PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION
1225 West Main Street, Suite 126 | Norman, OK 73069
Toll Free (888) 621-7484 | Fax (405) 360-2063
www.piaba.org

October 23, 2020

via email to rule-comments@sec.gov
Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **File No. SR-FINRA-2020-030**
(FINRA proposed rule change to modify the current process relating to the expungement of customer dispute information)

Dear Mr. Fields:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international, not-for profit, voluntary bar association that consists of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA's mission has been to promote the interests of the public investor by, among other things, seeking to protect such investors from abuses in the arbitration process, seeking to make the arbitration process as just and fair as possible, and advocating for public education related to investment fraud and industry misconduct. Our members and their clients have a fundamental interest in the rules promulgated by the Financial Industry Regulatory Authority ("FINRA") that govern the practices of brokers and broker-dealer firms.

We welcome the opportunity to comment on the proposed changes that would modify the current process relating to the expungement of customer dispute information from an associated person's Central Registration Depository ("CRD"). As you know, PIABA has studied and commented on issues surrounding expungement extensively. Past PIABA studies have found that where there had been a stipulated award or settlement, expungements were granted in 87.8% of cases. Recently, and consistent with PIABA's findings, FINRA found that expungement was granted in 88% of settled cases. In short, expungement is not the "extraordinary remedy" that it is supposed to be, but something that is granted 9 out of 10 times when it is sought and something associated persons have come to take for granted.

With that background, PIABA supports FINRA's efforts to examine the issue and attempt to find solutions to the issues PIABA has previously identified. SR-2020-030 is largely a step in the right direction, but it is clear that FINRA has not gone far enough and appears to have succumbed to industry pressure on a few key points in the past three years since sought comment on FINRA Regulatory Notice 17-42.

Officers and Directors
President: David P. Meyer, OH
EVP/President-Elect: Michael Edmiston, CA
Secretary: Thomas D. Mauriello, CA
Treasurer: Darlene Pasieczny, OR
Hugh D. Berkson, OH
Samuel B. Edwards, TX
Robert J. Girard II, CA
Marnie C. Lambert, OH
Christine Lazaro, NY
Thomas D. Mauriello, CA
David P. Neuman, WA
Timothy J. O'Connor, NY
Joseph C. Peiffer, LA
Jeffrey R. Sonn, FL
Andrew J. Stoltmann, IL
Robin S. Ringo, *Executive Director*

First, in a step backwards from Notice 17-42, FINRA has determined to allow arbitrators to recommend expungement via a majority of arbitrators considering the issue, as opposed to a unanimous decision. As described below, if expungement is to truly be extraordinary, there should be no doubt in anyone's mind that the claim being expunged was factually impossible or clearly erroneous. A requirement of a simple majority sends a contradictory message to both arbitrators and parties. Second, PIABA disagrees with FINRA's determination not to propose that the panel must find "no investor protection or regulatory value." Third, the time limits for expungement requests should only be one year as proposed in Notice 17-42.

In short, FINRA knows it could do more to ensure that customer dispute information is not improperly expunged from an associated persons' public records. SR-FINRA-2020-030 is a step backwards from FINRA's proposals in Notice 17-42.

A. Expungement Decisions Should Be Decided by Unanimous Agreement

In Notice 17-42[1], FINRA proposed rules to expand the criteria a panel must follow before it may decide an expungement request. One of those rule proposals was that to recommend expungement, a three-person panel of arbitrators would require unanimous agreement.[2] The purpose of the expansion of the criteria was to clarify the process and guide the arbitrator's decision-making.[3]
After considering comments, FINRA determined to allow arbitrators to recommend expungement through a mere majority – not unanimous - decision.[4] While PIABA believes that expungement determinations should be made outside of the arbitration process, we respectfully disagree with FINRA's determination on this issue.

As evidenced by FINRA's own longstanding position[5] on this matter, expungement is an extraordinary remedy. Requiring unanimous decisions properly reflects the heightened burden and importance for such proceedings. Indeed, FINRA has promulgated rules and policies in the past that facilitate customer complaints from the CRD in extraordinary circumstances, and it must continue to do so.
However, opting for majority rule over unanimous decision for expungement determinations is simply incommensurate with the extraordinary nature of this particular remedy. Moreover, not requiring unanimous agreement for expungement determinations undercuts the intent behind the proposed rule

---

[1] Regulatory Notice 17-42, Financial Industry Regulatory Authority (December 7, 2017), available at https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-42.pdf.

