

Discovery in FINRA Arbitration

SEC Approves Amendments to Arbitration Codes to Expand Time for Non-Parties to Respond to Arbitration Subpoenas and Orders of Appearance of Witnesses or Production of Documents

Effective Date: July 1, 2019

Summary

The Securities and Exchange Commission (SEC) approved¹ amendments to FINRA's customer and industry arbitration rules to expand time for non-parties to respond to arbitration subpoenas and orders of appearance of witnesses or production of documents. The amendments also make related changes to enhance the discovery process for forum users.

The amendments are effective for cases filed on or after July 1, 2019.

Questions concerning this *Notice* should be directed to:

- ▶ Leslie Leutwiler, Associate Director, Office of Dispute Resolution, at (212) 858-4136 or leslie.leutwiler@finra.org; or
- ▶ Kristine Vo, Principal Counsel, Office of General Counsel, at (212) 858-4106 or kristine.vo@finra.org.

Background & Discussion

Under the Codes of Arbitration Procedure for Customer and Industry Disputes (Codes), parties exchange documents and information to prepare for arbitration through the discovery process.² Parties who seek discovery from a non-party may request the panel to issue an order of appearance of witnesses or production of documents if the non-party is subject to FINRA's jurisdiction as an associated person or member firm.³ The Codes also authorize arbitrators to issue a subpoena if the non-party is not subject to FINRA's jurisdiction.⁴ If the panel decides to issue the order or subpoena, FINRA will transmit the signed order or subpoena to the moving party to serve on the non-party.⁵ If a non-party receiving an order or a subpoena objects to the scope or propriety of the order or subpoena, the non-party may file written objections through the Director of the Office of Dispute Resolution (Director).⁶

May 30, 2019

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

Key Topics

- ▶ Arbitration
- ▶ Codes of Arbitration Procedure
- ▶ Discovery
- ▶ Dispute Resolution
- ▶ Orders to Appear or to Produce Documents
- ▶ Subpoenas

Referenced Rules & Notices

- ▶ FINRA Rule 12512
- ▶ FINRA Rule 12513
- ▶ FINRA Rule 13512
- ▶ FINRA Rule 13513

FINRA amended the Codes to extend the response time for non-parties to object to an order or subpoena from 10 calendar days of service to 15 calendar days of receipt of the order or subpoena. Receipt of overnight mail service, overnight delivery service, hand delivery, email or facsimile is accomplished on the date of delivery. With each of these methods of service, parties will be able to determine the date of delivery. The amendments exclude first-class mail as an option to serve documents on the non-party and as an option for the non-party to file the objection to the scope or propriety of the order or subpoena. Finally, the amendments codify the current practice that the Director send, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel.

Effective Date

The amendments are effective for cases filed on or after July 1, 2019.

Endnotes

1. See Securities Exchange Act Release No. 85781 (May 6, 2019), 84 *Federal Register* 91 (May 10, 2019) (Order Approving File No. SR-FINRA-2019-004).
2. The Codes require parties to cooperate with each other and exchange documents or information to expedite the arbitration. See FINRA Rules 12505 and 13505.
3. See FINRA Rules 12513 and 13513.
4. See FINRA Rules 12512 and 13512.
5. See FINRA Rules 12512 and 12513. See also FINRA Rules 13512 and 13513.
6. See *id.*

Attachment A

Customer Code

12512. Subpoenas

(a) – (c) No change.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena on all parties and, if applicable, on any non-party receiving the subpoena. The party must serve the subpoena on the non-party by [first-class mail,] overnight mail service, overnight delivery service, hand delivery, email or facsimile.

(e) If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within [10] 15 calendar days of [service] receipt of the subpoena, file written objections with the Director and the requesting party. The non-party may file the objection by [first-class mail,] overnight mail service, overnight delivery service, hand delivery, email or facsimile. The Director shall forward a copy of the written objections to [the arbitrator and] all other parties. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. The party must serve the response on the non-party and all other parties and file proof of service with the Director pursuant to Rule 12300(c)(5). The Director will send, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections.

(f) – (g) No change.

* * * * *

12513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas

(a) – (c) No change.

(d) If the arbitrator issues an order, the party that requested the order must serve the order on all parties and, if applicable, on any non-party receiving the order. The party must serve the order on the non-party[.] by overnight mail service, overnight delivery service, hand delivery, email or facsimile.

(e) If a non-party receiving an order objects to the scope or propriety of the order, the non-party may, within [10] 15 calendar days of [service] receipt of the order, file written objections with the Director and the requesting party. The non-party may file the objection by [first-class mail,] overnight mail service, overnight delivery service, hand delivery, email or facsimile. The Director shall forward a copy of the written objections to [the arbitrator and] all other parties. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. The party must serve the response on the non-party and all other parties and file proof of service with the Director pursuant to Rule 12300(c)(5). The Director will send, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections.

(f) – (g) No change.

* * * * *

Industry Code

13512. Subpoenas

(a) – (c) No change.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena on all parties and, if applicable, on any non-party receiving the subpoena. The party must serve the subpoena on the non-party by [first-class mail,] overnight mail service, overnight delivery service, hand delivery, email or facsimile.

(e) If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within [10] 15 calendar days of [service] receipt of the subpoena, file written objections with the Director and the requesting party. The non-party may file the objection by [first-class mail,] overnight mail service, overnight delivery service, hand delivery, email or facsimile. The Director shall forward a copy of the written objections to [the arbitrator and] all other parties. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. The party must serve the response on the non-party and all other parties and file proof of service with the Director pursuant to Rule 13300(c)(4). The Director will send, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections.

(f) – (g) No change.

* * * * *

13513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas

(a) – (c) No change.

(d) If the arbitrator issues an order, the party that requested the order must serve the order on all parties and, if applicable, on any non-party receiving the order. The party must serve the order on the non-party by [first-class mail] overnight mail service, overnight delivery service, hand delivery, email or facsimile.

(e) If a non-party receiving an order objects to the scope or propriety of the order, the non-party may, within [10] 15 calendar days of [service] receipt of the order, file written objections with the Director and the requesting party. The non-party may file the objection by [first-class mail,] overnight mail service, overnight delivery service, hand delivery, email or facsimile. The Director shall forward a copy of the written objections to [the arbitrator and] all other parties. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. The party must serve the response on the non-party and all other parties and file proof of service with the Director pursuant to Rule 13300(c)(4). The Director will send, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections.

(f) – (g) No change.