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Post-Settlement Expungements: An Investor Protection Problem That Continues to Wait for a FINRA Solution

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INTRODUCTION

For more than two decades, the Financial Industry Regulatory Authority, Inc. ("FINRA") and its predecessor, the National Association of Securities Dealers, Inc. ("NASD"), have grappled with the issue of the expungement of information from the Central Registration Depository ("CRD") records of registered representatives.

Jointly developed by the North American Securities Administrators Association ("NASAA")[1] and the NASD, and implemented in 1981, the "CRD consolidated a multiple paper-based state licensing and regulatory process into a single, nationwide computer system."[2]

Today, the CRD system is an online registration and licensing system for the U.S. securities industry, state and federal regulators, and self-regulatory organizations ("SROs"). The CRD system contains broker-dealer information filed on Forms BD and BDW and information on associated persons filed on Forms U4 and U5. The CRD system also contains information filed by regulators via Form U6. The CRD system contains administrative information (*e.g.*, personal, organizational, employment history, registration and other information) and disclosure information (*e.g.*, criminal matters, regulatory disciplinary actions, civil judicial actions and information relating to customer disputes) filed on these forms.[3]

According to recent statistics, the CRD system currently "contains the registration records of more than 3,810 registered broker-dealers, and the qualification, employment and disclosure histories of more than 633,820 active registered individuals.[4]

The importance of maintaining the integrity and accuracy of the information on the CRD system is twofold. First, "state securities regulators

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1. "Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico." See, *About Us – Welcome to NASAA*, North American Securities Administrators Association, available at http://www.nasaa.org/about-us/ (last visited Jul. 7, 2017).
2. See, *CRD & IARD*, North American Securities Administrators Association, available at http://www.nasaa.org/industry-resources/investment-advisers/crd-iard/ (last visited Jul. 7, 2017).
3. See, *NASD Adopts Rule 2130 Regarding Expungement of Customer Dispute Information From The Central Registration Depository, NASD Notice to Members 04-16 (Mar. 2004)*, available at http://www.finra.org/industry/notices/04-16 (last visited Jul. 7, 2017).
4. See, e.g., *Central Registration Depository (Web CRD)*, Financial Industry Regulatory Association, available at http://www.finra.org/industry/crd (last visited Jul. 7, 2017).

rely upon [information on the CRD system] to make licensing decisions about brokers seeking to do business within their jurisdictions" and to "weed out bad actors and others who seek to harm investors."[5] Second, it is the information from the CRD system that serves as the predicate source for the partial disclosure information that is included on a BrokerCheck report for registered firms and individuals – a document that FINRA refers to as "a key component to FINRA's ongoing efforts to help investors make informed choices about brokers and brokerage firms."[6]

HISTORICAL PERSPECTIVE

In order to place the evolution of the expungement issue into a clear context, it is beneficial to consider some of the various pronouncements that have been issued by the NASD/FINRA over the years:

NASD Notice to Members 99-09: In February 1999, NASD issued Notice to Members 99-09. The purpose of the notice was to impose a moratorium on arbitration awards, issued on or before January 19, 1999, that granted the expungement of information, from the CRD system, absent the confirmation of the award by a court of competent jurisdiction. The moratorium, which was a product of discussions between NASAA and the NASD, was based on NASAA's opinion that, "under the laws of certain states, information filed with the CRD system is deemed to have been filed with those states and . . . is therefore a state record subject to all of the regulations and protocols that apply to state records." NASAA further opined that "state laws do not currently recognize the authority of an arbitrator to expunge a state record or do not otherwise currently permit such expungements because of state recordkeeping requirements."[7]

NASD Notice to Members 99-54: In July 1999, NASD issued Notice to Members 99-54. The purpose of the notice was to solicit comment on

