Recommendation of the Investor Advisory Committee
Financial Support for Law School Clinics that Support Investors
(March 8, 2018)

Background

- In November 1997, then SEC Chairman Arthur Levitt announced the start of pilot securities arbitration clinics at two New York law schools – Pace University and Fordham University – to help investors with small claims who had difficulty obtaining legal representation.[1] The clinics were started in response to concerns expressed to Chairman Levitt by small investors at several SEC town hall meetings.[2] The clinics would help small investors whose claims often were not large enough to obtain counsel to represent them in arbitration.[3]
- In December 2003, New York State Attorney General Eliot Spitzer announced agreements in securities fraud enforcement cases that awarded portions of the settlements to law school securities arbitration programs.[4] The grants awarded by Attorney General Eliot Spitzer led to the creation of several investor advocacy clinics[5] in the New York area.[6]
- In 2009, FINRA's Investor Education Foundation (the "Foundation") launched the Investor Advocacy Clinic Program to provide start-up grants to law schools to establish investor advocacy clinics in high-need areas.[7] From 2009 to 2012, under this program grants in the amount of $250,000 each were awarded to eight law

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[1] Press Release, SEC, SEC Announces Pilot Securities Arbitration Clinic to Help Small Investors – Levitt Responds to Concerns Voiced at Town Meetings, 97-101 (Nov. 12, 1997), https://www.sec.gov/news/press/pressarchive/1997/97-101.txt.
[2] *Id.*
[3] *Id.*
[4] Press Release, Office of the New York State Attorney General, *Former Telecom Executive Agrees to Turn Over IPO Profits*, (Dec. 4, 2003), https://ag.ny.gov/press-release/former-telecom-executive-agrees-turn-over-ipo-profits.
[5] Law school clinic names vary from school to school. For purposes of this recommendation, all law school clinics are referred to as investor advocacy clinics.
[6] Press Release*, Office of the New York State Attorney General, Former Telecom Executive Agrees to Turn Over IPO Profits, supra* note 4; Press Release, Office of the New York State Attorney General, *Telecom Executive Agrees to Give up Ipo Profits*, (Oct. 9, 2003), https://ag.ny.gov/press-release/telecom-executive-agrees-give-ipo-profits-0; Press Release, Office of the New York State Attorney General, *Telecom Executive Agrees to Give Up Ipo Profits*, (May 13, 2003), https://ag.ny.gov/press-release/telecom-executive-agrees-give-ipo-profits ("Under the terms of the settlement, six law schools in New York will divide $1.2 million to fund securities arbitration clinics…The six law schools eligible to receive the monies are: Albany Law School, Brooklyn Law School, Fordham University School of Law, Pace University School of Law, Syracuse University College of Law, SUNY at Buffalo Law School.").
[7] *See* Press Release, FINRA Investor Education Foundation, *FINRA Foundation Announces $1 Million in Grants to Fund Securities Advocacy Clinics* (Jan. 28, 2010), http://www.finra.org/newsroom/2010/finra-foundation-announces-1-million-grants-fund-securities-advocacy-clinics; *see also* Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. CONFLICT RESOL. 597, 603 (2014) ("As a result of these [FINRA] grants, clinics opened at other law schools such as Florida International University, Howard University, Suffolk University, and Pepperdine in 2009; at Seton Hall University and University of Miami in 2010; and at Georgia State and Michigan State University in 2012.")

schools.[8] In part, the Foundation funded clinics to "significantly expand the geographic reach of investor advocacy clinics available to investors."[9]

- In 2011, with the support of the Pennsylvania Securities Commission,[10] the University of Pittsburgh School of Law opened an investor advocacy clinic to offer free legal representation to small investors who could not afford representation or whose claims were too small to obtain private counsel.
- With the help of these external funding sources, twenty-four investor advocacy clinics were established.[11] However, external sources of funding no longer exist for many of these existing clinics.[12] As a result, only seventeen clinics exist today.[13]

