

Center for Clinical Programs

Mailing Address:

PO BOX 4037
Atlanta, GA 30302-4037
Phone: (404) 413-9270
Fax : (404) 413-9145

In Person:

85 Park Place
Atlanta, GA 30303



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VIA EMAIL TO PUBCOM@FINRA.ORG

Re: FINRA Special Notice: Engagement Initiative dated March 21, 2017

We are law professors who teach in thirteen of the remaining securities arbitration clinics.¹ We appreciate this opportunity to provide FINRA with feedback on how it can continue to meet its dual goals of investor protection and market integrity.² While our work renders us especially qualified to comment on several items in the Special Notice, there is one issue so crucial to investor protection that we limit our comments to it: the continued existence of law school securities arbitration clinics.

In response to FINRA's request for comment on its investor education engagement initiatives,³ we respectfully request that FINRA financially support securities arbitration clinics. Our clinics began after regulators at the SEC, FINRA, and the state level noticed that investors with smaller claims were unable to obtain legal advice. We help those small investors while filtering meritless claims out of the system. Moreover, we share a core mission with FINRA: providing education to vulnerable populations to prevent them from becoming victims of investment fraud. The existing securities arbitration clinics regularly collaborate with regulators and are a valuable source of information concerning issues unique to smaller investors. Despite the investor protection benefits that securities arbitration clinics provide, without ongoing financial support from groups such as FINRA, clinics in high-need areas have closed and will continue to do so. We urge FINRA to help ensure securities arbitration clinics' survival.

1. Securities Arbitration Clinics Fill a Need First Identified by Regulators and Serve as a Resource of Last Resort for Small Investors.

Twenty years ago, then SEC Chairman Arthur Levitt learned that investors with smaller claims had difficulty finding counsel and, as a result, often did not pursue valid claims.⁴ To address this problem, Levitt suggested a novel solution: that law schools create legal clinics to meet the need and provide free legal assistance to investors who are unable to attain it because their claims are too small for private

¹ There are currently eight law school clinics in New York State (Brooklyn, Cardozo, Cornell, Fordham, New York Law School, Pace, St. John's, and Syracuse). California investors have access to two clinics (Pepperdine and University of San Francisco). Other clinics are in the District of Columbia (Howard), Georgia (Georgia State), Illinois (Northwestern), Florida (University of Miami), New Jersey (Seton Hall), and Pennsylvania (University of Pittsburgh).

² See FINRA Special Notice: Engagement Initiative, available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Special-Notice-032117.pdf, at 2 (Mar. 21, 2017) ("FINRA is an SRO for the broker-dealer industry and is dedicated to investor protection and market integrity through effective and efficient regulation that facilitates vibrant capital markets.").

³ *Id.* at 18-20.

⁴ Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. OF CONFLICT RESOL. 597, 601 (2013) (hereinafter "*The Securities Arbitration Clinic*").

lawyers to take.⁵ Pace opened the first law school securities arbitration clinic in 1997.⁶ After Pace, twenty-three additional law school securities arbitration clinic were opened, at Fordham and Brooklyn (1998); Buffalo (1999); Duquesne (2001); University of San Francisco (2002); Albany, Cardozo, Syracuse and St. John's (2004); Touro, New York Law School, and Northwestern (2005); Hofstra (2006); Cornell (2008); and University of Pittsburgh (2011).⁷ Several clinics received seed funds from the FINRA Investor Education Foundation in the following years: Florida International, Howard, Suffolk, and Pepperdine (2009); Seton Hall and University of Miami (2010); and Georgia State and Michigan State (2012).⁸ Sixteen clinics remain today.

Clinics provide legal representation to investors who are unable to obtain an attorney due to the size of their claim. Though each clinic has its own criteria for who they will represent, the clinics' eligibility guidelines "are designed to allow [securities arbitration clinics] to offer free legal services to clients who have suffered losses from disputed transactions that have had a significant impact on their financial condition and cannot afford to or do not have access to private representation."⁹ Our clients include retirees, hairdressers, mail carriers, welders, schoolteachers, and librarians.

