No. _______

IN THE

Supreme Court of the United States

JOHN M. FIFE,

Petitioner,

—v.—

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For over 150 years, Congress has endowed district courts with "original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. When it passed the Securities Exchange Act of 1934 (the "**Exchange Act**"), Congress went even further, giving district courts the "exclusive jurisdiction" to determine violations of the statute. 15 U.S.C. § 78aa(a).

In 2012, Respondent Financial Industry Regulatory Authority, Inc. ("**FINRA**")—a "private" "not-for-profit" to which the United States Securities and Exchange Commission ("**SEC**") has outsourced authority to police securities firms and professionals—purported to "suspend" and "bar" Petitioner John M. Fife because he refused to fly halfway across the country on one week's notice to subject himself to FINRA's interrogation.

Nearly ten years later, the SEC instituted an enforcement action against Mr. Fife in the federal district court for the Northern District of Illinois on an unrelated matter and—relying on FINRA's previous proclamations—accused Mr. Fife of being a "recidivist violator of the securities laws," thereby triggering significantly higher sanctions if the jury finds Mr. Fife liable. In response, Mr. Fife sued in the federal district court for the Southern District of New York, bringing a single claim for declaratory judgment that FINRA's suspension and bar are null and void. Both the district court and court of appeals rejected Mr. Fife's claim, holding that Section 78y of the Securities Exchange Act of 1934 (the "**Exchange Act**") stripped district courts of subject matter jurisdiction to decide whether FINRA's "discipline" of Mr. Fife violated the Exchange Act.

The question presented is:

Whether Congress impliedly stripped federal district courts of their “exclusive jurisdiction” to determine whether FINRA violates the Exchange Act when it purports to exercise its disciplinary jurisdiction beyond the bounds set by Congress.

PARTIES TO THE PROCEEDING

Petitioner, Plaintiff–Appellant below, is John M. Fife.

Respondent, Defendant–Appellee below, is Financial Industry Regulatory Authority, Inc. (“**FINRA**.”).

CORPORATE DISCLOSURE STATEMENT

Petitioner John M. Fife is a natural person.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case within the meaning of this Court’s Rule 14(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

A "quasi-governmental," "private not-for-profit" should not be able to do whatever it wants, as long as it wants, no matter whom it hurts, in plain violation of federal securities law, without having to ever defend itself in federal district court.

Yet here, Respondent Financial Industry Regulatory Authority ("**FINRA**") has done just that—and both the district court and court of appeals simply shrugged their shoulders and told FINRA's victim, Petitioner John M. Fife, that his only recourse was to fight FINRA as investigator, prosecutor, judge, and jury through **ten** layers of FINRA's internal "disciplinary" process and another, eleventh layer at the Securities and Exchange Commission ("**SEC**") before he could ever make his case to a neutral, public court.

While oral argument suggested that the Second Circuit understood the danger posed by letting FINRA exceed the strict limits of its Congressionally-authorized jurisdiction, just one week later, the court issued a summary order adopting the district court's overly-narrow reading of this Court's 2010 decision in Free Enterprise Fund v. PCAOB. In holding that Exchange Act § 78y prohibited the district court from deciding whether FINRA's "discipline" of Mr. Fife, a mere securities customer—who has never been a FINRA associated person, and therefore has never explicitly or implicitly consented to FINRA's private "justice" system—violated the Exchange Act, both lower courts exhibited the all-too-common mistakes of ignoring § 78y's plain text and conflating the Exchange Act's procedures with the doctrine of administrative remedies: mistakes identical to those the Court currently is reviewing in in Axon Enterprise, Inc. v. Federal Trade Commission and SEC v. Cochran.

