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## What You Do Not Know Can Hurt You: How the FINRA Expungement Process Is Endangering Future Investors Through a Lack of Information

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## NOTE

### WHAT YOU DO NOT KNOW CAN HURT YOU: HOW THE FINRA EXPUNGEMENT PROCESS IS ENDANGERING FUTURE INVESTORS THROUGH A LACK OF INFORMATION

#### I. INTRODUCTION

It is often said, what you do not know can not hurt you. Unfortunately, in the high stakes world of securities investment, what investors do not know can indeed hurt them.<sup>1</sup> When investors did not know that the head of a small California investment firm had a previous claim brought against him for operating a \$1.75 million Ponzi scheme, they believed in his reputability, which led to another \$125 million Ponzi scheme over a seven-year stretch.<sup>2</sup> A deal cut in a previous settlement led to the lack of information on the broker's Central Registration Depository ("CRD") record.<sup>3</sup> More recently, in May 2013, a Wells Fargo broker—who despite *nine* client disputes on her record, and Wells Fargo agreeing to pay a \$125,000 settlement because of a complaint related to the broker—received an expungement award on some of the disputes on her record after an arbitrator determined they were “suitable and safe” for expungement (alternatively “expungement process” or “process”).<sup>4</sup> Just a few months prior, in February of 2013, a former

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1. See Rich Smith, *Investing Basics: What You Don't Know Is Hurting You*, DAILY FINANCE (Apr. 22, 2013, 10:30 AM), <http://www.dailyfinance.com/2013/04/22/investing-basics-what-you-dont-know-is-hurting-you> (discussing how brokers depend on the ignorance of investors).

2. Michael Freedman, *The X-ed Out Files*, FORBES (Dec. 25, 2000, 12:00 AM), <http://www.forbes.com/forbes/2000/1225/6616280a.html> (expunging a previous customer dispute through settlement allowed Carl Martellaro to continue his fraudulent practices without investors becoming aware, leading to the \$125 million Ponzi scheme).

3. See *id.* The CRD is an online registration system that houses administrative and disclosure information about brokerage firms and associated persons. See *Central Registration Depository*, FINRA, <http://www.finra.org/Industry/Compliance/Registration/CRD> (last visited July 20, 2014). For a further discussion about the CRD, including its reporting requirements and changes made to the system over time, see Scott Ilgenfritz, *Expungement Study of the Public Investors Arbitration Bar Association*, 20 PIABA B. J. 339, 340-43 (2013).

4. Susan Antilla, *A Rise in Requests From Brokers to Wipe the Slate Clean*, N.Y. TIMES,

Charles Schwab executive, who personally ran a fund which led to investors losing hundreds of millions of dollars, was able to secure an expungement award as well.<sup>5</sup> Despite agreeing with the Securities and Exchange Commission ("SEC") to pay a fine of \$325,000 and be barred from the business, the expungement award was the former executive's *eighth* award since August 2012.<sup>6</sup>

These examples are all illustrative of the negative aspects of the expungement process in the securities industry.<sup>7</sup> However, it would be misleading to suggest that such examples make up the complete expungement picture.<sup>8</sup> There are certainly desirable expungements, such as where an implicated broker was not actually in control of a customer's account and had no part in the wrongdoing.<sup>9</sup> In such a situation, the use of expungement is reasonable and desirable, as it does not jeopardize the overriding intention of the expungement guidelines—for example, investor protection—and it ensures that a broker is not inaccurately labeled as fraudulent.<sup>10</sup>

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June 11, 2013, at B1 (stating the recommended deletion of the complaint from the broker's record came after a hearing where only the broker was present, as the client did not attend, and the broker went as far as to request expungement of two unrelated incidents on her record).

5. *Id.*

6. *Id.* (denying any wrongdoing, despite the sanctions levied against him, the Charles Schwab executive will be allowed to reapply for FINRA membership in 2015).

7. See *Snyder v. City of Alexandria*, 870 F. Supp. 672, 683 n.28 (E.D. Va. 1994) (citing BLACK'S LAW DICTIONARY 522 (5th ed. 1979)) (defining expungement of information as "[t]he act of physically destroying information . . . in files, computers, or other depositories"); *Examples of Expungement Orders*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/SpecialProcedures/Expungement/P126302> (last visited July 20, 2014) (providing examples of expungement orders); *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/SpecialProcedures/Expungement> (last visited July 20, 2014) [hereinafter *Notice to Arbitrators*] (expunging information permanently deletes that information from the CRD system).

8. See Bill Singer, *PNC Broker Exonerated in FINRA Customer Dispute But Saddled with Expungement Ordeal*, FORBES (July 6, 2012, 9:07 AM), <http://www.forbes.com/sites/billsinger/2012/07/06/pnc-broker-exonerated-in-finra-customer-dispute-but-saddled-with-expungement-ordeal> (granting expungement to a broker not named in the claim and who attempted to deter the claimant from investing so heavily).

9. See *id.*; see also Jisook Lee, *A Closer Look at Expungement: Asking the Right Questions*, THE NEUTRAL CORNER (FINRA, New York, N.Y.), 2013, at 2, 3 (taking no part in the alleged action should result in expungement); Suzanne Barlyn, *COMPLY-Merrill Broker Files John Doe Case to Clear Record Quietly*, REUTERS (Sept. 19, 2013), <http://www.reuters.com/article/2013/09/19/finra-johndoe-idUSL2N0HE19220130919> (looking favorably on requests to expunge where customers filed claims, but ultimately did not pursue them).

10. See *About FINRA*, FINRA, <http://www.finra.org/AboutFINRA> (last visited July 20, 2014) (outlining how FINRA accomplishes its mission of investor protection); Suzanne Barlyn, *Wall Street Watchdog to Review Tactic for Cleaning Broker Records*, REUTERS (Aug. 2, 2013, 12:46 PM), <http://www.reuters.com/article/2013/08/02/us-finra-expungement-idUSBRE9710WA20130802> (presenting industry argument that "brokers' records should not have to carry black marks from cases in which investors have not proven their claims"). Patricia Cowart,

Brokers' desire for expungement stems from the fact that dispute information is made publicly available through the online tool BrokerCheck.<sup>11</sup> While investors are encouraged to research broker dealers through this online tool in order to determine whom they can trust, industry sentiment suggests that the current expungement process is depleting the amount of valuable information available to investors and putting them in danger.<sup>12</sup> These growing concerns with the process come from the frequency with which investors are relying on BrokerCheck to educate themselves with accurate information regarding broker dealers; as industry professional Seth Lipner describes it, "[p]eople are starting to use BrokerCheck the way they use TripAdvisor."<sup>13</sup>

The Financial Industry Regulatory Authority ("FINRA") is primarily responsible for self-regulating the securities industry and ensuring investor protection above all else.<sup>14</sup> Part of FINRA's responsibility in regulating the securities industry is to acquire and maintain registered broker dealer reporting information, which is then housed in the CRD.<sup>15</sup> Included in the required reporting information is customer dispute information, maintained in BrokerCheck's online database.<sup>16</sup> Through BrokerCheck, investors are able to investigate a

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a lawyer for Wells Fargo & Co., stated: "The importance of having an accurate and fair record will affect (a broker's) livelihood." *Id.*

11. See *FINRA BrokerCheck - Research Brokers, Brokerage Firms, Investment Adviser Representatives and Investment Adviser Firms*, FINRA, <http://www.finra.org/Investors/ToolsCalculators/BrokerCheck> (last visited July 20, 2014) [hereinafter *FINRA BrokerCheck*].

12. *Id.* (encouraging investors to make BrokerCheck the first resource they utilize when making investment decisions). While discussing investor concerns, the President of the Public Investors Arbitration Bar Association ("PIABA"), Scott Ilgenfritz, elaborated: "To say that 'expungement' of customer claims from broker records is a major investor protection problem is an understatement. . . . [I]nvestors who are diligent enough to seek out information about brokers may be getting a woefully incomplete picture . . ." *PIABA Study: Stockbroker Arbitrations Slates Wiped Clean 9 Out of 10 Times When "Expungement" Sought in Settled Cases*, PUB. INVESTORS ARB. BAR ASS'N 1-2 (Oct. 16, 2013), <http://piaba.org/system/files/pdfs/PIABA%20Expungement%20Study.pdf> [hereinafter *PIABA Study*]; see Seth E. Lipner, *The Expungement of Customer Complaint CRD Information Following the Settlement of a FINRA Arbitration*, 19 FORDHAM J. CORP. & FIN. L. 57, 102 (2013) (arguing that the current expungement process does not work and is harming investors); Antilla, *supra* note 4, (erasing records of bad brokers is happening too often according to attorneys representing investors).

13. Antilla, *supra* note 4.

14. *About FINRA*, *supra* note 10.

15. See Notice to Members 04-16, NASD Adopts Rule 2130 Regarding Expungement of Customer Dispute Information from the Central Registration Depository (Mar. 2004), at 212 [hereinafter Notice to Members 04-16], available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003235.pdf> (noting that the CRD contains administrative information, which includes broker dealer information, as well as disclosure information, such as customer dispute and disciplinary information).

16. See *FINRA BrokerCheck*, *supra* note 11.

broker dealer's dispute and arbitration history prior to entering into a relationship.<sup>17</sup>

Some investors are likely unaware that broker dealers can "expunge" information from their CRD records, permanently erasing the particular incident as if it never happened.<sup>18</sup> Expungement is intended to balance the goal of protecting investors from fraudulent brokers, while also protecting brokers against harmful reputations resulting from meritless claims.<sup>19</sup> The expungement process, which began in 1981, is currently governed under FINRA Rule 2080 and companion Rules 12805 and 13805.<sup>20</sup>

The expungement process has frequently been described by FINRA as an "extraordinary remedy," only to be used when the information would have no investor protection value if it were left on the respective CRD record.<sup>21</sup> Despite this objective, expungement has become something other than extraordinary—it has become ordinary.<sup>22</sup> Expungement requests were granted in post-settlement agreement claims 96.9% of the time from 2009 through 2011, and 91.5% of the time in 2013.<sup>23</sup> The use of settlements to obtain expungement agreements has been viewed in the industry as a large part of the current problem.<sup>24</sup>

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17. See *id.*; see also Christine Lazaro, *Ethical Concerns When Settlement Includes an Agreement About Expungement*, PIABA 22ND ANNUAL MEETING MATERIALS, 2013, at 90, 90 (using BrokerCheck to determine whether they will invest with a particular broker is an industry known use).

18. See Freedman, *supra* note 2 (investing public was unaware that information had been expunged from Martellaro's record); *Notice to Arbitrators*, *supra* note 7 (describing expungement as an extraordinary remedy granted only in certain instances).

19. See Karen Donovan, *The Expungement Crusade*, REGISTERED REP., at 3 (Nov. 1, 2007) (bringing claims without merit leads to erroneous entries on a broker's CRD).

20. See Howard R. Elisofon & Grant R. Comehls, *The Road to Expungement Grows Longer*, SEC. ARB. COMMENTATOR, Sept. 2010, at 1, 2. See generally FINRA MANUAL R. 2080 (2011) (pertaining to the process for obtaining an expungement order); FINRA MANUAL R. 12805 (2011) (pertaining to customer disputes); FINRA MANUAL R. 13805 (2011) (pertaining to industry disputes). Rule 13805 will not be discussed further as this Note deals exclusively with customer disputes.

21. See Lee, *supra* note 9, at 6; NASD Notice to Members 01-65—Request for Comment, NASD Seeks Comment on Proposed Rules and Policies Relating to Expungement of Information from the Central Registration Depository (Oct. 2001), at 565 [hereinafter Notice to Members 01-65], available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003745.pdf>; *Notice to Arbitrators*, *supra* note 7.

22. See *infra* Part III.A.1.

23. Ilgenfritz, *supra* note 3, at 360; FINRA Dispute Resolution Arbitration Award Review 2013 from Steven B. Caruso (Jan. 2014) (on file with the *Hofstra Law Review*).

