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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. 34-66442; File No. SR-FINRA-2012-012 – Proposed Rule
Change Relating to Raising the Limit for Simplified Arbitration**

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 amendment to Rule 12800 of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and Rule 13800 of the Code of Arbitration Procedure for Industry Disputes (“Industry Code”), which seeks to raise the limit for simplified arbitration from \$25,000 to \$50,000. PIRC is encouraged by the proposed increase in the claim amount ceiling because many investors incur losses between \$25,000 and \$50,000. We believe customers would benefit greatly from the increased customer choice the proposed amendment to Customer Code 12800 offers.

Increased Efficiency with Decreased Cost

Over the past decade, PIRC has written several comment letters to FINRA rule change proposals emphasizing its belief that all investors should have equal access to the FINRA forum.² The proposed rule change, if adopted, would further the goals of resolving customer disputes

¹ 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>.

² See, e.g., *PIRC Comment Letter SR-FINRA-2008-047* (Oct. 23, 2008); *PIRC Comment Letter SR-NYSE-2006-61* (Jan. 19, 2007).

expediently and efficiently, while simultaneously promoting the primary goals of FINRA as well as those of state and federal securities laws: investor protection and market integrity. Among PIRC's goals is providing representation to investors of modest means who cannot obtain it elsewhere. The increased threshold of the proposed rule change would allow PIRC, and other *pro bono* legal services organizations, to help even more investors due to the reduced time and resources involved in simplified arbitration. Moreover, the proposed increase in maximum simplified arbitration claim amounts would capture a far greater percentage of all arbitration claims, which could, in the aggregate, substantially expedite the average time necessary to resolve customer disputes.

FINRA's forum fee structure should not be an obstacle that bars investors from filing meritorious claims. Relative to the dollar amount of their claims, the cost of an evidentiary hearing can be staggering to some customers. Few arbitration cases are completed in less than one hearing day, and it is not uncommon for FINRA hearings to last three or four days.³ A case before one arbitrator involving alleged damages of \$26,000, for example, costs \$450 *per hearing session*. A three-day hearing would cost \$2,700.00 – more than 10% of that \$26,000 claim for evidentiary hearing fees alone. Reducing cost to customers through simplified arbitration for claims up to \$50,000 is prudent, especially if a customer wishes to dispense with evidentiary proceedings and elects to entrust an arbitrator to resolve the dispute solely “on the papers.”

The proposed amendment would alleviate some investing public concerns regarding the possible collateral costs of asserting lower dollar amount claims. Certain investors, particularly the elderly and disabled, as well as those who proceed *pro se*, might be dissuaded from pursuing meritorious low dollar claims if they were forced to travel to a hearing location, testify in person against a broker, and argue facts and law to a professional arbitrator who may be intimidating to them.⁴ We do not believe FINRA should impose the costs and/or burdens of a live hearing on customers who may be unwilling to incur or unable to pay those costs and burdens, yet possess valid customer claims up to \$50,000. Among the benefits of expanding dispute resolution options for injured investors, as proposed, is that it may deter some repeat securities law offenders if the specter of consequences existed for misconduct that caused harm in lower dollar amounts.

Telephonic Option

While PIRC agrees with FINRA's reasoning for seeking the rule change, we remain concerned about an arbitrator's ability to resolve customer disputes based solely on paper submissions and supporting documents. Customer disputes with their brokers, such as suitability, breach of fiduciary duty and fraud claims, typically involve hotly-contested issues of fact and credibility determinations, which arbitrators are hard-pressed to resolve based solely on

³ *Id.*

⁴ See, e.g., *PIRC Comment Letter*, SR-NYSE-2006-61 (Jan. 19, 2007).

written submissions. For example, in the American Arbitration Association (AAA) forum, disputants of lower dollar claims are afforded a telephonic hearing option.⁵ We see no reason why FINRA should not offer similar procedural flexibility for disputants as is provided by AAA.

In those disputes in which a customer-claimant may not prefer an in-person hearing, granting customers the option to elect a telephonic hearing would be a welcomed improvement. We also believe the option to elect telephonic, in-person, or no hearing at all should be solely that of customers, consistent with the existing parameters of Customer Code 12800(c)(1).

Fairness Perceptions

Academic research confirms the importance of monitoring fairness perceptions of participants within a dispute resolution forum.⁶ Scholars recently have focused on procedural justice as a more accessible predictor than substantive justice of parties' assessments of the overall perceived fairness of a dispute resolution process.⁷ These scholars have concluded that procedural fairness perceptions strongly impact substantive fairness perceptions, which, when favorable, can instill greater trust in and respect for the decision-maker and result in a greater willingness for disputants to comply with the outcome.⁸

Optional telephonic hearings would presumably enhance fairness perceptions regarding the arbitration process, for claimants and respondents alike. Professors Gross and Black completed a benchmark study of investors' perceptions of fairness of securities arbitration in 2008.⁹ The questions that generated the most negative customer reactions related to disputants' perceptions of arbitrator impartiality, based on the survey participants' most recent arbitration experience.¹⁰ The SICA study found that almost two-thirds of customers did not believe that, overall, the process was "fair."¹¹ As Professor Gross will report in a forthcoming article, the perception of fairness skews even lower among simplified arbitration participants, which makes it an area ripe for procedural improvement.¹²

⁵ See Rule E-6 of Expedited Procedures, available at <http://www.adr.org/sp.asp?id=22440#E6>; see also AAA, Guidelines for Written Arbitration, <http://www.adr.org/si.asp?id=5028>.

⁶ Jill I. Gross and Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 355.

⁷ *Id.* at 356; see also Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

⁸ Gross & Black, *supra* note 6, at 356; see also Susan Franck, *Integrating Investment Treaty Conflict and Dispute System Design*, 92 MINN. L. REV. 161 (2007).

⁹ Gross & Black, *supra* note 6, at 355.

¹⁰ *Id.* at 385.

¹¹ *Id.* at 389 ("Specifically, 63% of customers disagreed with the positive statement that 'as a whole, I feel the arbitration process was fair,' and 28% of customers agreed with the statement. In comparison, 40% of all other participants disagreed with the statement, and 51% of all other participants agreed with it.").

¹² See Jill I. Gross, *Small Claims Arbitration Post-AT&T Mobility*, 41 SW. U. L. REV. __ (forthcoming 2012).

Conclusion

For the reasons stated above, PIRC supports the proposed rule change to raise the limit for claims eligible for simplified arbitration from \$25,000 to \$50,000. However, the importance of subjective fairness perceptions cannot be understated because participants' views, particularly those of procedural fairness, are critical to the lasting integrity and viability of the dispute resolution process. The telephonic hearing option we suggest is but one method to decrease investors' negative perceptions of the simplified arbitration process. Thus, we urge FINRA to consider its feasibility.

Respectfully submitted,

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