



FINRA Amends Subpoena and Arbitrator Order Rules *by Benjamin Coulter and Mignon Lunsford*

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In its recent [Regulatory Notice 13-04](#), the Financial Industry Regulatory Authority ("FINRA") announced amendments to its Customer and Industry Codes of Arbitration Procedure related to subpoenas and arbitrator orders for the production of documents and testimony. The amendments affect Subpoena Rules [12512](#) and [13512](#), as well as Order Rules [12513](#) and [13513](#). The new rules became effective on February 18, 2013, and govern all motions filed on or after the effective date.

FINRA's amendments to the rules governing subpoenas and arbitrator orders will likely result in a much greater emphasis on the use of arbitrator orders and de-emphasis of FINRA subpoenas. As FINRA itself explained, the amended rules "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 new rules do so by changing the availability of subpoenas, the allocation of costs for responding to subpoenas, the procedures for objecting to both subpoenas and orders, and the procedures for obtaining arbitrator orders.

The amendments to the subpoena rules are substantial and impactful. To begin with, rules 12512(a)(2) and 13512(a)(2) now specify that arbitrators should *not* issue subpoenas to non-party FINRA members or employees or associated persons "unless circumstances dictate the need for a subpoena." These circumstances include, for instance, when a firm neglects to produce documents pursuant to a previously issued arbitrator order. Additionally a subpoena might be necessary when an order would otherwise be unsuccessful, such as when an associated person departs the industry and consequently falls outside the scope of a Rule 12513 or Rule 13513 order.

Second, the amendments outline a mechanism for a non-party objecting to the scope or propriety of a subpoena, providing that a non-party may file written objections with the director within ten (10) calendar days of service of the subpoena, with the requesting party having ten (10) calendar days to respond after receipt of the objections. In essence, this addition to the subpoena rules is a codification of the standard time frame already applicable to non-party subpoenas.

Finally, the subpoena rules were modified to include express provision for the costs incurred when a party firm or associated person issues a subpoena to a non-party firm. The amendments provide that if a subpoena is issued, then the party requesting the subpoena is required to pay "the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise." This is consistent with FINRA's belief that it is the responsibility of a party firm to reimburse a non-party firm or associated person for the costs associated with production.

While the changes to the order rules are less dramatic, they provide a workable process that should guaranty the use of arbitration orders. The primary change to the arbitration order rules incorporates the procedures from the subpoena rules for "making, objecting to and serving motions." The rules now also set out a process for non-party objections to an arbitrator's order. Additionally, as with the amendments to the subpoena rules, the order rules now expressly provide that the party ordering the production of documents or the appearance of a witness must pay non-parties for the reasonable costs associated with such an order.

FINRA's amendment of the subpoena and arbitrator order rules will almost certainly result in the greater use of arbitrator orders. By emphasizing orders and making subpoenas more difficult to obtain and more costly, FINRA appears to be directing parties to handle obtaining witness testimony and production of documents exclusively through the FINRA process, rather than through a process that might ultimately involve the court system. In explaining the impetus behind the amendments emphasizing the use of arbitrator orders, FINRA asserts that because enforcement of orders is handled exclusively by FINRA, orders will ultimately be more affordable and efficient for parties. Additionally, because arbitrator orders are not subject to the same geographical limitations contained in subpoena statutes, arbitrator orders offer a broader, and more malleable, method of obtaining documents and testimony.

In large part, however, the process of seeking testimony or documents will be the same. Parties seeking to compel a witness's testimony or the production of documents from a non-party will need to file a motion for an order with the director, attach a draft order, and serve the motion and draft on the other parties to the arbitration. If parties follow the procedures for obtaining orders, they should be able to obtain the testimony and documents that they need to prepare their cases. Should enforcement be needed, however, it will be handled by an arbitrator acquainted with the case, as opposed to a judge being informed of the issues for the first time.

On the other hand, parties at whom subpoenas and orders are directed will also have greater flexibility in responding. The rules in both the Customer Code and the Industry Code, as amended, severely limit the use of subpoenas, create a presumption of cost-shifting in responding, and allow a clear process for objections to both subpoenas and orders, thereby simplifying the entire process.

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