



PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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September 6, 2022

Via Electronic Mail @ Rule-comments@sec.gov

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F St. NE
Washington, DC 20549-1090

**RE: FINRA Proposed Rule Change to Amend the Codes of Arbitration
Procedure to Modify the Current Process Relating to the Expungement
of Customer Dispute Information – File No. SR-FINRA-2022-024**

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.

Thank you for the opportunity to comment on FINRA’s proposed rule changes to the FINRA Code of Arbitration Procedure for Customer Disputes and the FINRA Code of Arbitration Procedure for Industry Disputes in regard to the expungement of customer dispute information from an associated person’s registration records maintained in the Central Registration Depository (“CRD”). PIABA has studied and commented extensively on issues surrounding expungement. Past PIABA studies repeatedly found that in cases where there had been a stipulated award or settlement, expungements were granted in an abnormally high number of cases. One study found expungements were granted in as much as 87.8% of all such cases.¹ In practice, expungement has not been the “extraordinary remedy” that it is supposed to be, but something that has been routinely granted, with troubling consequences for investor protection. BrokerCheck, which derives its information from the CRD, is the primary source for investors to review broker disclosures. A 2021 study showed that brokers with multiple customer complaints or cases filed are

¹ PIABA, *Update to the 2013 Expungement Study of the Public Investors Arbitration Bar Association*, October 20, 2015. Available at: <https://piaba.org/sites/default/files/newsroom/2015-10/Update%20on%20the%202013%20Expungement%20Study%20of%20PIABA%20%28October%202020%2C%202015%29.pdf>

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far more likely to repeat future unlawful conduct.² Yet, brokers have been able to take advantage of the expungement process and its blind spots, to wipe their records clean nearly 90% of the time.

PIABA appreciates FINRA's continued efforts to examine the expungement problem and attempt to find solutions to the issues previously identified by PIABA's members.³ PIABA believes that SR-2022-024 is a significant improvement over current FINRA rules, and over FINRA's prior rule proposal concerning expungement, SR-2020-030. As detailed below, PIABA particularly supports FINRA's proposal to require notification to state securities regulators in every expungement request, and to permit state securities regulators to meaningfully participate in "straight-in" expungement cases.

Notwithstanding, PIABA believes that FINRA should have proposed additional changes to the expungement rules to ensure expungement becomes the "extraordinary remedy" it is supposed to be. First, PIABA believes that the time limitations for straight-in expungement requests should be a uniform one-year, as FINRA first proposed in Regulatory Notice 17-42,⁴ not the currently proposed two-year (arbitrations that end without an expungement determination) or three-year (customer complaints that do not progress to arbitration) limitation. Second, FINRA should reinstate the requirement it proposed in Regulatory Notice 17-42 that arbitration panels must find the underlying customer dispute information has "no investor protection or regulatory value" in order to recommend expungement. Finally, FINRA should prohibit associated persons from making "straight-in" expungement requests for multiple, unrelated matters by denying the FINRA forum for such requests.

In sum, PIABA applauds FINRA's proposal as a meaningful step in the right direction, but believes there are additional and important ways that the expungement process could be further improved. In the interest of immediate investor protection concerns, and to move forward the important provisions of SR-2022-024 such as mandatory state regulator notification and opportunity to participate in expungement proceedings, PIABA urges adoption of the proposed changes.

A. PIABA Supports Most of FINRA's Proposed Revisions.

First, PIABA commends FINRA for moving away from its position in SR-2020-30 and reverting back to its proposal in Notice 17-42 that arbitration decisions recommending expungement must be unanimous. As PIABA has previously stated, the extraordinary remedy that expungement is meant to be means that "[r]equiring unanimous decisions properly reflects the heightened burden and importance for such proceedings."⁵

² Colleen Honigsberg and Matthew Jacob, *Deleting misconduct: The Expungement of BrokerCheck Records*, 139 *Journal of Financial Economics* 800–831 (2021).

³ See, David Meyer, Jason Doss, and Lisa Braganca, *2021 Updated Study on FINRA Expungements: A Seriously Flawed Process that Should be Fixed Now to Protect the Integrity of the Public Record*, PIABA and PIABA Foundation (2021); and PIABA, *Expungement Study of the Public Investors Arbitration Bar Association*, (Oct. 16, 2013).