Clinics provide a valuable service to FINRA and the industry in screening out claims that do not have merit. In our collective experience, we find that the vast majority of investors who contact us do not have a viable claim.¹⁰ In such instances, we help them understand why a claim does not exist and what happened within their account. We listen to them and give them an outlet that is not otherwise available. This service undoubtedly reduces the number of unmeritorious claims filed. Moreover, because FINRA Dispute Resolution is not able to provide any legal advice to parties who ask legal questions concerning their claims, FINRA often refers *pro se* parties to clinics for legal assistance.¹¹ Screening non-viable claims out of the system and advising *pro se* parties provides an additional valuable benefit to all participants in the securities arbitration arena.

Whether or not clinics accept them as clients, the investors who reach out for assistance appreciate being able to talk about their situation and get answers. We are the last and only option for investors who have lost less than \$100,000. National news programs have highlighted our programs' work

⁵ *Id.* at 601-602.

⁶ *Id.* at 602.

⁷ *Id.* at 602-603.

⁸ *Id.*

⁹ *See id.* at 604. *See also id.* (describing typical criteria as "requir[ing] that the potential client: have a household income under \$100,000; have a claim for damages of less than \$100,000; have no major assets other than a primary residence and a car; and exhaust other avenues for private legal representation." Several clinics have flexible criteria and evaluate matters on an individual basis to ensure that needy claimants have access to assistance.

¹⁰ *See, e.g.,* Gross, *The Securities Arbitration Clinic*, at 608 ("During an academic year, Pace's SAC (PIRC) handles between twenty-five and fifty preliminary inquiries, investigates more than twenty cases in depth, and offers formal representation to approximately five to ten clients.").

¹¹ *See* FINRA, *FINRA's Dispute Resolution Process*, available at <https://www.finra.org/sites/default/files/Education/p117486.pdf> at 1 ("FINRA cannot offer legal advice or legal representation to anyone.").

precisely because we fill such an important function.¹² Indeed, investors' feedback and thank you notes speak for themselves:

"[W]e would like to express our sincere thanks for all the hard work both yourself and the students put into our case. Your dedication and hard work has brought this stressful situation to an end. We understand the amount of work and research put into our case by the students and yourself in addition to the studies the students must complete each day ... [We] were not sure where to turn, however, your expertise and the knowledge of the students was of great value."

- Investor represented by Cornell¹³

"Thank you so much for the Investor Advocacy Clinic's review of my situation. Though the outcome was not what I had hoped for, everyone has treated me kindly and with respect. It is wonderful that the State of GA offers this service to the public."

- Investor whose matter was declined by Georgia State¹⁴

"We are very grateful for your representation of [our] claim before FINRA. It would not have been possible without your help. The interaction with the students was a delight. ... Their hard work was obvious and much appreciated ... We are indebted to you and your students and thank you again for your efforts on [our] behalf."

- Investor represented in simplified proceeding to judgment by Georgia State¹⁵

"I would like to express my sincere appreciation to you and the student attorneys who worked on my claim against [my brokerage firm]... I know that [all of you] spent an incredible amount of time and energy to settle this case, and I am well aware that I would not have had the chance of getting any reparation from [my brokerage firm] without the assistance of John Jay Legal Services. Your Clinic provides an invaluable service to people like myself who are unable to retain an attorney either due to lack of funds or because the size of their case is not large enough to make it feasible to retain outside legal counsel ..."

- Investor represented by Pace¹⁶

Securities arbitration clinics fill a crucial gap and ensure that all investors have someone to turn to if they have a problem with their account even if their claim is too small for a private attorney. Clinics are

¹² See, e.g., NBC Nightly News, *Frustrated Investors Get Assistance*, available at <https://drive.google.com/open?id=0B6tLhfQksU5HNkNNQINLSXUwUnM> (May 30, 2009) (highlighting San Francisco clinic's work helping investors with smaller claims).

¹³ See Cornell, *Securities Law Clinic*, available at <http://www.lawschool.cornell.edu/Clinical-Programs/securities-law-clinic/index.cfm>.

¹⁴ Original on file with Nicole G. Iannarone.

¹⁵ Original on file with Nicole G. Iannarone.