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[8] *See* Press Release, FINRA Investor Education Foundation, *FINRA Foundation Announces $1 Million in Grants to Fund Securities Advocacy Clinics* (Jan. 28, 2010), http://www.finra.org/newsroom/2010/finra-foundation-announces-1-million-grants-fund-securities-advocacy-clinics; *see also* Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, *supra* note 7 at 603 ("As a result of these [FINRA] grants, clinics opened at other law schools such as Florida International University, Howard University, Suffolk University, and Pepperdine in 2009; at Seton Hall University and University of Miami in 2010; and at Georgia State and Michigan State University in 2012.").

[9] Press Release, FINRA Investor Education Foundation, *FINRA Foundation Announces $1 Million in Grants to Fund Securities Advocacy Clinics* (Jan. 28, 2010), http://www.finra.org/newsroom/2010/finra-foundation-announces-1-million-grants-fund-securities-advocacy-clinics.

[10] Press Release, University of Pittsburgh, *Pitt Law School to Open Securities Arbitration Clinic*, (May 2, 2011), http://www.news.pitt.edu/news/pitt-law-school-open-securities-arbitration-clinic.

[11] At their height, 24 investor advocacy clinics existed at the following law schools: Pace University Law School, Fordham Law School, Brooklyn Law School, Buffalo Law School, Duquesne School of Law, University of San Francisco School of Law, Albany Law School, Cardozo Law School, Syracuse University College of Law, St. John's University School of Law, Touro Law Center, New York Law School, Northwestern University School of Law, Hofstra School of Law, Cornell University School of Law, Florida International University School of Law, Howard University School of Law, Suffolk University School of Law, Pepperdine University School of Law, Seton Hall University School of Law, University of Miami School of Law, Georgia State University School of law, Michigan State University School of Law, and University of Pittsburgh School of Law. Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, *supra* note 7, at 602-03.

[12] Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, *supra* note 7, at 619 ("… FINRA [Investor Education Foundation] has established a policy that it will not fund the ongoing operations of existing clinics. Instead, it will provide only three years of seed money to any law school that expresses an interest in opening a new SAC, completes a complex grant application, and demonstrates the ability to secure other funding to sustain the clinics after the three-year seed money runs out.")

[13] As of February 2018, seventeen clinics exist at the following schools: Pepperdine University School of Law, University of San Francisco School of law, Howard University School of Law, University of Miami School of law, Georgia State University College of Law, Northwestern Pritzker School of Law, Seton Hall University School of Law, Benjamin N. Cardozo School of Law, Cornell Law School, Elisabeth Haub Pace University School of Law, Fordham University School of Law, New York Law School, St. John's University School of Law, Syracuse University College of Law, UNLV William S. Boyd School of Law, and University of Pittsburgh School of Law. *See* Jill I. Gross and Elissa Germaine, *Investor's Guide to Securities Industry Disputes, How to Prevent and Resolve Disputes with Your Broker* (2017) at 10, http://www.finra.org/sites/default/files/Investors_Guide_to_Securities_Industry_Disputes.pdf. UNLV William S. Boyd School of Law formally opened its clinic in the spring semester of 2018 after the publication of the FINRA guide. Brooklyn Law School maintains an investor advocacy clinic with a unique structure and as of the date of this Recommendation it is unclear if the clinic is currently active.

Three of the eight clinics that received FINRA Foundation start-up grants are among the clinics that have closed.[14]