[2] *Id.*at 9.

[3] *Id.*

[4] *See* Securities and Exchange Commission Release No. 34-9000, File No. SR-FINRA-2020-030, *Notice of Filing of a Proposed Rule Change to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitration Roster to Decide Certain Expungement Requests,* (September 25, 2020).

[5] *See, e.g. id.* at 3.

change, which is to (1) help preserve in CRD information that is valuable to investors and regulators (2) while allowing associated persons reasonable mechanisms to remove information that is inaccurate.[6] As explained below, a majority decision for expungement determinations will ultimately only harm the one group FINRA is charged to protect: public investors.

1. Unanimous Decisions Ensure Expungement Remedies Remain Extraordinary

FINRA makes clear that expungement should not be a common event. Whether discussed in its guidance, arbitration materials, or regulatory notices, the significance of the expungement process cannot be overstated. A permanent deletion of customer complaint information from the CRD system is indeed extraordinary relief, so it only makes sense that such a weighty determination is arrived through unanimous agreement by a panel.

Other rule proposals by FINRA support the gravity of the remedy. For example, the proposed change for FINRA Rule 12805(c) and 1380(c), which will remove the word "brief" before "written explanation," indicates to the panel that it must provide enough detail in the award to explain its rationale for recommending expungement.[7] This deletion strengthens the existing consensus that a short explanation is insufficient for such a meaningful determination.

It remains PIABA's position that if one of the arbitrators on a three-person panel believes that the customer dispute information has some meaningful investor protection or regulatory value, the information should remain on the associated person's record. Allowing unanimous consent by an arbitration panel will help ensure that expungement remains an extraordinary remedy.

2. *Divided Panel Determinations are Clearly Valuable to Public Investors and Associated Persons Still Have Access to Reasonable Mechanisms to Remove Inaccurate CRD Information*

One purpose of the proposed rule change is to help preserve in CRD information that is valuable to investors and regulators while allowing associated persons a reasonable mechanism to remove information that is inaccurate. However, by allowing arbitrators to recommend expungement through only a majority decision, FINRA is essentially declaring some arbitrators' dissenting opinions as valueless to investors. Public investors deserve full disclosure to protect themselves from harm, and having the ability to view divided panel decisions is an important tool aid in that goal of investor protection.

One such harm to investors is falling prey to bad actors who otherwise might have been avoided. Absent allowing unanimous panel agreements, investors will not have an accurate or comprehensive view of brokers' complaint history on CRD, which undermines the integrity of the entire process.

---

[6] *See, e.g.* Securities and Exchange Commission Release No. 34-9000, File No. SR-FINRA-2020-030, *Notice of Filing of a Proposed Rule Change to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitration Roster to Decide Certain Expungement Requests,* (September 25, 2020), at 141.

[7] *Id.* at 195-196.

Moreover, requiring unanimous decisions by arbitration panels does not impact an associated persons' ability to remove inaccurate information because the procedural mechanisms available to an associated person are the exact same if unanimous panel agreement was required. Rule 2080 standards will still provide grounds to expunge alleged inaccurate information.

3. *Unanimous Panel Decisions are Consistent in Other Provisions of the Customer and Industry Code*

In its rule proposal, FINRA acknowledges that the majority rule determination was consistent with what is required for other decisions in customer and industry arbitrations.[8] Specifically, FINRA cited Rules 12904(a) and 13904(a), which provide that all awards shall be in writing and signed by a majority of the arbitrators.[9] But the fact that the awards must be signed by a majority of arbitrators should not a primary, guiding consideration.

One reason is because rule consistency can be likewise found for unanimous agreement in other portions of the Customer and Industry Codes. For example, consider Motions to Dismiss[10] and Time Limitations dismissals,[11] which require unanimous agreement by the arbitration panel. Like awards, dismissals are an important part of the arbitration process yet the rule proposal does not explain the rationale for why matching the majority rule standards for awards is preferable.

In sum, PIABA respectfully disagrees with FINRA's determination that expungements are permitted by a mere majority decision.