FINRA's "quasi-governmental" status as the SEC's mall cop exacerbates the dangers posed in Axon and Cochran. Here, the lower courts compounded their errors by blindly giving FINRA the power of a full governmental "agency," just to conclude that a prior Supreme Court case acknowledging agencies' "**primary** authority to determine [their] own jurisdiction" meant that no district court could never review whether FINRA—a self-described "private not-for-profit"—correctly determined the bounds of its own jurisdiction. Compare App. at 4a (quoting Fed. Power Comm'n v. La. Power & Light Co., 406 U.S. 621, 647 (1972)) (cleaned up) (emphasis added) and, e.g., La. Power, 406 U.S. at 647 (quoting Marine Engineers Beneficial Ass'n v. Interlake S.S. Co., 370 U.S. 173, 185 (1962)) ("While the agency's decision is not the last word, it must assuredly be the first.").

Moreover, prohibiting district courts from determining whether FINRA has exceeded its jurisdiction poses even more problems than in Cochran and Axon: while those cases involved only one to two levels of administrative review before public adjudication, here, FINRA's own internal disciplinary system forces private litigants like Petitioner to endure **ten layers of internal "discipline" before they can even seek agency review by the SEC**.

Fundamental fairness, common sense, and the Exchange Act itself all compel the conclusion that Congress never intended to strip district courts of their ability to determine whether FINRA violated the Exchange Act—let alone force private parties to endure **eleven stages** of "quasi-governmental" and administrative review **before** they could ever be heard by a public court. Nor did Congress ever intend to imbue FINRA with governmental authority without concomitant governmental responsibility, allowing the SEC to outsource its duties to FINRA whenever it wants to avoid Constitutional scrutiny.

OPINIONS BELOW

The summary order of the court of appeals panel is not published in the Federal Reporter but is available at 2022 WL 17818984. The order of the district court is not published in the Federal Supplement but is available at 2022 WL 912945.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included at App. 13.

STATEMENT OF THE CASE

I. Legal Background

1. FINRA is a creature of contract, whose Congressional authorization begins and ends with its ability to supervise and discipline its own members. Until the Great Depression, the federal government treated stock exchanges and other securities associations as essentially "private clubs," giving

them "great latitude [. . .] to discipline errant members." Silver v. New York Stock Exchange, 373 U.S. 341 (1963). But in 1938, Congress amended the Securities "**Exchange**" Act of 1934 to establish the statutory scheme of "supervised self-regulation" that requires securities self-regulatory organizations ("**SRO**")—today, just FINRA—to adopt and enforce rules governing "the business conduct of [its] members." Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838, 840 (2d Cir. 1971) (quoting SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1 (1963)); accord Silver, 373 U.S. at 352 (Congress's intention was to "let[] the exchange take the leadership" to create and enforce "rules governing the conduct of exchange members.").

In 1975, Congress again amended the Exchange Act, explicitly authorizing SROs to discipline their members. NASD v. SEC, 431 F.3d 803, 808 (D.C. Cir. 2005). In explaining the 1975 amendments, the Senate emphasized that "[t]he concept of 'membership'—i.e., voluntary association with an industry organization—is fundamental to the self-regulatory system established by the Exchange Act." S. Rep. 94–75, 1, 1975 U.S.C.C.A.N. 179, 202 (the "**Senate Report**").

Accordingly, the statute allows FINRA to discipline only "[FINRA']s members and persons associated with its members." 15 U.S.C. §§ 78s(g)(1)(B), (h)(1)(B); accord 15 U.S.C. § 78s(d)(1). The Act does not provide any other basis for FINRA to exercise disciplinary jurisdiction over anyone. See generally 15 U.S.C. § 78a et seq.

Therefore, nothing in the Exchange Act allows FINRA to "discipline" securities customers like Mr.

Fife. See generally id. Indeed, the Senate Report reiterates, over and over and over again, that the Exchange Act authorizes SROs to exercise disciplinary jurisdiction over only (1) their "members"—any "broker or dealer who has **agreed to be regulated**," and (2) "[their] members' "associated persons," i.e. individuals "under common control with the broker or dealer." Senate Report at 267–68 (emphasis added); see also, e.g., id. at 202 (SROs "exercise government power [. . .] by imposing a disciplinary sanction[] on a member or person affiliated with a member"); id. at 206 (federal law "limit[s] the scope of the self-regulatory authority over their members to matters related to purposes of the Exchange Act").

