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VIA ELECTRONIC SUBMISSION

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

Re: File Number SR-FINRA-2018-003

Dear Mr. Fields:

I am a Professor of Law at Elisabeth Haub School of Law at Pace University, in White Plains, NY, as well as a FINRA arbitrator, a former Director of Pace's Investor Rights Clinic, and a former member of FINRA's National Arbitration and Mediation Committee. I frequently publish articles on issues related to FINRA arbitration and submit comment letters on FINRA proposed rule changes related to its Dispute Resolution forum. I am writing to express my strong support for FINRA's proposed rule change to adopt a Special Proceeding for Simplified Arbitration.

For many years, FINRA (including its predecessor forums) has offered forum users with low dollar value claims a "Simplified Arbitration" option, in which a single public arbitrator decides the claims based solely on pleadings and other documentary submissions. This simpler, lower cost and faster process provides access to justice especially for *pro se* claimants, as well as the elderly and disabled.

However, the paper-only process has its drawbacks.

First, since documentary evidence usually is the strongest proof of commercial transactions, the process disadvantages the party who has access to fewer documents. Typically, customers do not have or retain copies of their own documents, including customer agreements, account opening documents, periodic account statements, and trade confirmations.

Second, if documents do not exist, or the parties dispute what was said orally, the facts need testimonial proof. Common customer disputes, such as claims of unsuitable recommendations, breach of fiduciary duty and fraud, involve hotly-contested issues of fact and credibility determinations. However, in Simplified Arbitration where parties can offer witness

testimony only via affidavit, an arbitrator may find it difficult to assess the credibility or veracity of a witness without seeing or at least hearing that witness and without the benefit of cross-examination.[1]

Third, in a customer case, not requiring a representative of the brokerage firm to personally appear may serve as a deterrent to settling the matter.[2]

Fourth, FINRA's arbitrator training course does not cover Simplified Arbitration, leaving a less-experienced arbitrator with little guidance as to how to decide cases based on paper submissions. Parties are less likely to have legal representation in Simplified Arbitration, yet arguably legal representation is needed even more because of the decision-maker's reliance on writings and lack of training in this kind of process. Absent a lawyer's unique ability to present facts and law persuasively, an arbitrator may have a hard time parsing through the facts and claims as presented by a non-lawyer.[3]

Fifth, perhaps most importantly, many claimants desire their "day in court" and the ability to tell their story and be heard. Substantial literature establishes that participants perceive a dispute resolution process as far more fair if they feel that they have been heard.[4] Procedural justice scholars point to four key elements that "reliably lead people to conclude that a dispute resolution process is procedurally fair": (1) the process provides an opportunity for disputants to voice their concerns to a third party; (2) the disputants perceive that the third party actually considered these concerns; (3) the disputants perceive that the third party treated them in an "even-handed" way; and (4) the disputants feel that they were treated in a dignified and respectful manner.[5] 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.[6]

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[1]*See* Gray Panthers v. Schweiker, 716 F.2d 23, 34-35 (D.C. Cir. 1983) (oral hearings are required in cases involving credibility or veracity).

[2]Jason Zweig, *Investors Face Tough Duel When Fighting Brokers*, WALL STREET JOURNAL, Apr. 11, 2009. Zweig, a personal finance columnist who interviewed numerous securities arbitration practitioners, recommended that customer claimants with small disputes request a hearing, cautioning: "don't go on the papers."

[3]*See* Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (stating that "written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important").

[4]*See* 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, 383 (2008) (citing procedural justice literature).

[5]Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL ED. 49, 52 (2004) (citing Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L. Q. 787 (2001)); *see also* Deborah R. Hensler, *Judging Arbitration: The Findings of Procedural Justice Research*, in AAA HANDBOOK ON COMMERCIAL ARBITRATION 48 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2006).

[6]*See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 137-38 (2011) ("Simply put, the empirical evidence suggests that individuals value fairness of process, separate

Almost fifty years ago, the Supreme Court, in its seminal decision *Goldberg v. Kelly*,[7] considered whether written submissions satisfy requirements of procedural due process in a welfare benefits hearing. While the Court was applying constitutional requirements of procedural due process not applicable to arbitration, it also addressed the broader issue of what it means for a litigant to be heard. The Court wrote:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. …Written submissions are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision. … Therefore a recipient must be allowed to state his position orally.[8]

The same considerations apply in the context of FINRA Simplified Arbitration, where the claimant is often an individual retail investor and the brokerage firm has superior bargaining power and resources.

At least one empirical study has shown significantly decreased perceptions of fairness in Simplified Arbitration when compared to arbitration with an oral hearing.[9] In 2008, Professor Barbara Black and I reported on results of a survey we conducted measuring participants' perceptions of fairness in recent securities arbitrations. As we wrote, the survey results demonstrated that: "(1) investors have a far more negative perception of securities arbitration than all other participants, (2) investors have a strong negative perception of the bias of arbitrators in the securities arbitration forum, and (3) investors lack knowledge of the securities arbitration process."[10] While we acknowledged that, at least in part, factors other than the substantive fairness of the forum are responsible for investors' negative perceptions of FINRA arbitration,[11] we also contended that the survey results called for reform.[12]

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and apart from outcome, because of the special message that fairness of process sends to its recipients: an authority who acts in a fair manner is an authority who is legitimate and cares about the dignity and social standing of those who stand before it).