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5. See, *NASAA Supports FINRA's Effort to Reduce Deletion of Customer Complaint Records*, North American Securities Administrators Association (Jul. 28, 2014), available at http://www.nasaa.org/32253/nasaa-supports-finras-effort-reduce-deletion-customer-complaint-records/ (last visited Jul. 7, 2017).
6. See, e.g., *FINRA Launches National Ad Campaign Promoting BrokerCheck – Spots Underscore the Ease and Importance of Checking Before You Invest*, Financial Industry Regulatory Association (Jun. 1, 2015), available at http://www.finra.org/newsroom/2015/finra-launches-national-ad-campaign-promoting-brokercheck (last visited Jul. 7, 2017).
7. *See*, NASD Regulation Imposes Moratorium on Arbitrator-Ordered Expungements of Information from the Central Registration Depository, NASD Notice to Members 99-09 (Feb. 1999), *available at http://www. finra.org/industry/notices/99-09 (last visited Jul. 7, 2017).*

the issues of arbitrator-ordered expungements and the moratorium on such expungements that had been imposed in January 1999. More specifically, the Notice sought "comment on possible approaches that would address the interests of parties to an arbitration in having an arbitrator's expungement order effected (or given some meaningful effect), which ordinarily requires erasing or physically removing information on the CRD system, while at the same time complying with any applicable state recordkeeping laws and maintaining the integrity of the CRD system."[8]

NASD Notice to Members 01-65: In October 2001, NASD issued Notice to Members 01-65. The purpose of the notice was to solicit comment on "the establishment of certain criteria that must be met, and procedures that must be followed, before NASD Regulation would expunge certain information from the Central Registration Depository (CRD) system pursuant to an expungement order." The primary predicate for the issuance of this notice was NASD's stated belief that policy and procedural refinements were "necessary to address the expungement of customer dispute information (e.g., customer complaints or arbitration claims)" and that "additional safeguards and procedures in the expungement process are necessary to ensure that investor protection interests are served before the extraordinary relief of expungement is granted." Of equal importance, this notice, for the first time, requested specific comment on whether NASD should establish expungement standards for arbitrators to consider that would "limit expungement of customer dispute information from the CRD system to cases where an expungement order is based on a finding by a fact finder (i.e., either an arbitrator or a court) that (1) the subject matter of a claim or information in the system involves a case of factual impossibility or 'clear error' (e.g., the associated person named in the proceeding did not work for the firm, or worked in a different office, and was named in error); (2) the claim in question is without legal merit; or (3) the information contained in the CRD system is determined to be defamatory in nature."[9]

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8. See, *NASD Regulation Seeks Comment On Issues Relating To Arbitrator - Ordered Expungements Of Information from the Central Registration Depository, NASD Notice to Members 99-54 (Jul. 1999)*, available at http://www.finra.org/industry/notices/99-54 (last visited Jul. 7, 2017).
9. *See,* NASD Seeks Comment on Proposed Rules and Policies Relating to Expungement of Information from the Central Registration Depository, NASD Notice to Members 01-65 (Oct. 2001), *available at http://www. finra.org/industry/notices/01-65 (last visited Jul. 7, 2017).*

Finally, in December 2003, the Securities and Exchange Commission ("SEC") approved "new Rule 2130 concerning the expungement of customer dispute information from the CRD system" which would "apply to any request made to a court of competent jurisdiction to expunge customer dispute information from the CRD system that has its basis in an arbitration or civil lawsuit filed on or after April 12, 2004."

In its announcement of the approval of this rule, NASD stated that "Rule 2130 will protect regulators' and investors' ability to obtain meaningful data about the members and associated persons with whom they do, or plan to do, business by permitting customer dispute information to be expunged from the CRD system only when arbitrators and a court have ***affirmatively*** found that: (1) the claim, allegation, or information is factually impossible or clearly erroneous; (2) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (3) the claim, allegation, or information is false." (emphasis added)[10]

Although, in May 2009, in connection with the SEC's approval of new FINRA Rules as part of the Consolidated FINRA Rulebook, Rule 2130 was amended and renumbered as FINRA Rule 2080, the substance of the text of the rule did not materially change and it remains in full force and effect as of the present date.[11]

