st. john's UNIVERSITY

School of Law
Securities Arbitration Clinic

8000 Utopia Parkway
Queens, NY 11439
Tel (718) 990-6930
Fax (718) 990-6931
www.stjohns.edu

August 4, 2009

VIA US MAIL
Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Proposed Rule Change – Elimination of FINRA-DR Mandatory Industry Arbitrator Pursuant to Commission Rule of Practice 192(a), File No. 4-586

Dear Ms. Murphy:

On June 11, 2009, the Public Investors Arbitration Bar Association ("PIABA") wrote to the Commission to propose a rule change pursuant to SEC Rule of Practice 192(a), with regard to public investor cases arbitrated through FINRA's Dispute Resolution program, for which the amount in controversy exceeds $100,000. PIABA proposed that investors and member firms be allowed to choose whether or not they would like to have an industry arbitrator sit on their cases by giving all parties the ability to strike the entire industry list. This letter is written on behalf of the undersigned law school clinics (the "Clinics") across the country, which handle arbitration cases on behalf of public investors, in support of the rule change proposed by PIABA. The Clinics urge the SEC to initiate the process of rule adoption pursuant to Rule of Practice 192(b).

The Clinics represent public investors who otherwise cannot obtain legal representation. Our clients are generally contractually bound by pre-dispute arbitration agreements to arbitrate their disputes with their broker-dealers and their employees and registered representatives through FINRA's Dispute Resolution program. As a result, the Clinics have a strong interest in the rules governing the arbitration process at FINRA.

The Clinics support the rule change proposed by PIABA. Overall, the proposed rule change provides greater investor input in the dispute resolution system. We believe the proposed rule change has the potential to improve investor perception of the process in which they are forced to participate.

On February 6, 2008, Professors Jill I. Gross and Barbara Black issued a report to the Securities Industry Conference on Arbitration (SICA), entitled "Perceptions of Fairness of Securities Arbitration: An Empirical Study." The report documented the results of the authors' empirical study, through a one-time mailed survey, of survey participants' perceptions of fairness of securities SRO arbitrations involving customers. Overall, customers had a less favorable view of the dispute resolution process than others that participated in the survey. In their paper discussing the results of the report, the authors offered the following conclusion:

> Accordingly, based on the findings of our Report, we urge the SEC and FINRA to give serious consideration to eliminating the requirement of an industry arbitrator on every three-person arbitration panel. Rightly or wrongly, investors are simply suspicious of a mandatory process with an opaque outcome that is sponsored by the regulatory arm of the securities industry and that includes an industry representative on every three-arbitrator panel hearing a claim greater than $25,000. The frequently-made argument – that no one can prove that the presence of an industry arbitrator harms the investor – misses the point. Given the widespread distrust of the industry arbitrator, it would seem that the presence of an industry arbitrator would have to contribute great value to the process—which no one can establish either—to justify the continuation of this practice.

Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. Disp. Resol. 349, 400.

The Clinics recognize that the point is not whether industry arbitrators are in fact biased, as to which there are differing opinions, but rather that investors believe that the potential for bias exists when an industry arbitrator is present on an arbitration panel. We think it is important that the rule change proposed by PIABA does not eliminate the industry arbitrator, but rather gives parties the choice to have an industry arbitrator on their particular panel. We believe that by providing parties with choices in the process, the overall perception of the fairness of the process will improve.

Giving investors choice makes sense particularly in regions that have smaller arbitrator pools. If cases in those areas involve regional broker-dealers, the potential for a connection between the industry arbitrators and the defendants increases. Further, these potentials for bias may not be at the level that would require removal of the arbitrator. Investors are forced to allow individuals that they perceive will be unfair to remain on their case. The proposed rule change would eliminate this appearance of impropriety, and give investors greater confidence in the process.

Currently, FINRA is in the midst of a pilot program that essentially mirrors PIABA's proposed rule change on a limited voluntary basis. The Securities Industry and Financial Markets Association has stated that PIABA's proposed rule change is premature without waiting for the pilot program's results. Jane J. Kim, *Securities Arbitration is Faulted*, Wall St. J., June 23, 2009, at D6. However, the results of the pilot are a long way off, and the review of the results will be very subjective in terms of evaluating whether or not the pilot was "successful". Regardless of the outcome of the pilot program, the Clinics believe that it is important to work to improve the dispute resolution system immediately. PIABA's proposed rule change is a step in that direction. The proposed rule change will not eliminate industry arbitrators; it will simply give parties a choice. There is little doubt that this can only add to the perceived fairness of the system.

Accordingly, the Clinics are in support of PIABA's proposed rule change. We ask that the SEC consider the benefits of FINRA adopting such a rule, and submit the proposed rule change for public comment.

Respectfully,

Christine Lazaro
Supervising Attorney
St. John's University School of Law, Securities Arbitration Clinic

on behalf of the undersigned Clinics:

Christine Chung, Assistant Clinical Professor of Law and Director
Albany Law School, Securities Arbitration Clinic & Justice Center

Karen J. van Ingen, Associate Professor of Clinical Law
Brooklyn Law School, Investor Rights Clinic

Elizabeth Goldman, Clinical Associate Professor of Law
Benjamin N. Cardozo School of Law, Securities Arbitration Clinic

William A. Jacobson, Associate Clinical Professor and Director
Cornell University Law School, Securities Law Clinic

Alice Stewart, Clinical Professor of Law
Duquesne University School of Law, Securities Arbitration Practicum

Paul Radvany, Clinical Associate Professor of Law
Fordham University School of Law, Securities Arbitration Clinic

Curtis Pew, Visiting Clinical Professor of Law
Hofstra University School of Law, Securities Arbitration Clinic

Howard S. Meyers, Visiting Professor of Law
Aleta G. Estreicher, Professor of Law
New York Law School, Securities Arbitration Clinic

Samuel Tenenbaum, Clinical Assistant Professor of Law and Director
Northwestern University School of Law, Investor Protection Center, Bluhm Legal Clinic

Jill Gross, Professor of Law and Director
Pace University School of Law, Investor Rights Clinic

Lisa Catalano, Assistant Professor of Clinical Education and Director
Christine Lazaro, Supervising Attorney
St. John's University School of Law, Securities Arbitration Clinic

Birgitta Siegel, Visiting Assistant Professor of Law
Gary Pieples, Visiting Director of Securities
Syracuse University College of Law, Securities Arbitration Clinic

Robert E. Talbot, Professor of Law and Director
University of San Francisco School of Law, Investor Justice Clinic