24. See Steven B. Caruso, *Expungement Requests in Settlement Negotiations: Consequences If You Don't Just Say No*, PIABA B.J., Summer 2007, at 3, 4 (explaining potential consequences attorneys may face because of settlement issues); Lipner, *supra* note 12, at 103-04 (advocating for change of the way the current process handles settlement agreements); C. Thomas Mason, III, *CRD Expungement: Law, Proposed NASD Rules, and Lawyer Ethics*, PIABA B.J., Winter 2002, at 76, 96

Despite a number of rule changes over the past fourteen years, FINRA's expungement process still has flaws.<sup>25</sup> A member in the securities industry from the Consumer Federation of America, which works to ensure investors receive complete and accurate information, characterized the current expungement process as:

[T]oo easy for brokers to get complaints expunged from their records, investors who attempt to do the right thing and check out the broker's disciplinary record may end up making their decision based on incomplete information. Worse, they may be led to believe that a broker has a clean disciplinary record . . . .<sup>26</sup>

Curtailling the current use of settlement negotiations to secure expungement is a critical first step in fixing the process.<sup>27</sup> Further, modifying the current Rule 12805 in order to institute greater FINRA participation, along with more strict and defined arbitrator requirements, is necessary as well.<sup>28</sup> Finally, ensuring a further level of customer participation than is currently required in FINRA Rule 2080 is important in correcting the current process and ensuring that expungement awards do not remain the frequent occurrence they currently are.<sup>29</sup>

Part II of this Note will explain the history of FINRA, and the source of its power.<sup>30</sup> Also in Part II, the general arbitration process and its procedures, along with the establishment of the CRD and

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(discussing the misuse of settlement negotiations); Notice to Members 04-43, Members' Use of Affidavits in Connection with Stipulated Awards and Settlements to Obtain Expungement of Customer Dispute Information Under Rule 2130 (June 2004), at 554, [hereinafter Notice to Members 04-43], available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003015.pdf> (acknowledging the settlement problem). FINRA has made another attempt to fix the settlement issue in 2014—the Board of Governors approved a rule proposal to prohibit the conditioning of settlements on expungement awards, although the proposal still requires SEC approval. See News Release, FINRA, FINRA Board Approves Rule Prohibiting Conditioning Settlements of Customer Disputes on a Customer's Agreement Not to Oppose Expungement (Feb. 13, 2014) [hereinafter FINRA Board Approves Rule Prohibiting Conditioning Settlements], available at <http://www.finra.org/Newsroom/NewsReleases/2014/P445251>.

25. Jean Eaglesham & Rob Barry, *Brokers Able to Hide Some Disputes*, WALL ST. J., Oct. 17, 2013, at C1 ("[FINRA's] attempts to mandate narrow grounds for granting expungement relief . . . have failed.").

26. *PIABA Study*, *supra* note 12, at 2 (quoting Rachel Weintraub, legislative director and senior counsel, Consumer Federation of America).

27. See Caruso, *supra* note 24, at 4-5 (outlining the current issues facing investors' attorneys); Mason, *supra* note 24, at 96-97 (discussing the consequences if an attorney agrees to expunge a claim he knows is not false); see also FINRA Board Approves Rule Prohibiting Conditioning Settlements, *supra* note 24 (approving a rule to attempt to deter the settlement issue).

28. See FINRA MANUAL R. 12805 (2011).

29. See FINRA MANUAL R. 2080 (2011); *infra* Part III.A.1 (showing expungement awards have become common).

30. See *infra* Part II.A.

BrokerCheck will be explained.<sup>31</sup> Finally, and most importantly, Part II will describe the evolution of the expungement process since the inception of the CRD in 1981, the ramifications and industry sentiment towards the moratorium in 1999, and the new rule changes in 2004 and 2009.<sup>32</sup>

Part III will examine the current legal challenges faced by the securities industry as a result of the expungement process.<sup>33</sup> The ability of broker dealers to abuse settlement negotiations by offering a customer a lump sum in exchange for expungement is damaging the CRD, and resulting in a lack of faith in the expungement process.<sup>34</sup> Moreover, the incentive for a customer's attorney to accept such a settlement offer, in order to secure some type of monetary award for their client, presents legal and ethical issues for that attorney.<sup>35</sup> Along with the settlement issues that currently exist, Part III will also examine the issues surrounding the rest of the expungement guidelines, most notably the lack of input that they solicit from the customer.<sup>36</sup>

Part IV will explore the scope and obligation of FINRA to alleviate the current expungement issues outlined in Part III.<sup>37</sup> The current Rule 2080 will be used as a framework but will be modified to take into account the need to eliminate the settlement issues, while also requiring more extensive participation from FINRA.<sup>38</sup> Also, the need for stricter and more expansive arbitrator guidelines, along with adjustments to secure further customer participation, will be presented as modifications to Rule 12805.<sup>39</sup> Part IV will conclude with a brief overview of the potential benefits that updated arbitrator training could provide.<sup>40</sup>

This Note concludes that changes to the current FINRA expungement process are imminently necessary.<sup>41</sup> The current process is providing diligent investors with incomplete information and

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31. See *infra* Part II.B–C.

32. See Elisofon, *supra* note 20, at 2 (stating that the CRD was created in 1981); NASD Notice to Members 99-09, NASD Regulation Imposes Moratorium on Arbitrator-Ordered Expungements of Information from the Central Registration Depository (Feb. 1999), at 47 [hereinafter Notice to Members 99-09], available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p004582.pdf> (introducing the moratorium on arbitrator awarded expungements); Notice to Members 04-16, *supra* note 15, at 213-14 (explaining the new rule change in 2004); *infra* Part II.D–E.

33. See *infra* Part III.A–B.

34. See Ilgenfritz, *supra* note 3, at 360-61.

35. See Caruso, *supra* note 24, at 4.

36. See *infra* Part III.B.

37. See *infra* Parts III.A–B, IV.A–B.

38. See FINRA MANUAL R. 2080 (2011); *infra* Part IV.A.

39. See FINRA MANUAL R. 12805 (2011); *infra* Part IV.B.

40. See *infra* Part IV.C.

41. See *infra* Part V.

endangering their decision-making process.<sup>42</sup> Proposing rule changes to the SEC will put FINRA on the path to accomplishing its desired goal of making expungement an extraordinary remedy, instead of expungement's current state as an ordinary occurrence.<sup>43</sup>

## II. FINRA'S POWER AND ATTEMPTS TO FIX THE EXPUNGEMENT PROBLEM

Since 1981, FINRA has proposed, and the SEC has passed, numerous rules and regulations in attempting to improve the expungement guidelines and better serve FINRA's intended purpose—investor protection.<sup>44</sup> With each new rule or regulation that was passed, industry sentiment continued to grow; yet, the process was still not where it needed to be in order to prevent unnecessary expungements.<sup>45</sup> In order to gain a better understanding of the rules that FINRA has developed, it is helpful to look at the historical context behind the power granted to FINRA by the SEC, and why it was so empowered, which Subpart A will do.<sup>46</sup> Subpart B will explore the arbitration process and the guidelines surrounding that process, which allow for investors to bring claims against broker dealers.<sup>47</sup> Next, Subpart C will discuss the CRD's history and relation to the birth and subsequent growth of BrokerCheck.<sup>48</sup> Finally, Subparts D and E will look at the history of the expungement process, dating back to 1981, and will finish with an outline of where the expungement process stands today.<sup>49</sup>

### A. *The Power to Regulate the Securities Industry*

In 1934, the SEC was established after the passing of the Securities Exchange Act.<sup>50</sup> Congress passed the Securities Exchange Act in 1934 because it recognized that “[m]onitoring the securities industry

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42. See *infra* Part III.A–B.

43. See *infra* Part III.A.1.

44. See *infra* Part II.D–E. Examples of passed regulations include: FINRA MANUAL R. 2080 (2011); FINRA MANUAL R. 12805 (2011); NASD MANUAL R. 2130 (2004).

45. See Caruso, *supra* note 24, at 4–5 (arguing settlement issues created a number of concerns for both investors and their attorneys). See generally Lipner, *supra* note 12 (advocating for change in the expungement process regarding the use of settlements); Mason, *supra* note 24 (outlining issues with the entire expungement process).

46. See *infra* Part II.A.

47. See *infra* Part II.B.

48. See *infra* Part II.C.

49. See *infra* Part II.D–E.

50. See generally 15 U.S.C. § 78d (2006) (providing the SEC with the power to act as the regulatory agency for the U.S. securities industry).



require[d] a highly coordinated effort.”<sup>51</sup> Congress’s primary goals in monitoring the securities industry were to protect investors, as well as to have an agency to enforce the then-newly passed securities laws.<sup>52</sup> Four years after the Exchange Act was passed, Congress passed an amendment to the act which allowed for the creation of Self Regulating Organizations (“SRO”) to be formed underneath the supervision of the SEC.<sup>53</sup> The amendment “gave legislative approval to the formation of national securities associations designed to supervise their members’ conduct under the general oversight of the Securities Exchange Commission.”<sup>54</sup> Although there was no maximum number of organizations that could apply to the SEC for SRO status, only one organization applied after the 1938 amendment, the National Association of Securities Dealers (“NASD”).<sup>55</sup> After applying to the SEC for recognition, the NASD was approved in 1939.<sup>56</sup> Years later, the NASD merged with the New York Stock Exchange Regulation to form FINRA in 2008.<sup>57</sup> FINRA subsequently made its mission both investor protection and market integrity.<sup>58</sup>

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51. Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. RICH. L. REV. 1069, 1074-75 (2005) (concerning practices of stock exchange, members and manipulative practices were part of Congress’s rationale for the Exchange Act); *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMM’N, <http://www.sec.gov/about/whatwedo.shtml> (last visited July 20, 2014) [hereinafter *The Investor’s Advocate*].

52. *The Investor’s Advocate*, *supra* note 51; see also John E. Tracy & Alfred Brunson MacChesney, *Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1037-39 (1934) (creating the SEC for regulation of industry).

53. 15 U.S.C. § 78o-3 (2006) (amending the Securities Exchange Act, the Maloney Act of 1938 allowed for the creation of SRO).

54. Rebecca Cumin, Note, *The NASD’s Fair Sales Practice Rules: An Argument for Their Application to Government Securities Transactions, and for the Consideration of Some New Rules in the Mortgage Market*, 1993 COLUM. BUS. L. REV. 191, 193 (1993).

55. See Tamar Hed-Hofmann, *The Maloney Act Experiment*, 6 B.C. INDUS. & COM. L. REV. 187, 205-06 (1965); Onnig, *supra* note 51, at 1076-77 (describing the 1938 amendment and the incentives provided to individuals who became members of the NASD); Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. REV. 475, 485 (1984) (allowing for creation of additional SROs but only the NASD was formed after passage of act).

56. See Hed-Hofmann, *supra* note 55, at 188 (celebrating its twentieth anniversary in 1959).

57. See Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes to Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc., 73 Fed. Reg. 32377, 32377 (June 6, 2008); Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority – FINRA (July 30, 2007) (on file with the *Hofstra Law Review*) [hereinafter FINRA, NASD] (announcing the commenced operations of FINRA).

58. *About FINRA*, *supra* note 10; FINRA, NASD, *supra* note 57; see also *What We Do*, FINRA, <http://www.finra.org/AboutFINRA/WhatWeDo> (last visited July 20, 2014) (outlining the five ways that FINRA achieves its purpose).

### B. An Overview of the FINRA Arbitration Process

“Arbitration is an alternative to litigation or mediation,” with a panel composed of one or three arbitrators.<sup>59</sup> The award issued by the arbitration panel is universally binding, requiring all parties to abide by the decision unless it is successfully challenged in court.<sup>60</sup> “Arbitration, [which] is generally confidential,”<sup>61</sup> begins when a party files a claim requesting a specific remedy, and the respondent subsequently answers such a claim.<sup>62</sup> The selection of the arbitration panel depends on the amount of money in controversy.<sup>63</sup> Following arbitrator selection, the parties will have a telephonic prehearing conference, participate in discovery, and have a hearing in front of the arbitration panel,<sup>64</sup> where after the panel will make a decision and potentially grant awards.<sup>65</sup>

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59. *Arbitration Overview*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Overview> (last visited July 20, 2014). Arbitration became an entrenched aspect of the securities industry after the landmark decision *Shearson/Am. Express Inc. v. McMahon*. See generally 482 U.S. 220 (1987). The *Shearson* court found that claims brought under § 10(b) of the Securities Exchange Act could utilize arbitration under pre-dispute agreements. *Id.* at 238. As a result of the holding in *Shearson*, resolving securities disputes via arbitration has become the industry norm. See Constantine N. Katsoris, *Securities Arbitration After McMahon*, 16 FORDHAM URB. L.J. 361, 368-69 (1987) (reasoning just a year after the decision that arbitration would become the primary forum); Antilla, *supra* note 4, (noting that arbitration resulted in firms insisting that customers give up the right to sue in court).

