ SEC Release No. 34-88251; File No. SR-FINRA-2020-005 (February 20, 2020), 11167.

⁹ SEC Release No. 34-88251; File No. SR-FINRA-2020-005 (February 20, 2020), 11169.

¹⁰ FINRA Rules 12401(c) and 13401(c) permit parties to FINRA arbitration to agree to a single arbitrator to decide their case, even if the filing amount would otherwise require a three-person arbitration panel.

¹¹ As noted above, *see* note 2 *supra*, PIABA has already submitted an extensive and detailed comment letter to FINRA regarding the full breath of suggested revisions to FINRA's expungement framework that go far beyond a mandated requirement for a three-person arbitration panel to hear all expungement requests. While PIABA will refrain from discussing all of these additional issues and considerations at this point, it believes there is no reason to refrain from mandating a three-person arbitration panel handle expungement requests, even if further proposed revisions will be forthcoming from FINRA when it addresses the other proposed changes to the expungement framework.

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PIABA appreciates the opportunity to submit these comments and urges the Commission to approve the proposed rules with the revisions suggested above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Samuel Edwards". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Samuel Edwards
PIABA President