POST-IMPLEMENTATION RULES & GUIDANCE

Following the adoption of the preceding expungement rule, there have been a number of additional rules and pronouncements that have been issued by the NASD/FINRA including:

NASD Notice to Members 04-43: In June 2004, NASD issued Notice to Members 04-43. The purpose of the notice was to address NASD's belief that member firms and associated persons were "abusing NASD's

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10. *See,* NASD Adopts Rule 2130 Regarding Expungement of Customer Dispute Information From The Central Registration Depository, NASD Notice to Members 04-16 (Mar. 2004), *available at http://www.finra.org/industry/notices/04-16 (last visited Jul. 7, 2017).*
11. See, e.g., *Order Approving Proposed Rule Change as Amended, Relating to the Adoption of FINRA Rule 2080 (Obtaining an Order of Expungement of Customer Dispute Information From the Central Registration Depository (CRD System))*, Financial Industry Regulatory Authority, available at http://www.finra.org/sites/default/files/RuleFiling/p118851.pdf (last visited Jul. 7, 2017).

dispute resolution system by negotiating settlements with customers in return for exculpatory affidavits that the member or associated person knows or should know are false or misleading." In response to this issue, NASD announced that arbitrators would "be receiving training that alerts them to this concern. The training required of arbitrators who consider expungement relief will make clear that arbitrators are expected to consider whether a financial settlement indicates some culpability on the part of the respondent, thereby precluding them from making an affirmative finding that one or more of the standards for expungement in Rule 2130 have been met. The training also will advise arbitrators to consider the original claim, any other evidence presented, and the settlement terms in assessing the credibility of a supporting affidavit."[12]

FINRA Regulatory Notice 08-79: In December 2008, FINRA issued Regulatory Notice 08-79. The purpose of the notice was to announce that FINRA had adopted FINRA Rules 12805 and 13805 which established "specific procedures that arbitrators must follow before ordering expungement of customer dispute information from the CRD system consistent with NASD Rule 2130" so as to "ensure that arbitrators have the opportunity to consider the facts that support or weigh against a decision to grant expungement" and to "add transparency to the process and safeguards designed to ensure that the extraordinary relief of expungement is granted only under appropriate circumstances." These new procedures included the requirements that "an arbitration panel must hold a recorded hearing session by telephone or in person regarding the appropriateness of expungement; in cases involving settlements, the arbitration panel must review the settlement documents, consider the amount paid to any party, and consider any other terms and conditions of the settlement that might raise concerns about the associated person's involvement in the alleged misconduct before awarding expungement; the arbitration panel must indicate which of the grounds for expungement under Rule 2130(b)(1)(A)-(C) serve as the basis for their expungement order, and provide a brief written explanation of the reasons for ordering expungement; and the arbitration panel must assess against the parties requesting expungement relief all forum

12. See, *Expungement Members' Use of Affidavits in Connection with Stipulated Awards and Settlements to Obtain Expungement of Customer Dispute Information under Rule 2130, NASD Notice to Members 04-43 (Jun. 2004)*, available at http://www.finra.org/industry/notices/04-43 (last visited Jul. 7, 2017).

fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement."[13]

FINRA Regulatory Notice 14-31: In July 2014, FINRA issued Regulatory Notice 14-31. The purpose of the notice was to announce that the SEC had approved new FINRA Rule 2081 (Prohibited Conditions Relating to Expungement of Customer Dispute Information) which would address the fact that "FINRA has long had concerns about the practice of firms and associated persons conditioning settlement agreements for the purpose of obtaining expungement relief and, thereby, potentially removing from the CRD system information that helps protect investors." Under the new rule, member firms and associated persons would be prohibited 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 CRD system."[14]