- At present, nine states have investor advocacy clinics, leaving many retail investors without access to high quality legal representation.[15] Nine of the existing seventeen clinics are located in the New York region.[16]
- The seventeen existing clinics continue to fill a much needed gap by providing legal representation for small investors who are unable to obtain counsel due to the size of their claim or who cannot afford legal representation.
- During the course of their existence, law school clinics have formally represented roughly 500 retail investors, and recovered an estimated $5,000,000 for their clients.
- A clinic's typical client tends to be between 60 and 90 years old, elderly, retired or on the verge of retiring and living on their social security income. But clinic clients also include young investors receiving disability benefits, young people whose parents have passed and left them a small sum of money, immigrants with limited English language skills, and disabled persons with, or living off of disabled persons' trusts. Most clients are working class investors with $5,000-$100,000 in assets invested with a broker. Often, clinic clients feel significant financial distress and concern about their financial futures, and may have few assets beyond a small IRA, personal account or those assets that were invested in the questionable investments.
- In addition to the hundreds of clients clinics have formally represented, many clinics engage in outreach and advocacy efforts including, but not limited to, investor education presentations, blog posts, and informative videos. Together, clinics have served thousands of retail investors through the outreach and counseling services the clinics provide. As a part of their advocacy and outreach efforts, it is estimated that as a whole, clinics have filed more than 100 comment letters to FINRA, MSRB and the SEC on policy matters related to the retail investor. These comment letters reflect the real-world challenges faced by investors whose voices might otherwise go unheard.
- Typically investor advocacy clinics may receive anywhere from 5 to 75 inquiries a year, but are forced to decline a large portion of claims each year due to lack of capacity, jurisdictional issues, and lack of merit. Clinics reach capacity, in large part, because of lack of funding. Without additional funding clinics are unable to hire additional attorneys to staff the clinic, and cannot take on additional matters. Clinics also serve an important role with respect to FINRA and the industry, by screening out non-viable claims and explaining to investors why their claims may lack merit. Clinics are limited by local court rules, student practice rules and ethical

[14] Florida International University College of Law and Suffolk University Law School both received FINRA Foundation grants in 2009 and have since closed. Michigan State University College of Law received a FINRA Foundation grant in 2012 and has since closed.
[15] *See generally*, Letter from Nicole Iannarone, Georgia State University College of Law Investor Advocacy Clinic, et al. to FINRA (June 19, 2017) (on file with SEC Office of the Investor Advocate).
[16] Eight clinics are located in New York State (Brooklyn, Cardozo, Cornell, Fordham, New York Law School, Pace, St. John's and Syracuse). Seton Hall University School of Law is located in Newark, New Jersey.

rules, and therefore may not be able to represent clients outside of the clinics' jurisdiction.[17]

- It is estimated that it costs roughly $150,000 to $200,000 per year to run an investor advocacy clinic with at least one full time faculty attorney. Due to funding constraints, some clinics utilize adjunct professors as opposed to full time faculty to staff the clinic; this in turn lowers the average operating cost of the clinics.
- As a result of limited external funding, most clinics must rely entirely on their law schools for funding. Many law schools are unable to fund the clinics entirely, and as a result, clinics have been forced to curtail their services. At full operating capacity, clinics were once capable of serving between 6 and 16 clients in a year, but most clinics have had to curtail services because of funding and now on average serve between 4 to 7 clients in a year.
- The declining number of investor advocacy clinics poses a threat to investor protection and to small investors' ability to retain representation in arbitration.

Recommendation

The Investor Advisory Committee (the "IAC" or "Committee") recommends that the Commission explore ways to improve external funding sources to the law school investor advocacy clinics. In the short term, the Committee recommends that the Commission work with FINRA to provide continued funding of existing law school investor advocacy clinics, possibly through the use of FINRA fines and penalties. In addition, the Committee recommends the Commission work with the North American Securities Administrators Association (NASAA) and the broader legal community to identify any potential sources of funding for these programs at the State and/or local level. As part of a longer term effort to improve external funding for law school investor advocacy clinics, we encourage the Commission to request legislation from Congress to consider permanently funding law school investor advocacy clinics, possibly through a matching grant program through the SEC Investor Protection Fund.

