

Subpoenas and Orders to Appear or Produce Documents

SEC Approves Amendments to Arbitration Codes Relating to Subpoenas and Orders to Direct the Appearance of Witnesses and Production of Documents Without Subpoenas

Effective Date: February 18, 2013

Executive Summary

The Customer and Industry Codes of Arbitration Procedure (Codes) provide arbitrators with the authority to issue subpoenas for the appearance of witnesses and the production of documents. The Codes also authorize arbitrators to order FINRA member firms and their employees and associated persons to produce documents and/or to appear as witnesses without using the subpoena process. The SEC approved amendments to the Codes which direct arbitrators, in most instances, to issue orders (arbitrator orders), instead of issuing subpoenas, when industry parties seek the appearance of witnesses or the production of documents from non-party firms or their employees or associated persons.

The amendments add procedures for non-parties to object to subpoenas and for parties and non-parties to object to arbitrator orders of production. They also standardize procedures under the Codes relating to service of motions for subpoenas and arbitrator orders; service of issued subpoenas and arbitrator orders; and time frames for responding to subpoenas and arbitrator orders, making them operationally consistent.¹

The amendments are effective on February 18, 2013, for all motions filed on or after the effective date that request a subpoena under Rule 12512 or 13512, or an arbitrator order under Rule 12513 or 13513.

The text of the amendments is set forth in Attachment A.

January 2013

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

Key Topics

- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Discovery
- ▶ Orders to Appear or Produce Documents
- ▶ Subpoenas

Referenced Rules & Notices

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



Questions concerning this *Notice* should be directed to:

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Background & Discussion

Subpoenas

The Codes give arbitrators the authority to issue subpoenas to parties and non-parties. Subpoena Rules 12512 and 13512 set forth procedures for a party to make a motion for a subpoena. The subpoena rules also detail how a party may object to a subpoena and reply to an objection. Finally, the subpoena rules describe how parties must share documents produced under a subpoena.

The subpoena rules do not address who bears the production costs under a subpoena. In practice, arbitrators resolve disputes between parties, and between parties and non-parties, relating to costs associated with subpoenas. The subpoena rules do not provide a procedure for non-parties to object to subpoenas served upon them. As a matter of practice, FINRA permits non-parties to file objections to subpoenas. The objections may include a request for the arbitrators to determine who pays the costs of production.

Arbitrator Orders

The Codes authorize arbitrators to order firms, their employees or their associated persons to produce documents and/or to appear as witnesses without using the subpoena process. Unlike the subpoena rules, Rules 12513 and 13513 (order rules) expressly address the costs relating to production by non-party firms and their employees/associated persons. The order rules provide that, unless the panel directs otherwise, the party requesting the appearance of witnesses or the production of documents from non-parties pays the reasonable costs of the appearance and/or production.

Amendments to the Subpoena Rules

FINRA believes that a party firm's responsibility to reimburse a non-party firm (or its employees or associated persons) for production costs should be the same regardless of whether the party firm requests a subpoena or an arbitrator order. FINRA also believes that firms and associated persons are better served by requesting an arbitrator order. Arbitrator orders offer an efficient mechanism for obtaining the appearance of witnesses and production of documents from firms and their employees. While the Codes provide an enforcement mechanism for subpoenas and arbitrator orders,² typically, once an arbitrator issues a subpoena, non-compliance is handled away from the arbitration forum through the courts. However, non-compliance relating to an arbitrator order is handled by the arbitrators who are familiar with the case. Another advantage to using an arbitrator order is that arbitrator orders are not subject to the geographical limitations contained in subpoena statutes. Arbitrator orders are cost effective because forum users avoid the costs and risks associated with court proceedings.

Since the Codes provide a mechanism through the order rules for seeking production of documents and witnesses without resorting to the subpoena process, FINRA amended the subpoena rules to provide that unless circumstances dictate the need for a subpoena, arbitrators may not issue subpoenas to non-party firms and/or employees or associated persons of non-party firms at the request of party firms and/or employees or associated persons of party firms. The amendments state that if the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, then the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party firms under the order rules. An arbitrator might order a subpoena if, for example, a firm failed to produce documents pursuant to an arbitrator order, or if a former associated person of a firm has left the industry and the arbitrator believes that an order would not be effective.