[7]*Goldberg*, 397 U.S. at 261 (procedural due process required before terminating welfare benefits).

[8]*Id.* at 268-69.

[9]Gross and Black, *supra* note 4.

[10]*Id.* at 354.

[11]*Id.* at 391-99.

[12]Indeed, in direct response to the survey results, FINRA enacted several reforms of its arbitration procedures, including requiring arbitrators to write an "explained decision" if all parties request it, and changing the composition of a three-arbitrator panel in customer cases to provide an all-public panel. *See* Order Approving Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure To Require Arbitrators To Provide an

The 2008 report did not, however, focus on Simplified Arbitration. For purposes of a 2010 article, using the raw data from the 2008 study, I isolated responses from survey participants who reported that their most recent securities arbitration was a paper case as opposed to a live hearing to compare perceptions of fairness by participants in Simplified Arbitration to those of participants in arbitration with an oral hearing.[13] My analysis showed significant jumps in negative perceptions of fairness for survey participants whose most recent experience in securities arbitration was a simplified arbitration. In particular, survey participants whose most recent securities arbitration proceeded as a paper case had substantially more negative reactions to the following four statements:

- "The arbitration panel was impartial"
- "I am satisfied with the outcome"
- "As a whole, I feel that the arbitration process was fair"
- "The securities arbitration process is conducted by the arbitrators in a way that is fair to all parties involved."[14]

Though the data admittedly has limited value due to a small sample size and other survey science limitations,[15] it is hard to ignore the overall conclusion that survey participants in Simplified Arbitration at FINRA have more negative perceptions about the fairness of the process than participants in non-Simplified Arbitration. While current FINRA Rules 12800 and 13800 offer the option of requesting a live, in-person hearing to claimants seeking $50,000 or less in damages, under the current system design, the claimant still would face the drawbacks mentioned above, and the cost of a live hearing ultimately may outweigh the value of any recovery.

FINRA's proposal to adopt an intermediate "Special Proceeding" squarely addresses the concerns about an arbitrator's ability to resolve fact-based disputes based solely on paper submissions and supporting documents and a claimant's desire to be heard, yet limits the costs and burdens of an in-person hearing.[16] FINRA properly strikes a balance between the need to be heard orally and the desire for an inexpensive, simpler process by restricting the length of the

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Explained Decision Upon the Joint Request of the Parties, 74 Fed. Reg. 6928-29 (Feb. 11, 2009) (citing survey results as one catalyst for the revised rule change proposal); Order Granting Accelerated Approval of a Proposed Rule Change Relating to Amendments to the Panel Composition Rule, and Related Rules, of the Code of Arbitration Procedure for Customer Disputes, 76 Fed. Reg. 6500, 6500 (Feb. 4, 2011) (acknowledging FINRA sought rule change "to address the perception that FINRA's mandatory inclusion of a nonpublic arbitrator…in the Majority Public Panel is not fair to customers").

[13]Jill I. Gross, AT&T Mobility *and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47 (2012).

[14]*Id.* at 75-76.

[15]*Id.* at 76.

[16]Notably, this telephonic hearing option parallels an option that the American Arbitration Association offers to claimants in its forum with lower dollar claims. *See* AAA, Rule E-6 of Expedited Procedures.

arbitration to two hearing sessions to be completed in one day, eliminating cross-examination, and restricting the types of witnesses each party can present.

In addition, the ability of the arbitrators to ask questions of witnesses ameliorates the concern that a party could unduly prejudice the proceeding by avoiding presenting evidence about certain aspects of the case. In my own experience as a FINRA arbitrator, at in-person hearings, the arbitrators are very savvy in asking questions that get to the crux of the dispute, and can expose strengths and weaknesses in a case that were not addressed during the parties' own presentations of their respective cases. In actuality, because formal rules of evidence do not apply in arbitration, cross-examination rarely yields the "gotcha" moment we might see dramatized on television.

The proposal also addresses the concerns about procedural justice, because the proposed Special Proceeding would provide each party with an opportunity to tell his or her story orally to an arbitrator who can listen to the story, evaluate the evidence, decide issues of veracity and credibility, resolve factual disputes based on live testimony, and interact with the parties in a way that signals they have been heard. In turn, enhancing procedural justice is likely to enhance fairness perceptions regarding the FINRA arbitration process, for claimants and respondents alike.

In sum, providing the option of electing a telephonic hearing to claimants who are concerned about the drawbacks of an in-person hearing would be a welcomed improvement to the FINRA arbitration forum. Not only does the proposal offer more choices to small claim claimants, but it also designs a small claims arbitration process that improves both procedural and substantive justice by providing a viable option for disputants to voice their grievances out loud to a third-party neutral. For these reasons, I strongly support the proposal.

Thank you for considering these comments.

Very truly yours,

/s/ *Jill I. Gross*