Supporting Rationale:

Law school and investor advocacy clinics fill a crucial gap for retail investors by providing high quality legal advice and representation to investors with small claims, that otherwise, would have no access to representation. The Committee is concerned that due to the lack of external funding available to existing investor advocacy clinics, clinics will be forced to further curtail services or close their doors, leaving small investors with nowhere to turn. Moreover, the Committee recognizes that law school investor advocacy clinics play an important role in the protection of retail investors through their education and advocacy efforts. Clinics also serve an important role with respect to FINRA and the industry, by helping to screen out non-viable claims.

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[17] *See* Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, *supra* note 7, at 604.

In 2016 the Office of the Investor Advocate ("OIAD") launched its Law School Clinic Outreach Program. The Outreach Program was designed to benefit law student clinic participants and the investing public by creating an additional path to provide OIAD with direct feedback on Commission rulemakings and policy.[18] From October 2016 to date, OIAD has met with fourteen of the seventeen existing law school clinics in-person, and has also held teleconferences and videoconferences with the clinics. OIAD has also attended clinic outreach events, and hosted clinic directors and students at Commission Headquarters when the IAC invited the law school clinics to present testimony at the October 12, 2017 IAC public meeting. Throughout these meetings, OIAD and the clinics have had ongoing discussions about clinic longevity, the retail investors they serve, access to justice issues and ongoing funding concerns.

Generally, law school investor advocacy clinics provide legal representation to investors with claims up to $100,000.[19] Their clients have suffered losses from disputed transactions that have had a significant impact on their financial condition and cannot afford or do not have access to private representation. Clinic clients are working-class Americans, such as or including hairdressers, homemakers, mechanics, skilled tradesmen, paralegals, and schoolteachers.[20] Often, clinic clients are between 60 and 90 years old, retired or on the verge of retiring, living on social security and have little or no prior investment experience. However, clinic clients also include young investors receiving disability benefits, young people whose parents have passed and left them a small sum of money, immigrants with limited English language skills, and disabled persons with, or living off of, disabled persons' trusts. Clients hail from diverse racial, ethnic, religious and cultural backgrounds. Most clients have few assets beyond a small IRA, personal account, or those assets that were invested in the questionable investments.

Since opening their doors, law school investor advocacy clinics have formally represented roughly 500 retail investors, recovering an estimated $5,000,000 on behalf of retail investors during the course of their existence. In addition to the hundreds of investors clinics have formally represented, clinics have served more than a thousand investors through the interviewing and counseling services clinics provide. Clinics have also engaged hundreds of investors through investor education presentations and outreach efforts, including blog posts, and informative videos. Moreover, together, clinics have submitted more than 120 comment letters to the Commission, FINRA and other regulators, SROs, and industry organizations on policy issues important to the retail investor such as FINRA's arbitration rules, FINRA's standards of conduct governing brokers, the DOL's fiduciary duty rule proposal and NASAA's Statement of Policy regarding Real Estate Investment Trusts. In doing so, they speak for investors whose voices might otherwise go unheard on policy matters that affect them.

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[18] SEC, Off. of the Investor Advocate, *Report on Activities, Fiscal Year 2017*, 32 (Dec. 20, 2017) https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2017.pdf.
[19] Prepared Remarks of Qudsia Shafiq to the Investor Advisory Committee (Oct. 12, 2017) https://www.sec.gov/spotlight/investor-advisory-committee-2012/qudsia-shafiq-remarks-iac-101217.pdf.
[20] *Id.*

Based on market conditions, a clinic may receive 15 to 40 inquiries each year, or about two to three each week. Clinics provide a critical education function by helping investors understand if they have a claim, what the merits of their claim are, and if they do not have a claim, why a claim does not exist. Furthermore, by filtering investor claims, clinics help FINRA and industry by reducing the number of meritless claims filed each year. Even if clinics are unable to take claims, many clinics may further assist investors by interviewing and counseling the potential clients.