FINRA Notice to Arbitrators and Parties on Expanded Expungement Guidance: Finally, based on the controversy that continued to surround the issue of expungement, FINRA has issued its "guidance and reminder for arbitrators when considering expungement requests" which reiterated the fact that "[e]xpungement is an extraordinary remedy that should be recommended only under appropriate circumstances . . . customer dispute information should be expunged only when it has no meaningful investor protection or regulatory value . . . in making these determinations, arbitrators should consider the importance of maintaining the integrity of the information in the CRD system . . . [and that] ensuring that CRD information is accurate and meaningful is essential to investors, who may rely on the information when making decisions about brokers with whom they may conduct business; to regulators, who rely on the information to fulfill their regulatory responsibilities; and to prospective broker-dealer employers, who rely on the information when making hiring decisions."[15]

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13. See, *Expungement – SEC Approves Rules Establishing Procedures for Arbitrators Considering Expungement Requests, FINRA Regulatory Notice 08-79 (Dec. 2008)*, available at http://www.finra.org/industry/notices/08-79 (last visited Jul. 7, 2017).
14. See, *SEC Approves FINRA Rule 2081 Regarding Prohibited Conditions Relating to Expungement of Customer Dispute Information, FINRA Regulatory Notice 14-31 (Jul. 2014)*, available at http://www.finra.org/industry/notices/14-31 (last visited Jul. 7, 2017).
15. See, *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA Dispute Resolution (Sept. 2015 Update), available at http://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance (last visited Jul. 7, 2017).

As a consequence of those efforts, the system for the award of expungements has over time been improved. In some respects, however, the system remains static with a high percentage of expungements continuing to be granted in cases involved settled claims.

EXPUNGEMENTS ASSOCIATED WITH SETTLED CASES

Statistics that are released by FINRA Dispute Resolution, on a monthly basis, clearly confirm that the substantial majority of arbitration proceedings are "closed" or resolved prior to either an evidentiary hearing or, in the case of simplified arbitrations, the review of submitted documents.

These closures may be achieved by either direct settlement between the parties, settlements in connection with mediation, the withdrawal of the arbitration proceeding, or under circumstances that are classified, but undefined, as "other" occasions.

In fact, the statistics over the past few years indicate that closed arbitration proceedings that were "decided by arbitrators" – either through an evidentiary hearing or after the review of documents – only comprised 23% of the total closed cases in both 2013 and 2014, 24% of the total closed cases in 2015, 21% of the total closed cases in 2016, and 17% of the total closed cases in the current year to date as of May 31, 2017.[16]

When viewed from the alternative perspective, during this same period of time, closed arbitration proceedings that were *not* "decided by arbitrators" comprised 77% of the total closed cases in both 2013 and 2014, 76% of the total closed cases in 2015, 79% of the total closed cases in 2016, and 83% of the total closed cases in the current year to date as of May 31, 2017.

A substantial number of the closed arbitration proceedings that were *not* "decided by arbitrators" – which will be collectively referred to as "post-settlement" cases for purposes of this article – have been the subject of subsequent expungement proceedings in which an associated person seeks the removal of a disclosure event from his or her registration record.

Notwithstanding the fact that FINRA Dispute Resolution has provided guidance to its arbitrators that "[e]xpungement is an extraordinary remedy that should be recommended only under appropriate circumstances" and that "[c]ustomer dispute information should be expunged only when it has no meaningful investor protection or regulatory value," the statistics

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16. See, e.g., *Dispute Resolution Statistics*, FINRA Dispute Resolution, available at http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (last visited Jul. 7, 2017).

on post-settlement expungements over the past few years clearly indicate that it is not an "extraordinary remedy" at all.[17]

In fact, these statistics indicate that post-settlement expungements were granted by arbitration panels in 323 proceedings in 2013 which represented 91.50% of the total post-settlement expungement requests that were considered; in 231 proceedings in 2014 which represented 88.17% of the total post-settlement expungement requests that were considered; in 179 proceedings in 2015 which represented 84.83% of the total post-settlement expungement requests that were considered; in 124 proceedings in 2016 which represented 84.35% of the total post-settlement expungement requests that were considered; and in 64 proceedings in the current year to date, as of June 30, 2017, which represented 86.49% of the total post-settlement expungement requests that were considered.[18]

When viewed from a collective or aggregate perspective, these statistics indicate that, between January 1, 2013 and June 30, 2017, arbitration panels granted post-settlement expungement relief in 921 arbitration proceedings which represented 87.966% of the total post-settlement expungement requests that were considered during this period of time.

