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March 20, 2012

**VIA ELECTRONIC SUBMISSION**

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

**Re: Release No. 34-66441; File No. SR-FINRA-2012-011 – Proposed Rule  
Change Relating to Mediator Selection**

Dear Ms. Murphy:

The Investor Rights Clinic at Pace Law School, operating through John Jay Legal Services, Inc. (“PIRC”),<sup>1</sup> welcomes the opportunity to comment on FINRA’s proposed amendment to Rule 14107 of the Code of Mediation Procedure (“Mediation Code”) to provide the Director of Mediation with discretion to determine whether parties to a FINRA mediation may select a mediator who is not on FINRA’s mediator roster.

*Investor Choice*

PIRC agrees with the underlying principle of the proposed rule but is concerned that the change, if adopted, may limit party control over mediator selection. Currently, Mediation Code 14107 allows investors to choose either a (1) FINRA-approved mediator or (2) mediator not vetted by FINRA. PIRC understands the reasoning of the proposed change to promote only those mediators pre-screened by FINRA. However, we believe FINRA should favor investor choice over any desire to evaluate and approve mediators selected by the parties.

A recurring concern in dispute resolution is the cost an investor must incur to have a grievance resolved. FINRA’s current rule, which allows investors to engage a non-FINRA *pro bono* mediator, or a mediator who is willing to work at a decreased cost, alleviates this concern. Amending the rule to remove that choice from investors and place the decision in the hands of

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<sup>1</sup> PIRC opened in 1997 as 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>.

one who is not a party to the dispute would revive concerns of investors of modest means that they could not afford mediation in the FINRA forum.

Professor Gross has written extensively on the topic of fairness in securities dispute resolution and concluded mediation is fair to individual investors because it maximizes party control over the process, is encumbered by only a minimal level of regulation, offers procedural justice at relatively low cost and does so more efficiently than arbitration.<sup>2</sup> Dispute system designers should provide maximum party control and self-determination to infuse disputants with a strong sense that they received a full and fair opportunity to participate in a process outcome.<sup>4</sup> In fact, the most important decision—the decision to participate at all—is entirely the result of party choice.<sup>5</sup> The ability of the disputants to select from differing mediator styles and identify the mediator and style that works best for them in their unique dispute not only legitimizes the party control over the process, but also increases the overall perceptions of fairness of that process.<sup>6</sup>

FINRA's proposed amendment to Mediation Code 14107(a), which would empower the Director of Mediation to reject non-FINRA mediators, may inhibit investor choice and force investors to incur further costs by hiring only mediators approved by the Director. Any concerns regarding the non-FINRA approved mediators should be eased by Mediation Code 14107(c), which requires mediators to comply with all pertinent FINRA Rules.

### *Conclusion*

For the reasons stated above, PIRC cannot support the proposed amendment as it may ultimately limit party choice and control in the mediator selection process.

Respectfully submitted,

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Edward Pekarek  
Assistant Director, PIRC

Genavieve Shingle  
Student Intern, PIRC

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<sup>2</sup> See Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISP. RESOL. 329 (2006).

<sup>4</sup> *Id.* at 366.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*