¹⁶ See Pace, *Investor Rights Clinic*, at 5, available at <http://www.law.pace.edu/lawschool/files/publications/investorrightsclinic.html>.

able to assist FINRA and the industry by ensuring investors receive competent advice about potential claims, and explanations about why claims may not be viable, thereby reducing the number of *pro se* claims and filtering meritless claims out of the system.

2. Securities Arbitration Clinics' Investor Education Efforts are a Key Component of Their Missions and Align with FINRA's Investor Protection Goals.

In addition to providing legal advice to small investors, clinics prevent vulnerable investors from harm through investor education and outreach.¹⁷ For example, Pace authored the *Investor's Guide to Securities Industry Disputes: How to Prevent and Resolve Disputes with Your Broker*, a guide that aims to help "investors learn more about their legal rights and best practices for responsible investing, before a dispute arises, and to gain an understanding of their options in case a dispute does arise."¹⁸ The Cardozo and Georgia State clinics are both working to create investor-friendly videos describing key concepts in investing and securities arbitration.¹⁹ Several clinics provide links to investor education tools and include investor guides on their websites.²⁰ Clinics maintain investor education blogs with regular contributions from students breaking down complicated investing topics into easy to digest pieces.²¹ Clinic students write and publish scholarly articles related to securities arbitration.²² Clinics regularly provide in-person educational presentations at high schools, libraries, community centers, and to vulnerable groups including members of the military, seniors, young professionals, and faith communities.²³ Northwestern even created an educational guide to help other law schools establish an

¹⁷ Northwestern, *Guidelines for Establishing a Law School Investor Advocacy Clinic*, at 11, available at <http://www.finrafoundation.org/web/groups/foundation/%40foundation/documents/foundation/p118734.pdf> ("Legal clinics exist not only to provide education for their students and to serve individual clients but also to reach out to the community-at-large.").

¹⁸ Pace, the *Investor's Guide to Securities Industry Disputes*, available at <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p119054.pdf>.

¹⁹ See, e.g., *Investor Advocacy Clinic Partners with Secretary of State Office on Investor Education*, available at <http://law.gsu.edu/2016/09/26/investor-advocacy-clinic-partners-secretary-state-brian-kemp-case-work-investor-education/> (describing partnership between clinic and Georgia Securities Division "to enhance investor education in Georgia").

²⁰ See, e.g., Cornell, *Investor Protection Guide*, available at <http://www.lawschool.cornell.edu/academics/clinicalprogram/securities-law/Investors-Protection-Guide.cfm>; New York Law, *Research Tools*, available at <http://www.securitiesclinic.org/research-tools/>; Miami, *Investor Resources*, available at <http://investorrights.law.miami.edu/investor-resources/>; and Miami, *Resources for Broker Claims: Investor Rights Clinic*, available at <http://www.law.miami.edu/academics/clinics/resources-for-broker-claims-investor-rights-clinic>.

²¹ See GSU Blog, available at <https://investoradvocacyclinic.wordpress.com/>; Miami Blog, available at <http://investorrights.law.miami.edu/>.

²² See, e.g., Pepperdine, *Investor Advocacy Clinic Program*, available at <https://law.pepperdine.edu/strauss/academic-programs/investor-clinic.htm>.

²³ See Cornell, *Securities Law Clinic*, available at <http://www.lawschool.cornell.edu/Clinical-Programs/securities-law-clinic/> ("SLC students conduct seminars and provide educational materials to senior citizens groups and others on how to avoid falling victim to investment fraud."); Georgia State, *Clinic Interns Present Investor Education to GSU ROTC Cadets*, available at <https://investoradvocacyclinic.wordpress.com/2014/04/22/clinic-interns-present-investor-education-to-gsu-rotc-cadets/>; Georgia State, *Clinic Interns Engage in Outreach at Local Retirement Community*, available at <https://investoradvocacyclinic.wordpress.com/2013/12/20/clinic-interns-engage-in-outreach-at-local-retirement-community-2/>; Howard, *Investor Justice and Education Clinic (IJE)*, available at

investor advocacy clinic.²⁴ Operating entirely independently from industry groups or financial motives, we find that our status as law school clinics opens doors not available to others.

