

Code of Procedure

SEC Approves Amendments to FINRA's Code of Procedure

Effective Date: March 30, 2012

Executive Summary

The SEC approved amendments to FINRA's Code of Procedure.¹ The amendments are procedural in nature and include the following, in addition to several more minor changes:

- ▶ allowing service of a complaint (and notices of certain expedited proceedings) on counsel when counsel agrees to accept such service;
- ▶ permitting electronic filing of papers with an adjudicator;
- ▶ requiring an attorney seeking to withdraw from a disciplinary case to file a motion before withdrawal would be approved;
- ▶ allowing hearing officers to manage the parties' pre-hearing submissions to reduce and eliminate duplicative filings; and
- ▶ allowing counsel to the NAC to decide a procedural motion in an eligibility proceeding or an expedited proceeding.

The text of the amended rules can be found at www.finra.org/notices/12-12. Once effective, the amended rules will apply immediately to all new and pending matters governed by FINRA's Code of Procedure.

Questions concerning this *Notice* should be directed to:

- ▶ Alan Lawhead, Vice President and Director, Appellate Group, Office of General Counsel (OGC), at (202) 728-8853;
- ▶ Andrew J. Love, Associate General Counsel, OGC, at (202) 728-8281; or
- ▶ Matthew E. Vitek, Assistant General Counsel, OGC, at (202) 728-8156.

March 2012

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Legal
- ▶ Senior Management

Key Topics

- ▶ Code of Procedure

Referenced Rules & Notices

- ▶ FINRA Rule 9000 Series

Background & Discussion

FINRA's Code of Procedure (the Code) contains detailed provisions for initiating and adjudicating various types of actions, including disciplinary, eligibility, expedited, and cease and desist proceedings.² The amendments, as described below, seek generally to improve the efficient administration of FINRA proceedings and are procedural in nature. The amendments become effective on March 30, 2012, and, once effective, apply immediately to all new and pending matters governed by the Code.

Service of Complaint

FINRA Rule 9131(a) requires a complaint to be served on each respondent by FINRA's Enforcement or Market Regulation departments. The amended rule now allows for service on counsel or another person authorized to represent others when the representative agrees to accept service of the complaint. Further, Rule 9131(a) previously provided that a party initiating a proceeding shall serve a document initiating the proceeding on the other party. Amended Rule 9131(a) deletes this provision to clarify that only Enforcement or Market Regulation can initiate a proceeding.³

The FINRA Rule 9550 Series provides procedures for initiating and adjudicating expedited proceedings. The service provisions contained in the Rule 9550 Series are similar to Rule 9131(a) in that they require serving notice on a member firm, person associated with a member firm or person subject to FINRA's jurisdiction, but do not provide for service on counsel. The amended rules, Rules 9551(b), 9552(b), 9553(b), 9554(b), 9555(b) and 9556(b), now allow FINRA to serve counsel or a person authorized to represent others when counsel or a representative agrees to accept service of a notice.

Filing of Papers With Adjudicator

FINRA Rule 9135(a) prescribes the timing for the filing of papers with an adjudicator and the method of their delivery. Amended Rule 9135(a) adds the use of electronic mail as another delivery method for complaints and other papers required to be filed with an adjudicator.

FINRA Rule 9136 establishes the form for papers filed in connection with a disciplinary proceeding or an appeal of a disciplinary proceeding. Amended Rule 9136(a)(5) modifies the format for footnotes by requiring them to be single-spaced. Additionally, to reduce duplication, amended Rule 9136(c) decreases the number of copies required to be filed with the adjudicator from three to one, unless otherwise ordered. Finally, the rule change amends Rule 9313 by giving counsel to the National Adjudicatory Council (NAC) the authority to set the number of copies of all papers to be filed with the NAC.

Motion to Withdraw by Attorney

FINRA Rule 9142 requires an attorney for a party or a person authorized to represent others seeking to withdraw to give notice setting forth good cause for the withdrawal at least 30 days prior to withdrawal, unless circumstances do not permit. The amended rule now requires an attorney for a party (or a person authorized to represent others by Rule 9141) seeking to withdraw to file a motion that sets forth good cause for withdrawal and contains the contact information of the party no longer being represented.

Subjects Discussed at Pre-Hearing Conference

FINRA Rule 9241(c) describes the subjects that the hearing officer, in a pre-hearing conference, may consider and act upon. The amended rule adds an additional, permissive subject for a pre-hearing conference: designation of relevant portions of transcripts from investigative testimony or other proceedings and the inclusion of an index for such testimony.