Due to a number of factors, including limited resources, clinics are forced to turn away potential clients each year. Clinics reach capacity, in part, because they do not have funding to hire additional attorneys to staff the clinic. In addition to declining claims for lack of capacity, clinics have also curtailed investor education services. For example, one clinic engaged in educational outreach programs during the three years of its FINRA Foundation grant term. However, since the grant term has expired, the clinic is no longer able to conduct investor outreach programs. Another clinic, not a FINRA Foundation grant recipient, had to curtail its direct education and outreach efforts because external funding no longer exists for such efforts.

1. FINRA Investor Education Foundation Renewal of Investor Advocacy Clinic Program Funding for New Law School Clinics and Continued Funding of Existing Clinics

Historically, the FINRA Foundation has provided funding support to law school investor advocacy clinics through the Foundation's general grant program and the Investor Advocacy Clinic grant program. For example, in 2004 the Foundation awarded Northwestern University a general grant to start an investor advocacy clinic and to create "Guidelines for Establishing a Law School Investor Advocacy Clinic" to provide practical information to law schools interested in establishing securities advocacy clinics.[21] In 2006, the Foundation granted Pace Law School Investor Rights Clinic a general grant to develop a "Guide to Dispute Resolution for the Small Investor."[22]

Then, starting in 2009 the FINRA Foundation provided three-year grants to eight law schools as start-up funding to establish clinics to provide assistance to customers with small claims who are not able to obtain legal assistance.[23] Through these grants, the

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[21] J. Samuel Tenenbaum & Thomas H. Morsch, *Guidelines for Establishing a Law School Investor Advocacy Clinic*, FINRA (Dec. 2013) (electronic copy on file with the Office of the Investor Advocate).

[22] Press Release, NASD Investor Education Foundation, *NASD Investor Ed Foundation Announces 2007 General Grant Program Focusing on Investment Behavior and Retirement Income Security* (Feb. 22, 2007), http://www.finra.org/newsroom/2007/nasd-investor-ed-foundation-announces-2007-general-grant-program-focusing-investment; Press Release, FINRA Investor Education Foundation, *FINRA Foundation Announces $1 Million in Grants to Fund Securities Advocacy Clinics* (Jan. 28, 2010), http://www.finra.org/newsroom/2010/finra-foundation-announces-1-million-grants-fund-securities-advocacy-clinics [hereinafter Press Release, *Foundation Advocacy Clinic Grants*].

[23] The eight schools that received FINRA Foundation grants were: Florida International University, Howard University, Suffolk University, Pepperdine University, Seton Hall University, University of Miami, Georgia State University and Michigan State University.

Foundation sought to "significantly expand the geographic reach of securities advocacy clinics available to investors."[24] Grant recipients were expected to provide funds to continue operating clinics after the three year start-up grants expired, as the Foundation did not guarantee funding beyond the three-year term.[25] Existing law school investor advocacy clinics were not eligible for these three-year grants.[26]

In June 2014, FINRA's Dispute Resolution Task Force (the "Task Force") was created to consider possible enhancements to its arbitration and mediation forum.[27] The Task Force received reports that, as a result of the Foundation's three-year start-up grant policy, some clinics will be forced to close.[28] The Task Force noted that, while it was not inclined to second-guess the Foundation's policy of limiting funding for post-grant sustainability, it advocated that continued funding of law school clinics would be an appropriate use of FINRA fines and penalties.[29] The Committee shares the Task Force's view.

The Committee is concerned that the Foundation's policy to not provide funding to existing clinics, and to not fund clinics past the three-year start-up grants, leaves vulnerable investors without access to quality representation. Moreover, the Committee believes that funding law school investor advocacy clinics aligns with FINRA's investor protection mission. Vulnerable small investors would benefit from the use of FINRA fines and penalties to fund law school investor advocacy clinics at least in the short term while the Commission seeks avenues for more permanent funding for investor advocacy clinics.

2. The Commission Should Request Legislation from Congress to Permanently Fund Investor Advocacy Clinics Through the SEC Investor Protection Fund

   a. The SEC Investor Protection Fund

The Committee believes the investor advocacy clinics serve an important function in providing retail investors access to protection, education, and advocacy, and therefore, clinics should have a defined and reliable source of funding.