2. In 2007, the National Association of Securities Dealer's ("**NASD**") member firms approved consolidating the NASD and the New York Stock Exchange's ("**NYSE**") regulatory function into what would become FINRA. At its inception, FINRA included the 2,400 NASD organizations and 470 NYSE regulation, arbitration, and enforcement personnel—not customers. 5 Louis Loss et al., Securities Regulation at 554 (5th ed. 2016) (citing NASD, Members Overwhelmingly Approve Plan for New SRO for Member Regulation, 39 Sec. Reg. & L. Rep. (BNA) 130 (2007)). Today, FINRA is the only reamining SRO authorized by the SEC, pursuant to the Exchange Act, to oversee securities broker–dealers and professionals. Fiero v. FINRA, 660 F.3d 569, 572 (2d Cir. 2011).

Because the Exchange Act limits FINRA's disciplinary jurisdiction to its own members and associated persons, FINRA only can demand information or testimony from a FINRA "member, person associated with a member, or any other person subject to FINRA's jurisdiction;" accordingly, FINRA may suspend, expel, or bar its members for refusing to respond to those requests. Being barred from association with any broker or dealer is a "harsh" and "severe penalty." Vanasco v. SEC, 395 F.2d 349, 350 (2d Cir. 1986) (affirming decision and order of SEC finding that petitioner had committed securities fraud); but see Jarkesy v. SEC, ___ F.4th ___, 2022 WL 1563613 (5th Cir. May 18, 2022) (holding, inter alia, that SEC administrative proceedings regarding alleged securities fraud violated petitioners' Constitutional right to a jury trial). FINRA issues those information requests pursuant to internal FINRA Rule 8210.

3. However, and consistent with its limited Congressional authorization, FINRA has no right to subpoena or otherwise force customers to testify or provide information to the SRO. See, e.g., In re Christopher A. Parris, Inc., No. 3-17128, SEC Release No. 78669 at 2 (Aug. 24, 2016) (reversing FINRA bar of person who argued that he was not an associated person and therefore need not comply with 8210 request and observing, inter alia, that there is no need to exhaust administrative remedies where FINRA's challenged action failed to comply with applicable law and rules); In re Allen Mansfield, 46 SEC 356, 359–60 (1976) (SEC acknowledges that "[t]he NASD does not have the power to issue subpoenas" and that customers have the "voluntary" decision of whether to testify in NASD proceedings); Richard J. Rouse, 51 SEC 581, 584 (1995) (NASD's predecessor rule to 8210 "provides a means, **in the absence of subpoena power**, for the NASD to obtain **from its members** information necessary to conduct investigations. It is a key element in the

NASD's effort to police **its members**.") (emphasis added).

In expressly limiting FINRA's disciplinary jurisdiction to only its own members, Congress prohibited FINRA from intruding on the lives and liberty of mere customers. Cf. Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds Constitution and Congress have prescribed.").

Federal district courts regularly decide whether individuals are "customers" entitled to demand FINRA arbitration of customer disputes, or "associated persons" entitled to demand FINRA arbitration of industry disputes. See, e.g., Citigroup Global Mkts. Inc. v. Abbar, 761 F.3d 268, 275 (2d Cir. 2014); Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 39 (2d Cir. 2010). For example, the Second Circuit has established a "bright-line rule" to determine whether someone was a "customer" of a broker–dealer. Deutsche Bank Sec. Inc. v. Roskos, 692 F. App'x 52, 54 (2d Cir. 2017). Did he purchase a "purchase a good or service from a FINRA member or (2) ha[ve] an account with a FINRA member?" Abbar, 761 F.3d at 275. If so, he is a customer. That's it.