The amendments add new Rules 12512(g) and 13512(g) to address costs when a party firm and/or employee or associated person requests a subpoena directed to a non-party firm and/or employee or associated person. Under the new rules, if an arbitrator issues a subpoena, the party firm requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.

Finally, the amendments add new Rules 12512(e) and 13512(e) to provide a mechanism for non-parties to object to a subpoena they receive. Under the new provisions, if a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within 10 calendar days of service of the subpoena, file written objections with the director of Arbitration. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. These new provisions codify FINRA's current practice concerning non-party objections to subpoenas.

Amendments to the Order Rules

As described above, the order rules authorize arbitrators to order firms, their employees, or their associated persons to produce documents and/or to appear as witnesses without using the subpoena process. The rules also provide that unless the panel directs otherwise, the party requesting the appearance of witnesses or the production of documents from non-parties pays the reasonable costs of the appearance and/or production.

FINRA amended the order rules to incorporate the procedures outlined in the subpoena rules for making, objecting to and serving motions. In addition, FINRA amended the order rules to provide for non-party objections to an arbitrator's order.

Effective Date

The amendments are effective on February 18, 2013, for all motions filed on or after the effective date that request a subpoena under Rule 12512 or 13512, or an arbitrator order under Rule 12513 or 13513.

Endnotes

1. See Securities Exchange Act Rel. No. 68404 (December 11, 2012), 77 Federal Register 74712 (December 17, 2012) (File No. SR-FINRA-2012-041).
2. IM-12000 states that it may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code (see Customer Code of Arbitration Procedure Part I – Interpretative Material, Definitions, Organization and Authority).

ATTACHMENT A

New language is underlined; deletions are in brackets

Customer Code

12512. Subpoenas

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas.

(1) Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(2) Unless circumstances dictate the need for a subpoena, arbitrators shall not issue subpoenas to non-party FINRA members and/or employees or associated persons of non-party FINRA members at the request of FINRA members and/or employees or associated persons of FINRA members. If the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party FINRA members under Rule 12513.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

(e) If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within 10 calendar days of service of the subpoena, file written objections with the Director. 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. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections.

~~[(e)]~~ (f) Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

(g) If the arbitrators issue a subpoena to a non-party FINRA member and/or any employee or associated person of a non-party FINRA member at the request of a FINRA member and/or employee or associated person of a FINRA member, the party requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.

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

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

- The appearance of any employee or associated person of a member of FINRA; or
- The production of any documents in the possession or control of such persons or members.

(b) The motion must include a draft order and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft order on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft order on a non-party.

(c) If a party receiving a motion and draft order objects to the scope or propriety of the order, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the order may respond to the objections within 10 calendar days

of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the order.

(d) If the arbitrator issues an order, the party that requested the order must serve the order at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the order.

(e) If a non-party receiving an order objects to the scope or propriety of the order, the non-party may, within 10 calendar days of service of the order, file written objections with the Director. 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. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections.

(f) Any party that receives documents in response to an order served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

[(b)] (g) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.

Industry Code

13512. Subpoenas

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas.

(1) Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(2) Unless circumstances dictate the need for a subpoena, arbitrators shall not issue subpoenas to non-party FINRA members and/or employees or associated persons of non-party FINRA members at the request of FINRA members and/or employees or associated persons of FINRA members. If the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party FINRA members under Rule 13513.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

(e) If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within 10 calendar days of service of the subpoena, file written objections with the Director. 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. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections.

[(e)] (f) Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

(g) If the arbitrators issue a subpoena to a non-party FINRA member and/or any employee or associated person of a non-party FINRA member at the request of a FINRA member and/or employee or associated person of a FINRA member, the party requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.

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

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

- The appearance of any employee or associated person of a member of FINRA; or
- The production of any documents in the possession or control of such persons or members.

(b) The motion must include a draft order and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft order on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft order on a non-party.

(c) If a party receiving a motion and draft order objects to the scope or propriety of the order, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the order.

(d) If the arbitrator issues an order, the party that requested the order must serve the order at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the order.

(e) If a non-party receiving an order objects to the scope or propriety of the order, the non-party may, within 10 calendar days of service of the order, file written objections with the Director. 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. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections.

(f) Any party that receives documents in response to an order served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

[(b)] (g) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.