The Committee believes the SEC Investor Protection Fund is the appropriate source of funding to advance investor education initiatives to help investors protect themselves

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[24] Press Release, *Foundation Advocacy Clinic Grants, supra* note 22. .

[25] FINRA, *FINRA Arbitration Task Force Issues Final Report*, (Dec. 16, 2015) at 52, http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf.

[26] Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, *supra* note 7, at 619 ("… FINRA [Investor Education Foundation] has established a policy that it will not fund the ongoing operations of existing clinics.").

[27] FINRA, *FINRA Dispute Resolution Task Force*, (last visited Feb. 16, 2018), https://www.finra.org/arbitration-and-mediation/finra-dispute-resolution-task-force.

[28] FINRA, *FINRA Arbitration Task Force Issues Final Report*, (Dec. 16, 2015) at 52 http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf.

[29] *Id.*

against securities fraud or other violations of securities laws.[30] The SEC Investor Protection Fund[31] as enacted provides funding for the SEC's whistleblower award program and the employee suggestion program of the SEC's Office of the Inspector General.[32] It is funded by monetary sanctions collected by the Commission through judicial and administrative actions against securities laws violators. Money deposited into the fund is designated after harmed retail investors receive payment.[33] Since the Investor Protection Fund's creation the balance has remained over $300,000,000[34] in each fiscal year report from 2011 – 2017.[35] As such, the SEC Investor Protection Fund is the ideal funding source for investor advocacy clinics. Moreover, investor advocacy clinics directly align with the Congressional intent of the SEC Investor Protection Fund to educate and protect retail investors.

b. Internal Revenue Service (IRS) Office of the Taxpayer Advocate and Low Income Taxpayer Clinics

Law school investor advocacy clinics provide access to representation for small means investors, to investors who do not have the ability to pay for representation, or who have claims too small to warrant private representation. In the past, Congress has passed similar legislation to authorize funding for the Low Income Taxpayer Clinics (LITC) grant program.[36] The LITC program is designed to protect taxpayers' rights by providing "access to representation for low income taxpayers, so that achieving a correct outcome in an IRS dispute does not depend on the taxpayer's ability to pay for representation."[37] Subject to the availability of appropriated funds, "the IRS may award grants of up to $100,000 per year to qualifying organizations for the development, expansion, or continuation of an LITC."[38] LITCs are required to provide matching funds on a dollar-for-dollar basis.[39] Similar to the mission of LITCs, law school investor advocacy clinics also provide "access to representation" for small means investors, to investors who do not have the ability to pay for representation, or who have claims too small to warrant private representation. Accordingly, the investor advocacy clinics should have a reliable source of funding, through legislation, the same way LITCs do.

[30] "USE OF FUND.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for the following purposes: ''(A) Paying awards to whistleblowers as provided in subsection (a). ''(B) Funding investor education initiatives designed to help investors protect themselves against securities fraud or other violations of the securities laws, or the rules and regulations thereunder." H.R. 14612, 111th Cong. § 7203(a)(2) (2009).
[31] 15 U.S.C. § 78u-6(g)(1).
[32] 15 U.S.C. § 78u-6(g)(2).
[33] 15 U.S.C. § 78u-6(g)(3).
[34] No monetary sanctions are deposited into or credited to the Fund if the balance of the Fund at the time of monetary sanction collection exceeds #300,000,000. 15 U.S.C. § 78u-6(g)(3)(A)(i).
[35] Reports and Publications Office of the Whistleblower Annual Reports https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=Reports+and+Publications-AnnualReports&tid=59.
[36] Low Income Taxpayer Clinics, 2018 Grant Application Package and Guidelines (2018), at 1, https://www.irs.gov/pub/irs-pdf/p3319.pdf.
[37] *Id.*
[38] *Id.*
[39] 26 U.S.C. § 7526(c)(5).