⁴ FINRA, Regulatory Notice 17-42, (December 7, 2017), available at https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-42.pdf.

⁵ See PIABA Comment Letter to Brent Fields, File No. SR-FINRA-2020-030 (October 23, 2020) ("PIABA Fields Letter"), p.2.

PIABA notes and supports the proposal to codify and update the “best practices” in the Notice to Arbitrators and Parties on Expanded Expungement Guidance be codified and updated. It has been a long time coming for these reminders to arbitrators and parties to be formally adopted as part of the procedural rules.

In regard to FINRA’s proposed rule changes regarding expungement requests made during a customer arbitration, PIABA is largely supportive. In particular, PIABA supports removing the ability of an arbitration panel in a customer case to conduct separate expungement hearings after a case closes other than by award or by award without a hearing. PIABA agrees with FINRA that such arbitration panels do not get to hear the full presentation of the evidence on the merits of the underlying customer case and that “customers or their representatives have little incentive to attend and participate in an expungement hearing once their case has settled.” Thus, requiring associated persons to instead file a new “straight-in” expungement request after the arbitration case has closed is a better alternative.

FINRA’s proposed changes to “straight-in” expungement requests includes new, important procedural changes to the appointment of arbitrators. These proposals seek to avoid the cherry-picking of arbitrators who are historically more likely to grant expungements. Specifically, the proposal includes a provision to require a three-arbitrator panel rather than permitting single arbitrator panels to determine these expungement requests. There would also be no permitted changing of the panel by the parties (by agreement or otherwise) including striking panel members, changing or reducing the panel by agreement, or appointing particular arbitrators by agreement. These are critically important change as they remove actual or apparent repeat-player incentives to decide expungement cases.

B. Permitting State Regulators to Participate in Straight-In Expungement Hearings is a Significant Improvement to the Expungement Process.

FINRA’s proposal requiring giving notice of straight-in expungement requests to state securities regulators and to permit regulators to send representatives to participate in these proceedings is a significant improvement to the expungement rules. State securities regulators are major stakeholders and co-developers with FINRA of the CRD system. The records contained in the CRD system are state records. Through the use of uniform laws and corresponding rules, NASAA, FINRA and the SEC designed a framework that sets forth when and how regulatory information, including customer complaints and arbitrations, must be reported to regulators. Given this, as PIABA previously noted, “any decision to expunge information from the CRD system is necessarily a *regulatory determination* since it is superseding the considered and deliberate decisions made by securities regulators as to what information should be . . . maintained in the CRD system.”⁶ As such, FINRA’s proposal to permit state securities regulators to participate in straight-in expungement hearings ensures that for the first time state regulators will be able to play a significant and active role in this regulatory determination, which aligns with the important regulatory function of the CRD system.

PIABA continues to believe that expungement determinations should be removed from the FINRA arbitration forum altogether and have the “determinations made by securities regulators directly or through a regulatory tribunal established and agreed to by FINRA, NASAA and the SEC.”⁷ Nevertheless, PIABA

⁶ PIABA Comment Letter to Brent Fields, File No. SR-FINRA-2020-030, p.7 (emphasis in original).

⁷ *Id.*

applauds FINRA for the proposed rule change to better enable state regulators to exercise their regulatory duties by examining expungement requests and participating in FINRA expungement hearings.

C. The Time Limitations for Expungement Requests Should Revert Back to the One-Year Time Limitation Previously Proposed by FINRA.

PIABA is relieved that FINRA has revised the proposed six-year time limitation for customer complaints not filed in arbitration contained in SR-FINRA-2020-030. While the currently proposed three-year time limitation for expungement requests is an improvement over prior SR-FINRA-2020-030, PIABA continues to believe that FINRA should revert back to a one-year time limitation for expungement requests both not filed in arbitration and for arbitrations which closed without an expungement determination, as proposed by FINRA in Regulatory Notice 17-42.

