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October 4, 2012

Ms. Margo Hassan
Assistant Chief Counsel
FINRA Dispute Resolution
1735 K Street, NW
Washington, D.C. 200006-1506

Re: Release No. 34-67803; File No. SR-FINRA-2012-041 – Proposed Rule Change to Amend FINRA's Customer and Industry Codes of Arbitration Procedure Relating to Subpoenas

Dear Ms. Hassan:

The Investor Rights Clinic at Pace Law School ("PIRC"),[1] operating through John Jay Legal Services, Inc. ("JJLS"), welcomes the opportunity to comment on the proposed changes to rules 12512-13 and 13512-13, respectively, of the FINRA Customer and Industry Codes of Arbitration Procedure ("Codes"). The rule change proposal codifies FINRA's preference for parties to invoke the arbitrators' power to issue Orders Directing Appearance of or Production from non-party FINRA members and/or Associated Persons ("AP"), when seeking third-party discovery, as opposed to the more invasive subpoena procedures. The rule change proposal also preserves parties' ability to invoke the arbitrators' discretionary authority to issue a subpoena under limited circumstances, if necessary. PIRC fully supports the clarification and codification of these preferred procedures.

By expressing in the rule change proposal a clear preference for the issuance of orders as opposed to subpoenas, FINRA helps parties and arbitrators avoid potential litigation that could flow from an arbitrator's subpoena, due to an existing conflict in the federal circuit courts of appeal in interpreting § 7 of the Federal Arbitration Act ("FAA").[2] The circuits presently are

[1] PIRC opened in 1997 and 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 97-101, Securities Exchange Commission, *SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors – Levitt Response To Concerns Voiced At Town Meetings* (Nov. 12 1997), *available at* http://www.sec.gov/news/press/pressarchive/1997/97-101.txt.

[2] 9 U.S.C. § 7 provides as follows:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

split as to the power of arbitrators under the FAA to issue subpoenas.[3] By codifying procedures that designate subpoenas an action of last resort, FINRA has created an internally enforceable process that sidesteps the potentially problematic subpoena process while achieving the same ends, at least with respect to discovery from non-party FINRA members and their APs.

The rule change proposal creates a unified and efficient course of action that does not leave customers vulnerable to the expense and delay of collateral litigation based on disputes over the authority of arbitrators to compel testimony and/or document production from non-party members and APs. Often, a customer is not in a position to participate in the collateral litigation and could be negatively impacted by the delay such litigation might cause. Increased efficiency can only aid in the expedient resolution of disputes and minimize the invasiveness of such proceedings for non-parties.

In sum, we support the rule change proposal because it homogenizes FINRA procedures for members who seek third-party discovery from non-party FINRA members during arbitration. By making explicit the process and procedures for orders to produce and appear, FINRA minimizes the inconvenience imposed on non-party FINRA members and APs, avoids the potential legal minefield created by disparate court interpretations of the FAA, and increases the uniformity of the procedures for arbitration. We expect this clarity to make arbitration proceedings increasingly efficient with fewer challenges to arbitrator decisions. In turn, this benefits all parties in arbitration, while enhancing market integrity and protecting the interests of the investing public.

Respectfully submitted,

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[3] *Compare Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 217-18 (2d Cir. 2008) (FAA §7 does not convey authority on arbitrators to compel discovery from third parties), *with In re Security Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000) (arbitrators are authorized to compel third-party discovery under FAA §7).