Though these questions often are decided before discovery, district courts occasionally have ordered full-on fact trials to determine whether an individual was a FINRA customer. See, e.g., Wachovia Bank, N.A. v. VCG Special Opportunities Master Fund, Ltd., 661 F.3d 164, 173 (2d Cir. 2011); Bensadoun v. Jobe-Riat, 316 F.3d 171, 176 (2d Cir. 2003).

4. While historically, federal courts have not treated FINRA as a governmental actor with Constitutional responsibilities—an increasingly dangerous approach, given FINRA's inexhaustible appetite for expansion—FINRA's disciplinary "process" is beyond Kafka's wildest tales. See generally FINRA Enforcement, Who We Are, https://www.finra.org/rules-guidance/enforcement.

First, FINRA begins an investigation and issues 8210 demands for testimony and evidence pursuant to that initial investigation. As discussed below, **FINRA ensnared Mr. Fife at this very first step**, suspending and barring him because he refused to fly to New York subject himself to FINRA's investigation, and in doing so, explained that he was a mere "customer" beyond FINRA's disciplinary power.

Second, FINRA's investigation team recommends a disposition.

Third, FINRA issues a disposition of either (a) formal disciplinary action, (b) informal action, or (c) no action.

If and only if FINRA institutes a formal disciplinary action, the **fourth** step is review by FINRA's Office of the Counsel to the Head of Enforcement ("**OHCE**").

Fifth, FINRA's Office of Disciplinary Affairs ("**ODA**") approves the disposition.

Sixth, FINRA finally either reaches a settlement via a Letter of Acceptance, Waiver and Consent ("**AWC**") or (b) issues a Complaint. Here, the (a) FINRA member at which Mr. Fife had customer accounts, clearing brokerage firm Gordon & Co., and

(b) that FINRA member's principal, Allison Salke, settled FINRA's investigation pursuant to AWCs.

Seventh, FINRA's Office of Hearing Officers ("**OHO**") adjudicates the Complaint via a hearing.

Eighth, the OHO issues either (a) an "Order Accepting Officer of Settlement" or (b) a Decision.

Ninth, the FINRA member or associated person can appeal to FINRA's National Adjudicatory Council ("**NAC**").

Tenth, the respondent can ask FINRA's Board of Governors to review NAC's appellate discretion—though the Board of Governors need not accept the respondent's plea. See FINRA, National Adjudicatory Council, https://www.finra.org/rules-guidance/adjudication-decisions/national-adjudicatory-council-nac.

Then—at the **eleventh stage**—the FINRA member or associated person finally gets the right to **appeal to the SEC**. See FINRA, Frequently Asked Questions for Respondents in FINRA Expedited Proceedings, https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho/expedited-proceeding-faq.

If—and only if—at this eleventh stage, the SEC issues a (1) final order (2) against the respondent, that person finally has the option of appealing the SEC order to the Court of Appeals. See § 78y.

In other words, the lower courts' Second Circuit's decision against Mr. Fife means that **all people**—regardless of whether they have ever been FINRA associated persons, worked in the American securities industry, or otherwise consented to FINRA's jurisdiction—must endure at least **ten**

stages of FINRA's own internal, contractual "disciplinary" process, plus an eleventh step at the SEC, before they can seek judicial review.

