

# MADDOX HARGETT & CARUSO, P.C.

Representing Investors

Mark E. Maddox<sup>1</sup>  
Thomas A. Hargett<sup>2</sup>  
Steven B. Caruso<sup>4</sup>  
Thomas K. Caldwell<sup>3</sup>

80 Broad Street  
Fifth Floor  
New York, NY 10004  
212.837.7908  
212.837.7998 fax

[www.investorprotection.com](http://www.investorprotection.com)

Indianapolis  
10150 Lantern Road  
Suite 175  
Fishers, IN 46037  
317.598.2040  
317.598.2050 fax

## VIA EMAIL SUBMISSION TO PUBCOM@FINRA.ORG

January 30, 2018

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-42

Dear Ms. Asquith:

The purpose of this letter is to provide the Financial Industry Regulatory Authority, Inc. ("FINRA") with comments on the above referenced Regulatory Notice which was issued by FINRA on December 6, 2017.

I am an attorney whose practice is exclusively devoted to the representation of individual and institutional investors in their disputes with the securities industry. Moreover, I am the current Chairman of FINRA's National Arbitration and Mediation Committee ("NAMC") and a public member of the NAMC; the former Chairman of FINRA's Discovery Task Force Committee ("DTFC"); a former member of the Securities Investor Protection Corporation ("SIPC") Modernization Task Force; and a former President and current Director Emeritus of the Public Investors Arbitration Bar Association ("PIABA").

It is my understanding that the Regulatory Notice requests comment on proposed amendments to the FINRA Code of Arbitration Procedure ("FINRA Code") which are intended to help address the issues that are associated with requests to expunge customer dispute information from both the Central Registration Depository ("CRD") system and the FINRA BrokerCheck ("BrokerCheck") system.<sup>1</sup>

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<sup>1</sup>/ As a preliminary matter, it must be noted that the recently adopted process of issuing "Regulatory Notices" to seek comment on nearly every proposed rule change not only unduly delays consideration of the same, but of equal, if not greater importance, it provides an unfair and unnecessary advantage to industry participants who are the most likely constituency to be aware of and to comment on issued Regulatory Notices at this stage of their consideration.

The critical issue of expungements continues to be in desperate need of a viable and effective solution. Unfortunately, notwithstanding the fact that expungements have been widely recognized as an “extraordinary” measure with significant “regulatory” and “investor protection” implications, the historical monthly expungement data that I have personally maintained since January 1, 2013 indicates otherwise:

- Between January 1, 2013 and December 31, 2017, expungements were granted in 1,145 out of the 1,974 arbitration proceedings in which an expungement was requested which equates to an expungement approval rate of 73.20%; and
- With respect to post-settlement arbitration awards (awards which followed the settlement of the underlying customer arbitration proceeding), between January 1, 2013 and December 31, 2017, expungements were granted in 981 out of the 1,117 settled arbitration proceedings in which an expungement was requested which equates to an expungement approval rate of 87.83%.

The troubling nature of this latter statistic is further evidenced by a review of the FINRA Rule 2080 predicates which served as the basis for the expungements in these post-settlement arbitration proceedings between January 1, 2013 and December 31, 2017.

In fact, 44.48% of the awards associated with post-settlement arbitration proceedings in which expungements were granted were predicated on a finding, under FINRA Rule 2080(3), that “the claim, allegation or information [was] false.”

This statistic – 44.48% of the awards associated with post-settlement arbitration proceedings in which expungements were granted having been predicated on a finding, under FINRA Rule 2080(3), that “the claim, allegation or information [was] false,” is belied by the fact that a substantial majority of settlements are effectuated by the payment of monetary compensation.

With respect to the questions presented for specific comment in the Regulatory Notice, I would offer the following comments and observations.

- Should the expungement rule retain “grant” or change to “recommend” or some other description to more accurately reflect the panel’s authority in the expungement process?

