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December 18, 2017

VIA EMAIL

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-34, Non-Attorney Representation in Arbitration

Dear Ms. Asquith:

The Investor Rights Clinic at the Elisabeth Haub School of Law at Pace University, operating through John Jay Legal Services, Inc. (PIRC),¹ welcomes the opportunity to submit this letter regarding FINRA's request for comment on the efficacy of allowing compensated non-attorneys to represent clients in securities arbitration and mediation. PIRC echoes FINRA's concerns regarding the competency and ethics of compensated Non-Attorney Representatives (NAR firms). Our main concern is ensuring that all investors, even those with claims under \$100,000, can retain quality representation in FINRA's dispute resolution forum. As discussed below, if FINRA determines that NAR firms can provide such representation, PIRC believes that FINRA should put procedures in place to ensure adequate disclosure and verification to protect investors.

As a law school clinic, we see firsthand the difficulty for investors with small claims to obtain legal representation. Many of our referrals come from private attorneys who have determined that the investors' claims were too small to be financially viable for their firms. Our eligibility guidelines (and those of most, if not all, of the other law school securities arbitration clinics) include a damages limit of generally no more than \$100,000 and are designed to fill the void for clients who cannot secure private legal representation due to the size of their claims.

¹ PIRC opened in 1997 as the nation's first law school clinic in which law 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>.

However, we understand that when clinic representation is not available due to lack of funding, jurisdictional issues, client preference, or other reasons, investors who cannot afford a private attorney may turn to NAR firms to assist them with their claims rather than bringing them *pro se* or not at all.

Although NAR firms could provide a valuable alternative for investors who are unable to obtain legal representation due to the small sizes of their claims, PIRC shares the concerns that are outlined in FINRA's Regulatory Notice, in particular the lack of professional conduct rules regulating these firms, as well as the lack of malpractice insurance requirements, licensing boards, and supervisory bodies. These deficiencies appear to have led to the unacceptable behaviors described in the notice and comments, including inappropriate business practices, excessive fees, unauthorized practice of law, representation by barred brokers, and poor quality representation by non-attorneys who do not understand the complexities of securities arbitration. As such, retaining a NAR firm can prove to be a double-edged sword for aggrieved investors. Not only were the investors harmed by their brokers, they now may be harmed again by NAR firms offering inadequate and, in some cases, unethical representation.

Based on the Regulatory Notice and the majority of the comments filed thus far, it appears that NAR firms provide more harm than good to investors and to the forum (though we acknowledge the submission of comments noting some success stories with NAR firms). PIRC encourages further research, possibly funded by the FINRA Investor Education Foundation, into whether investors fare better when represented by a NAR firm than when representing themselves *pro se*.

If FINRA determines that investors are better off being represented by a NAR firm than bringing a claim *pro se* or not bringing a claim at all and continues to allow NAR firms in the forum, PIRC believes the investors should be fully informed about the nature of that representation and FINRA should mandate that the NAR firms disclose and verify their adherence to all applicable state laws and FINRA rules. Rule 12208 permits parties to be represented by a person who is not an attorney, unless "(1) state law prohibits such representation, or (2) the person is currently suspended or barred from the securities industry in any capacity, or (3) the person is currently suspended from the practice of law or disbarred." However, according to Regulatory Notice 07-57:

neither the staff nor the arbitration panel is required to verify the non-attorney's compliance with state law. If state law prohibits such representation or if the non-attorney representative is currently (i) suspended or barred from the securities industry or (ii) suspended from the practice of law or disbarred, the parties may raise the issue with the panel. Parties also may seek court or regulatory agency relief. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

We recommend that FINRA amend Rule 12208 to put the burden on the NAR firms to provide disclosures and verifications to FINRA and to their clients. NAR firms should be required to provide documentation that certifies that they are not in violation of relevant state law. Additionally, NAR firms should be required to disclose background information on all

employees and/or beneficial owners of the firm to ensure that no “barred” individual is practicing behind a veil. Finally, NAR firms should be required to disclose, in their retainer agreements, that they are not attorneys and therefore their communications with clients are not subject to the attorney-client privilege, and submit such agreements to FINRA for review and verification.

If FINRA determines that NAR firms provide a valuable resource to those investors who are unable to obtain legal representation due to the size of their claims, these safeguards should help ensure that aggrieved investors have additional recourse options while protecting them from being doubly harmed – once by their broker and then a second time by their non-attorney representative.

Respectfully submitted,

Pace Investor Rights Clinic



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