

FINRA's Information and Testimony Requests

SEC Approves Amendments to Rule 8210

Effective Date: February 25, 2013

Executive Summary

The SEC approved amendments to FINRA Rule 8210¹ to:

- ▶ clarify the scope of FINRA's authority under Rule 8210 to inspect and copy the books, records and accounts of member firms, associated persons and persons subject to FINRA's jurisdiction;
- ▶ specify the method of service for certain unregistered persons under the rule; and
- ▶ authorize service of requests under the rule on attorneys who are representing firms, associated persons or persons subject to FINRA's jurisdiction.

The text of the amended rule, including Supplementary Material, is set forth in Attachment A. The amendments are effective on February 25, 2013.

Questions concerning this *Notice* should be directed to:

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

January 2013

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Senior Management

Key Topics

- ▶ Information and Testimony
- ▶ Inspection and Copying of Books and Records

Referenced Rules & Notices

- ▶ FINRA Rule 8210
- ▶ NTM 99-77

Background & Discussion

FINRA Rule 8210 grants FINRA staff and adjudicators authority to inspect and copy the books, records and accounts of member firms, associated persons and other persons over whom FINRA has jurisdiction. The SEC's approval of FINRA's proposed rule change means the amended rule now specifies that FINRA staff and adjudicators have the right to inspect and copy information in the "possession, custody or control" of the member firm, associated person or person over whom FINRA has jurisdiction. FINRA added the phrase "possession, custody or control" to link this concept to the existing body of case law that has defined possession, custody or control as used in Rule 34 of the Federal Rules of Civil Procedure. For example, in using the word "control," the amended rule requires firms, associated persons and other persons over whom FINRA has jurisdiction to provide records that they have the legal right, authority or ability to obtain upon demand.² FINRA also added Supplementary Material .01 to address what books, records and accounts are covered by the rule. The broad scope of books, records and accounts covered by the rule includes records relating to a FINRA investigation of outside business activities, private securities transactions, and possible violations of just and equitable principles of trade, other FINRA rules, MSRB rules and the federal securities laws.³ The Supplementary Material further indicates that all aspects of the relationship between a broker-dealer and its associated persons are potentially the subject of a Rule 8210 request.

The amended rule addresses how FINRA staff or an adjudicator serves a Rule 8210 request on an associated but unregistered person.⁴ The Central Registration Depository (CRD[®]) generally does not contain addresses for unregistered persons.⁵ The amended rule therefore allows service at a business address or a home address. FINRA will send a Rule 8210 request to a firm's business address when an unregistered person is associated with the firm. FINRA will personally serve an unregistered person who is not currently associated with a firm.⁶

The amended rule allows FINRA to serve a Rule 8210 request on the attorney for a member firm, associated person or person subject to FINRA's jurisdiction. The amended rule provides that, if FINRA staff or an adjudicator knows that a firm, associated person or person subject to FINRA's jurisdiction is represented by counsel regarding the matter in question, notice of a Rule 8210 request will be provided to counsel rather than to the client. It is accordingly the responsibility of a firm, associated person or person subject to FINRA's jurisdiction to communicate clearly to FINRA staff when they are being represented by an attorney in responding to a Rule 8210 request. When FINRA sends a Rule 8210 request to counsel, counsel receives it as the authorized agent for the firm, associated person or person subject to FINRA's jurisdiction. In this situation, service of the request on counsel is treated the same as service on the client.

Endnotes

1. See Securities Exchange Act Release No. 68386 (Dec. 7, 2012), 77 FR 74253 (Dec. 13, 2012) (Order Approving Proposed Rule Change; File No. SR-FINRA-2009-060).
2. See *Camden Iron & Metal v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991) (“Federal courts construe ‘control’ very broadly”).
3. In a 2006 opinion, the SEC expressed skepticism regarding FINRA’s argument that an associated person was required to provide documents because they were in his possession and control. See *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 SEC LEXIS 1926, at *19 (Aug. 25, 2006). The SEC accepted, for the purpose of its decision, that a “possession and control” standard applied, but concluded that “[FINRA] has not met its burden of proof to meet even that standard.” *Id.* 2006 SEC LEXIS 1926, at *22. By adding the phrase “possession, custody or control,” the amended rule removes this uncertainty identified in the *Ochanpaugh* opinion.
4. All associated persons are not necessarily registered persons. FINRA’s By-Laws define “associated person of a member” or “person associated with a member” as: “(1) a natural person who is registered or has applied for registration under the Rules of the Corporation; (2) a sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the Corporation under these By-Laws or the Rules of the Corporation; and (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member”. See FINRA By-Laws, Art. I (rr).
5. The amended rule therefore does not rely on an unregistered person to update CRD with his or her current address. Firms and registered persons, in contrast, have an affirmative duty to update CRD with their current address for at least two years after they have had their registration terminated. See *Notice to Members 99-77* (Sept. 1999).
6. The amended rule provides that notice will be deemed received by the associated person upon personal service, as specified in FINRA Rule 9134(a)(1).

© 2013 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission. *Regulatory Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Attachment A

Below is the text of the amended FINRA Rule 8210. New language is underlined.

* * * * *

8200. INVESTIGATIONS

8210. Provision of Information and Testimony and Inspection and Copying of Books

(a) Authority of Adjudicator and FINRA Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody or control.

(b) through (c) No Change.

(d) Notice

A notice under this Rule shall be deemed received by the member or currently or formerly registered person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. With respect to a person who is currently associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person by mailing or otherwise transmitting the notice to the last known business address of the member as reflected in the Central Registration Depository. With respect to a person subject to FINRA's jurisdiction who was formerly associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person upon personal service, as set forth in Rule 9134(a)(1). If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

(1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository; and

(2) any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person knows that the member or person is represented by counsel regarding the investigation, complaint, examination, or proceeding that is the subject of the notice, then the notice shall be served upon counsel by mailing or otherwise transmitting the notice to the counsel in lieu of the member or person, and any notice served upon counsel shall be deemed received by the member or person.

(e) through (g) No Change.

• • • Supplementary Material: -----

.01 Books and Records Relating to Investigations. This rule requires FINRA members, associated persons and persons subject to FINRA's jurisdiction to provide FINRA staff and adjudicators with requested books, records and accounts. In specifying the books, records and accounts "of such member or person," paragraph (a) of the rule refers to books, records and accounts that the broker-dealer or its associated persons make or keep relating to its operation as a broker-dealer or relating to the person's association with the member. This includes but is not limited to records relating to a FINRA investigation of outside business activities, private securities transactions or possible violations of just and equitable principles of trade, as well as other FINRA rules, MSRB rules, and the federal securities laws. It does not ordinarily include books and records that are in the possession, custody or control of a member or associated person, but whose bona fide ownership is held by an independent third party and the records are unrelated to the business of the member. The rule requires, however, that a FINRA member, associated person, or person subject to FINRA's jurisdiction must make available its books, records or accounts when these books, records or accounts are in the possession of another person or entity, such as a professional service provider, but the FINRA member, associated person or person subject to FINRA's jurisdiction controls or has a right to demand them.

* * * * *