While these statistics are undeniably inconsistent with the purported "extraordinary relief" standard that has been set forth by FINRA Dispute Resolution and should call into question whether arbitration panels are being unfairly charged with the responsibility to determine whether "meaningful investor protection or regulatory value" is being advanced by consideration of an expungement request, a review of the FINRA Rule 2080 (b)(1) predicates that have been cited by arbitration panels when they have granted post-settlement expungement requests should be deeply concerning.[19]

For example, with respect to the predicate contained in FINRA Rule 2080(b)(1)(A) – that the "claim, allegation or information is factually

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17. See, e.g., *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA Dispute Resolution (Sept. 2015 Update), available at http://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance (last visited Jul. 7, 2017).
18. The expungement statistics that are presented in this article, which only include those arbitration proceedings in which a public customer was a named party, are attached hereto under the designations of Appendix 1 (Expungement Requests in Public Customer Awards) and Appendix 2 (Expungement Requests in Public Customer Awards: Post-Settlement Awards).
19. It should be noted that arbitration awards, more often than not, usually cite several of the FINRA Rule 2080(b)(1) predicates as the basis for the expungement relief that has been awarded.

impossible or clearly erroneous" – this predicate was cited by arbitration panels in 217 proceedings in 2013 which represented 67.18% of the total post-settlement expungement predicates that were cited in arbitration awards; in 100 proceedings in 2014 which represented 30.21% of the total post-settlement expungement predicates that were cited in arbitration awards; in 76 proceedings in 2015 which represented 29.34% of the total post-settlement expungement predicates that were cited in arbitration awards; in 55 proceedings in 2016 which represented 30.56% of the total post-settlement expungement predicates that were cited in arbitration awards; and in 33 proceedings in the current year to date, as of June 30, 2017, which represented 37.93% of the total post-settlement expungement predicates that were cited in arbitration awards.

Similarly, with respect to the predicate contained in FINRA Rule 2080 (b)(1)(B) – that the "registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds" – this predicate was cited by arbitration panels in 149 proceedings in 2013 which represented 46.13% of the total post-settlement expungement predicates that were cited in arbitration awards; in 81 proceedings in 2014 which represented 24.47% of the total post-settlement expungement predicates that were cited in arbitration awards; in 53 proceedings in 2015 which represented 20.46% of the total post-settlement expungement predicates that were cited in arbitration awards; in 40 proceedings in 2016 which represented 22.22% of the total post-settlement expungement predicates that were cited in arbitration awards; and in 20 proceedings in the current year to date, as of June 30, 2017, which represented 22.99% of the total post-settlement expungement predicates that were cited in arbitration awards.

It is alarming, however, with respect to the predicate contained in FINRA Rule 2080(b)(1)(C) – that the "claim, allegation or information is false" – this predicate was cited by arbitration panels in 256 proceedings in 2013 which represented 79.26% of the total post-settlement expungement predicates that were cited in arbitration awards; in 150 proceedings in 2014 which represented 45.32% of the total post-settlement expungement predicates that were cited in arbitration awards; in 130 proceedings in 2015 which represented 50.19% of the total post-settlement expungement predicates that were cited in arbitration awards; in 85 proceedings in 2016 which represented 47.22% of the total post-settlement expungement predicates that were cited in arbitration awards; and in 34 proceedings in the current year to date, as of June 30, 2017, which represented 39.08% of the total post-settlement expungement predicates that were cited in arbitration awards.

