

Faculty Supervisors

DAVID N. DORFMAN
MARGARET M. FLINT
ELISSA J. GERMAINE
ROBIN FRANKEL
JILL GROSS
VANESSA MERTON
JASON PARKIN

JOHN JAY LEGAL SERVICES, INC.

PACE UNIVERSITY SCHOOL OF LAW
80 NORTH BROADWAY
WHITE PLAINS, NY 10603
TEL 914-422-4333
FAX 914-422-4391
JJLS@LAW.PACE.EDU

Executive Director

MARGARET M. FLINT

Clinic Administrator

ROBERT WALKER

IJC Administrator

IRIS MERCADO

Staff

JESHER CIRIACO

March 12, 2014

VIA ELECTRONIC SUBMISSION

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

**Re: File No. SR-FINRA-2014-005, Proposed Rule Change to Amend
FINRA Rule 12104 to Broaden Arbitrators' Authority to Make
Referrals During an Arbitration Proceeding**

Dear Ms. Murphy:

The Pace 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 FINRA Rule 12104 to broaden arbitrators' authority to make referrals during an arbitration proceeding. While PIRC is concerned about the negative impacts of mid-case referrals on individual claimants, PIRC recognizes that such referrals could – in very limited circumstances – help prevent future harm or mitigate ongoing harm resulting from widespread fraud perpetrated on the investing public. As a result, PIRC supports the proposal to allow for mid-case referrals with one modification detailed below.

PIRC Supports the Proposal Because Mid-Case Referrals Protect Investors

PIRC supports mid-case referrals and expanding the type of activity that is subject to a referral under subsection 12104(e) of the proposed rule because these changes provide additional protection to investors. PIRC commends FINRA's efforts to increase investor protection in light of the well-publicized "Ponzi" schemes that have resulted in harm to investors over the past few years. We agree with FINRA that the proposed rule would strengthen its regulatory structure and provide additional protection to investors and the securities markets. As noted in the rule

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>.

change proposal, an arbitration hearing may last many weeks and if the arbitrator detects – at an early stage of the hearing – a serious threat, which is either ongoing or imminent, that is likely to harm investors, a mid-case referral could limit financial losses to investors.

PIRC believes that further clarifying the rule via supplementary guidance will prevent unnecessary mid-case referrals that could be made at the conclusion of the hearing, while protecting both the individual claimant and the investing public. In its proposal, FINRA acknowledges that the stringent requirements for making mid-case referrals under the proposed rule would make them very rare. FINRA should provide clear guidance to arbitrators in its arbitrator training materials and reference guides on the proposed standard for when a threat rises to the level of requiring a mid-case referral (*e.g.*, when the hearing dates are scheduled many weeks or months apart and the arbitrator learns of the potential threat early in the hearing).

PIRC Opposes the Explicit Reference to Recusal Requests

Although PIRC supports mid-case referrals, we object to explicitly allowing recusal requests under subsection 12104(c) because it could lead to unnecessary burdens on individual claimants, particularly those of modest means. Thus, we believe that FINRA should eliminate the second sentence of 12104(c), which provides that a mid-case referral is an explicit ground for a party to request the referring arbitrator(s) to recuse themselves.²

As acknowledged in the proposal, an arbitrator's mid-case referral based on the evidence presented during a hearing and the conduct of the parties cannot be fairly claimed to show that an arbitrator is biased. As such, there can be no appearance of bias and the parties would not have "good cause" to request a recusal.

Recusals in the middle of a hearing may cause procedural disadvantages, significant delays, and additional costs to the claimant, which disparately impact modest means investors. Further, if the arbitrator denies the recusal request, respondents may make frivolous motions to vacate an award. PIRC acknowledges that even if FINRA eliminates mid-case referrals as an explicit ground for recusal, respondents may still file motions to vacate the award. However, FINRA can discourage these motions by providing guidance to the parties through its training materials pointing out that courts typically have not found that arbitrators forming opinions using evidence presented during a hearing and then acting on that evidence rises to the level of evident partiality.

² Parties are always able to request a recusal "for good cause" under Rule 12406 of the Customer Code and 13409 of the Industry Code.

In sum, PIRC supports the proposed amendment as it is consistent with FINRA's goal of protecting investors from widespread fraud and it provides additional protection to investors. However, FINRA should try to minimize the negative impacts of the proposed rule on individual investors.

Respectfully submitted,

JOHN JAY LEGAL SERVICES, INC.

Elissa Germaine

Elissa Germaine
Supervising Attorney, PIRC

Michelle N. Robinson

Michelle N. Robinson
Student Intern, PIRC