60. *Arbitration Overview*, *supra* note 59.

61. *Id.* However, disciplinary decisions and the subsequent disciplinary action documents are available and can be obtained through FINRA's website. See 2013 OHO Disciplinary Decisions, FINRA, <http://www.finra.org/Industry/Enforcement/Adjudication/OHO/DisciplinaryDecisions/2013> (last visited July 20, 2014) (providing past years' decisions, but not yet 2014 decisions); *FINRA Disciplinary Actions Online Database*, FINRA, <http://www.finra.org/Industry/Enforcement/DisciplinaryActions/FDAS> (last visited July 20, 2014).

62. *Arbitration Process*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process> (last visited July 20, 2014) (following the filing of a claim is the selection of the arbitration panel).

63. *Arbitrator Selection*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/ArbitratorSelection/index.htm> (last visited July 20, 2014) (providing three arbitrators for claims exceeding \$100,000 and one arbitrator for claims between \$50,000 and \$100,000). During the selection process FINRA will send a list of qualified arbitrators to each party, allowing each party to strike up to four arbitrators from the list, leaving the ultimate selection of the panel up to FINRA; for claims of \$50,000 or less, FINRA will appoint one arbitrator for a simplified arbitration procedure. *Id.*

64. *Arbitration Process*, *supra* note 62; see also *Discovery*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/Discovery/index.htm> (last visited July 20, 2014) (subjecting the discovery process to The Codes of Arbitration Procedure); *Hearings*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/Hearings/index.htm> (last visited July 20, 2014) (involving motions, cross-examination, and testimony, similar to a trial).

65. *Arbitration Process*, *supra* note 62; *Decision & Awards*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/DecisionAwards/index.htm> (last visited July 20, 2014).

### C. *Establishing an Informational Database for the Securities Industry*

As the securities industry was rapidly growing, the NASD needed to ensure that it could maintain, and subsequently dispense to the public, the registration and dispute information of the thousands of broker dealers that were forming in the industry.<sup>66</sup> Thus, the NASD created the CRD in 1981.<sup>67</sup> The CRD houses registered firm and individual broker information, which includes customer dispute information disclosures.<sup>68</sup> Customer dispute information consists of “customer complaints, arbitration claims, . . . court filings made by customers, and the arbitration awards or court judgments that may result from those claims or filings.”<sup>69</sup>

FINRA gathers the information found on the CRD through the completion of required registration forms.<sup>70</sup> The most commonly referred to forms in the industry are the U-4 and U-5, which are used for the registration and termination of associated persons.<sup>71</sup> Customer dispute information reported on FINRA’s registration forms is made available through the investor tool BrokerCheck.<sup>72</sup> What started as the NASD’s Public Disclosure Program in 1988 became known as BrokerCheck in 2003.<sup>73</sup> BrokerCheck is a free tool for investors, intended to assist their investing decisions by providing professional background information on current and former FINRA-registered brokerage firms and brokers.<sup>74</sup> FINRA intends for BrokerCheck to be the

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66. See *CRD & IARD*, N. AM. SEC. ADMINISTRATORS ASS’N, <http://www.nasaa.org/industry-resources/investment-advisers/crd-iard> (last visited July 20, 2014) (sharing the responsibility of maintaining the system with the North American Securities Administrators Association (“NASAA”)).

67. *Id.*

68. See Elisofon, *supra* note 20, at 1 (including criminal and disciplinary history and civil litigation history too); *Central Registration Depository*, *supra* note 3 (operating as the central licensing and registration system); *CRD & IARD*, *supra* note 66.

69. Notice to Members 04-16, *supra* note 15, at 212 (“[C]ontain[ing] allegations that a member or one or more of its associated persons has violated securities laws, rules, or regulations.”).

70. See *Current Uniform Registration Forms for Electronic Filing in Web CRD*, FINRA, <http://www.finra.org/industry/compliance/registration/crd/filingguidance/p005235> (last visited July 20, 2014) (listing all registration forms required by FINRA). For the purposes of this Note, only the U-4, U-5, U-6, BD, and BDW are relevant.

71. See *id.* Forms BD and BDW are used for SEC registration and Form U-6 reports disciplinary action. *Id.*

72. *FINRA BrokerCheck*, *supra* note 11.

73. See Regulatory Notice 12-10, FINRA Requests Comment on Ways to Facilitate and Increase Investor Use of BrokerCheck Information, FINRA (Feb. 2012), at 2, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125621.pdf> (establishing the program in 1988).

74. *FINRA BrokerCheck*, *supra* note 11 (containing background information for approximately 1.3 million FINRA-registered brokers and 17,400 FINRA-registered brokerage

first resource that investors turn to when contemplating investment relationships.<sup>75</sup> BrokerCheck is a valuable source of information because it provides investors with “information about their registered representative before [the customers] open [their] account[s].”<sup>76</sup> Moreover, because most investor claims will be heard through private arbitration, the CRD and BrokerCheck are the public’s only access to information about legal proceedings brought by customers.<sup>77</sup>

The information available on BrokerCheck was enhanced by a FINRA rule change in May 2009.<sup>78</sup> Prior to May 18, 2009, there were only two categories of customer complaints that required reporting on Forms U-4 and U-5: (1) customer initiated sales practice violations; and (2) customer-initiated investment-related arbitration in which the broker was a named respondent.<sup>79</sup> Missing from the required reporting, however, were actions where a registered representative was identified through arbitration as being involved in the practice violations, but was not a named respondent.<sup>80</sup> This anomaly was corrected when the SEC approved FINRA’s proposed rule change,<sup>81</sup> which incorporated two additional questions into the Form U-4 and Form U-5; this could incidentally be responsible for the higher expungement requests since 2009, due to more broker reporting and subsequently more desired expungements.<sup>82</sup>

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firms).

75. *Id.*

76. Transcript of Testimony of Adam Levitt, Chairman, Concerning the Large Firm Project, (Sept. 14, 1994), available at <http://www.sec.gov/news/studies/roque2.txt>. Finding a trustworthy and reliable representative is essential. *Id.*

77. See Lipner, *supra* note 12, at 95 (providing that Internet access to arbitration information fills a significant gap in the public record).

78. See Order Approving a Proposed Rule Change as Modified by Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Filing as Amended by Amendment No. 2 Relating to Changes to Forms U4, U5, and FINRA Rule 8312, Securities Exchange Act Release No. 34-59916, 95 SEC Docket 2283 (Dec. 7, 2009) (approving SR-FINRA-2009-008).

79. See Ilgenfritz, *supra* note 3, at 341-42.

80. See Notice of Filing of Proposed Rule Change Relating to Proposed Rule Changes to Forms U4 and U5, 74 Fed. Reg. 13491, 13491-92 (Mar. 27, 2009) (stating purposes for rule change); Ilgenfritz, *supra* note 3, at 342 (regarding the absence of a requirement to report to FINRA).

81. Order Approving a Proposed Rule Change as Modified by Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Filing as Amended by Amendment No. 2 Relating to Changes to Forms U4, U5, and FINRA Rule 8312, 74 Fed. Reg. 23750, 23751 (May 20, 2009).

82. See Ilgenfritz, *supra* note 3, at 342, 359 (requiring registered representatives to report being the subject of investment related, customer-initiated arbitration claims within the past twenty-four months, even when not named as a defendant, brought about expected results); Antilla, *supra* note 4 (increasing requests was likely a result of the rule change in 2009).

### D. *The Initial Expungement Process and Subsequent Moratorium Rule Changes*

The process through which customer dispute information was expunged from a broker's CRD record went unchanged from the inception of the CRD in 1981 until 1999.<sup>83</sup> During that time, the NASD took the position that expungement ordered by an arbitrator should be afforded the same treatment as court-ordered expungement.<sup>84</sup> A disconnect between the NASD and the North American Securities Administrators Association ("NASAA") led to the 1999 moratorium imposed by the NASD.<sup>85</sup>

Because of the disconnect between the NASD and NASAA,<sup>86</sup> the NASD imposed a moratorium solely on arbitrator awarded expungements in February 1999, meaning that a customer dispute record would not be expunged unless it was confirmed by a court of appropriate jurisdiction.<sup>87</sup> The moratorium was met with serious opposition from members of the securities industry.<sup>88</sup> Following the moratorium, a multi-year effort was undertaken by the NASD to formulate and propose a new rule regarding the expungement process.<sup>89</sup> After circulating the text of

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83. Elisofon, *supra* note 20, at 2 (expunging information from the CRD system was permitted on the basis of an arbitration award directing such relief).

84. See Notice to Members 99-09, *supra* note 32, at 47.

85. See *id.* (disagreeing with the position that an arbitrator awarded expungement should be afforded the same treatment as an award granted by a court); see also *Our Role*, N. AM. SEC. ADMINISTRATORS ASS'N, <http://www.nasaa.org/about-us/our-role> (last visited July 20, 2014) (working within state governments, the NASAA state securities regulators protect the investing public).

86. See *supra* note 85.

87. See Notice to Members 99-09, *supra* note 32, at 47 ("NASD Regulation will not expunge information from the CRD system based on a directive contained in an arbitration award . . . unless the award has been confirmed by a court of competent jurisdiction.").

88. Mason, *supra* note 24, at 77; Letter from Stuart J. Kaswell to Joan C. Conley (July 30, 1999), available at <http://www.sifma.org/issues/item.aspx?id=1365> (recommending a return to pre-moratorium practices); NASD Notice to Members 99-54, NASD Regulation Seeks Comment on Issues Relating to Arbitrator-Ordered Expungements of Information from the Central Registration Depository (July 1999), at 352 [hereinafter Notice to Members 99-54], available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p004219.pdf> (acknowledging the opposing view of Florida's Attorney General and NASAA).

89. See Proposed Rule 2130 Governing Expungement of Customer Dispute Information from the Central Registration Depository (CRD System), File No. SR-NASD-2002-168 (Nov. 18, 2002), available at <http://www.sec.gov/rules/sro/34-47435.htm> (providing initial rule proposal to SEC for review); Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Proposed Rule 2130 Concerning the Expungement of Customer Dispute Information from the Central Registration Depository, 68 Fed. Reg. 11435, 11435 (Mar. 10, 2003) (filing amendment to 2130; proposing new rule by the NASD); Order Granting Approval of Proposed Rule Change and Amendment No. 1, Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2, Thereto, Relating to Proposed NASD Rule 2130 Concerning the Expungement of Customer Dispute Information From

the new rule for comments and concerns from members of the industry,<sup>90</sup> the NASD proposed Rule 2130 to the SEC; it was subsequently confirmed and put into effect by the SEC in 2004.<sup>91</sup>

Rule 2130 attempted to establish an approach to expungement that would challenge expungement awards “that might diminish or impair the integrity of the system and to ensure the maintenance of essential information for regulators and investors.”<sup>92</sup> In reaching the basis for the new rule, the NASD concluded it must balance the interests of three separate groups: (1) regulators; (2) the brokerage community; and (3) the investing community.<sup>93</sup> The NASD’s new rule held over the requirement from the 1999 moratorium that a court of competent jurisdiction must order or confirm all expungement directives.<sup>94</sup> Further, Rule 2130 required that in order to expunge customer dispute information, the arbitrator must find that: “(A) the claim, allegation, or information is factually impossible or clearly erroneous; (B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (C) the claim, allegation, or information is false.”<sup>95</sup> Thus, when a respondent sought expungement relief in arbitration, the respondent had to ask for expungement in his prayer for relief, and the arbitrator thereafter decided whether to grant the expungement request on the basis of at least one of the three articulated standards.<sup>96</sup> If an expungement award was granted by the arbitrator, the party seeking to enforce the award not only had to seek a court order to confirm the award, the party also had to name the NASD as an additional party to the request and serve the NASD with all appropriate documents, unless the NASD waived the requirement.<sup>97</sup> The notice of Rule 2130’s approval<sup>98</sup> was short lived though, as the NASD

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the Central Registration Depository System, 68 Fed. Reg. 74667, 74667 (Dec. 24, 2003).

90. See Notice to Members 01-65, *supra* note 21, at 563 (seeking specific comment on whether it should limit expungement to cases where order is based on one of three listed findings).

