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October 23, 2008

Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington D.C. 20549-1090

Re: File No. SR-FINRA-2008-047

To Whom It May Concern:

The Investor Rights Clinic of John Jay Legal Services, Inc. at Pace University School of Law (“PIRC”) welcomes the opportunity to comment on FINRA’s proposal to amend NASD Rule 12401 of the Code of Arbitration Procedure for Customer Disputes. PIRC represents small investors in disputes with their brokerage firms and brokers, and advocates for investor rights. We are writing to set forth our views from the perspective of an investor of modest means with a small damages claim.

We enthusiastically support the proposal to increase the monetary threshold for one-arbitrator panels to \$100,000, because it decreases the costs associated with arbitration for many investors with smaller claims, adds flexibility in scheduling and, in some instances, increases the choices for customer claimants. We also support the amendment insofar as it will require all parties’ consent for a three-arbitrator panel for claims under \$100,000. Presently, under Rule 12401, FINRA assigns one arbitrator to claims between \$25,000 and \$50,000 unless any party requests a panel of three arbitrators. Under this regime, respondents can game the system by requesting three arbitrators for the sole purpose of multiplying costs and time, frustrating the investor’s right to an inefficient and speedy dispute resolution process. The proposed rule will eliminate that potential for gamesmanship.

However, we strongly believe that the proposed increase to \$100,000 as the threshold for a one-arbitrator panel is insufficient. We respectfully urge FINRA to increase the threshold to \$200,000, as we believe the high forum fees for claims between \$100,000 and \$200,000 will continue to discourage – if not outright preclude – many investors from pursuing those claims. Simply put, FINRA’s forum fee structure should not be an insurmountable obstacle barring investors from filing meritorious claims.

The costs associated with a three-arbitrator case, under today's litigious securities arbitration process, can be staggering. To illustrate our concerns, we prepared a chart (attached to this letter as Exhibit A) to demonstrate the impact on claimant's net recovery of forum fees associated with a three-arbitrator panel at various claims levels. For example, under the current rule, investors with a \$75,000 claim incur claim filing fees and hearing session fees totaling \$6,225, and can expect, on average, to recover only 18.4% of the claim. Likewise, investors with a \$125,000 claim incur claim filing fees and hearing session fees totaling \$9,300, and can expect, on average, to recover only 19.2% of the claim. It is not until the \$200,000 claim level that investors can expect, on average, a net recovery rate of 22%.

Thus, it is not surprising that many small investors conclude that filing the claim is not worth the money because net recovery rates statistically approximate 20% of the original claim amount. Reducing the number of arbitrators necessary to hear a case will inevitably reduce forum fees, making the forum more affordable for small investors and increasing the net recovery rate for meritorious claims.

Notably, other prominent commercial arbitration forums, which frequently administer arbitrations between two commercial entities, set the default rule that cases are decided by one arbitrator, unless the parties agree otherwise. For example, the American Arbitration Association, Commercial Arbitration Rule 15, provides:

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.¹

JAMS' commercial arbitration rules provide that all claims are heard by one arbitrator unless all parties agree otherwise.² The National Arbitration Forum, Code of Procedure Rule 22, states that unless the parties otherwise agree all claims are heard by one arbitrator.³ These dispute resolution service providers apparently have concluded that, even in larger commercial cases among sophisticated parties, whatever benefits it has identified of a three-arbitrator panel do not outweigh the resulting delays and fees. FINRA should consider adopting a similar default rule, while preserving the parties' option to agree otherwise.

¹ AAA Commercial Arbitration, Rule 15, *available at* <http://www.adr.org/sp.asp?id=22440#A7>. *But see* AAA Supplementary Procedures for Securities Arbitration ("SPSA"), Rule 1, "To the extent that there is any variance between the Commercial Arbitration Rules and the Supplementary Procedures for Securities Arbitration, the Supplementary Procedures shall apply." Rule 4 of the SPSA states that all claims receive one arbitrator, unless the claim exceeds \$100,000 where the AAA then assigns three arbitrators. SPSA Rules, *available at* <http://www.adr.org/sp.asp?id=22009>.

² JAMS Comprehensive Arbitration Rules and Procedures, Rule 7, *available at* <http://www.jamsadr.com/rules/comprehensive.asp#Rule%207>.

³ The National Arbitration Forum, Code of Procedure, Rule 22, *available at* <http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf>.

Thank you for the opportunity to make these comments.

Sincerely,

Jill Gross
Director, PIRC

Stephanie Myers
Student Intern, PIRC

Exhibit A
Claimant's Potential Net Recovery under Current Rule 12401

Claim Amount⁴	Award Amount⁵	Claim Filing Fees⁶	Hearing Session Fees⁷	Attorney's Fees⁸	Net Recovery⁹	Net Recovery Percentage¹⁰
\$75,000	\$30,000	\$975	\$5,250	\$10,000	\$13,775	18.4%
\$100,000	\$40,000	\$975	\$5,250	\$13,333	\$20,442	20.4%
\$125,000	\$50,000	\$1,425	\$7,875	\$16,667	\$24,033	19.2%
\$150,000	\$60,000	\$1,425	\$7,875	\$20,000	\$30,700	20.5%
\$175,000	\$70,000	\$1,425	\$7,875	\$23,333	\$37,367	21.4%
\$200,000	\$80,000	\$1,425	\$7,875	\$26,667	\$44,033	22.0%
\$225,000	\$90,000	\$1,425	\$7,875	\$30,000	\$50,700	22.5%
\$250,000	\$100,000	\$1,425	\$7,875	\$33,333	\$57,367	22.9%

⁴ We assumed for purposes of this chart that claimant neither sought nor recovered any punitive damages, costs, interest or attorney's fees.

⁵ We calculated "Award Amount" by multiplying "Claim Amount" by 40%, a generous estimate of customer median recovery rates based upon *Securities Arbitration Commentator* surveys of SRO awards. The customer median recovery rate was 47% in 2000 and 34% in 2005. 2006 SECURITIES ARBITRATION COMMENTATOR 1, No. 7 & 8 (Feb. 2007); 2006 SECURITIES ARBITRATION COMMENTATOR 1, No. 2 (Apr. 2006).

⁶ We calculated "Claim Filing Fees" via the Arbitration Filing Fee Calculator on the FINRA website, available at <http://apps.finra.org/ArbitrationMediation/ArbFeeCalc/1/Default.aspx>.

⁷ We calculated "Hearing Session Fees" via the Arbitration Filing Fee Calculator on the FINRA website, available at <http://apps.finra.org/ArbitrationMediation/ArbFeeCalc/1/Default.aspx>. We assumed for purposes of this chart that there is an initial prehearing conference session as well as three days of hearing sessions, with two sessions per day. FINRA estimates the average hearing lasts 3 to 4 days. See FINRA, Arbitration Case Flow Definitions, available at <http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseFlow/ArbitrationCaseFlowDefinitions/p085735>.

⁸ We calculated "Attorney's Fees" by multiplying "Award Amount" by 33%, as it is well-known that typical claimant's lawyers charge a one-third contingency fee.

⁹ "Net Recovery" is "Award Amount" minus expenses associated with "Claim Filing Fees," "Hearing Session Fees," and "Attorney's Fees."

¹⁰ We calculated "Net Recovery Percentage" by dividing "Net Recovery" by "Claim Amount."