3. Securities Arbitration Clinics Collaborate with Regulators.

Due to the populations we serve, clinics are often the first to identify trends impacting small investors. We regularly collaborate with FINRA and the SEC and discuss problematic products and practices that harm the most vulnerable investors. Fordham hosts a Securities Arbitration Roundtable every year that brings together clinic faculty, FINRA, and the SEC. A significant portion of the Roundtable is devoted to providing feedback to regulators on processes and rulemaking priorities. Clinic directors answer regulators' questions and describe trends, problematic products, and other issues that affect small investors. Similarly, clinics have unique insight on FINRA and SEC rulemaking priorities as they impact small investors. Thus, many clinics are actively involved in drafting comment letters.²⁵ Some clinics draft

<http://law.howard.edu/content/investor-justice-and-education-clinic-ijec> (“[S]tudents design, implement, and participate in at least one investor education and outreach program for the under-served investing community each semester.”); Seton Hall, *Investor Advocacy Project*, available at http://law.shu.edu/About/News_Events/Program_Highlight/program-highlight-spotlight.cfm?customel_datapageid_3661=310035 (“In the past year, IAP students have conducted nearly two dozen seminars among diverse audiences throughout the state.”); St. John’s, *Securities Arbitration Clinic*, available at <http://www.stjohns.edu/law/securities-arbitration-clinic> (“Students also conduct Investor Education Seminars in local public libraries and other community organizations”); Miami, *IRC Provides Financial Education Services to South Florida Investors*, available at <http://investorrights.law.miami.edu/community-outreach/fall-2012-community-outreach/> (describing four investor outreach presentations to young adults and seniors); Pittsburgh, *Securities Arbitration Clinic*, available at <http://law.pitt.edu/academics/experiential/clinics/securities> (“[T]he Securities Arbitration Clinic also provides public education about investment fraud, with particular attention to investment schemes targeting PA residents and the elderly.”); San Francisco, *Investor Justice Clinic*, available at <https://www.usfca.edu/law/professional-skills/law-clinics/investor-justice> (“Students enrolled in the clinic also lead investor education seminars at senior centers.”).

²⁴ See Northwestern, *Guidelines for Establishing a Law School Investor Advocacy Clinic*, available at <http://www.finrafoundation.org/web/groups/foundation/%40foundation/documents/foundation/p118734.pdf>.

²⁵ See, e.g., Cornell, *Securities Law Clinic*, available at <http://www.lawschool.cornell.edu/Clinical-Programs/securities-law-clinic/> (“Students have the opportunity to research and write on legal topics of importance to investors, including regulatory comment letters, amicus briefs and research articles.”); Georgia State, *Investor Advocacy Clinic Helps Shape Regulation via Comment Letters*, available at <http://law.gsu.edu/2017/04/05/investor-advocacy-clinic-helps-shape-regulations-via-comment-letters/> (“As part of its mission of serving regular investors, Georgia State Law’s Investor Advocacy Clinic regularly evaluates FINRA rule proposals and submits comments.”); St. John’s, *Securities Arbitration Clinic*, available at <http://www.stjohns.edu/law/securities-arbitration-clinic> (“students may write comment letters to the SEC and/or FINRA in response to requests for public comment on proposed rulemaking or other agency activity.”).

amicus briefs on issues that impact regular investors.²⁶ Many clinics also collaborate with state regulators in addition to their work at the federal level.²⁷

4. Securities Arbitration Clinics Require Funding to Protect and Represent Small Investors.

Securities arbitration clinics will not be able to continue their investor protection function without support. Many securities arbitration clinics began with or at some point in time received financial support from the FINRA Investor Education Foundation or state regulators.²⁸ Today, however, these sources do not fund new or existing clinics. Moreover, other lines of funding that supported the securities arbitration clinics due to our status as a consumer protection resource have also been discontinued. As one example, earlier this month, the Attorney General prohibited the use of settlement funds and *cy pres* awards for third party groups in federal litigation, sources of past clinic funding.²⁹ Unlike other types of law school clinics focused primarily on poverty law, securities arbitration clinics do not have access to outside funding sources despite the fact that our work often prevents aggrieved investors from becoming destitute.