In view of the fact that arbitrators do not have the power to “grant” an expungement request, it is clear that the language should be changed to “recommend” as this



would insure that it is both 100% clear and accurate.

- What are the costs and benefits of requiring the unanimous consent of a three-person panel to grant all requests for expungement of customer dispute information?

In view of the fact that expungements have been widely recognized as an “extraordinary” measure with significant “regulatory” and “investor protection” implications, it is clear that requiring the unanimous consent of a three-person panel to recommend the expungement of customer dispute information must be adopted. Moreover, given the historical fact that more than 99% of prior expungement awards have been decided on a unanimous basis, this proposed rule amendment would not have any material cost impact on the expungement process and would simply codify existing reality.

- Is the one-year limitation on being able to request expungement of customer dispute information appropriate?

It is my opinion that a one-year limitation on being able to request expungement of customer dispute information is appropriate in view of the fact that this time limitation would encourage more customers to potentially participate in the expungement hearing and to provide information and documentation that would be material to the consideration of whether or not a recommendation of expungement would be appropriate.

- Should an associated person who is requesting expungement be required to appear in person or by videoconference, rather than by phone, at the expungement hearing?

It is my opinion that an associated person who is requesting expungement should be required to appear in person or by videoconference so that the arbitrators can assess the associated person’s demeanor and credibility.

- Should the arbitrators on the Expungement Arbitrator Roster have specific qualifications and, if so, are the proposed additional qualifications appropriate or should FINRA consider other qualifications?

It is my opinion that it is necessary for arbitrators to have specific qualifications to be included on the Expungement Arbitrator Roster so that the integrity of the CRD and BrokerCheck systems can be maintained. Moreover, the proposed additional qualifications appear to be fair and reasonable.

Marcia E. Asquith  
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· The proposal would clarify for arbitrators that the standard for granting the permanent removal of customer dispute information from CRD is a finding that at least one of the Rule 2080(b)(1) factors applies and that the customer dispute information has “no investor protection or regulatory value.” Are there specific factors that arbitrators should consider when making a finding that the customer dispute information has “no investor protection or regulatory value”?

The predicate issue in connection with this question is whether it is appropriate for FINRA to download the responsibility for the determination of “investor protection” and/or “regulatory value” to arbitrators? Based on the available historical data for expungements, in my opinion the answer to this question is clearly no. Arbitrators in the FINRA forum have signed on for the determination of disputes – that is what they are trained to do and that is what they should be solely asked to do. In order for arbitrators to now be asked to determine “investor protection” and/or “regulatory value” considerations would require not only a tremendous amount of specific training, but there would also need to be ongoing oversight of their determinations so as to insure that this critical function achieves its goals.

In the event that you should have any questions with respect to the preceding, please do not hesitate to contact me.

Very truly yours,

Maddox Hargett & Caruso, P.C.

*s/ Steven B. Caruso*

Steven B. Caruso

Steven B. Caruso, Esq.  
 Maddox Hargrett & Caruso, P.C.  
 80 Broad Street, 5th Floor  
 New York, N.Y. 10004  
 www.investorprotection.com  
 (212) 837-7908

FINRA DISPUTE RESOLUTION ARBITRATION AWARD REVIEW - 2013

MONTH ENDED	POST-SETTLEMENT		CLAIMANT AWARD		RESPONDENT AWARD		BD/AP v. CUSTOMER AWARD		RULE 2080(b)(1) PREDICATE		
	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	A	B	C
Jan. 2013	20	0	1	1	7	2	2	0	12	12	15
Feb. 2013	20	2	1	5	7	1	2	0	9	8	18
Mar. 2013	31	1	2	0	5	2	6	0	22	14	24
Apr. 2013	34	4	1	1	7	4	3	0	23	14	27
May. 2013	39	4	2	4	8	3	2	0	26	21	28
Jun. 2013	25	2	2	9	11	3	4	0	20	17	20
Jul. 2013	35	3	1	2	6	3	1	0	22	14	30
Aug. 2013	24	1	0	4	9	3	2	0	22	14	30
Sept. 2013	20	1	1	3	3	2	3	0	14	9	14
Oct. 2013	26	3	1	3	11	1	2	1	22	10	24
Nov. 2013	26	3	1	4	11	2	2	1	22	10	24
Dec. 2013	23	6	0	6	3	4	2	0	12	12	13
	323	30	13	42	88	30	31	2	226	155	267
		91.50%		23.64%		74.58%		93.94%	49.67%	34.07%	58.68%