B. Excluding the "No Investor Protection or Regulatory Value" Standard from the Proposal Harms Public Investors and Threatens the Integrity of the CRD

PIABA disagrees with FINRA's determination not to propose that the panel must find "no investor protection or regulatory value" to recommend expungement. By excluding this additional finding, arbitrators will continue to misinterpret and misapply Rule 2080 standards, which risks the accuracy and value of the CRD information for public investors and regulators.

As already set forth in PIABA's February 2018 Comment Letter to FINRA Regulatory Notice 17-42, Rule 2080 findings (*e.g.* factual impossibility or clearly erroneous, falsity) are high standards, which makes sense considering that expungement is an extraordinary remedy. Unfortunately, the confusion already present among arbitration panels, such as whether a claim is factually impossible or false where customers did not meet their burden to establish liability, or where an affirmative defense was present to limit

---

[8] *See, e.g., id.* at 121.

[9] *Id.*

[10] FINRA, Rule 12504(a)(7); FINRA, Rule 13504(a)(7).

[11] Rule 12206(b)(5); Rule 13206(b)(5).

liability, will only continue with FINRA's determination to not propose this language. The result will be the permanent unavailability of highly valuable, relevant information to the investing public. Maintaining the integrity of the information in the CRD system cannot be overstated. That is why PIABA continues to believe that clarifying this standard in the rules, combined with training, remains the best approach to obtain successful results in the expungement process.

C. The Time Limits for Expungement Requests Should Revert Back to the One Year Limit Previously Proposed by FINRA

In Notice 17-42, FINRA proposed one-year time limits for the filing of expungement requests for both arbitration cases that had closed without an award and for customer complaints that had not progressed to arbitration.[12] PIABA supported these limitations, stating, "PIABA believes that "at a maximum, a one-year time frame is acceptable" for these type of situations.[13] PIABA asserted that "a more stringent timeline will also lead to a higher quality of evidence for the Panel to consider, both in terms of testimony and documentary evidence, both which become less reliable and available with the passage of time."[14] PIABA further noted that a customer was "far more likely to participate in an expungement hearing when in takes place in close proximity to the underlying arbitration hearing."[15]

Unfortunately, rather than affirming the prior proposed one-year time limitation for the filing of expungement requests, FINRA's current proposal succumbs to industry pressure and goes backward by proposing to expand these limitations significantly. PIABA strongly disagrees with this revision to the prior proposal and urges the Commission to reinstate the one-year time limitations previously proposed. First, FINRA proposes to double the time limitation to two years for the filing of expungement requests after an arbitration is closed without going to award. FINRA asserts that a two-year time period "would help ensure that the expungement hearing is held close in time to the customer arbitration or civil litigation, when information regarding the customer arbitration is available and in a timeframe that would increase the likelihood for the customer to participate."[16] FINRA further states that such a time limitation "would allow the associated person time to determine whether to seek expungement."[17]

PIABA believes that extending the time limitation an additional year will unnecessarily degrade the quality of evidence for a panel to consider in making an expungement determination and decrease the likelihood that the customer will participate in the hearing for no additional benefit. Given that FINRA arbitrations are often filed several years after the underlying events that are the subject of the arbitration and can take

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

[13] *See* PIABA Comment Letter to Marcia Asquith, FINRA Regulatory Notice 17-42, *Expungement of Customer Dispute Information* (February 2, 2018), p.6 (emphasis in original).

[14] *Id.* at p. 5.

[15] *Id.*

[16] *See* SEC Release No. 34-90000; File No. SR-FINRA-2020-030 (October 1. 2020), 62171.

[17] *Id.*

two years or more to administer, giving associated persons a further two-year time period to *file* a new arbitration claim for expungement could mean that the expungement hearing itself will not occur until over a decade or more has passed from the underlying events. Further, since under the proposed rules firms and associated persons will be required to seek expungement in a customer's arbitration case or waive the ability to make such a request (should the case go to an award), there is no rationale or benefit for giving associated persons two additional years "to determine whether to seek expungement" since they would have already made that determination in the underlying customer arbitration. As such, the previously proposed one-year timeframe for expungement requests that were the subject of arbitrations that do not go to award should be reinstated by the Commission, as it provides ample time for registered representatives to decide if they wish to file a new arbitration claim for expungement, while ensuring that the timeframe for the expungement request is much closer to the original closed arbitration, thereby increasing the chances both that the customer will participate and the quality of the evidence for the new arbitration panel to consider.