5. Historically, this Court has recognized district courts' power to determine whether federal agencies exceeded their statutory authority. See, e.g., Free Enterprise Fund v. PCAOB, 561 U.S. 477, 513 (2010) (allowing plaintiffs to sue in district court to challenge agency action; plaintiffs were "entitled to declaratory relief to ensure that the [relevant laws] will be enforced only by a constitutional agency accountable to the executive"); McKart v. United States, 395 U.S. 185, 200 (1969) (administrative exhaustion not required where claims are collateral to agency's merits determination; litigants "neither sought nor were awarded benefits in the district court, but rather challenged the Secretary's failure to follow the applicable regulations"); McCulloch v. Sociedad Nacional, 372 U.S. 10, 16 (1963) (citing Leedom v. Kyne, 358 U.S. 184, 188 (1958)) (reiterating that district courts have jurisdiction to determine whether agencies violated their animating statutes); cf. Bastek v. Fed Crop Ins. Corp., 145 F.3d 90, 95 (2d Cir. 1998) (exhaustion excused if, inter alia, "agency cannot give effective relief" because plaintiff challenges "the adequacy of the agency procedure itself[] or the agency lacks authority to grant the type of relief requested," "the claim is collateral to a demand for benefits," or plaintiff "would suffer irreparable harm if required to exhaust [his] administrative remedies"); PennMont Sec. v. Frucher, 586 F.3d 242, 246 (3d Cir. 2009) (citing First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 696 (3d Cir. 1979)) (exhaustion not necessary where complaint alleges "clear and unambiguous statutory or constitutional violation").

Therefore, no matter the procedural posture, the judiciary has always had the power to determine whether an agency, representing the executive, exceeded its Congressionally-granted powers. See, e.g., Nat'l Ass'n of Postal Supervisors v. United States Postal Serv., 26 F.4th 960, 966 (D.C. Cir. 2022) ("It is well established that judicial review of [agency] actions is available to determine whether the agency has acted ultra vires—that is, whether it has exceeded its statutory authority."); Rajasekaran v. Hazuda, 815 F.3d 1095, 1099 (8th Cir. 2016) ("Whether an agency exceeds its **statutory** authority is necessarily a predicate legal question; whether an agency exceeds its **regulatory** authority is not necessarily a predicate legal question.") (emphasis in original); Schiller v. Tower Semiconductor Ltd., 449 F.3d 286, 295 (2d Cir. 2006) ("For obvious reasons, whether an agency has ignored its statutory mandate is a question for the judiciary, not the agency, to address.").

Yet neither FINRA nor the district court nor the Second Circuit articulated any reason why district courts can determine whether the SEC exceeds its statutory authority, yet cannot decide whether FINRA violates the Exchange Act. Instead, the lower courts they held that § 78y stripped the district court of subject matter jurisdiction to hear Mr. Fife's Complaint.

In doing so, both decisions exhibited the lower courts' recurring problem of reading Free Enterprise Fund to **limit** district court jurisidiction. But in Free Enterprise Fund, this Court held that § 78y's "text does not expressly limit the jurisdiction that other statutes confer on the district courts. Nor does it do so implicitly." 561 U.S. at 489. In doing so, this Court observed that it was highly unlike Congress intended to limit district court jurisdiction if doing so would "foreclose all 'meaningful judicial review;' if the suit is 'wholly collateral to a statute's review provisions;' and if the claims are 'outside the agency's expertise.'" Free Enterprise Fund, 561 U.S. at 489 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994)).

Moreover, § 78y contains numerous qualifiers that narrowly constrain its reach. As the *en banc* Fifth Circuit observed in Cochran:

> First, § 78y provides that **only** "person[s] aggrieved by a final order of the Commission" [. . .] The statute says nothing about people, like Cochran, who have not yet received a final order of the Commission. Nor does it say anything about people, again like Cochran, who have claims that have nothing to do with any final order that the Commission might one day issue. [. . .] although Cochran's case is farther along than in Free Enterprise Fund, she is still not guaranteed an adverse final order, as the SEC might resolve her case in her favor," which would prevent her from "be[ing] able to obtain judicial review over her removal power claim.

Cochran v. SEC, 20 F.4th 194 at 203 (5th Cir. 2021).

II. Factual Background

Petitioner John M. Fife has never worked as a stockbroker, investment banker, or other securities professional. Because his long investment history has always been in the capacity of investing his own money for his own family—not playing with other peoples' money—Mr. Fife has never been registered with FINRA and has never acted as an associated person of any FINRA member.