In view of the fact that a substantial majority of settlements are accompanied by the payment of some financial compensation to the investor, it defies logic and common sense that the stated FINRA Rule 2080(b)(1)(C) predicate of the claim, allegation or information being "false" could have reasonably been cited by arbitration panels in 655 post-settlement arbitration awards that were issued between January 1, 2013 and June 30, 2017 which represented 44.287% of the total post-settlement expungement predicates that were cited in all post-settlement arbitration awards that were issued during that period of time.

READILY IDENTIFIABLE PROBLEMS WITH THE CURRENT PROCESS

In our opinion, there are a number of inherent problems with the present system of determining expungement requests that, individually and, most certainly, collectively, require immediate and substantial changes if meaningful investor protection and/or the maintenance of regulatory values are to be achieved.

1. Lack of Investor Participation: Our review of post-settlement expungement awards that have been issued over the past 4 ½ years clearly indicates that in a substantial number of those arbitration proceedings – well in excess of ninety (95%) percent of them – the investor whose complaint is being considered for expungement did not appear at and/or otherwise participate in the expungement proceeding.

   The reason for this is simple – once an investor has received his or her settlement proceeds, the investor does not have any inducement to either spend time or money on legal fees to contest the expungement in a subsequent hearing.

   As a result of this fact, arbitration panels are only presented with one side of the story which is the unchallenged side that is being advanced by the individual who is seeking the expungement.

2. BrokerCheck Report: In connection with the consideration of an expungement request, one of the documents that arbitrators may review – although it is not required – is the BrokerCheck report for the registered person.[20]

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20. See, e.g., *Award Information Sheet – Sole Topic is Determination of Expungement of Customer Dispute Information*, FINRA Dispute Resolution (Last Updated Sept. 24, 2015) ("Documentary or Other Evidence: A. Did the broker seeking expungement (or the party seeking expungement on the broker's behalf) provide a

As stated on FINRA's website, "BrokerCheck is a free tool from FINRA that can help you research the professional backgrounds of brokers and brokerage firms, as well as investment adviser firms and advisers. The information about brokers and brokerage firms that you find in BrokerCheck comes from the Central Registration Depository (CRD®). All brokers must be licensed and registered by FINRA, and CRD is the securities industry online registration and licensing database. Information in CRD is obtained through forms that brokers, brokerage firms and regulators complete as part of the securities industry registration and licensing process."[21]

There are a number of problems, however, that are associated with using a BrokerCheck report in the context of an expungement proceeding.

First and foremost is the fact that a BrokerCheck report will not reflect any prior disclosure events that have already been expunged in a prior arbitration proceeding. We would submit that information as to prior expungements is not only material, but that it is critical to the consideration of an expungement request.

Secondly, it is important to note that there are several additional limitations to the information that is included on a BrokerCheck report for an associated person.[22]

For example, information as to "internal review disclosures" and "reasons for termination" are not included on a BrokerCheck report nor is information as to all "oral complaints" or all "historical" written complaints that are more than two (2) years old that may have been received in connection with the conduct of an associated person.[23]

We would suggest that the only way to remedy these deficiencies and to insure that arbitrators have *all* of the necessary information that must be considered in connection with an expungement request would be to mandate that arbitrators are provided with the *complete*

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current copy of the BrokerCheck® report?), available at http://www.finra.org/sites/default/files/Award_Information_Sheet_092515.pdf (last visited Jul. 7, 2017).

21. See, *About BrokerCheck*, Financial Industry Regulatory Authority, available at http://www.finra.org/investors/about-brokercheck (last visited Jul. 7, 2017).
22. See, *FINRA Rule 8312 – FINRA BrokerCheck Disclosure*, Financial Industry Regulatory Authority, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3891 (last visited Jul. 7, 2017).
23. See, e.g., *FINRA Rule 8312(d)(3) and (4)* and *FINRA Form U4 and U5 Interpretive Questions and Answers*, Financial Industry Regulatory Authority, available at https://www.finra.org/sites/default/files/Interpretive-Guidance-final-03.05.15.pdf (last visited Jul. 7, 2017).

