

## Definition of Non-Public Arbitrator

### SEC Approves Amendments to Arbitration Codes to Revise the Definition of Non-Public Arbitrator

Effective Date: October 9, 2017

#### Summary

FINRA's proposed amendments to the definition of non-public arbitrator in the Customer and Industry Codes of Arbitration Procedure have been approved by the SEC.<sup>1</sup> The amended definition provides that a non-public arbitrator is a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under the Codes.

The amendments are effective on October 9, 2017.

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

Questions concerning this *Notice* should be directed to:

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- ▶ Margo Hassan, Associate Chief Counsel, FINRA Office of Dispute Resolution, at (212) 858-4481 or [margo.hassan@finra.org](mailto:margo.hassan@finra.org).

#### Background & Discussion

FINRA classifies arbitrators under the Customer and Industry Codes of Arbitration Procedure (Codes) as either "non-public" or "public."<sup>2</sup> Currently there is a gap between these definitions. The non-public arbitrator definition lists affiliations that might qualify a person to serve as a non-public arbitrator at the forum. The non-public arbitrator roster is composed, among other things, of individuals who work, or worked, in the financial industry. Conversely, the public arbitrator definition enumerates criteria that disqualify an applicant from inclusion on the public arbitrator roster. Public arbitrators have never been employed by the industry, do not provide services to the industry or to parties engaged in securities arbitration and litigation, and do not have immediate family members or co-workers who do so.

#### October 2017

##### 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

In 2015, the SEC approved amendments to the definitions of non-public arbitrator and public arbitrator in the Codes, which narrowed the public arbitrator definition to individuals who do not have any significant affiliation with the financial industry as described above.<sup>3</sup> At the time, 800 arbitrators became disqualified from the public arbitrator roster under the narrowed public arbitrator definition. Moreover, more than 100 of these arbitrators did not meet any of the criteria outlined in the non-public arbitrator definition for service on the non-public arbitrator roster, and thus were no longer eligible to serve as arbitrators at the forum in any capacity. In most instances, the basis for the ineligibility is an affiliation relating to an arbitrator's family members or co-workers.

FINRA amended the Codes to allow FINRA to appoint individuals to the non-public arbitrator roster if they meet FINRA's general arbitrator qualification criteria, but cannot be classified as public arbitrators. Specifically, FINRA amended the non-public arbitrator definition to delete the specific criteria for inclusion on the non-public arbitrator roster. Instead, Rules 12100(r) and 13100(r) provide that the term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator.

## Effective Date

The amendments are effective on October 9, 2017.

## Endnotes

1. See Securities Exchange Act Release No. 81572 (September 11, 2017), 82 *Federal Register* 43436 (September 15, 2017) (Order Approving File No. SR-FINRA-2017-025).
2. See FINRA Rules 12100 and 13100.
3. See Securities Exchange Act Release No. 74383 (February 26, 2015), 80 *Federal Register* 11695 (March 4, 2015) (Order Approving File No. SR-FINRA-2014-028).

## Attachment A

Proposed new language is underlined; deletions are in brackets.

### Customer Code

#### Rule 12100. Definitions

##### **(r) Non-Public Arbitrator**

The term “non-public arbitrator” means a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under paragraph (y). [meets any of the following criteria:

(1) is, or was, associated with, including registered through, under, or with (as applicable):

(A) a broker or a dealer (including a government securities broker or dealer or a municipal securities broker or dealer); or

(B) the Commodity Exchange Act or the Commodities Future Trading Commission, or a member of the National Futures Association or the Municipal Securities Rulemaking Board; or

(C) an entity that is organized under or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940; or

(D) a mutual fund or a hedge fund; or

(E) an investment adviser;

(2) is an attorney, accountant, or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to any entities listed in paragraph (r)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (r)(1); or

(3) is an attorney, accountant, expert witness or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry; or

(4) is, or within the past five years was, an employee of a bank or other financial institution who effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

For purposes of the non-public arbitrator definition, the term “professional time” shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.]

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## Industry Code

### Rule 13100. Definitions

#### **(r) Non-Public Arbitrator**

The term “non-public arbitrator” means a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under paragraph (x). [meets any of the following criteria:

(1) is, or was, associated with, including registered through, under, or with (as applicable):

(A) a broker or a dealer (including a government securities broker or dealer or a municipal securities broker or dealer); or

(B) the Commodity Exchange Act or the Commodities Future Trading Commission, or a member of the National Futures Association or the Municipal Securities Rulemaking Board; or

(C) an entity that is organized under or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940; or

(D) a mutual fund or a hedge fund; or

(E) an investment adviser;

(2) is an attorney, accountant, or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to any entities listed in paragraph (r)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (1) (1); or

(3) is an attorney, accountant, expert witness or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry; or

(4) is, or within the past five years was, an employee of a bank or other financial institution who effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

For purposes of the non-public arbitrator definition, the term “professional time” shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.]