In 2013, Professor Jill Gross identified “maintenance of ongoing funding” as “perhaps the biggest challenge to SACs” and feared that some clinics may close.³⁰ Unfortunately, Professor Gross’s fear has become a reality: since her article was published, two more clinics closed (FIU and Michigan State). In total, out of the twenty-four clinics once in operation, only sixteen currently exist.³¹ Three of the clinics that closed (FIU, Michigan State, and Suffolk) received seed grants from the FINRA Investor Education Foundation. These closures represent a lost investment of \$750,000, sums that could have reaped

²⁶ See, e.g., Brief of *Amicus Curie* Investor Rights Clinic at Pace Law School, *Stone v. Bear, Stearns & Co., Inc.*, available at http://www.law.pace.edu/sites/default/files/investor-rights-clinic/13-959_Brief_of_Amicus_Curiae_Investor_Rights_Clinic_at_Pace_Law_School.pdf (March 14, 2014); Cornell, *About the Clinic*, available at <http://www.lawschool.cornell.edu/Clinical-Programs/securities-law-clinic/about-the-clinic.cfm> (“Students ... [p]repare amicus briefs on investment and arbitration law in pending court cases.”); University of Pittsburgh, *Securities Arbitration Clinic*, available at <http://law.pitt.edu/academics/experiential/clinics/securities> (Students “[p]repare amicus briefs on investment and arbitration law in pending court cases.”).

²⁷ See Pittsburgh, *Securities Arbitration Clinic*, available at <http://law.pitt.edu/academics/experiential/clinics/securities> (clinic co-taught with Deputy Chief Counsel of Pennsylvania Securities Commission); Georgia State, *Investor Advocacy Clinic Partners with Secretary of State Office on Investor Education*, available at <http://law.gsu.edu/2016/09/26/investor-advocacy-clinic-partners-secretary-state-brian-kemp-case-work-investor-education/> (Sept. 26, 2016).

²⁸ See, Gross, *The Securities Arbitration Clinic*, at 602-603 (describing grants from NASD Foundation, New York State Attorney General’s Office, FINRA Foundation, and Pennsylvania Securities Commission).

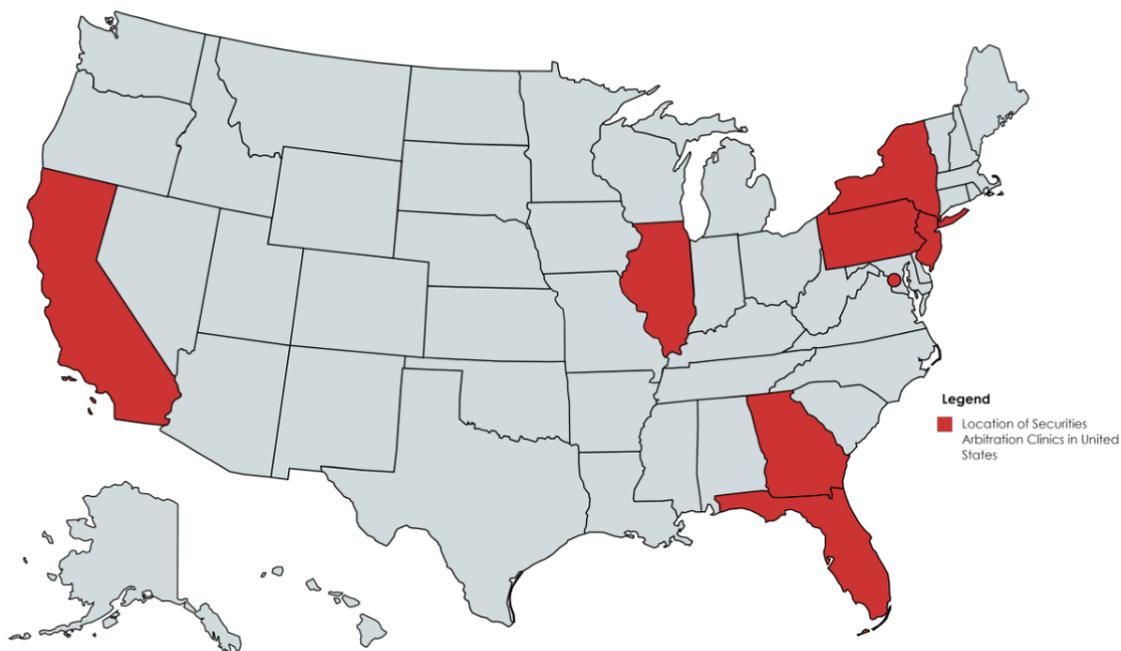
²⁹ See *Prohibition on Settlement Payments to Third Parties*, available at <https://www.justice.gov/opa/press-release/file/971826/download> (June 5, 2017); Gross, *The Securities Arbitration Clinic* at n98 (describing *cy pres* award to Pace and their use as possible, yet limited, funding source for other clinics); Northwestern, *Guidelines for Establishing a Law School Investor Advocacy Clinic* at 30 (“For continued maintenance of a clinical program, it may be possible to obtain *cy pres* awards directly from state or federal court judges who control unclaimed funds from class action settlements or decrees.”).