TOTAL EXPUNGEMENTS GRANTED IN CALENDAR YEAR 2013: 455 OUT OF 559 = 81.40%

Steven B. Caruso, Esq.  
 Maddox Hargett & Caruso, P.C.  
 80 Broad Street, 5th Floor  
 New York, N.Y. 10004  
 www.investorprotection.com  
 (212) 837-7908

FINRA DISPUTE RESOLUTION ARBITRATION AWARD REVIEW - 2014

MONTH ENDED	POST-SETTLEMENT		CLAIMANT AWARD		RESPONDENT AWARD		BD/AP v. CUSTOMER AWARD		RULE 2080(b)(1) PREDICATE		
	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	A	B	C
Jan. 2014	28	3	0	4	4	1	1	0	13	10	23
Feb. 2014	13	3	0	1	6	2	0	0	10	7	11
Mar. 2014	18	1	1	7	5	5	0	0	10	13	15
Apr. 2014	19	4	0	3	6	0	0	0	8	9	17
May. 2014	17	3	0	5	4	3	0	0	8	10	18
Jun. 2014	24	2	1	5	8	4	1	1	17	12	26
Jul. 2014	24	4	0	4	1	3	2	2	10	10	17
Aug. 2014	15	3	1	8	2	3	1	1	11	9	9
Sept. 2014	13	0	0	0	4	2	0	0	10	8	15
Oct. 2014	25	6	1	2	7	2	1	1	15	14	29
Nov. 2014	15	0	0	4	1	3	0	0	6	4	12
Dec. 2014	20	2	0	5	7	5	0	0	15	11	18
	231	31	4	48	55	33	35	5	133	117	210
		88.17%		7.69%		62.50%		87.50%	28.91%	25.43%	45.65%

TOTAL EXPUNGEMENTS GRANTED IN CALENDAR YEAR 2014: 325 OUT OF 442 = 73.53%



Steven B. Caruso, Esq.  
 Maddox Hargrett & Caruso, P.C.  
 80 Broad Street, 5th Floor  
 New York, N.Y. 10004  
 www.investorprotection.com  
 (212) 837-7908

FINRA DISPUTE RESOLUTION ARBITRATION AWARD REVIEW - 2015

MONTH ENDED	POST-SETTLEMENT		CLAIMANT AWARD		RESPONDENT AWARD		BD/AP V. CUSTOMER AWARD		RULE 2080(b)(1) PREDICATE		
	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	A	B	C
Jan. 2015	7	1	1	2	6	1	0	0	5	5	9
Feb. 2015	14	3	0	2	6	2	2	0	7	9	13
Mar. 2015	20	2	0	5	4	5	5	1	11	10	19
Apr. 2015	15	2	0	6	2	5	5	0	11	6	14
May. 2015	14	4	0	9	7	3	4	0	12	8	19
Jun. 2015	19	2	0	7	2	2	1	0	8	6	16
Jul. 2015	9	7	3	8	3	0	1	0	6	6	12
Aug. 2015	16	2	0	4	4	2	0	1	13	8	10
Sept. 2015	15	2	0	2	4	3	1	0	7	5	15
Oct. 2015	17	1	2	7	2	1	1	0	15	4	16
Nov. 2015	14	1	0	6	7	2	1	0	7	5	17
Dec. 2015	15	4	1	5	8	1	3	0	13	11	18
	175	31	7	63	55	27	24	2	115	83	178
		84.95%		10.00%		67.07%		92.31%	30.59%	22.07%	47.34%