Mr. Fife is an entrepreneur, investor, and philanthropist who received a Bachelor of Science degree in Computer Science and Statistics from Brigham Young University in 1986, and a Masters of Business Administration degree from Harvard Business School in 1990. After founding and managing several multi-million-dollar businesses, today, Mr. Fife is the President, Chief Executive Officer ("**CEO**") and Chair of numerous private companies. At all times relevant to this case, Mr. Fife lived and worked in Chicago, Illinois. Most relevant to this lawsuit, Mr. Fife is the owner and Managing Partner of Chicago Venture Partners, L.P. ("**CVP**"). Id. ¶ 43. CVP is Mr. Fife's family office and manages approximately $150 million of the Fife family's own money, and only the family's money.

CVP's primary activities are pursuing strategic acquisitions for CVP's subsidiaries and affiliates and investing in publicly-traded entities through private transactions ("**PIPE**"). CVP's PIPE investments have a long history of SEC approval. For example, in 1997 and again in 2007, the SEC implemented several regulatory reforms to encourage investors like Mr. Fife to make PIPE investments, including shortening the time period during which investors must hold such securities, and adopting new rules to "particularly [encourage] smaller companies" to engage in PIPE investments.

CVP's PIPE investments sometimes are structured as convertible "**Notes**," which give the borrower the flexibility to repay the debt by repaying the loan either in cash or with shares of the borrower's stock.

Like other securities, the borrowers' newly-issued securities necessarily had to be sold through accounts at FINRA-registered broker–dealers. Similar to how many operations require customized services from their key vendors, whether Amazon Web Services or Salesforce, Mr. Fife's investments required a broker–dealer that would tailor its services to Mr. Fife's specialized needs.

In 2011, Mr. Fife entered into a new customer relationship with a Boston-based clearing broker–dealer, Gordon & Co. ("**Gordon**" or the "**Brokerage**"), which was owned by the family of its CEO, Allison Salke. At that time, Ms. Salke held FINRA Series 7, 24, 27, 55, and 63 licenses, which allowed her to act as a General Securities Representative; General Securities Principal; Financial Operations and Principal; Limited Representative–Equity Trader; and Uniform Securities Agent, respectively. A Massachusetts partnership formed in 1961, Gordon had always been a family business, and was registered with FINRA and its predecessor between 1983 and 2012. Throughout Mr. Fife's relationship with Gordon, Ms. Salke's family owned over 95% of the Brokerage. Because Mr. Fife was one of Gordon's two primary customers, Ms. Salke sometimes discussed customer service, client referral, and risk issues with Mr. Fife. Around the same time that Mr. Fife opened multiple customer accounts with Gordon, a Fife family "**Trust**" invested $150,000 in the Brokerage in exchange for 12.5% of its non-voting Class B shares. The Trust's trustee was Mr. Fife's wife and its beneficiaries were his children.

Despite the Trust's investment, Ms. Salke—the Brokerage's CEO and a member of the family that continued to own over 95% of the Brokerage—continued to control and make all decisions regarding the operations and activities of her family's business. Indeed, when the Trust invested in Gordon, it explicitly agreed that it was prohibited from participating in the Brokerage's daily business activities: its input was limited to baseline investor-protection provisions, such as discrete compensation and governance matters.

In early fall 2011, FINRA sent Rule 8210 requests issued pursuant to an investigation FINRA titled "Gordon & Co., No. 20110292037" (the "**Gordon Investigation**") to FINRA member Gordon and FINRA associated person Ms. Salke. Those 8210 requests claimed, among other allegations, that the Trust's **12.5%** ownership of **Class B** shares had triggered Gordon's NASD requirement to "file an application for approval of equity ownership or partnership of the member that results in one person or entity directly or indirectly owning or controlling **25 percent or more of [Gordon's] equity or partnership capital**." Those 8210s to Gordon and Ms. Salke also claimed that Mr. Fife was so "involved in [Gordon's] management" that Gordon should have registered him with FINRA as a principal of the brokerage. Gordon and Ms. Salke disagreed with FINRA's characterizations and quickly refuted them in letter dated October 3, 2011.