³⁰ See *id.* at 617-618, 621-622.

³¹ The eight closed clinics are Albany, Buffalo, Duquesne, Florida International, Hofstra, Michigan State, Suffolk, and Touro.

greater returns if continued funding was available.³² The surviving clinics require funding to “prevent their not-so-inconceivable death.”³³

Closing clinics burdens the already over-extended clinics in jurisdictions with other clinics. Thus, Miami has a waitlist so long that it cannot add any more names to it, notwithstanding the significant demand for its services.³⁴ For investors who reside in jurisdictions with no clinic, they may have nowhere to turn. Yet jurisdictions without clinics are not without investor claims. As of April 2017, FINRA’s Dispute Resolution Statistics show that 45% of the filed cases (excluding all cases pending in Puerto Rico) are in jurisdictions in which there is no clinic available to assist smaller investors.³⁵ The following illustrates the location of the currently existing clinics:



The declining number of clinics and lack of clinics in many jurisdictions may also contribute to a potential investor protection issue identified by the Dispute Resolution Task Force in its 2015 report: the proliferation of non-attorney representatives (NARs).³⁶ Absent additional funding, more clinics may close, leaving a larger amount of investors without any channels for free, high-quality legal advice.

³² See *Investor Advocacy Clinic Program*, available at <http://www.finrafoundation.org/grants/awarded/advocacy/index.html>.

³³ Gross, *The Securities Arbitration Clinic*, at 622.

³⁴ As of February 2017, there are nearly as many arbitrations actions pending in Florida (560 active cases), as in New York (563 active cases). See FINRA Dispute Resolution Statistics, available at <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>.

³⁵ See FINRA, Hearing Location Statistics, available at <https://www.finra.org/arbitration-and-mediation/hearing-location-statistics> (cases filed by hearing location). We excluded the 813 Puerto Rico cases from this calculation.

³⁶ See FINRA Dispute Resolution Task Force, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force* (Dec. 16, 2015) at 52, available at <http://www.finra.org/sites/default/files/Final-DR-task-force->

5. FINRA's Investor Education Engagement Initiatives Should Include Developing a Securities Arbitration Clinic Funding Model that Sustains and Grows Securities Arbitration Clinics.