While FINRA's proposal to double the time limitation for arbitrations that do not go to award is ill-advised and unnecessary, its new proposal for the time limitations to make expungement requests for customer complaints that are not filed in arbitration is far worse. FINRA's proposed rule change increases the time limitation ***six-fold*** – from one-year to six-years – from its prior proposal made in RN 17-42. Such an increase in the time limitation to file these expungement requests will significantly degrade the evidence for arbitrators to consider and lower the chances that a customer will participate in the arbitration hearing. As such, this will increase the chances that associated persons will be able to present a one-sided, distorted presentation of the facts of circumstances given rise to the customer complaint that the rule proposal is purportedly designed to prevent.

The rationales given by FINRA and the financial industry commentators for this six-fold expansion to the time limitation for these expungement requests are insufficient to justify the harm to investor protection that would occur due to the strong likelihood of more numerous one-sided, distorted expungement hearings with such an expansion.

Firms do not need *six years* to "complete investigations of customer complaints and close them in the CRD system." Indeed, any firm that had not completed its investigation of a customer complaint within six years would likely be sanctioned by FINRA for failure to maintain an adequate supervisory system. Six years is nowhere close to a "reasonable time limit to encourage customer participation and help ensure the availability of evidence," especially since customer complaints are almost never made with the assistance of counsel and do not have any of the additional fact-finding process, procedures and devices available to them that FINRA arbitrations do. As such, registered representatives making such expungement requests many years after the underlying customer complaint would be able to cherry pick whatever "evidence" they chose to present to the arbitration panel, distorting the process further.

The risk of duplicative requests for expungement should a customer complaint that was not an arbitration matter become one after the registered representative files an expungement claim is a small price to pay for the regulatory benefit – through better and more available evidence and increased customer participation – that will result from maintaining a one-year time limitation for these expungement requests, rather than increasing the time limits. Moreover, there are other alternatives that FINRA could consider that would lessen any perceived detriment to possible second expungement requests that would not decrease the regulatory benefit of a one-year time limitation, such as waiving the filing fee for the additional expungement request.

Accordingly, PIABA urges the Commission to reinstate the one-year time limitation that FINRA previously proposed for these expungement requests.

D. Expungement is a Regulatory Determination That Has No Place in FINRA's Dispute Resolution Forum

The CRD system was developed jointly by FINRA and the state securities regulators (NASAA), to maintain regulatory and licensing records for the brokerage industry. Through the use of uniform rules and corresponding rules, NASAA, FINRA and the SEC designed a framework that sets forth when and how regulatory information, including customer complaints, must be reported to regulators. Thus, 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 reported and maintained in the CRD system.

In contrast, FINRA's arbitration forum, is a private dispute resolution forum that is completely separate and distinct from FINRA's regulatory duties. FINRA arbitrators are charged with resolving disputes between investors and members of the securities industry. Asking FINRA arbitrators to also make the important regulatory determination as to whether or not information should be expunged from the CRD system is nonsensical as it usurps an important regulatory function from securities regulators whose statutory duties include protecting the investing public and maintaining the CRD system.

The fact that FINRA arbitration panels conduct arbitration hearings, review evidence, and take witness testimony concerning a customer dispute, does not qualify them to make regulatory determinations any more than it does to make broker disciplinary determinations. Just as FINRA arbitration panels are only permitted to make disciplinary referrals concerning broker conduct to FINRA's Department of Enforcement, but are prohibited from undertaking any disciplinary action or determinations, so should arbitrators be prohibited from making regulatory determinations as to the expungement of customer dispute information. Such important regulatory decisions should be made by the securities regulators who have been specifically tasked with making such determinations and who have overall responsibility for the CRD system.

While PIABA appreciates many of the reforms FINRA proposes to the expungement process as steps in the right direction, it believes that the long-term solution to correcting the expungement process must begin with removing expungement determinations from the FINRA arbitration forum altogether and instead have these determinations made by the securities regulators directly or through a regulatory tribunal established and agreed to by FINRA, NASAA and the SEC.

Respectfully submitted,

David P. Meyer
President, PIABA