91. See 68 Fed. Reg. at 74667 (ordering approval of proposed rule); Notice to Members 04-16, *supra* note 15, at 211 (informing members that the SEC had confirmed Rule 2130 and it was now in effect).

92. See Notice to Members 04-16, *supra* note 15, at 212.

93. See *id.* at 212-13 (protecting the ability of both investors and regulators to obtain meaningful data).

94. *Id.* at 213.

95. NASD MANUAL R. 2130(b)(1)(A)–(C) (2004).

96. Notice to Members 04-16, *supra* note 15, at 213.

97. See *id.* at 214. “[The] NASD will waive the obligation to be named as a party if [the] NASD determines that the expungement relief is based on an affirmative finding that the expungement meets one or more of the standards in the rule.” *Id.* However, “[if the] NASD staff determines that the expungement was not based on one or more of the standards in Rule 2130, it will advise the parties that NASD will not waive the requirement . . .” *Id.*

98. See generally *id.*

soon after released another notice, which addressed the growing industry concerns about the mistreatment of the expungement process through settlement.<sup>99</sup>

*E. The Use of Affidavits in Connection with Stipulated Awards and Settlements and the Clarification of Arbitrator Requirements*

The NASD's notice addressing the use of affidavits in connection with settlements was released in June 2004, shortly after the approval of Rule 2130.<sup>100</sup> There were a growing number of instances in the industry where a claimant would receive a monetary award through settlement in return for a customer affidavit absolving the respondent(s) of responsibility for the wrongdoing.<sup>101</sup> The NASD conceded that the affidavits submitted with the settlement terms were usually inconsistent with the initial claim that had been filed against the respondent broker.<sup>102</sup> Prior to the NASD's notice, some industry members had already recognized this trend, even before Rule 2130 was implemented.<sup>103</sup>

Included in the June 2004 notice, the NASD alerted the industry that they would begin taking action regarding the abuse of settlement proceedings by requiring arbitrators to undergo training to help alert themselves of such concerns.<sup>104</sup> Further, the NASD required any party requesting a waiver of the NASD's participation in a court proceeding to also submit a copy of the claim, and all settlement documents and affidavits.<sup>105</sup> Finally, the NASD went so far as to threaten potential disciplinary action by the NASD's Department of Enforcement, but made no indication that any present cases of concern would be reinvestigated and subject to discipline.<sup>106</sup>

Despite the notice from the NASD, concerns continued to grow as members of the industry observed more and more oral requests to

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99. See generally Notice to Members 04-43, *supra* note 24.

100. *Id.* at 553.

101. *Id.* at 554.

102. *Id.*

103. See Mason, *supra* note 24, at 96 ("[T]he brokerage industry has taken matters privately into its own hands and for a number of years has been abusing the issue of expungement by using it as a settlement demand.").

104. See Notice to Members 04-43, *supra* note 24, at 555 (training advised arbitrators to consider the original claim filed and the settlement terms when assessing credibility). For current arbitrator training materials, see *Training*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitrators/Training> (last visited July 20, 2014) (containing links for required training, advanced training, and the written materials). See generally *FINRA Dispute Resolution Expungement*, FINRA (Feb. 2014), <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p125419.pdf> (providing the written training regarding expungement requests).

105. Notice to Members 04-43, *supra* note 24, at 555.

106. *Id.*

consent to expungement as part of a settlement.<sup>107</sup> These requests come with both practical and legal consequences for a customer's attorney in future claims.<sup>108</sup> As noted by an industry member, agreeing to a settlement is not a matter of negotiation, but instead is a professional responsibility decision.<sup>109</sup>

After the NASD issued its notice in June 2004 as the initial response to these concerns,<sup>110</sup> a new rule outlining additional arbitrator requirements was proposed and received SEC approval in 2008.<sup>111</sup> The rule implemented new procedures, taking effect in January 2009, for arbitrators to follow when considering requests for expungement relief.<sup>112</sup> Under these rules, arbitrators were required to: (1) hold a recorded hearing session by telephone or in person; (2) in cases involving a settlement, review the settlement documents to examine the amount paid to any party and any other terms and conditions of the settlement; (3) provide a brief written explanation of the reasons for ordering expungement; and (4) assess forum fees for hearing sessions held solely for the purpose of considering expungement against the parties requesting the relief.<sup>113</sup> FINRA informed members that these procedures were put into place to add transparency to the process and install even further assurances that expungement relief was only granted under the appropriate circumstances.<sup>114</sup> In accordance with the issuance of Rule 12805, FINRA required that arbitrators certify that they had familiarized themselves with the new rules, which was achieved through completion of one of six provided training methods.<sup>115</sup>

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107. See Caruso, *supra* note 24, at 4 (requesting such action typically came when discussing "a stipulated arbitration award, on the basis of Rule 2130(b)(1)(C) . . . which states that 'the claim, allegation, or information is false'").

108. *Id.* (including future cases where it can be indicated that a customer's counsel has a "track record" of filing false claims based on his history of retracting claims in expungement settlements, while "false" claims filed in an expungement suit could lead to possible sanctions from the respective state bar).

109. See Mason, *supra* note 24, at 96 (agreeing to an expungement in settlement "means you agree that the claim was baseless, unmeritorious, even frivolous," thus, you must not agree unless you have made a genuine mistake).

110. See Notice to Members 04-43, *supra* note 24, at 553.

111. See Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure to Establish Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief, 73 Fed. Reg. 66086, 66086 (Nov. 6, 2008).

112. See Regulatory Notice 08-79, SEC Approves Rules Establishing Procedures for Arbitrators Considering Expungement Requests, FINRA (Dec. 2008), at 1-2, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/pl117540.pdf>.

113. *Id.* at 2-3.

114. *Id.* at 2.

115. *Id.* at 4 (training methods included: reviewing written correspondence with a question and answer; reviewing a broadcast email with the same content as the written correspondence; listening to the audio workshop on expungement that FINRA broadcasted; reading Regulatory Notice 08-79;



FINRA made no further attempts at expungement change until updating the expungement portion of its website at the beginning of 2014.<sup>116</sup> The “guidance and reminder” was meant to remind arbitrators of their role in the expungement process, specifically the importance of their unique role in maintaining the CRD’s informational integrity.<sup>117</sup> Further, FINRA reiterated how essential accurate and complete information is to investors, as well as the importance of reviewing all appropriate documentation and providing a written explanation.<sup>118</sup> Most recently, FINRA’s Board has approved a rule proposal addressing the conditioning of settlements on expungement agreements, and has submitted the rule to the SEC for review.<sup>119</sup>

### III. INADEQUACIES OF THE CURRENT EXPUNGEMENT PROCESS

It would be inaccurate to suggest that FINRA has idly sat by while the industry clamored for expungement changes, as FINRA has made multiple attempts at resolving the deficiencies with the expungement process over the past fourteen years.<sup>120</sup> FINRA has implemented these rule changes in an attempt to ensure its overriding expungement purpose, that information only be expunged if it no longer has meaningful investor protection value.<sup>121</sup> Despite these attempts though, expungement continues to be a far too ordinary occurrence, and thus, decreases the completeness of the BrokerCheck resource with each accurate dispute that is expunged from a broker’s record.<sup>122</sup> Industry experts continue to advocate for changes of the flawed procedures, with the most recent being the incoming President of the Public Investors Arbitration Bar Association (“PIABA”): “The expungement process for

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taking the revised online expungement training module; and reading an article on expungement published in the arbitrator and mediator newsletter). Arbitrators certified they completed the training through a mailed-in form or online certification. *Id.* For current training materials, see *supra* note 104.

116. See generally *Notice to Arbitrators*, *supra* note 7.

117. See *id.*

118. *Id.* (reminding arbitrators that the written explanation can not be solely a recitation of one of the Rule 2080 grounds, arbitrators need to instead identify the documentation or evidence that was relied upon to make the expungement decision).

119. See FINRA Board Approves Rule Prohibiting Conditioning Settlements, *supra* note 24 (notifying members of rule approval); Proposed Rule Change to Adopt FINRA Rule 2081 (Prohibited Conditions Relating to Expungement of Customer Dispute Information), File No. SR-2014-020 (Apr. 14, 2014), <http://www.finra.org/Industry/Regulation/RuleFilings/2014/P485127> (proposing rule to SEC).

120. See *supra* Part II.D–E.

121. See *Notice to Arbitrators*, *supra* note 7.

122. See Ilgenfritz, *supra* note 3, at 361 (suggesting that accurate expungements are adversely affecting the CRD); Mason, *supra* note 24, at 77 (undermining the CRD’s accuracy by getting accurate material expunged); *infra* Part III.A.1.

stockbrokers in arbitration cases is clearly broken today and needs fixing. We have believed for some time now that expungements are a significant investor protections issue . . . .”<sup>123</sup>

Particularly concerning to industry members is the misuse of settlement negotiations to obtain expungement orders and the subsequent adverse effect it has had on the expungement process.<sup>124</sup> Subpart A of this Part will further examine the settlement issues damaging the expungement process.<sup>125</sup> Aside from the specific settlement issue, the general expungement guidelines are also not serving their purpose.<sup>126</sup> Subpart B will discuss the issues surrounding the general guidelines, most specifically, the lack of defined requirements for arbitrators to follow and the negative effect that the customer’s absence has on an expungement hearing.<sup>127</sup>

### A. *The Abuse of the Expungement Process Through Settlement*

In claims between customers and broker dealers ending in settlement, the broker dealers often provide terms within the settlement agreement to facilitate their expungement request, which has led to multiple issues involving the expungement process.<sup>128</sup> The use of settlements as a tool to obtain expungement awards is not a problem that suddenly appeared—it has been a point of constant discussion among industry members for over a decade.<sup>129</sup> The primary tactic that has been called into question is a respondent’s offer of monetary compensation in

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123. *PIABA Study*, *supra* note 12, at 2 (quoting Jason R. Doss, incoming President, PIABA). Doss continued, “the consequences for the information relied upon by investors and investor confidence in the financial markets must be seen as paramount here. This situation cannot be allowed to go unaddressed.” *Id.*

124. *See* Caruso, *supra* note 24, at 4-5 (misusing settlements creates ethical concerns for investor attorneys); Ilgenfritz, *supra* note 3, at 360 (arguing expungement has become an ordinary remedy in settlement cases); Lipner, *supra* note 12, at 95-96 (expunging claims based on settlement agreements risks removal of valuable information from the CRD); Mason, *supra* note 24, at 77 (inserting expungement demands into settlements is an abuse of the process); *PIABA Study*, *supra* note 12, at 2 (“Regulators need to step in and crack down on the granting of expungements particularly in settled cases.” (quoting Scott Ilgenfritz, current President, PIABA)).

125. *See infra* Part III.A.

126. *See infra* Part III.B.

127. *See infra* Part III.B.

128. *See* Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure to Establish New Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief, 73 Fed. Reg. 18308, 18309 (Apr. 3, 2008) (providing an example where a customer is required to accept such stipulation); Notice to Members 01-65, *supra* note 21, at 567 (identifying the concern that brokers will condition settlement awards on expungement agreements); Lazaro, *supra* note 17, at 94 (requesting expungement through settlements poses ethical concerns).

129. *See supra* notes 24, 124.

exchange for an agreement to not oppose the respondent's expungement request.<sup>130</sup> Such a monetary offer often puts pressure on the customer and the customer's attorney to accept a deal that grants expungement because, "even if '[the attorney] and [his] client thought the guy was guilty as sin [they] would still do it, because [they] wouldn't get money unless [they] agreed to that.'"<sup>131</sup> Therein lies the problem; customers and their attorneys are feeling forced into accepting an offer.<sup>132</sup>

As industry concern over settlement abuse grew over time, FINRA imposed numerous regulations in attempt to solve the settlement problem.<sup>133</sup> FINRA recognized that this type of bargaining in a settlement agreement could result in the "buying of a clean record and would make a mockery of any affirmative determination of one of the three grounds in Rule 2130 by a panel of arbitrators."<sup>134</sup> Prior to instituting Rule 12805, FINRA even admitted that there were flaws in the guidelines.<sup>135</sup>

However, despite the numerous rule changes, notable flaws regarding the handling of settlements still exist.<sup>136</sup> Since disputes generally settle at an early stage in the claim—before a hearing of evidence—it remains unclear how arbitrators make definitive expungement determinations.<sup>137</sup> Further, a customer's oral requests to consent to an expungement award after settlement places all burdens and

130. See Lipner, *supra* note 12, at 96; Eaglesham & Barry, *supra* note 25 ("[E]xpungement has gone from being a means to correct genuine errors into a 'tool for brokers and their firms . . .'" (quoting Bruce Oakes)).