Because FINRA's investor protection mission and the live-client representation and educational functions of law school securities arbitration clinics align so closely, we respectfully request that FINRA's investor education engagement initiatives include creating a funding model that sustains and grows clinics. This request is not without precedent. For example, in its 2015 report, the FINRA Dispute Resolution Taskforce wrote that it "believes that an appropriate use of FINRA fines and penalties would be funding of law school arbitration clinics and recommends FINRA consideration."³⁷ Moreover, funds may be available for this purpose from both FINRA and the FINRA Investor Education Foundation. The FINRA Investor Education Foundation's 2015 Form 990 indicates net assets exceeding \$74 million.³⁸ In that year, FINRA awarded \$50 million to the Foundation.³⁹ FINRA's 2015 annual report also noted that its "financial position remains strong and highly liquid with approximately \$2.3 billion of total assets, including \$2.0 billion of cash and investments, and approximately \$1.5 billion in equity."⁴⁰ Successful models for funding of law school clinics already exist. As one example, addressing similar needs in the context of unrepresented taxpayers, the IRS Office of the Taxpayer Advocate created a successful low income taxpayer clinic (LITC) grant program in 1999.⁴¹ In its first year, that program "awarded grants totaling less than \$1.5 million to 34 entities located in 18 states and the District of Columbia."⁴² Almost 20 years later, in 2016, the program has grown to fund "138 entities located in 49 states and the District of Columbia."⁴³ To ensure sustainability of LITCs, the program requires that law schools match grants dollar for dollar up to a maximum grant of \$100,000. A similar program for securities arbitration clinics would ensure the longevity of existing clinics and create capacity for new clinics in high need areas.

Conclusion

We appreciate this opportunity to provide FINRA with feedback on its engagement initiatives. We strongly urge FINRA and the FINRA Foundation to support all existing securities arbitration clinics to ensure that this important investor protection mechanism does not contract any further and to provide additional funding to expand securities arbitration clinics' coverage so that all investors with small claims

[report.pdf](#) ("The task force also heard complaints about poor performance by compensated non-attorney representatives (NARs) and doubts about whether they provide a service to investors...The task force recommends that a study be conducted to determine how many jurisdictions allow NARs to represent customers in the FINRA forum, whether NARs provide a service to investors with small claims who otherwise would not be able to obtain representation, and whether NARs are performing competently.").

³⁷ See *id.* at 52-53.

³⁸ See FINRA Investor Education Foundation IRS Form 990 at p. 1, available at <http://www.guidestar.org/FinDocuments/2015/200/863/2015-200863779-0d6c4433-90.pdf>.

³⁹ See FINRA 2015 Year in Review and Annual Financial Report, at 7, available at https://www.finra.org/sites/default/files/2015_YIR_AFR.pdf ("In February 2105, the FINRA Board of Governors approved a \$50 million contribution to the FINRA Investor Education Foundation to provide continuing support for the Foundation's innovative research and education efforts.").

⁴⁰ *Id.* at 8.

⁴¹ *LITC 2017 Grant Application Package and Guidelines*, at 1-2, available at <https://www.irs.gov/pub/irs-pdf/p3319.pdf>.

⁴² *Id.* at 2.

⁴³ *Id.*

have somewhere to go for legal assistance. We look forward to continuing our longstanding collaboration. We would be pleased to provide any additional information to assist FINRA's review or development of investor protection mechanisms to sustain securities arbitration clinics.

Respectfully submitted,⁴⁴

Nicole G. Iannarone
Director
Investor Advocacy Clinic
Georgia State University College of Law

J. Samuel Tenenbaum
Director
Investor Protection Center
Northwestern Pritzker School of Law

Elissa Germaine
Director
Investor Rights Clinic
Elisabeth Haub School of Law at Pace University

Teresa J. Verges
Director
Investor Rights Clinic
University of Miami School of Law

Elizabeth Goldman
Director
Securities Arbitration Clinic
Benjamin N. Cardozo School of Law

David Michael White
Director
Investor Advocacy Project
Seton Hall University School of Law

Christine Lazaro
Associate Professor of Clinical Legal Education
St. John's University School of Law

Gary J. Pieples
Director
Securities Arbitration and Consumer Clinic
Syracuse University College of Law

Robert Talbot
Director
Investor Justice Clinic
University of San Francisco School of Law

Howard S. Meyers
Director
Securities Arbitration Clinic
New York Law School

Alice L. Stewart
Visiting Professor of Law
Securities Arbitration Clinic
University of Pittsburgh School of Law

Bruce Sanders
Supervising Attorney & Adjunct Professor of Law
Investor Justice & Education Clinic
Howard University School of Law

Robert A. Uhl
Director, Founder and Adjunct Professor
Investor Advocacy Clinic
Pepperdine University School of Law

⁴⁴ This comment letter contains the undersigned professors' individual views and is not intended to and does not reflect the views of our respective institutions.