Fees for Copying Costs During Discovery

FINRA Rule 9251(f) allows a respondent to obtain a photocopy of all documents made available for inspection by FINRA's Enforcement or Market Regulation departments and requires the respondent to pay the copying costs. The amended rule now identifies FINRA staff as setting the rate for copies. FINRA staff will base the copying charges on rates charged by local copying vendors in the area where FINRA maintains the documents.

Submission of Evidence

FINRA Rule 9261(a) addresses pre-hearing disclosures and requires each party to submit to all other parties and to the hearing officer copies of documentary exhibits the parties intend to introduce and the names of the witnesses each party intends to present at a hearing. Currently, pre-hearing, proposed documentary evidence submitted to the hearing officer becomes part of the record. At the hearing, all of the documents that are admitted into evidence also become part of the record.⁴ This results in the record containing a duplicate of nearly every document that was admitted into evidence. Amended Rule 9261(a) establishes that documentary evidence submitted prior to a hearing shall not become part of the record, unless a hearing officer, hearing panel or extended hearing panel orders that it will be. Under the amended rule, the record will be focused on the evidence the parties introduced, or attempted to introduce, at the hearing. Further, the hearing officer may order the parties—who will continue to exchange proposed documentary evidence with other parties—to refrain from submitting their proposed documentary evidence to the hearing officer.

Hearing Panel and NAC Decisions

FINRA Rules 9268(b)(1) and 9349(b)(1) require that a statement describing the investigative or other origin of the disciplinary proceeding be included in the contents of a decision of the hearing panel or the NAC, respectively. The amended rule requires such a statement only if the information is not otherwise contained in the record.

Review Proceedings

FINRA Rule 9312(a)(2) requires that if a default decision issued pursuant to Rule 9269 is called for review by the general counsel within 25 days after the date of service of the decision, the decision will be reviewed by the NAC. Amended Rule 9312(a)(2) clarifies that the Review Subcommittee also may review the decisions.⁵

Oral Argument on Appeal

FINRA Rule 9341(a) establishes the procedure for a party on appeal to request an oral argument before the subcommittee of the NAC or, if applicable, the Extended Proceeding Committee of the NAC. Currently, once oral argument is requested, there is no mechanism to cancel the argument if a respondent abandons his or her request for oral argument subsequent to filing a brief but prior to the date set for oral argument. Amended Rule 9341(a) allows the subcommittee or, if applicable, the Extended Proceeding Committee, to cancel in writing a previously scheduled oral argument, and decide the matter based on the briefs and the record without oral argument, if the adjudicator finds good cause due to a respondent abandoning his or her prior request, or being unreasonably unavailable.

Failure to Participate in Disciplinary Proceeding

FINRA Rule 9344(a) gives the NAC or the Review Subcommittee discretion on how to proceed when an appealing party did not participate in the disciplinary proceeding before a hearing officer, a hearing panel or, if applicable, an Extended Hearing Panel. The amended rule now states more plainly that the NAC or the Review Subcommittee will remand the disciplinary proceeding with instructions when a party shows good cause for failing to participate. If, on the other hand, a party does not show good cause, the amended rule states that the subcommittee or other adjudicator will decide the case based on the briefs and the record and without oral argument.

Filing of Papers in Eligibility Proceedings

FINRA Rule 9524(a)(5) gives a hearing panel in an eligibility proceeding the ability, after obtaining consent of all the parties, to extend or shorten any time limits prescribed by the Code for the filing of any papers. The amended rule removes the consent requirement for any extension of a time limit to empower hearing panels with authority over scheduling matters.

Procedural Motions in Eligibility or Expedited Proceedings

FINRA Rule 9146(j)(3) requires that in the Rule 9500 Series, a motion shall be decided by an adjudicator. The amended rule allows counsel to the NAC to decide a procedural motion made in an eligibility proceeding or an expedited proceeding.

Endnotes

1. See Securities Exchange Act Release No. 66096 (January 4, 2012), 77 FR 1524 (January 10, 2012) (Order Approving File No. SR-FINRA-2011-044); see also SR-FINRA-2012-019.
2. The FINRA Rule 9000 Series is FINRA's Code of Procedure.
3. The concept of allowing an aggrieved person to initiate an NASD disciplinary proceeding was eliminated, with SEC approval, in 1997. See *Russell A. Simpson*, 53 S.E.C. 1042, 1044 n.3, (1998).
4. See FINRA Rule 9267(a)(3).
5. The Review Subcommittee is authorized to determine whether disciplinary decisions should be called for review by the NAC and to perform any other function set forth in FINRA's rules. See FINRA Regulation By-Laws, Article V, Section 5.13.