131. *NASD Names Itself a Party to Expungement Proceedings in New Rule*, SEC. WK., Mar. 15, 2004, at 1 (quoting Kord Lagemann).

132. See Elisofon, *supra* note 20, at 3.

133. See *supra* Part II.E. In addressing concerns, FINRA has reiterated to members that they must "observe high standards of commercial honor and just and equitable principles of trade." Notice to Members 04-43, *supra* note 24, at 555.

134. Ilgenfritz, *supra* note 3, at 349 (internal quotations omitted); see Notice to Members 04-44, Impermissible Confidentiality Provisions and Complaint Withdrawal Provisions in Settlement Agreements (June 2004), at 558, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003012.pdf> (reminding members that conditioning settlements on withdrawal of complaints is impermissible).

135. See Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure to Establish New Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief, 73 Fed. Reg. 18308, 18309 (Apr. 3, 2008) (admitting that arbitrators would sometimes order expungement on the merits of the case, but would more often grant expungement in order to facilitate settlement of the dispute).

136. See *infra* notes 137-40 and accompanying text; Part III.A.1-3.

137. Dan Jamieson, *Record-Cleaning Rules for Registered Reps to Get Finra Tweak*, INVESTMENT NEWS (Aug. 6, 2013, 3:40 PM), <http://www.investmentnews.com/article/20130806/FREE/130809952#> [hereinafter Jamieson, *Record-Cleaning*]. Even when the arbitration panel hears evidence it is almost always one-sided, as the customer rarely participates, which provides the same unclear picture of how an arbitrator is to make a definitive decision. See Lipner, *supra* note 12, at 88.

potential ramifications on the customer's counsel.<sup>138</sup> Moreover, the money offered through settlement leads to the assumption that a clean record is being bought, as paying a large sum of money certainly suggests some form of culpability.<sup>139</sup> Put in the most succinct way possible, "[e]xpungement is just too easy after settlement."<sup>140</sup>

The review of expungement statistics regarding disputes that resulted in a settlement agreement is a useful way to demonstrate the issues just discussed, which Subpart A.1, will examine.<sup>141</sup> Further, as a result of the demonstrated issues involving settlement in expungement claims, ethical issues are likely to arise too, which will be considered in Subpart A.2.<sup>142</sup> Finally, the discussed settlement issues have not gone unnoticed by members of public office, thus Subpart A.3 will detail members of public office who have taken a stance against the abuse of settlement in expungement proceedings.<sup>143</sup>

#### 1. Statistical Analysis of Settlements Agreeing to Expungement Awards

Dating back as early as 2006, a study performed by PIABA analyzing 200 settlement award cases found that out of the 185 where brokers requested expungement, 182 were successful.<sup>144</sup> In the two years prior to the institution of Rule 12805, expungement was granted roughly 89% of the time in cases resolved by settlement that subsequently sought an expungement award.<sup>145</sup> After the institution of the new rule, in a span of approximately seven months—from May 2009 to December 2009—out of a total of 199 settlements that agreed to an expungement, only 6 of those expungement requests were denied.<sup>146</sup> The study continued, finding that from May 2009 through the end of December 2011, a total of 483 settlements agreeing to expungement were entered, with only 15

138. See Caruso, *supra* note 24, at 4.

139. See Ilgenfritz, *supra* note 3, at 362 ("Member firms do not pay substantial sums to claimants when investors' claims are clearly erroneous . . ."); Dan Jamieson, *New Finra Rules Could Help Brokers Clear Records in Certain Cases: Regulator Working on Dual Tracks But Specifics and Timing Remain Uncertain*, INVESTMENT NEWS (Aug. 8, 2013, 4:57 PM), <http://www.investmentnews.com/article/20130808/FREE/130809919> [hereinafter Jamieson, *New Finra Rules*]; Lee, *supra* note 9, at 4.

140. Barlyn, *supra* note 10 (quoting Seth Lipner).

141. See *infra* Part III.A.1.

142. See *infra* Part III.A.2.

143. See *infra* Part III.A.3.

144. Donovan, *supra* note 19, at 3. The study found that in 130 of those 200 cases, arbitrators granted expungement before any hearing on the merits of a case went forward. *Id.*

145. Ilgenfritz, *supra* note 3, at 360 (dating back to January 1, 2007 through May 2009).

146. *Id.* at 357.

of those expungement requests being denied.<sup>147</sup> That is nearly a 97% success rate for broker dealers seeking to find a way to expunge their records through settlement negotiations.<sup>148</sup>

Separately, more recent studies have shown similar results to the previously mentioned research.<sup>149</sup> Lipner, an attorney who represents investors against brokers, analyzed 150 expungement requests from the fourth quarters of 2011 and 2012 that resulted from settlements, and discovered that arbitrators had granted expungement in all but *five* of the cases.<sup>150</sup> The most recent analysis of all 2013 settlement cases indicates that out of 353 total expungement requests brought for post-settlement confirmation, only *thirty* were denied.<sup>151</sup> That equates to a 91.5% success rate for broker dealers who sought expungement through settlement this past calendar year.<sup>152</sup> These settlement agreements leading to expungement not only endanger investors, but also present further legal issues for customer attorneys who are agreeing to such settlements.<sup>153</sup>

## 2. Problems Faced by Customer Attorneys After Agreeing to a Settlement

When a customer agrees to a settlement offer in exchange for their agreement to expunge the dispute from the broker's record, it may not affect the customer, but it presents practical, legal, and collateral consequences for the customer's attorney.<sup>154</sup> The burden and ramifications are placed squarely on the attorney who accepts such an offer on behalf of the client.<sup>155</sup> An attorney who agrees to expunge a

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147. *Id.* at 359.

148. *See id.*

149. *See supra* notes 144-48 and accompanying text.

150. Antilla, *supra* note 4. In his most recent analysis of the first six months of 2013, Professor Lipner looked at 205 and found that only 13 resulted in a denial, and in only 3 of the cases did the investor object to expungement. Lipner, *supra* note 12, at 92. In each of the 3 cases where the investor objected, the request for expungement was denied. *Id.* For a more detailed analysis of Professor Lipner's most recent research, see *id.* at 91-95.

151. FINRA Dispute Resolution Arbitration Award Review 2013, *supra* note 23. The research also indicates the Rule 2080(b)(1) predicate that was cited by the arbitrators when granting expungement and found that predicate (c), "the claim, allegation, or information is false" was the primary factor cited, roughly 79% of the time. *Id.*; FINRA MANUAL R. 2080(b)(1)(C) (2011). Factor (a), "the claim, allegation, or information is factually impossible or clearly erroneous" was cited the second most, approximately 67% of the time. FINRA Dispute Resolution Arbitration Award Review 2013, *supra* note 23; FINRA MANUAL R. 2080(b)(1)(A) (2011).

152. FINRA Dispute Resolution Arbitration Award Review 2013, *supra* note 23.

153. *See infra* Part III.A.2.

154. Caruso, *supra* note 24, at 4-5; Lazaro, *supra* note 17, at 94-95 (presenting two possible ethical concerns: (1) an attorney's obligation of candor; and (2) whether the attorney knowingly filed a frivolous and meritless claim).

155. Caruso, *supra* note 24, at 4 (describing settlement abuse as the "flavor of the month").

claim and admit on the record that the claim filed was “false,” puts himself in danger of both earning a reputation as an attorney who files false claims, and receiving severe sanctions from his respective bar association for filing a false claim.<sup>156</sup> A customer’s attorney who files an honest, non-frivolous claim can not accept a deal agreeing to expungement, as it would require the attorney to agree the claim was false.<sup>157</sup>

### 3. Challenges From Public Office

In 2006 and 2007, a Maryland broker named Joseph Karsner received eighteen separate arbitrator expungements that had been preceded by settlement, which prompted the Maryland Securities Commissioner to interject.<sup>158</sup> One of the claims even involved an arbitrator dissenting because the panel’s conclusion had been based on no actual evidence.<sup>159</sup> Accusing Karsner of “dishonest and unethical” practices,<sup>160</sup> the Maryland Securities Commissioner successfully interjected into the court confirmation claim,<sup>161</sup> but eventually settled with Karsner.<sup>162</sup> As a crystal clear indication of what likely occurs in many settlement negotiations that involve expungement, Karsner wrote to FINRA that an offer to settle with a customer for \$15,000 would be “automatically reduced to \$9,999 if [the customer denied] the expungement request.”<sup>163</sup>

Similar to the situation that took place in Maryland, New York’s former Attorney General, Andrew Cuomo, also attempted to interject into a number of expungement claims in 2007.<sup>164</sup> Cuomo intervened in seven separate cases, arguing, among other things, that expungements

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156. *Id.*; see also Lazaro, *supra* note 17, at 95-96 (asserting that while no attorney wants to file a meritless claim, possible sanctions are unlikely). Along with the name of the lawyer being associated with filing a false claim, the investor’s name will also be associated with filing a false claim, because when expungement is granted, the FINRA award database will list the award with the investor’s name in a caption and will likely contain a “finding” that the complaint was false or erroneous. Lipner, *supra* note 12, at 102.

157. Mason, *supra* note 24, at 96.

158. Lipner, *supra* note 12, at 76 (objecting to one of the cases where expungement was sought).

159. Antilla, *supra* note 4 (“It is the responsibility of the panel to see through a ruse such as this.” (quoting Sidney Werner, arbitrator)).

160. *Id.*

161. *Karsner v. Lothian*, 532 F.3d 876, 887 (D.C. Cir. 2008) (reversing the lower court). For a further analysis of the *Karsner* decision, including whether courts have the power to confirm arbitration expungement awards, see Lipner, *supra* note 12, at 76-78.

162. Antilla, *supra* note 4 (agreeing not to seek a broker’s license until 2016); Lipner, *supra* note 12, at 78 (consenting to engaging in dishonest and unethical practices).

163. Antilla, *supra* note 4.

164. See Donovan, *supra* note 19, at 1 (believing complaints were expunged too easily).

were being bought and violated public policy.<sup>165</sup> The request to intervene was based on Cuomo's role as a securities regulator and interest in preserving state records.<sup>166</sup> However, the N.Y. Courts pointed to the lack of judicial requirements to confirm an expungement award.<sup>167</sup> Thus, despite successfully intervening in all but one case, Cuomo was unsuccessful in his attempts to overturn the expungements and implement his policy.<sup>168</sup>

### B. FINRA's Deficient Expungement Guidelines

While a majority of expungement issues stem from the previously discussed settlement agreement problem,<sup>169</sup> the general expungement guidelines regulating the granting of all expungement awards are "seriously flawed," too.<sup>170</sup> A primary concern surrounding the guidelines, including both Rule 2080 and Rule 12805, is that arbitrators do not appear to be applying either guideline when making expungement determinations.<sup>171</sup> Moreover, "arbitrators do not appear to appreciate the importance of the accuracy of disclosure information in the CRD system to investor protection."<sup>172</sup>

A likely source of these issues<sup>173</sup> is the current unclear arbitrator guidelines.<sup>174</sup> As one court described it, nothing in Rule 2080 "tells the

165. Lipner, *supra* note 12, at 79. The seven cases in which Cuomo intervened were: *In re Johnson v. Summit Equities, Inc.*, 864 N.Y.S.2d 873, 881 (Sup. Ct. 2008); *In re Kay v. Abrams*, 853 N.Y.S.2d 862, 863 (Sup. Ct. 2008); *In re BNY Inv. Ctr. Inc. v. Bacchus*, No. 0109678/2007, 2008 WL 2490062 (N.Y. Sup. Ct. June 13, 2008); *In re Walker v. Connelly*, No. 52161, slip op. at 2 (N.Y. Sup. Ct. 2008); *Zaferiou v. Holgado*, No. 102996/07, 2008 WL 6677787, at \*1 (N.Y. Sup. Ct. Apr. 14, 2008); *Sage, Ruddy & Co. v. Salzberg*, No. 2007-01942, 2007 WL 2174117, at \*2 (N.Y. Sup. Ct. June 1, 2007); *In re UBS Fin. Servs., Inc. v. Gibson*, No. 103188/07, slip op. at 1 (N.Y. Sup. Ct. Nov. 15, 2007).