But on October 18, 2011, FINRA sent Mr. Fife and his wife 8210 requests that directed them to travel from Chicago to Manhattan to subject themselves to FINRA's questioning on October 25, 2011. FINRA's Demand to Mr. Fife stated, without further explanation, that FINRA was investigating Gordon—the member firm of which Mr. Fife was a customer—"to determine whether [unidentified] violations of [unidentified] federal securities laws or [unidentified]

FINRA, NASD, NYSE, or MSRB rules ha[d] occurred."

Unlike in its requests to Gordon and Ms. Salke, FINRA's 8210 to Mr. Fife did **not** state or otherwise suggest that FINRA believed Mr. Fife had violated the securities laws, or FINRA, NASD, NYSE, or MSRB rules. Nor did the 8210 Demand to Mr. Fife claim or otherwise explain that FINRA believed Mr. Fife, himself, was an associated person or otherwise subject to FINRA's jurisdiction, let alone explain why FINRA purportedly believed that Mr. Fife was subject to its jurisdiction. Yet FINRA claimed, without explanation or analysis, that "[u]nder FINRA rule 8210, Mr. and Mrs. Fife [we]re obligated to appear as requested." The 8210s also contained FINRA's form caution that because FINRA is not a governmental entity, any witness who appears for a Rule 8210 interview cannot invoke his Constitutional rights.

Nothing in the Demands explained why FINRA could require Mr. or Mrs. Fife to travel halfway across the country, on one week's notice, and give up their Constitutional rights to satisfy the whims of a purportedly non-profit professional association to which they did not belong.

After investigating the circumstances, the Fifes' counsel advised them that FINRA lacked jurisdiction to compel their testimony or to discipline them. While the 8210s claimed that FINRA could suspend and bar them for failing to fly to Manhattan to voluntarily talk to FINRA, Mr. and Mrs. Fife had no reason to expect that either proclamation would have any practical effect on their lives, businesses, or investments: neither of them had ever worked in the securities industry, neither of them planned to ever work in the securities industry, and they had always been mere customers, not associated persons, of securities firms.

On January 3, 2012, FINRA issued "Notices of Suspension" to Mr. and Mrs. Fife, which stated that FINRA would "suspend [them] from associating with any FINRA member in any capacity because [they] failed to provide information to FINRA" that FINRA had requested pursuant to its own internal Rule 8210, and that without further action, the suspensions would become "automatic bars" on April 6, 2012. After the Fifes refused to respond to the unjustified Notices, FINRA barred them.

In the decade after FINRA purported to "bar" Mr. Fife for refusing to respond to the 8210 demands, Mr. Fife continued to make PIPE investments. But in spring 2020, the SEC reversed course and unveiled a brand-new prosecutorial theory against PIPE investors in several enforcement actions, arguing—for the very first time—that those investors' purchases of convertible notes and sales of ensuing securities comprised "dealer" activity that required the investors to register as securities dealers pursuant to Exchange Act Section 15(a)(1). In September 2020, the SEC filed a nearly-identical action against Mr. Fife, CVP, and other Fife family investment vehicles in case captioned Sec. & Exch. Comm'n v. Fife et al., No. 1:20-cv-05227 (N.D. Ill.) (the "**SEC Enforcement Action**"). Invoking FINRA's Bar, the SEC characterizes Mr. Fife as a "recidivist violator of the federal securities laws," and pleads that his supposed "recidivist history" justifies injunctive relief and heightened penalties.

On December 7, 2020, Mr. Fife moved to dismiss the SEC Enforcement Action, arguing, inter alia, that the SEC's theory "rests on an interpretation of 'dealer' that is contrary to the plain text, structure, and history of the Exchange Act, over a century of legal and business precedent, and the [SEC's] repeated and consistent guidance," and that the SEC "violates the Due Process Clause by seeking to retroactively enforce a novel, newly-minted interpretation of 'dealer' that jettisons decades of agency and judicial application."

