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November 6, 2014

VIA ELECTRONIC SUBMISSION

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-FINRA-2014-028, Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change Relating to Revisions to the Definitions of Non-Public Arbitrator and Public Arbitrator

Dear Mr. Fields:

The Investor Rights Clinic at Pace Law School, operating through John Jay Legal Services, Inc. ("PIRC"),[1] welcomes the opportunity to offer additional comment on FINRA's proposed rule change related to the definitions of non-public and public arbitrators. On July 24, 2014, PIRC submitted a comment letter to the SEC during the initial public comment period in connection with SR-FINRA-2014-028. In that letter, PIRC suggested three main revisions to the proposed rule change. Specifically, PIRC proposed that FINRA: (1) define non-public arbitrators as FINRA and disputants have always considered them to be – as industry-funded arbitrators; (2) define "professional work" through annual revenue instead of professional time; and (3) establish a proportional cooling-off period for professionals who worked in the securities industry and for professionals who provided services to the industry before they are placed on the public roster.

In its September 30, 2014 response, FINRA categorically rejected all suggested revisions to the proposed rule and indicated it intended to seek implementation of the proposed rule in its current form. PIRC would like to use this opportunity to respond to two areas of concern raised in FINRA's September 30 response letter. Specifically, PIRC recommends that FINRA: (1) conduct a full cost-benefit analysis before the SEC considers whether to approve any rule change; and (2) avoid creating confusion by using new terms like "investor advocates" and "industry advocates." Alternatively, PIRC suggests FINRA should consider eliminating the non-public/public arbitrator distinction and allow parties to choose from a single pool of arbitrators.

[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.

FINRA Should Conduct a Full Cost-Benefit Analysis Before the SEC Approves the Proposed Rule Change

FINRA's suggestion that a cost-benefit analysis should be conducted after the rule change is implemented runs afoul of basic logic. In its September 30 response letter, FINRA stated: "…the only way to determine the exact number of public arbitrators who would be affected by the proposed rule change would be to survey every arbitrator on the public roster. If the SEC approves the proposed rule change, FINRA will conduct such a survey." This is akin to closing the barn door after the horse has escaped. FINRA's "we won't know until we know" argument does not ring true for the investors who will likely be negatively impacted by a rule change that shrinks the public arbitrator pool and drains it of experienced and qualified neutrals. Moreover, if the rule needed to be changed back due to the cost-benefit analysis, the approval process would need to be duplicated, which is not beneficial to the industry, investors, or the forum. FINRA should conduct a full cost-benefit analysis instead of only a preliminary analysis prior to making a decision on the proposed rule change. It is worth noting that FINRA's preliminary analysis suggested only 100 arbitrators would be reclassified. However, some individuals have suggested that upwards of 1,000 arbitrators might be reclassified.[2] The wide difference in the estimated effect itself suggests that the SEC should require FINRA to conduct a full cost-benefit analysis prior to completing the approval process.

FINRA's Use of New Definitional Terms "Industry Advocate" and "Investor Advocate" Has the Potential to Create Unnecessary Confusion

PIRC is concerned that FINRA's introduction of the terms "industry advocate" and "investor advocate" in its September 30 response letter and in the October 7 Federal Register Notice risks clouding the debate with ambiguous new language. Nowhere in FINRA's original June 27, 2014 proposal do these terms appear. Their use now suggests that FINRA itself does not understand fully the distinctions it is trying to draw between non-public and public arbitrators. Traditionally, FINRA has defined, and disputants have understood, non-public arbitrators as being industry arbitrators (which PIRC described in our previous letter as being "industry-funded") and public arbitrators as being non-industry.

In its September 30 response letter, FINRA speaks of the efficiency of its bright-line test in classifying arbitrators. However, FINRA's bright-line test will potentially gut the public arbitrator pool of many experienced and knowledgeable arbitrators. FINRA's chief goal is to protect investors. Adding attorneys and other professionals who have solely represented investors against industry to the non-public arbitrator pool does not further FINRA's original vision of offering two arbitrator pools: one with direct industry connections and experience and one without such experience and connections.

[2] For example, Jeffrey Kaplan, who serves on FINRA's National Arbitration and Mediation Committee, guessed that up to 1,000 arbitrators could be reclassified. *See* Investment News, "FINRA Moves to Tighten Public Arbitrator Definition", (Feb. 11, 2014), available at: http://www.investmentnews.com/article/20140211/FREE/140219972/finra-moves-to-tighten-public-arbitrator-definition.

As previously mentioned, FINRA's proposal to redefine non-public and public arbitrators would shrink the public arbitrator pool and force a brain drain of experienced professionals who have only represented the investing public in FINRA arbitrations. The result is that "all-public panels" or single arbitrator panels potentially may be comprised solely of individuals who have no knowledge of the mechanics of the forum or customs and practices of the investing world. As Justices White and Marshall of the Supreme Court stated: "It is often because [arbitrators] are men of affairs, not apart from *but of* the marketplace, that they are effective in their adjudicatory function."[3] PIRC believes that the public arbitrator pool will lose many talented individuals and possibly be comprised only of inexperienced laypersons, which is contrary to FINRA's goal of promoting fairness through allowing the parties in arbitration to choose from a diverse pool comprised of professionals and laypersons from differing backgrounds.

Alternatively, FINRA Should Consider Removing the Non-Public/Public Distinction for Arbitrators

This latest proposed rule change and introduction of new terms highlights FINRA's continued grappling with the distinction between non-public and public arbitrators. PIRC believes FINRA should consider cleaning the slate and having one pool of arbitrators, permitting parties to look at full disclosure reports and make independent determinations about each arbitrator. If FINRA is trying to change the whole underlying premise of the system, then it should consider having one pool of arbitrators from which parties would choose. This would also help create the efficiency FINRA seeks in its latest proposal. At the very least, PIRC believes FINRA must look to the historical understanding of the non-public vs. public distinction in guiding any revisions moving forward.

[3] *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968) (emphasis supplied).

Conclusion

PIRC believes that FINRA's September 30 response to comments related to SR-FINRA-2014-028 is not synchronized with FINRA's stated objective of protecting investors. FINRA should conduct a cost-benefit analysis to determine the effect of the rule proposal. Moving forward, FINRA should look to its own history and tradition for instruction in modifying the definitions of non-public and public arbitrators moving forward. Alternatively, FINRA should consider scrapping the non-public/public distinction and allow parties to pick arbitrators from one pool.

Respectfully submitted,

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