166. Lipner, *supra* note 12, at 79.

167. See Elisofon, *supra* note 20, at 3 (observing that Rule 2080 lacked direction for judges); Lipner, *supra* note 12, at 80 (viewing their role as extremely limited in the confirmation process).

168. See Donovan, *supra* note 19, at 1-2 (describing Cuomo's intervention in all cases); Lipner, *supra* note 12, at 79-86 (describing the prior case decisions that ultimately doomed Cuomo's cause).

169. See *supra* Part III.A.

170. See *PIABA Study*, *supra* note 12, at 2 (quoting Scott Ilgenfritz).

171. See Ilgenfritz, *supra* note 3, at 360-61 (failing to apply guidelines and rubber-stamping awards); Jamieson, *Record-Cleaning*, *supra* note 137 (arguing arbitrator determinations are unclear because of how quick they make them); Lipner, *supra* note 12, at 96 (imposing Rule 2080 changed nothing, as the rule was "vague and over-lapping").

172. Ilgenfritz, *supra* note 3, at 362; see also Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure to Establish Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief, 73 Fed. Reg. 66086, 66087 (Nov. 6, 2008) (granting expungement without reviewing settlement agreement).

173. See *supra* notes 170-72 and accompanying text.

174. See Ilgenfritz, *supra* note 3, at 351 (identifying commentater arguments with the

court what it must find or what the arbitrator must find for a court to confirm” an award directing expungement.<sup>175</sup> Lipner has recognized that “[t]here’s a certain amount of vagueness in [the] current standards . . . .”<sup>176</sup> The lack of guidance provided in the rules affects the court confirmation process too, as a court that denied an expungement confirmation request indicated, the court would have confirmed it if the arbitration panel had provided “amended awards containing specific affirmative factual findings in each case justifying the expungement recommendations, along with the portions of the record on which those findings are based . . . .”<sup>177</sup>

A considerable lack of input on behalf of the customer after an award is issued is a further point of contention with the current guidelines.<sup>178</sup> FINRA has indicated that it does not believe the absence of the customer leads to any presumption of consent to expungement on the customer’s behalf.<sup>179</sup> However, industry lawyers have said that they believe an investor’s testimony could possibly sway an arbitrator to decline the broker’s expungement request.<sup>180</sup> One industry attorney felt that, “one-sided hearings inherently lack[ed] the adversarial mechanism needed for fact-finding.”<sup>181</sup>

Further, the relative ease with which FINRA can remove itself as an additional party limits the involvement it will have with a given expungement claim.<sup>182</sup> Take, for instance, the current Rule 2080(b)(2)(B), which allows FINRA to remove itself as an additional party if “the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory

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guidelines when the rules were initially passed); Lipner, *supra* note 12, at 62 (instituting Rule 2080 was supposed to limit expungements but has only acted as rubber-stamping the process).

175. *In re Kay v. Abrams*, 853 N.Y.S.2d 862, 865 (Sup. Ct. 2008).

176. Jamieson, *New Finra Rules*, *supra* note 139 (quoting Seth Lipner).

177. *In re Johnson v. Summit Equities, Inc.*, 864 N.Y.S.2d 873, 901 (Sup. Ct. 2008); *see also* Lipner, *supra* note 12, at 81-83 (discussing the reasoning behind the *Johnson* decision). An arbitrator in a recent decision indicated that few arbitration decisions actually reflect the higher standard of proof required, and any claim supported by some reasonable proof can not be labeled as false. *See* Award FINRA Dispute Resolution at 4, *In re Gilliam v. SagePoint Fin., Inc.*, No. 12-03717 (July 19, 2013) (Meyer, Arb.), *available at* <http://finraawardsonline.finra.org/viewdocument.aspx?DocNB=61402>.

178. *See* Lipner, *supra* note 12, at 97-98 (considering only broker testimony at hearings).

179. *See* Regulatory Notice 12-18, FINRA Requests Comment on Proposed New *In re* Expungement Procedures for Persons Not Named in a Customer-Initiated Arbitration, FINRA (Apr. 2012), at 8, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125947.pdf> (providing the ability for the customer to attend or be represented at hearing).

180. Barlyn, *supra* note 10.

181. Lipner, *supra* note 12, at 88 (internal quotations omitted).

182. *See* Ilgenfritz, *supra* note 3, at 363 (suggesting FINRA should play a larger role because their current involvement is not enough); Mason, *supra* note 24, at 84 (suggesting that the NASD would have a lack of involvement in the process).



requirements.”<sup>183</sup> FINRA has consistently indicated that information should not be expunged from the CRD unless it has no meaningful investor protection or regulatory value.<sup>184</sup> Thus, all expungement awards granted by arbitration panels should no longer have any value to the CRD,<sup>185</sup> which means in *all* circumstances FINRA would be able to rely on Rule 2080(b)(2) to remove itself as an additional party, and to describe the claim as an extraordinary circumstance is factually incorrect.<sup>186</sup> Rule 2080(b)(2) only adds to the current redundancy and ineffectiveness of both Rule 2080 and Rule 12805.<sup>187</sup>

#### IV. MODIFYING THE CURRENT RULES

As this Note has identified, the current FINRA expungement process continues to prove its inadequacy, and will only continue to endanger investors for as long as the current expungement guidelines are in effect.<sup>188</sup> Expungement was implemented by FINRA in order to be an extraordinary remedy, one that should be awarded only when the information in question has no meaningful investor protection or regulatory value.<sup>189</sup> However, it is time to stop and realize that expungement is no longer an extraordinary remedy, it has become nothing short of an ordinary remedy.<sup>190</sup> There are parts of the securities industry that have recognized the existing issue with the expungement process,<sup>191</sup> and it is now time for FINRA, and subsequently the SEC, to admit that there is a problem that needs to be fixed.<sup>192</sup>

This Part will suggest, and succinctly identify, a solution to the current expungement issue.<sup>193</sup> Subpart A will provide the first step

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183. FINRA MANUAL R. 2080(b)(2)(B) (2011).

184. *E.g.*, Lee, *supra* note 9, at 2; *Notice to Arbitrators*, *supra* note 7; *see also* Notice to Members 99-54, *supra* note 88, at 352 (“[I]nformation should not be expunged without good reason . . .”).

185. *See* Mark Schoeff, Jr., *Too Easy for Brokers to Clean Records, Lawyers Say*, INVESTMENTNEWS (Oct. 16, 2013, 3:31 PM), <http://www.investmentnews.com/article/20131016/FREE/131019905> (speaking with an attorney who believes FINRA should get rid of expungement, as all information should be on the CRD).

186. *See* Lipner, *supra* note 12, at 73-75.

187. *See supra* notes 169-86 and accompanying text.

188. *See supra* Part III.A-B.

189. *See supra* note 184 and accompanying text.

190. *See* Ilgenfritz, *supra* note 3, at 360; *supra* Part III.A.1.

191. *See supra* note 24.

192. *See supra* note 119 and accompanying text (identifying that FINRA has begun the process of approving one new rule and submitting it to the SEC for review).

193. *See infra* Part IV.A-C. As this Note proposes changes to current rules, it is important to have an understanding of the FINRA rulemaking process. *See FINRA Rulemaking Process*, FINRA, <http://www.finra.org/industry/regulation/finRARules/rulemakingProcess> (last visited July 20, 2014) (providing an overview of the rule making process from proposal to confirmation).

towards fixing the current expungement process with modifications and additions to the current FINRA Rule 2080.<sup>194</sup> The proposed solution will continue in Subpart B with necessary amendments that should be made to the current FINRA Rule 12805, providing stricter and more expansive requirements.<sup>195</sup> Finally, Subpart C will discuss the possibility of proposing additional training guidelines for current FINRA arbitrators and whether or not they are necessary for the purposes of this solution.<sup>196</sup>

### A. Amending Current FINRA Rule 2080

When considering the current Rule 2080, it must be kept in mind that it serves as the first step of the expungement process, as it allows FINRA to waive its right to be named as an additional party.<sup>197</sup> FINRA's participation in the process should be a priority to an organization tasked with regulating the securities industry, where protecting investors is of primary concern.<sup>198</sup> Waiving the right to participate in the expungement process creates a situation where arbitrators are rubber-stamping expungement awards, as there is no real supervision or ramifications for not following guidelines.<sup>199</sup> Resolving such an issue begins with ensuring more FINRA involvement than is currently taking place.<sup>200</sup>

Initially, when considering what aspects of the current Rule 2080 to leave unchanged, section (a) of Rule 2080 should be one of those sections.<sup>201</sup> Despite the court system often being reluctant to enter into the details of the process and overturn awards<sup>202</sup> (except in rare instances),<sup>203</sup> requiring a court to confirm the award still allows for that possibility, which is why section (a) of Rule 2080 is a necessity.<sup>204</sup> The

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194. See *infra* Part IV.A.

195. See *infra* Part IV.B.

196. See *infra* Part IV.C.

197. FINRA MANUAL R. 2080(b)(2) (2011).

198. See *About FINRA*, *supra* note 10.

199. See Ilgenfritz, *supra* note 3, at 360-61 (reasoning that rubber-stamping occurs when arbitrators issue expungement awards in settlement cases without following mandated FINRA requirements); Lipner, *supra* note 12, at 62 (allowing for rubber-stamping of awards is a problem with the current rule).

200. See Ilgenfritz, *supra* note 3, at 363 (suggesting that FINRA play a more active role); Schoeff, Jr., *supra* note 185 ("Finra needs to take more action to protect investors." (quoting Jason Doss)). But see S. Lawrence Polk & Avital Stadler, *Expungement Games: A Closer Look at PIABA's Study and FINRA's Response*, SEC. ARB. COMMENTATOR, Dec. 2013, at 1 (suggesting that more restrictions are unnecessary as there are adequate regulations in place to protect investors).

201. See FINRA MANUAL R. 2080(a) (2011); *infra* notes 202-04 and accompanying text (explaining why the section will be beneficial). But see Lipner, *supra* note 12, at 101 (suggesting that the court confirmation process provides no additional safeguards).

202. See *supra* Part III.A.3.

203. See Lipner, *supra* note 12, at 81-83 (discussing *In re Johnson*).

204. See *supra* notes 165-68 and accompanying text (identifying an attempt at court

remainder of the current Rule 2080 is where this Note suggests modifications to improve the expungement process.<sup>205</sup> Rule 2080 must be altered to include much more diligent involvement from FINRA, both before the claim reaches the arbitration stage, and also throughout the claim as well, including the court confirmation process.<sup>206</sup> The following is a draft proposal for a modified Rule 2080, excluding section (a) of Rule 2080:<sup>207</sup>

*(b) Prior to mailing an expungement motion to the presiding arbitrator(s), FINRA must critically review the motion. Based on such review, FINRA may determine that it will interject to make the final decision on whether to award expungement, thus making the decision of the arbitrator(s) a recommendation. A critical review of the motion must include the following:*<sup>208</sup>

*(1) An assessment of any monetary award issued to the claimant in the initial arbitration hearing;*<sup>209</sup> and

*(2) An assessment of the number of times the moving party has requested expungement award prior to this motion.*<sup>210</sup> *This number must be communicated to the panel when the motion is sent from FINRA.*<sup>211</sup>

*(c) Members or associated persons petitioning a court for expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents unless this requirement is waived pursuant to subparagraph (1) or (2) below. FINRA may not waive its obligation to be named as an additional party in any claim seeking expungement involving a settlement agreement, thus the following subparagraphs are inapplicable to any claim involving a settlement agreement.*<sup>212</sup>

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confirmation and how the courts see themselves in such a role). This Note acknowledges the potential issue regarding the court system's larger role in this matter; however, it is a much larger issue than this Note's intended purpose and would be better resolved in a separate piece.

205. See *infra* notes 208-33 and accompanying text (outlining a new rule proposal and the reasons for the proposal).

206. See *supra* Part III.B.

207. Modifications and additions to the current Rule 2080 are indicated by italics.

208. See Ilgenfritz, *supra* note 3, at 363 (suggesting similar critical review); Lipner, *supra* note 12, at 103 (making a similar suggestion for FINRA to receive notice earlier).

