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SCHOOL of LAW

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March 6, 2018

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

**RE: File Number SR-FINRA-2018-003—FINRA's Proposed Amendments to Rules 12600 and 12800 of the Code of Arbitration Procedure for Customer Disputes to Provide an Additional Hearing Option for Parties in Simplified Arbitration.**

Dear Mr. Fields:

The University of Miami School of Law Investor Rights Clinic ("the IRC") appreciates the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") proposal to amend rules 12600 and 12800 ("the amendments") to provide small claim investors with an additional hearing option in simplified arbitration proceedings before FINRA. For over six years, the IRC has represented investors (primarily seniors) who suffered losses as a result of broker misconduct, but whose claims were too small for them to find legal representation. Most of the IRC's cases involve claims under $50,000 and, therefore, qualify to proceed under FINRA's simplified arbitration process. Based on its experience with these cases, the IRC fully supports the proposed amendments and urges their prompt implementation.

Under current FINRA Rule 12800, investors with claims under $50,000 (exclusive of interest and expenses) have the choice of requesting a full arbitration hearing subject to the regular provisions of the Customer Code, or proceeding on the pleadings and any other written materials submitted by the parties (a "paper case"). These choices negatively impact the ability of investors to obtain legal representation, which, in turn, reduces claimant recoveries in simplified arbitration.[1] Attorneys who may be willing to handle a simplified case may only be willing to do so as paper case because a full hearing is not economically feasible. Although securities law arbitration clinics may be willing to accept a simplified case where the investor requests a hearing, most clinics will not handle a hearing case that will require travel to a remote location. For example, although the IRC has accepted simplified cases for clients who live outside South Florida, due to limited resources, it has only accepted such cases if the client consents to proceeding on the papers.

The amendments offer a third option, a "special proceeding" where the investor can request a telephonic hearing (or other method agreed upon by the parties) to present his or her

[1] For example, in 2016, *pro se* litigants won only 24% of the time in a paper case, while claimants with attorneys won 40% of the time. https://securitiesarbitrations.com/finra-customer-case-awards-story-behind-statistics/.

case, without being subject to cross-examination by respondent(s). The special proceeding would be limited to two hearing sessions, in no event longer than one day. Each side would have two hours to present their case plus a ½ hour for rebuttal and closing statements, leaving over 3 hours for the arbitrator to ask questions of the parties. The IRC supports the option of a special proceeding, as it will provide small claim investors with an efficient and cost effective manner to present their case in person, albeit remotely.

First, the special proceeding will provide investor claimants with a more meaningful opportunity to redress their claims and improve their perception of the fairness of the arbitration process. Paper cases are inherently limited because they do not provide investors with the opportunity to "tell their story," except perhaps through an affidavit. In contrast, the proposed special proceeding has the potential to increase investor trust in FINRA arbitration. "[P]eople who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, even if that outcome is unfavorable."[2] Simplifying the hearing process and allowing investors to tell their story gives investors a sense of participation that they do not get when their case is decided on the papers. Moreover, investors get more interaction with the arbitrator in the special proceeding and can address the arbitrators concerns more directly. This gets investors involved in the process and therefore can lead to more investor trust in the process.

Additionally, many of our clients are elderly and have never been involved in a trial or arbitration. As a result, they are afraid of the hearing process. Some of our South Florida clients have opted against requesting a hearing because of their fear of being cross-examined by opposing counsel. Other IRC clients have physical limitations that make travel to and attendance at a hearing for multiple days particularly challenging, if not impossible. The special proceeding option eliminates these concerns as it provides for a telephonic hearing and no cross-examination.

Should the proposed amendments become final, the IRC makes the following recommendations, which FINRA could address through training and a further rule-making:

**Technology beyond the telephone.** The special proceeding will take place telephonically, unless the parties agree otherwise. New technologies, like the web-based program called Skype, allow parties to freely participate on a conference call and see each other. FINRA should encourage the use of such technology, since telephonic conferences can be limited. Moreover, this technology affords the arbitrator a chance to better assess credibility of witnesses. Online Dispute Resolution, or "ODR,"[3] is quickly emerging outside of FINRA arbitration and is

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[2] Nancy Welsh, Perceptions of Fairness, in THE NEGOTIATOR'S FIELDBOOK 165, 170 (Andrea K. Schneider & Christopher Honeyman eds., 2006).

[3] "ODR" simply refers to conducting any type of dispute resolution through the internet, over the phone, or via video conferencing. The proposed special proceedings is a form of ODR.

becoming increasingly popular because it can reduce costs and increase efficiency and flexibility.[4]

**Discovery.** Unlike a full hearing, the special proceeding is still subject to the discovery provisions of a paper case under Rule 12800(d), which does not provide for an exchange of documents under Rule 12506 and the Discovery Guide. The IRC submits that FINRA should amend 12800(d) to provide for an exchange of a shorter list of documents in all simplified cases, and provide parties with some additional time for this exchange and supplemental discovery. The need for a more formal discovery process in simplified arbitration cases is increased given the option of a special proceeding.

**Training arbitrators.** FINRA already recognizes that arbitrators serving in a special proceeding should receive extensive training in handling these cases, and questioning witnesses. Given the limitations on cross examination, both parties must rely on the skill of the arbitrator to question witnesses. The IRC recommends a neutral roster of chair-qualified public arbitrators who are specifically trained to handle special proceedings and also trained to work with *pro se* claimants.

The IRC would like to again thank the Commission for the opportunity and privilege to comment on. SR-FINRA-2018-003.

Respectfully submitted,

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[4] https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/consumerodr.authcheckdam.pdf ("Websites such as Cybersettle, SettlementOnline and clickNsettle offer services that are entirely online and focus primarily on negotiating monetary settlements"); Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE L. & TECH. R. 1, 2 (2003).