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June 16, 2010

VIA E-MAIL

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Release No. 34-62134; File No. SR-FINRA-2010-022
Proposed Rule Change Relating to Amending the Codes of Arbitration Procedure to Increase the Number of Arbitrators on Lists Generated by the Neutral List Selection System

Dear Ms. Murphy:

The Investor Rights Clinic at Pace Law School, operating through John Jay Legal Services, Inc. ("PIRC"),[1] welcomes the opportunity to comment on FINRA's proposed amendments to the FINRA Codes of Arbitration Procedure relating to increasing the number of potential arbitrators on lists sent to parties for panel selection (the "proposed rule change"). The proposed rule change is designed to increase the likelihood that parties' disputes will be heard and decided by panelists that the parties themselves have chosen and ranked, instead of by an "extended list" arbitrator randomly generated by the Neutral List Selection System ("NLSS") and appointed by FINRA staff.

Current Arbitrator Selection Process Provides Insufficient Investor Protection

FINRA's NLSS randomly generates lists of arbitrators for each case. In a three-arbitrator customer case, the parties receive three lists of eight arbitrators each – one public, one chair-qualified and one non-public. Under the current rules, each party may strike up to four of the

[1] PIRC, which opened in 1997, is the nation's first law school clinic in which J.D. students, for academic credit and under close faculty supervision, provide *pro bono* representation to individual investors of modest means in arbitrable securities disputes. *See* Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000); *see also* Press Release, Securities Exchange Commission, *SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings* (Nov. 12, 1997), *available at* http://www.sec.gov/news/press/pressarchive/1997/97-101.txt (last visited June 16, 2010).

eight names while ranking the remaining names in order of preference. FINRA then appoints the panel based on the remaining names and their respective rankings. Occasionally, no names remain on the list, or a mutually acceptable arbitrator is unable to serve, and FINRA staff "extends the list" by randomly appointing an arbitrator not on any list. Parties are unable to strike arbitrators from this "extended list." Thus, contrary to their expectation that they "select" their arbitration panels, parties are forced to accept one or more panelists that they had no role in choosing.

Investors and industry participants alike have criticized the appointment of a replacement or "extended list" arbitrator, sometimes referred to pejoratively as a "cram down" arbitrator. This practice may damage the public perception of arbitration within the securities industry, as disputants may infer that their arbitration panel lacks neutrality.

PIRC supports the proposed rule change to expand the number of potential arbitrators on each list (public, non-public, and public chairperson) generated by the NLSS, from eight to ten, because it increases the parties' ability to present their dispute to an arbitrator of their own choosing. Arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (2009) ("FAA"), is premised on preserving party choice, and "the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen…." *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1404 (2008). By increasing the number of candidates on the lists, FINRA will decrease the likelihood that the parties will strike all candidates and end up with an "extended list" arbitrator.

The "Separately Represented" Dilemma

Notwithstanding our support for the proposed rule change, PIRC strongly advocates for further reform of other aspects of the FINRA arbitrator selection process that remain inequitable and serve to frustrate an otherwise effective form of alternative dispute resolution. FINRA Arbitration Rule 12404 provides that each separately represented party is entitled to a separate set of strikes on each list. Therefore, if a claimant asserts a claim against two "separately represented" respondents, the respondents are effectively able to control the arbitrator selection process by having twice the amount of strikes as the claimant for the same number of potential arbitrators.

Although the proposed rule change may reduce the number of "extended list" appointed arbitrators in cases with more than two parties, it does not guarantee that any arbitrators will remain on the lists in such cases. The proposed rule change would provide cold comfort to investors filing claims against "separately represented" parties because, under the current rules, each of those parties is entitled to strike four arbitrators from a list of eight. Therefore, even with a ten-arbitrator list, in cases involving a customer, a member, and an associated person where each party is "separately represented," the parties have a total of twelve strikes per list, yielding a strong possibility that all ten names would be exhausted by strikes. A rule revision that each *side*, as opposed to each "separately represented party," be given a total of four strikes per list would truly ensure a more level playing field in the arbitrator selection process.

Because both investor and industry representatives have expressed a preference for reducing the incidences of extended list appointments, PIRC strongly encourages FINRA to propose modifications that would further enhance the effectiveness of the arbitrator selection process. FINRA should reform the language that grants four strikes to each "separately represented party" to eliminate situations where a claimant's four strikes are rendered ineffective against a named member firm and its associated person(s), who possess four strikes each. Without appropriate reform, the proposed rule change, while certainly a positive development, would still not achieve the desired goal of increased party choice. In fact, it may actually have the opposite effect by granting greater arbitrator choice to one party while eliminating it from the other. Potential unintended consequences may include claimants not naming the associated person as a party in an attempt to deprive respondents of this procedural advantage.

Conclusion

For the reasons stated above, PIRC strongly supports the proposed rule change for two-party cases. However, in cases where there are two or more "separately represented" respondents, the proposed rule change may be ineffective in accomplishing its intended goals. PIRC urges FINRA to revise the "separately represented party" provision in Rule 12404, to provide a more transparent arbitration selection process and equitable dispute resolution system, and to protect the interests of individual investors.

Respectfully submitted,

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