209. See *supra* Part II.B (discussing the arbitration process and its importance).

210. See Ilgenfritz, *supra* note 3, at 363 (suggesting the assessment of the number of prior expungement requests as aspects to consider for additional arbitrator training); see also Lipner, *supra* note 12, at 97-98 (mentioning prior awards as something not included in the current system).

211. The following draft of section (c) is a rewrite of the current section 2080(b). See FINRA MANUAL R. 2080(b) (2011).

212. There have been industry professionals who have suggested adjusting the settlement process. See Ilgenfritz, *supra* note 3, at 362-63 (suggesting stricter penalties for abusing the settlement process along with more expansive arbitrator training); Lazaro, *supra* note 17, at 98

(1) Upon request, FINRA may waive the obligation to name FINRA as a party if FINRA determines that the expungement relief is based on affirmative judicial or arbitral findings that:

(A) the claim, allegation or information is factually impossible or clearly erroneous.<sup>213</sup> *FINRA must consider the following guidelines to justify such a finding:*

(i) *Any monetary compensation awarded to the claimant through the initial, non-expungement arbitration claim; and*

(ii) *Whether the party requesting expungement was found liable as a result of the initial arbitration hearing.*

(B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds;<sup>214</sup> or

(C) the claim, allegation or information is false. *FINRA must consider the following guidelines to justify such a finding:*

(i) *Any monetary compensation awarded to the claimant through the initial, non-expungement arbitration claim; and*

(ii) *Whether the party requesting expungement was found liable as a result of the initial arbitration hearing.*

(2) If the expungement relief is based on judicial or arbitral findings other than those described above, FINRA, in its sole discretion and under extraordinary circumstances, also may waive the obligation to name FINRA as a party if it determines that:

(A) the expungement relief and accompanying findings on which it is based are meritorious.<sup>215</sup>

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(suggesting expungement is removed entirely from the settlement process); Lipner, *supra* note 12, at 103-04 (suggesting that arbitrators no longer make decisions and someone other than FINRA should make award decisions instead); Schoeff, Jr., *supra* note 185 (speaking with an attorney who suggested that arbitrators should not be involved in the settlement process at all).

213. See Lee, *supra* note 9, at 3 (indicating an example of a factually impossible claim would be “if the registered person was not [actually] handling the customer’s account at the time of dispute and no liability was found” during the initial arbitration).

214. FINRA MANUAL R. 2080(b)(1)(B). Clause (b)(1)(B) is not changed in this proposal, as it serves its current purpose adequately, because preventing brokers from expunging detrimental erroneous claims can adversely affect their careers. See Barlyn, *supra* note 10 (carrying black marks from unproven claims should not be an industry norm); Mason, *supra* note 24, at 87 (“Ever try to switch brokerages with such a record? You are radioactive . . .”).

215. Section (b)(2)(B) was removed as this Note determined it to be redundant. See *supra* text accompanying notes 183-87.

*(d) If FINRA waives its obligation to be named as an additional party it must provide a brief written explanation indicating which finding they based their decision on as well as a description supported by evidence or testimony as to why the (c)(1)(A)–(C) or (c)(2)(A) finding was applicable.*<sup>216</sup>

The general purpose behind the modified Rule 2080 proposal is to ensure more substantive involvement from FINRA throughout the process.<sup>217</sup> Requiring FINRA's review prior to the expungement motion being sent to the arbitrators ensures FINRA's understanding of all expungement cases before they begin, instead of after the award is granted as it is under the current system.<sup>218</sup> While the addition of proposed Rule 2080(b) leaves the decision of whether to completely interject up to FINRA, requiring FINRA to make itself more knowledgeable regarding all expungement claims will benefit the entire process.<sup>219</sup>

The ultimate rationale behind the proposed Rule 2080(c), currently Rule 2080(b), is to help alleviate the previously identified issue of unclear guidelines.<sup>220</sup> Further, as also discussed, the most critical issue currently facing FINRA is the rate at which expungements are being granted as a result of settlement agreements.<sup>221</sup> Moreover, expungement agreements via settlement present the strongest possibility for deception and non-merited expungements.<sup>222</sup> The proposal is not requiring FINRA to be involved in *every* proceeding, only those involving settlement agreements.<sup>223</sup> Moreover, if FINRA's purpose is truly to protect investors, it will need to devote the resources necessary to remain informed of proceedings involving settlements in order to prevent the continued expungement of valuable CRD information.<sup>224</sup>

216. The current Rule 2080(c) remains unchanged and becomes 2080(e) in this proposal.

217. See *supra* notes 197-211 and accompanying text.

218. See Ilgenfritz, *supra* note 3, at 362 (explaining FINRA's current process of receiving a motion for expungement relief, not reviewing it, and sending a copy to the arbitration panel).

219. See *id.* at 363 (arguing FINRA does not currently play an active enough role and must make itself more knowledgeable); Lipner, *supra* note 12, at 103 (arguing FINRA must insert itself into the dispute earlier to become more knowledgeable).

220. See *supra* Part III.B.

221. See *supra* Part III.A.1.

222. See *supra* Part III.A.

223. See *supra* note 212 and accompanying text.

224. Ilgenfritz, *supra* note 3, at 362 (suggesting similar review from FINRA to return expungement to an extraordinary remedy). The recently submitted proposal to the SEC is a step in the right direction. See Proposed Rule Change to Adopt FINRA Rule 2081, *supra* note 119; see also Jean Eaglesham & Rob Barry, *U.S. Aims to Fix Broker Records*, WALL ST. J. (Apr. 16, 2014), <http://online.wsj.com/news/articles/SB30001424052702303887804579503653564597512?mg=ren064wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB30001424052702303887804579503653564597512.html> (indicating that FINRA may propose a rule change that will require firms to

The purpose of narrowing the guidelines under which FINRA may excuse itself is to provide further clarity.<sup>225</sup> It is important for all parties involved to understand under what circumstances FINRA may remove itself as a party.<sup>226</sup> Moreover, it is important for FINRA to consider whether monetary compensation was given, as firms do not typically pay out sums of money where claims are clearly erroneous or factually impossible.<sup>227</sup> The desire to get further understanding out of FINRA is aided by the addition of Rule 2080(d), which requires a written explanation.<sup>228</sup> As FINRA requires the arbitrator to provide a written explanation, FINRA should not be exempt from the same practice.<sup>229</sup> Providing a written explanation—supported by factual evidence—further protects against the rubber-stamping of awards.<sup>230</sup>

The proposed modifications to Rule 2080 serve the initial purpose of gaining more extensive FINRA participation in the expungement process.<sup>231</sup> FINRA's current lack of participation has resulted in the absence of guidance and thoroughness within arbitration panels.<sup>232</sup> A modified Rule 2080 can not change the process on its own, though; thus, a modification to the current Rule 12805 instituting stricter guidelines to grant expungements is necessary as well.<sup>233</sup>

### B. *Modifying Current Rule 12805*

Along with the current Rule 2080, its companion Rule 12805 must be adjusted as well, to ensure that the expungement process is further improved.<sup>234</sup> As it currently stands, the guidelines of Rule 12805 do not provide enough significant concrete direction for an arbitration panel to follow.<sup>235</sup> While certain aspects of Rule 12805 will remain in the

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perform background checks on all brokers to ensure better accuracy of information on the CRD).

225. See *supra* text accompanying notes 208-16 (outlining the text of the proposed rule).

226. See *supra* notes 174-81 and accompanying text (discussing the issue of unclear guidelines).

227. See Ilgenfritz, *supra* note 3, at 362.

228. See *supra* text accompanying note 216.

229. FINRA MANUAL R. 12805(c) (2011) (requiring a written explanation from the arbitrator).

230. See Ilgenfritz, *supra* note 3, at 361 (identifying rubber-stamping as an adverse effect on the current CRD system); Lipner, *supra* note 12, at 62 (acknowledging the current issue with rubber-stamping awards).

231. See *supra* text accompanying notes 197-200 (outlining the issues with FINRA's current participation in the expungement process); see also *supra* text accompanying notes 208-16 (outlining the proposed rule).

232. See *supra* Part III.B.

233. See *infra* Part IV.B.

234. See *infra* text accompanying notes 240-79 (proposing new provisions of Rule 12805).

235. See Ilgenfritz, *supra* note 3, at 362 (showing the widespread sentiment that arbitrators are not adequately following the procedures outlined in FINRA's rules, and thus, not affording the proper level of importance to what they decide to expunge and take off the CRD); Lipner, *supra*

proposed role,<sup>236</sup> the general rule must be restructured in order to ensure that investor safety remains FINRA's number one priority.<sup>237</sup> The need for change stems from the initial clause's lack of requirement for both the claimant to be involved in the hearing, and the claimant not being required to testify.<sup>238</sup> The following is a proposed re-draft of Rule 12805(a):<sup>239</sup>

(a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement,<sup>240</sup> *where both the party seeking expungement and the customer responsible for the original claim, or the customer's attorney, are present.* This paragraph will apply to cases administered under Rule 12800, even if a customer did not request a hearing on the merits. *The recorded hearing must be conducted pursuant to each of the following subparagraphs:*

(1) *The arbitrator(s) must question each party under oath regarding the potential expungement award and record all testimony;*<sup>241</sup> *and*

(2) *If the claim involves an agreed upon settlement between the parties, the arbitrator(s) must question the customer, or the customer's attorney, as to why expungement was agreed to and, if applicable, why the customer's attorney agreed to dismiss the claim.*<sup>242</sup>

Requiring customers, or the customer's attorney, to be present for all hearings, even if they did not request such a hearing, prevents the party seeking expungement from dominating the fact-finding process.<sup>243</sup> Further, the addition of required testimony will allow arbitrators to delve further into the facts of the case.<sup>244</sup> This additional information will ideally uncover any situation where the expungement-seeking party

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note 12, at 103-04 (going as far as suggesting that the current system with arbitrators is so flawed, arbitrators should be removed entirely).

236. See *infra* note 240 (identifying the carried-over text from the original Rule 12805).

237. See *infra* text accompanying notes 238-79; see also *supra* text accompanying note 58 (identifying investor protection as primary purpose).

238. See FINRA MANUAL R. 12805(a) (2011); Lipner, *supra* note 12, at 99 (identifying *Barker v. Securities America, Inc.*, and describing the peculiar absence of testimony, alluding to its necessity but not going so far as to make it a requirement) (citing *In re Barker v. Sec. Am., Inc.*, No. 12-01305, 2013 WL 595840 (FINRA Aug. 15, 2013) (Connett, Arb.)).

239. Modifications and additions to the current clause are indicated in italics.

240. FINRA MANUAL R. 12805(a) (2011).

241. See Lipner, *supra* note 12, at 97-98 (suggesting the need for testimony).

242. See *id.* at 98 (agreeing that no *ex parte* hearing will ever be successful).

243. See *supra* text accompanying notes 178-81.

244. See Lipner, *supra* note 12, at 97-98 (noting that the hearing is usually only attended by party seeking expungement, meaning the arbitration panel only hears one-sided evidence, which is insufficient to make expungement decisions).

attempted to coerce the customer into a settlement agreement contingent on not opposing the broker's expungement request.<sup>245</sup>

There are, understandably, possible issues and concerns, primarily on behalf of the customer and his attorney, with requiring customer participation in the hearing.<sup>246</sup> However, action must be taken to prevent the continued practice of brokers attending expungement hearings unopposed.<sup>247</sup> It is predictable that no investor would put himself through further hearings or pay more attorneys' fees in a case where he has already received his compensation.<sup>248</sup> A potential solution to the attorney fee issue would be for the broker seeking expungement to pay the portion of attorney fees required by the expungement hearing.<sup>249</sup> An arbitrator's responsibility to hear a full disclosure of evidence is critically important,<sup>250</sup> and thus the reason for making the customer's presence at the hearing a requirement.<sup>251</sup>

The second clause in Rule 12805 pertains to arguably the biggest issue within the current expungement process—awards deriving from settlement agreements.<sup>252</sup> As previously addressed, granting an expungement award based on a settlement agreement between the two parties presents a multitude of dilemmas; most important is the threat of necessary and valuable information being wrongfully expunged from the CRD.<sup>253</sup> Keeping with the current structure of Rule 12805(b), this Note proposes the following significant additions and modifications to make the clause more effective in preventing the undeserved expungement of customer dispute information:<sup>254</sup>

(b) In cases involving settlements, *in addition to testimony requirements outlined in paragraph (a), arbitrator(s) must review settlement documents and consider the amount of payments made to any party and any other terms and conditions of settlement.*

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245. See *supra* note 119 and accompanying text (identifying FINRA's recent movement to deter such conduct).

