

**MEMO# 27236**

May 10, 2013

# **FINRA Rule 8210 Revised to Provide FINRA Access to Records of Third Parties During Inspection of a FINRA Member**

[27236]

May 10, 2013

TO: COMPLIANCE MEMBERS No. 25-13  
SEC RULES MEMBERS No. 45-13  
SMALL FUNDS MEMBERS No. 34-13  
OPERATIONS MEMBERS No. 12-13  
BROKER/DEALER ADVISORY COMMITTEE No. 23-13  
TRANSFER AGENT ADVISORY COMMITTEE No. 37-13  
UNIT INVESTMENT TRUST MEMBERS No. 13-13 RE: FINRA RULE 8210 REVISED TO PROVIDE  
FINRA ACCESS TO RECORDS OF THIRD PARTIES DURING INSPECTION OF A FINRA MEMBER

Effective February 25, 2013, the SEC approved amendments to FINRA Rule 8210, which governs FINRA's "right" to inspect the records of a FINRA member. [\[1\]](#) As amended, the scope of FINRA's authority under this rule has been substantially expanded to include "books, records, and accounts" that are in the member's "possession, custody, or control." According to a recent FINRA interpretation of this new provision, "Generally a document will be considered to be in control of a member firm or person if the firm or person has the legal right, authority, or ability to obtain the document upon demand." [\[2\]](#) As discussed in more detail below, third parties that interact with FINRA members (including mutual fund issuers and service providers) should be aware of FINRA's expanded jurisdiction and know that, so long as a FINRA member has the ability to obtain a third party's documents upon request, such records may be obtained by FINRA during a routine inspection or an investigation.

Apparently the genesis for this rule amendment was, in part, a 2006 decision of the SEC in which the SEC denied the NASD n/k/a FINRA access to records maintained by a third party. [\[3\]](#) As noted by the SEC in this decision:

. . . the scope of [Rule 8210] does have limits. There may be circumstances in which possession and control of documents by an NASD member or associated person, together with some other interest in the documents short of an ownership interest, may be sufficient given the enforcement objectives of the NASD to trigger application of the Rule. In other circumstances, the NASD's authority under the Rule might not extend to documents that may belong to a

third party, or that may contain a third party's confidential information not closely related to securities trading with a member or associated person, even if those documents were in the possession and control of a member or associated person. [4]

When it proposed to expand the reach of Rule 8210, FINRA noted that the amendments "would clarify that the information [obtained by the FINRA during an investigation, complaint, examination, or proceeding] must be in the member's or person's 'possession, custody, or control.'" [5] The Adopting Release notes that "commenters expressed concern that FINRA's intent to clarify the scope of its authority regarding requests pursuant to FINRA Rule 8210 represented an expansion of the current rule without a meaningful discussion or consideration of the possible legal and practical implications and consequences for member firms, associated persons, and persons over whom FINRA has jurisdiction." [6] FINRA responded to these concerns as follows:

FINRA believes that the concerns . . . relating to issues regarding access to third party documents and procedural protections incorrectly assume that FINRA's investigations into the conduct of its members and associated persons are strictly limited in scope to the FINRA members and associated persons under investigation. FINRA stated that although it has jurisdiction to file an action against its members and associated persons (and those otherwise subject to its jurisdiction), its investigation can involve non-FINRA members, including customers, issuers, or foreign businesses. Consequently, FINRA contends that third party documents within the 'possession, custody, or control' of the FINRA member or associated person that relate to the investigation should be produced pursuant to proposed FINRA Rule 8210 and concerns solely based on their status as third party documents should not prevent the Commission from approving the proposed change. [7]

FINRA further noted that "concerns about limiting the scope of the rule are misplaced." [8]

In support of the amendment, FINRA stated that the newly added language "parallels the Federal Rules of Civil Procedure regarding document requests and subpoenas for documents." [9] While this may be true, the SEC itself has noted that, unlike the Federal Rules of Civil Procedures, the procedural protections available to FINRA's members under Rule 8210 are quite limited:

We noted that under the Federal Rules of Civil Procedure, document requests or subpoenas for documents expressly cover documents within the 'possession, custody and control' of the person to whom the request or subpoena is directed. The authority for the Federal Rules, however, stems from the Supreme Court's power to prescribe general rules of practice and procedure for cases in the United States district courts, while NASD's authority to request documents pursuant to Rule 8210 stems from the contractual relationship entered into voluntarily by NASD members and associated persons with NASD. Moreover, the potential breadth of requests for documents under the Federal Rules is circumscribed by the full panoply of procedural protections afforded as part of the discovery process, including the right to object to the production of requested documents and the right to have such objection heard by a court, an entity independent of the party requesting the documents. These protections are not available when NASD makes a Rule 8210 request; in such a case, the only recourse against possible overreaching by NASD is for the person to whom

the request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission. [10]

In light of the above, third parties that interact with FINRA members (including mutual fund issuers and service providers) should be aware that the third party's records may be subject to FINRA's access during an inspection or investigation unless the third party's agreements with the FINRA member deny the member access to such records.

Tamara K. Salmon  
Senior Associate Counsel

#### endnotes

[1] See SEC Release No. 34-68386 (December 7, 2012) ("Adopting Release"), which is available at: <http://www.sec.gov/rules/sro/finra/2009/34-68386.pdf>.

[2] See Information and Testimony Requests, FINRA Rule 82100 Frequently Asked Questions [emphasis added], which is available at: <http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p250124.pdf>.

[3] See In Re: Jay Alan Ochanpaugh, SEC Release No. 54363 (August 25, 2006) ("Ochanpaugh"). See also SEC Release No. 34-60836 (October 16, 2009) ("Proposing Release") at fn. 4. The Proposing Release, which sought comment on FINRA's proposed revisions, is available at: <http://www.sec.gov/rules/sro/finra/2009/34-60836.pdf>.

[4] See Ochanpaugh at p. 9.

[5] Proposing Release at p. 4.

[6] Adopting Release at p. 7.

[7] Adopting Release at p. 11 [emphasis added]. Note that, even though this excerpt refers to an "investigation," the revised rule also applies to FINRA's access to records in connection with any "examination."

[8] Adopting Release at p. 12.

[9] Adopting Release at p. 3.

[10] Ochanpaugh at pp. 9-10. FINRA responded to commenters' concerns about the lack of due process that would be afforded by the amendments to Rule 8210 by stating its authority is "based on its rules applying to all members and their associated persons. . . [I]n light of these relationships, [FINRA's] investigations are based on a model of implied cooperation as opposed to the adversarial system that is governed by the Federal Rules of Civil Procedure." Adopting Release at p. 11 [emphasis added].