

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67803; File No. SR-FINRA-2012-041)

September 7, 2012

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Amend the Customer and Industry Codes of Arbitration Procedure Relating to Subpoenas and to Arbitrator Authority to Direct the Appearance of Associated Person Witnesses and the Production of Documents Without Subpoenas

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 24, 2012, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Customer and Industry Codes of Arbitration Procedure (collectively “Codes”), to provide that when specified industry parties seek the appearance of witnesses or the production of documents from FINRA members (and individuals associated with the members) that are not parties to the arbitration, FINRA arbitrators shall issue orders for the appearance of witnesses or the production of documents, instead of issuing subpoenas. The proposed rule change would add procedures for non-parties to object to subpoenas and arbitrator orders of production (“arbitrator orders”). It would also standardize procedures under the Codes relating to:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is proposing to amend the Codes to provide that, when specified industry parties seek the appearance of witnesses or the production of documents from FINRA members (and individuals associated with the members) that are not parties to the arbitration, FINRA arbitrators shall issue orders for the appearance of witnesses or the production of documents, instead of issuing subpoenas, and to standardize certain procedures relating to subpoenas and arbitrator orders.

Subpoenas

The Codes give arbitrators the authority to issue subpoenas to parties and non-parties. Subpoena Rules 12512 and 13512 (“Subpoena Rules”) set forth procedures for a party to make a motion for a subpoena. A party must make a written motion requesting that an arbitrator issue a subpoena to a party or non-party. The motion must include a draft subpoena and the party must serve the motion on each other party. The party may not serve the motion or draft subpoena on a non-party. The Subpoena Rules also detail how a party may object to a subpoena and reply to an objection. 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. Finally, the Subpoena Rules describe how parties must share documents produced under a subpoena.

The Subpoena Rules do not address who bears the costs of production under a subpoena issued to either a party or a non-party. In practice, arbitrators resolve disputes between parties, and between parties and non-parties, relating to costs associated with subpoenas. In addition, the Subpoena Rules do not provide a means 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 FINRA firms, their employees, and/or their associated persons to appear and to produce documents without using the subpoena process. Unlike the Subpoena Rules, Rules 12513 and 13513 (“Order Rules”) expressly

address the costs relating to non-party production by 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.

Proposed 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 members and associated persons would be better served by requesting an arbitrator order. Arbitrator orders offer an efficient mechanism for obtaining the appearance of witnesses and production of documents from FINRA members and their employees. While the Codes provide an enforcement mechanism for subpoenas and arbitrator orders,³ typically, once an arbitrator issues a subpoena, non-compliance is handled away from the arbitration forum through the courts. Conversely, FINRA staff and the arbitrators who are familiar with the case handle requests for arbitrator orders. 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 for forum users because members and associated persons avoid the costs and risks associated with court proceedings. FINRA

³ 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).

does not believe that the proposal would impact firms' ability to obtain documents and witnesses at the forum.

Since the Codes provide a mechanism through the Order Rules for seeking production of documents and witnesses without resorting to the subpoena process, FINRA believes that arbitrators should use this mechanism first. FINRA is proposing to amend the Subpoena Rules to provide that 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. The proposal states 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 FINRA members 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 FINRA member has left the industry and the arbitrator believes that an arbitrator order would not be effective.

Under the proposed rule change, FINRA would add new Rules 12512(g) and 13512(g) to address costs when a FINRA member and/or employee or associated person requests a subpoena directed to a non-party FINRA member and/or employee or associated person. If an arbitrator issues a subpoena, the party requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.

Finally, FINRA is proposing to add new Rules 12512(e) and 13512(e) to provide a mechanism for non-parties to object to a subpoena that an arbitrator issues to them. 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. 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. The proposed amendments would codify FINRA's current practice relating to objections.

Proposed Amendments to the Order Rules

As stated above, the Order Rules authorize arbitrators to order FINRA firms, their employees, and/or their associated persons to appear and to produce documents 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 is proposing to amend the Order Rules to incorporate the procedures outlined in the Subpoena Rules for making, objecting to, and serving motions, and which detail how parties must share documents received from non-parties. Finally, FINRA is proposing to amend the Order Rules to provide for non-party objections to an arbitrator's order. The proposed rule change will standardize FINRA's procedures relating to Arbitrator Orders.

Arbitrators' Authority to Assess Production Costs

As stated above, under proposed new Rules 12512(g) and 13512(g), if the arbitrators issue a subpoena, the party requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise. If a dispute arises regarding who pays the production costs and whether a stated amount is reasonable, the proposed rule change allows the arbitrators to determine the reasonable costs and to assess responsibility for paying them. The amendments would codify the current practice relating to how FINRA handles such disputes. The proposed rule change eliminates the current disparity between how the Codes treat costs under the Subpoena Rules and the Order Rules for member requests to non-party members for the appearance of witnesses and production of documents.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁴ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change would eliminate a disparity between how the Codes treat costs under the Subpoena Rules and the Order Rules for member requests to non-party members for the appearance of witnesses and production of documents and could lower discovery costs to member firms and their associated persons and employees. The proposed amendments would also enhance the user

⁴ 15 U.S.C. 78o-3(b)(6).

experience at the forum by standardizing certain procedures relating to subpoenas and arbitrator orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would enhance the efficiency of the FINRA forum for FINRA members and their associated persons and employees because it would require them to use the Order Rules for obtaining the appearance of witnesses and the production of documents from non-party FINRA firms (and their associated persons and employees) during an arbitration proceeding. It would also remove the financial burden associated with document production for non-party FINRA firms (and their associated persons and employees) that must produce documents because the proposed rule change requires the firm party requesting documents to bear the reasonable cost of the non-party's production. Due to the nature of the proposed rule change, FINRA does not believe that the proposal will impact competition or capital formation. The proposed rule change aims to enhance the efficiency of the forum for its users, as explained above, and seeks to ensure that the arbitrators assess the reasonable costs of discovery during an arbitration proceeding to the industry parties involved in the dispute.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2012-041 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2012-041. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-FINRA-2012-041 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵

Kevin M. O'Neill
Deputy Secretary

⁵ 17 CFR 200.30-3(a)(12).