246. See *supra* text accompanying notes 178-81 (outlining arguments for customer participation).

247. See Lipner, *supra* note 12, at 97-98 (outlining the consequences of brokers attending hearings unopposed).

248. See *id.* at 88; see also Elisofon, *supra* note 20, at 3 (understanding the customer's mindset—brokers are able to take advantage of customers when offering monetary compensation through settlement).

249. See *infra* text accompanying and immediately following note 277 (proposing a new section (d)(1) to Rule 12805).

250. See Lipner, *supra* note 12, at 98 (continuing absence of investor's attorney under current rules likely leads to the burying of the truth).

251. See *infra* text following note 254 (identifying text of proposed rule).

252. See *supra* Part III.A.

253. See *supra* Part III.A.

254. All modifications and additions to the current clause are indicated in italics.



*Arbitrator(s) must also coordinate with FINRA on all cases involving settlements pursuant to each of the following subparagraphs:*

*(1) FINRA must receive all settlement documents, testimony, and any other applicable evidence from the arbitration panel prior to the panel confirming any grant of expungement;<sup>255</sup> and*

*(2) The arbitration panel must provide FINRA with its recommendation on whether expungement is appropriate and FINRA will control the final determination of whether such a recommendation is confirmed or denied; and*

*(3) FINRA's review of the case prior to making a final determination must include:*

*(A) Review of all documents provided by the arbitration panel, including listening to the recorded hearing; and*

*(B) Speak with the arbitration panel, either in person or telephonically, regarding their rationale behind recommendation and ascertain whether all required protocols were followed; and*

*(C) If determined to be necessary by FINRA, conduct a follow-up meeting, either telephonically or in person, with both parties to discuss relevant evidence and determine whether reason for settlement was coerced during settlement negotiations.*

*(i) If FINRA determines settlement was obtained through coercion or bad faith during negotiations, FINRA must immediately reject the request for expungement and dismiss the claim.*

While the changes this proposal makes to the current Rule 12805(b) are drastic, the current expungement landscape calls for such wholesale changes.<sup>256</sup> Requiring that FINRA control the final determination of expungement awards on all claims involving settlements not only removes the possibility of arbitrators rubber-stamping expungement awards, but it also ensures a stricter approach that ideally tips the scales back in favor of investor protection.<sup>257</sup> Further, while instituting three separate FINRA requirements prior to making a final determination may appear excessive, the current industry sentiment towards FINRA's

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255. See Lipner, *supra* note 12, at 103 (suggesting similar disclosure of documents to ensure state regulators have time to object).

256. See *supra* Part III.A–B.

257. See Ilgenfritz, *supra* note 3, at 361 (identifying rubber-stamping as current problem); Lipner, *supra* note 12, at 98 (“Arbitrators just recite the denials that the broker offers during the ex-parte expungement hearing.”).

existing approach calls for such drastic measures.<sup>258</sup> Moreover, this Note's proposal for a modified Rule 12805(b) favors leniency and common sense with regards to section (b)(3)(C).<sup>259</sup> It would be senseless to propose further participation from the customers, and most likely the customers' attorneys, when their participation is already required during the arbitration.<sup>260</sup> Despite FINRA's recent failures,<sup>261</sup> the proposed rule change relies on the arbitration panel to collect all substantial information from each party, which FINRA will then have to review at its disposal.<sup>262</sup> Ideally, such information will provide enough of a basis for FINRA to make its determination. However, where any factual inconsistencies or discrepancies arise during the determination process, FINRA must conduct the necessary follow up meeting and not simply adhere to the arbitration panel's recommendation.<sup>263</sup>

Considering next the current Rule 12805(c), a proposal to change the current clause must center on deriving clarity from the arbitration panel's written explanation.<sup>264</sup> Under the current rule,<sup>265</sup> many explanations are being considered nothing more than formalities, with arbitrators simply identifying the Rule 2080 grounds for expungement and providing no further written explanation.<sup>266</sup> Requiring a written explanation from the arbitration panel is a beneficial idea in concept, but more detail must be provided within the rule to ensure that the arbitration panel can not turn the explanation into a short formality granting expungement.<sup>267</sup> The following additions would not only provide greater clarity to arbitrators drafting the explanation, but would also ensure that FINRA, under the proposed Rule 12805(b) discussed above,<sup>268</sup> has a more accurate report on the panel's recommendation.<sup>269</sup>

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258. See *supra* Part III.A.

259. See *supra* text immediately following note 254.

260. See Lipner, *supra* note 12, at 88 (discussing why a customer has no desire to be part of the process after receiving compensation); *supra* text immediately following note 254.

261. See *supra* Part III.A.1 (identifying the high rate of expungements granted under FINRA's current guidance).

262. See *supra* text accompanying notes 241-42 and text immediately following note 254.

263. See *supra* Part III.B.

264. See *supra* notes 170-72 and accompanying text (identifying the issue with arbitrators rubber-stamping their written explanation).

265. FINRA MANUAL R. 12805(c) (2011).

266. See *In re Barker v. Sec. Am., Inc.*, No. 12-01305, 2013 WL 595840, at \*3 (FINRA Aug. 15, 2013) (Connett, Arb.) (granting expungement on over thirty separate claims in one session); Lipner, *supra* note 12, at 99 (granting all *Barker* expungements in one hearing). In another claim, *In re York v. Morgan Stanley Smith Barney*, the arbitrator's grounds for expungement was a word-for-word recital of the stipulation submitted by the party. No. 11-03966, 2012 WL 4847068, at \*2-3 (FINRA Oct. 2, 2012) (Knotter, Arb.); see Lipner, *supra* note 12, at 98 n.276.

267. See *supra* notes 170-72 and accompanying text.

268. See *supra* text immediately following note 254 (identifying rule proposal).

(c) Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement award and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case. *All explanations of findings must provide the following information displayed in subparagraphs (1)–(3), along with any additional information deemed beneficial by the arbitrator(s) [all written explanations of claims involving settlement agreements must be labeled as ‘recommendation’ and be made pursuant to the guidelines in Rule 12805(b)]:*

*(1) Evidence or testimony supporting the Rule 2080 ground(s) specified; and*

*(2) In claims involving settlement agreements, agreed upon settlement figures and justifications as to why such a claim should be dismissed when the party seeking the expungement is providing the customer monetary compensation; and*

*(3) Explanation of why non-cited Rule 2080 ground(s) did not support an expungement award.*

Providing such detail to the written explanation will serve the purpose of deterring arbitrators from seeing the written explanation as a mere formality.<sup>270</sup> Moreover, requiring the arbitrator to assert the specific evidence or testimony on which the decision was based builds on that same purpose.<sup>271</sup> A more detailed explanation will help to deter the current practice of arbitrators simply following the written explanation provided by the broker seeking expungement.<sup>272</sup>

The final clause in the current Rule 12805(d), requires one additional subsection to make it more effective under the proposals outlined in this Note.<sup>273</sup> FINRA’s original inclusion of a clause assessing forum fees is essential.<sup>274</sup> However, with the addition to section (a) requiring customers, or their attorneys, to be present for a hearing,<sup>275</sup> the

269. Modifications and additions to the current clause are indicated in italics.

270. See *In re Hyman v. Sec. Am., Inc.*, No. 12-02969, 2013 WL 2368505, at \*2 (FINRA Aug. 5, 2013) (Connett, Arb.) (granting six expungements in one hearing); *In re Gilliam v. SagePoint Fin., Inc.*, No. 12-03717, 2013 WL 3963949, at \*3 (FINRA July 19, 2013) (Meyer, Arb.) (arguing that the current process requires the panel to play “devil’s advocate” with *ex parte* evidence); *In re Miller v. Sec. Am., Inc.*, No. 11-03509, 2013 WL 1933872, at \*1 (FINRA May 1, 2013) (Loss, Gray & Pleiss, Arb.) (showing the mere formality of the current process as eleven separate expungements were granted).

271. See *supra* note 266 (identifying examples that will ideally be resolved under the new proposal).

272. See Lipner, *supra* note 12, at 98.

273. See *supra* Part IV.A; text accompanying notes 234-72.

274. FINRA MANUAL R. 12805(d) (2011).

275. See *supra* text accompanying notes 240-41.

rationale behind forum fees must change slightly.<sup>276</sup> A modified proposal of Rule 12805(d) is as follows:<sup>277</sup>

(d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

*(1) The party requesting expungement relief is responsible for all attorneys' fees associated with the customer's presence, or legal representation, at the award hearing.*

While it may appear overly detrimental to the expungement-seeking party, requiring that party to cover the customer's legal fees is the only legitimate way to ensure the customer's interaction in the process.<sup>278</sup> The list of reasons why a customer would be unlikely to participate in an expungement hearing has been described above, and addressing that glaring issue requires a drastic step.<sup>279</sup> Although it may appear unfair to require such action from the expungement-seeking party, the proposal justifies itself on the notion that expungement is intended to be an extraordinary remedy, and thus, a party seeking expungement may be required to pay an extraordinary price for such an award.<sup>280</sup>

### C. Addressing FINRA's Inadequate Training for Arbitrators

The current training required of arbitrators becomes less of a dire issue if the modified rule proposals presented above are implemented.<sup>281</sup> However, since members of the industry have discussed possible changes to arbitrator training, this Note finds it necessary to at least briefly discuss it.<sup>282</sup> Moreover, FINRA needs to provide further direction with regards to significant questions to ask during a hearing to ensure that the most informed decision is being made.<sup>283</sup> While the proposed rules above diminish the need for an extensive training overhaul,<sup>284</sup>

276. See *infra* notes 277-79 and accompanying text.

277. Modifications and additions to the current clause are indicated in italics.

278. See Lipner, *supra* note 12, at 88 (identifying the complete lack of incentive for an investor to currently appear at the expungement hearing).

279. See *supra* notes 243-45 and accompanying text.

280. See *Notice to Arbitrators*, *supra* note 7.

281. See *supra* Part IV.A-B. The more detailed inclusion of FINRA in the proposed solution will mitigate some of the current issues of the arbitrators primarily working on their own. Ilgenfritz, *supra* note 3, at 362 (describing FINRA's current practice of not reviewing an expungement motion, and instead, sending it to arbitrators without a prior review).

282. See Ilgenfritz, *supra* note 3, at 363 (emphasizing the need for more importance to be placed on the integrity of the CRD system); Lazaro, *supra* note 17, at 98 (receiving effective training is important to fully understand the significance of an expungement request); Lipner, *supra* note 12, at 101 (arguing that no amount of training will fix the current expungement process).

283. See Ilgenfritz, *supra* note 3, at 363.

284. See *supra* Part IV.A-B.

addressing arbitrator training through ways suggested by other industry members<sup>285</sup> can certainly benefit the expungement process.<sup>286</sup>

## V. CONCLUSION

The current expungement process is not serving its intended purpose of only expunging information that would hold no value to the CRD.<sup>287</sup> Under the current system, investors are being encouraged to research registered brokers despite the likely result that they will be reviewing inadequate information of those brokers.<sup>288</sup> While such lack of information may not seem like a primary issue of concern, the current guidelines have already caused investor harm and will likely continue to do so.<sup>289</sup> This Note's proposed solutions advocating for more extensive FINRA involvement, as well as more detailed and stricter guidelines for arbitrators, would remove many of the current issues that exist.<sup>290</sup> Tilting the scales back toward investor protection will better inform investors and ensure that the information investors currently lack does not end up hurting them.<sup>291</sup>

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285. See *supra* note 281.

286. See *supra* note 280.

287. See *Notice to Arbitrators*, *supra* note 7; *supra* note 58 and accompanying text; *supra* Part III.A–B (identifying why the process is not serving its purpose).

288. See Lynnley Browning, *Site That Tracks Brokers Questioned on Erased Cases*, N.Y. TIMES, Dec. 17, 2007, at C10 (“BrokerCheck gives you no assurance that you’re dealing with somebody who has a clean record.” (quoting Pat Huddleston)); Eaglesham & Barry, *supra* note 25 (suggesting investors using BrokerCheck risk wrongfully believing information on a broker’s record).

289. See *supra* notes 2–6 and accompanying text.

290. See *supra* Part IV.A–B.

291. See *supra* Part IV.

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