"Legacy" or "Web" CRD Report for the associated person that includes the "Regulatory Archive and Z Records" (historical information) sections of his or her CRD report.[24]

3. Inadequate Rule 2080 Predicates: The statistically validated misuse of the predicate contained in FINRA Rule 2080(b)(1)(C) in post-settlement expungement proceedings – that the "claim, allegation or information is false" – clearly requires additional study and consideration as to whether this predicate, in particular, is properly formulated so as to assist arbitration panels in their consideration of the various situations where expungement requests are appropriate.

   As noted above, in view of the fact that a substantial majority of settlements are accompanied by the payment of some financial compensation to the investor, it defies logic and common sense that the stated FINRA Rule 2080(b)(1)(C) predicate of the claim, allegation or information being "false" could have reasonably been cited by arbitration panels in 655 post-settlement arbitration awards that were issued between January 1, 2013 and June 30, 2017 which represented 44.287% of the total post-settlement expungement predicates that were cited in all post-settlement arbitration awards that were issued during that period of time.

4. Future Role of Arbitrators: The final question that needs to be addressed is whether arbitration panels are being unfairly charged with the responsibility to determine whether "meaningful investor protection or regulatory value" is being advanced by consideration of an expungement request.

   As noted on the FINRA Dispute Resolution website, "FINRA arbitrators – neutral, qualified individuals who are essential in maintaining a fair, impartial and efficient system of arbitration – serve as decision makers, weighing the facts of each case presented. Arbitrators hear all sides of the dispute, study the evidence and then render a final and binding decision. FINRA maintains a roster of more than 7,000 arbitrators. FINRA has two classifications of arbitrators:

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24. See, e.g., *FINRA Web CRD and IARD Training, Individual and Organization Disclosure*, Financial Industry Regulatory Authority ("Regulatory Archive and Z Records contain information specific to an individual's or firm's CRD record that is not or no longer reportable via Forms U4, Form U5, or Form BD. Information in Regulatory Archive and Z Records is not generally disclosable via the BrokerCheck system."), available at http://www.finra.org/sites/default/files/AppSupportDoc/p124434.pdf (last visited Jul. 7, 2017).

public and non-public. Public arbitrators are select individuals who are not required to have knowledge of the securities industry."[25]

It is our opinion that arbitration panels should not be the guardians of the integrity of the CRD system and the disclosures that appear thereon for an associated person.

CONCLUSION

Despite the long history of well-intentioned efforts to improve the system by which the purported "extraordinary" remedy of expungement is granted, the time has come to take additional concrete steps to improve the process so that the "meaningful investor protection" and the "regulatory value" of disclosures on the CRD system can be preserved.

Of equal importance, FINRA should take the additional step of removing expungement requests out of the hands of arbitrators who view their role as participants in the dispute resolution process rather than as gatekeepers of the integrity of the regulatory record.

Finally, although the SEC has called on FINRA to "conduct a comprehensive review of its expungement rules and procedures to determine whether additional rulemaking is necessary or appropriate to assure that expungement in fact is treated as an extraordinary remedy,"[26] it is clear that both the SEC and NASAA continue to sit on the sideline and, notwithstanding their rhetoric, have both abdicated their "investor protection" responsibilities.

Unfortunately, investors continue to wait for a FINRA solution.

Submitted: July 12, 2017

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25. See, *FINRA Arbitrators*, FINRA Dispute Resolution, available at http://www.finra.org/arbitration-and-mediation/finra-arbitrators (last visited Jul. 7, 2017).
26. See, *NASAA Supports FINRA's Effort to Reduce Deletion of Customer Complaint Records*, North American Securities Administrators Association (Jul. 28, 2014), available at http://www. nasaa.org/32253/nasaa-supports-finras-effort-reduce-deletion-customer-complaint-records/ (last visited Jul. 7, 2017).