D. FINRA’s Previously Proposed “No Investor Protection or Regulatory Value” Requirement Should be Reinstated.

In Regulatory Notice 17-42, FINRA proposed that arbitration panels recommending expungement would be required to find that “the customer dispute information ha[d] no investor protection or regulatory value.”⁸ PIABA supported this proposal noting that, “[r]equiring that an arbitration panel to find that customer dispute information does not have any investor protection or regulatory value . . . emphasizes the notion that arbitrators’ actions have significant repercussions on investor protection.”⁹

However, both in SR-FINRA-2020-030 and its current proposal, FINRA removed the “no investor protection or regulatory value” requirement. PIABA disagrees with this decision, and again urges the reinstatement of this requirement. PIABA believes that the “no investor protection or regulatory value” finding requirement is consistent with the extraordinary nature and high standards of expungement relief.

Further, PIABA believes that this requirement would be very helpful to arbitration panels that may misinterpret and misapply FINRA Rule 2080 standards, by providing additional clarity as to the standard that must be met to grant expungement. This would help ensure that the highly valuable, relevant information contained in the CRD system is not inappropriately removed from the investing public’s view.

PIABA urges the Commission to reinstate this requirement into the proposed revised expungement rules.

E. FINRA Should Prohibit Straight-In Expungement Requests for Multiple, Unrelated Matters.

Perhaps the worst abuse of the current expungement rules are the straight-in expungement requests to expunge multiple, often dated, and unrelated matters from an associated person’s CRD records. FINRA is well aware of this abusive tactic, but FINRA’s proposal contains no specific prohibition against it. Rather,

⁸ FINRA, Notice to Members 17-42, p. 9.

⁹ See PIABA Comment Letter to Marcia Asquith, FINRA Regulatory Notice 17-42, *Expungement of Customer Dispute Information* (February 2, 2018), p. 10.

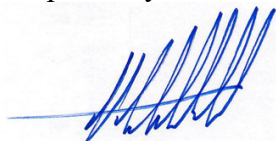
in discussing the proposed shorter time limitations, FINRA notes, “[t]he proposed time limits may also curtail the common practice of bundling unrelated and aged expungement requests in one straight in request.”¹⁰ While PIABA agrees that tighter time limitations, along with some of the other revisions proposed, may help curtail the practice of bundling unrelated expungement requests, FINRA should prohibit the practice altogether.

FINRA’s proposal for expungement requests during an arbitration hearing notes that the “Director would be authorized to deny the DRS forum to requests made during a customer arbitration to expunge customer dispute information that is not associated with the customer’s statement of claim.”¹¹ In this way, arbitration panels are prevented from hearing expungement requests from multiple, unrelated matters.¹² FINRA should use the same denial of the forum mechanism for straight-in expungement requests that join multiple, unrelated matters in a combined expungement request.

The extraordinary nature of expungement relief and the high burden necessary to obtain this relief does not and should not lend itself to straight-in requests for the expungement of multiple, unrelated matters. An arbitration panel for a straight-in expungement request should be focused and limited to one particular prior arbitration claim or CRD occurrence and the facts and circumstances surrounding that claim or occurrence. Permitting multiple, unrelated claims to be subject to a single straight-in expungement request unnecessary complicates the case and broadens its intended, limited scope. Further, such requests cheapen the extraordinary nature of expungement and, by extension, are inappropriate for FINRA arbitration since they are contrary to FINRA’s purpose and the intent of the Code.¹³ As such, FINRA should specifically prohibit these requests.

PIABA appreciates the opportunity to submit these comments. PIABA will continue to advocate for the additional improvements in the expungement process. However, recognizing that these proposed rule changes have been years in the making, and because of the urgency of protecting the investing public and maintaining the integrity of the CRD system, PIABA supports adoption of the proposed changes in SR-FINRA-2022-024.

Respectfully submitted,



Michael S. Edmiston
PIABA President

¹⁰ See Securities and Exchange Commission Release No. 34-95455; File No. SR-FINRA-2022-024 (August 15, 2022), 50181.

¹¹ *Id.* at 50175.

¹² In a contested customer arbitration, multiple, unrelated claims could also be subjected to a motion to sever pursuant to FINRA Rules 12312, should the opposing party believe they did not arise from “the same transaction or occurrence or series of transactions or occurrences.”

¹³ See FINRA, Rule 12203, Denial of FINRA Forum.