TOTAL EXPUNGEMENTS GRANTED IN CALENDAR YEAR 2015: 261 OUT OF 384 = 67.969%

Steven B. Caruso, Esq.  
 Maddox Hargett & Caruso, P.C.  
 80 Broad Street, 5th Floor  
 New York, N.Y. 10004  
 www.investorprotection.com  
 (212) 837-7908

FINRA DISPUTE RESOLUTION ARBITRATION AWARD REVIEW - 2016

MONTH ENDED	POST-SETTLEMENT		CLAIMANT AWARD		RESPONDENT AWARD		BD/AP v. CUSTOMER AWARD		RULE 2080(b)(1) PREDICATE		
	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	A	B	C
Jan. 2016	6	3	0	3	5	0	1	0	4	2	8
Feb. 2016	9	2	0	4	7	2	1	0	6	6	12
Mar. 2016	8	3	0	3	1	2	0	0	3	2	7
Apr. 2016	11	0	2	2	5	2	4	0	8	5	16
May. 2016	13	4	0	4	4	1	1	0	10	7	10
Jun. 2016	13	1	2	4	6	4	1	0	8	9	15
Jul. 2016	13	0	0	9	2	4	1	0	6	8	10
Aug. 2016	9	2	1	1	9	2	2	0	7	5	17
Sept. 2016	6	4	0	2	4	4	0	0	3	3	6
Oct. 2016	12	1	1	4	6	2	1	0	6	5	13
Nov. 2016	6	1	1	5	8	0	1	0	9	2	12
Dec. 2016	18	2	0	2	3	1	0	0	9	6	14
	124	23	7	43	60	24	13	0	79	60	140
		84.35%		14.00%		71.43%		100.00%	28.32%	21.51%	50.18%

TOTAL EXPUNGEMENTS GRANTED IN CALENDAR YEAR 2016: 204 OUT OF 294 = 69.388%



Steven B. Caruso, Esq.  
 Maddox Hargett & Caruso, P.C.  
 80 Broad Street, 5th Floor  
 New York, N.Y. 10004  
 www.investorprotection.com  
 (212) 837-7908

FINRA DISPUTE RESOLUTION ARBITRATION AWARD REVIEW - 2017

MONTH ENDED	POST-SETTLEMENT		CLAIMANT AWARD		RESPONDENT AWARD		BD/AP v. CUSTOMER AWARD		RULE 2080(b)(1) PREDICATE		
	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	GRANTED	DENIED	A	B	C
Jan. 2017	6	2	1	2	4	3	1	0	4	4	4
Feb. 2017	8	0	0	1	4	5	2	0	9	3	7
Mar. 2017	9	2	1	5	6	6	2	0	9	7	12
Apr. 2017	17	3	0	5	0	1	2	0	11	7	8
May. 2017	12	1	0	3	9	2	2	1	11	8	15
Jun. 2017	12	2	0	6	2	3	3	0	7	5	12
Jul. 2017	7	2	0	5	5	0	0	0	5	3	7
Aug. 2017	13	0	1	3	4	2	1	0	6	6	13
Sept. 2017	7	2	0	1	2	3	2	0	8	3	8
Oct. 2017	11	3	2	4	2	1	4	0	5	8	14
Nov. 2017	11	3	1	6	2	2	1	0	9	4	10
Dec. 2017	15	1	1	4	4	0	1	0	10	7	12
	128	21	7	45	44	28	21	1	94	65	122
		85.91%		13.46%		61.11%		95.45%	33.45%	23.13%	43.42%

TOTAL EXPUNGEMENTS GRANTED IN CALENDAR YEAR 2017: 200 OUT OF 295 = 67.797%