

Definitions of Non-Public and Public Arbitrator

SEC Approves Amendments to Arbitration Codes to Revise the Definitions of Non-Public and Public Arbitrator

Effective Date: June 26, 2015

Executive Summary

The SEC approved amendments to the definitions of non-public arbitrator and public arbitrator in the Customer and Industry Codes of Arbitration Procedure.¹ The amended definitions provide, among other matters, that persons who worked in the financial industry for any duration during their careers will always be classified as non-public arbitrators, and persons who represent investors or the financial industry as a significant part of their business will also be classified as non-public, but may become public arbitrators after a cooling-off period. The amendments also reorganize the definitions to make them easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification.

The amendments are effective on June 26, 2015.

The text of the amendments is available at www.finra.org/notices/15-18.

Questions concerning this *Notice* should be directed to:

- ▶ Todd Saltzman, Deputy Director of Case Administration, Dispute Resolution, at (212) 858-4273 or todd.saltzman@finra.org; or
- ▶ Margo A. Hassan, Associate Chief Counsel, Dispute Resolution, at (212) 858-4481 or margo.hassan@finra.org.

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

Key Topics

- ▶ Arbitration
- ▶ Codes of Arbitration Procedure
- ▶ Definitions of Non-Public and Public Arbitrator

Referenced Rules & Notices

- ▶ FINRA Rule 12100
- ▶ FINRA Rule 13100

Background & Discussion

FINRA classifies arbitrators under the Customer and Industry Codes of Arbitration Procedure (codes) as either “non-public” or “public.” FINRA Rules 12100 and 13100 define these terms. The non-public arbitrator definition lists affiliations that might qualify a person to serve as a non-public arbitrator at the forum and includes, among other matters, persons who work in the financial industry. Conversely, the public arbitrator definition itemizes affiliations that disqualify a person from serving as a public arbitrator at the forum. FINRA classifies persons who do not have any significant affiliation with the financial industry, and who do not have immediate family members who have a significant affiliation with the financial industry, as public arbitrators.

FINRA amended the codes to provide, among other matters, that persons who worked in the financial industry for any duration during their careers will always be classified as non-public arbitrators, and persons who represent investors or the financial industry as a significant part of their business will also be classified as non-public, but may become public arbitrators if their business mix changes, after a cooling-off period. The amendments also reorganize the definitions to make them easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification. The key changes to the arbitrator definitions are highlighted below.

Revisions to the Non-Public Arbitrator Definition

FINRA amended the non-public arbitrator definition to:

- ▶ eliminate the five-year cooling-off period for financial industry employees to transition from the non-public arbitrator roster to the public arbitrator roster, thereby providing that FINRA will classify persons who worked in the financial industry, at any point in their careers, for any duration, as non-public;
- ▶ add two new categories of financial industry employees who may qualify as non-public, persons associated with a mutual fund or a hedge fund, and persons associated with an investment adviser;
- ▶ expand it beyond financial industry affiliates to also include professionals who regularly represent or provide services to investor parties in disputes concerning investment accounts or transactions;² and
- ▶ adopt a standard cooling-off period of five years before specified persons may transition to the public arbitrator roster.

Revisions to the Public Arbitrator Definition

FINRA amended the public arbitrator definition to:

- ▶ add to the list of persons who are disqualified from serving as public arbitrators, attorneys, accountants, expert witnesses, or other professionals who earned significant revenue from representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry;
- ▶ add to the list of persons who are disqualified from serving as public arbitrators, attorneys, accountants, or other professionals whose firms earned significant revenue from representing individual and/or institutional investors relating to securities matters;
- ▶ revise the cooling-off periods in the public arbitrator definition so that disqualified persons must wait five years after ending an affiliation based on their own activities, and two years after ending an affiliation based on someone else's activities, before they may be permitted to serve as public arbitrators (provided that another disqualification does not apply);
- ▶ decrease applicable permanent disqualification periods from 20 years to 15 years; and
- ▶ revise the definition of immediate family member to include more of the current societal relationships.

Organizational Changes

FINRA reorganized the arbitrator definitions to:

- ▶ remove confusing cross-references in the definitions to make it easier for staff, arbitrators and potential arbitrators, and parties to figure out the correct arbitrator classification; and
- ▶ separate the disqualifications in the public arbitrator definition into categories of those that are permanent versus those that are temporary, and those based on a person's own activities versus those based on the activities of others (*e.g.*, others at a person's firm).

Effective Date

The amendments are effective on June 26, 2015. The new definitions will apply to all lists of arbitrators for arbitrator selection that FINRA sends to parties on or after June 26, 2015. However, for cases in which FINRA sent lists prior to June 26, 2015, FINRA will not change the classification status of non-public and public arbitrators based on the new definitions, and will not grant challenges for cause based solely on an arbitrator's reclassification.

Endnotes

1. See Securities Exchange Act Rel. No. 74383 (February 26, 2015), 80 Federal Register 11695 (March 4, 2015) (File No. SR-FINRA-2014-028).
2. Under the amendments, FINRA will reclassify these individuals as public arbitrators five years after their business mix changes. However, if their professional business mix keeps them on the non-public roster because of this rule for a total of 15 years, the non-public designation becomes permanent.