In December 2021, Judge Robert Dow denied Mr. Fife's motion to dismiss the Chicago Complaint, reasoning that the SEC's allegations were sufficiently plausible to proceed to discovery, after which "[t]he full gamut of [the d]efendants' trading activities will be measured against the parties' nuanced expositions of the statutory scheme." Sec. & Exch. Comm'n v. Fife, No. 20-cv-5227, 2021 WL 5998525, at *6 (N.D. Ill Dec. 20, 2021).

III. Proceedings Below

Because the SEC now is attempting to use FINRA's Bar to prove that Mr. Fife is a "recidivist violator of the securities laws," in December 2020, Mr. Fife initiated the instant Action by suing for declaratory judgment that FINRA violated the Exchange Act when it purported to "discipline" him. In March 2021, FINRA moved for dismissal pursuant to both Rules 12(b)(1) and 12(b)(6), arguing that (1) Mr. Fife failed to exhaust administrative remedies, (2) FINRA has absolute immunity for its regulatory acts, and (3) the Exchange Act does not create a private right of action against FINRA.

While FINRA cited dozens of cases to support its motions, not a single one involved a party alleging that FINRA never had jurisdiction over him in the first place—all of them challenged the merits of FINRA's disciplinary decisions. See generally MTD; cf. FINRA 2013 Year in Review and Annual Financial Report at 3 ("In 2013, FINRA brought 1,535 disciplinary actions against **registered individuals and firms**") (emphasis added).

Mr. Fife opposed FINRA's dismissal motion, arguing, inter alia, that because the Action alleges that FINRA is the wrongdoer that violated the Exchange Act, the administrative exhaustion doctrine is irrelevant. Even if administrative exhaustion were relevant, multiple exceptions would allow Mr. Fife's Complaint to proceed: because FINRA's attempt to exercise disciplinary jurisdiction is, in and of itself, the harm that Mr. Fife sought to avoid, exhaustion would be futile and FINRA's disciplinary process could not grant him adequate relief.

Exactly one year after FINRA filed its motion, the district court dismissed Mr. Fife's Complaint pursuant to Rule 12(b)(1), reasoning that Exchange Act § 78y strips the district court of "jurisdiction to hear post-enforcement challenges seeking declaratory and injunctive relief related to disciplinary proceedings," because such proceedings must skip directly from the SEC to the Second Circuit Court of Appeals. Mr. Fife perfected his appeal of that order on May 24, 2022, and the Second Circuit held oral argument on December 14, 2022.

One week later, the Second Circuit issued a four-page summary order affirming the district court's dismissal. Despite the oral argument's focus on whether FINRA had the statutory authority purport to "suspend" and "bar" a securities customer, the Second Circuit's opinion did little more than regurgitate the district court's opinion, holding that § 78y stripped the district court of its jurisdiction over Mr. Fife's case—despite the fact that there was no § 78y "final order" and, in a footnote, blaming Mr. Fife for FINRA's and the SEC's failure to create a final order., Further holding that FINRA is entitled to the doctrine of administrative exhaustion, the court refused to independently analyze whether Mr. Fife was ever a FINRA "associated person."

REASONS FOR GRANTING THE PETITION

This case is important because it involves threats to federal court access when citizens have legitimate complaints about "quasi-governmental" action, the democratic accountability of executive officers who hide behind multiple layers of agency and "quasi-governmental" henchmen, and the democratic accountability of executive officers. The ultimate resolution of these questions presented will either facilitate or foreclose all "**meaningful**" judicial review of citizens' claims that a fellow supposedly-private actor has harmed them in violation of the federal securities laws.

The Exchange Act's plain text and legislative history—not to mention the SEC's and FINRA's historical practices—make clear that FINRA lacks the jurisdiction to "discipline" anyone but securities firms and personnel. FINRA does not have the power to even subpoena the general public for testimony or records, let alone sanction the general public for refusing to submit themselves to FINRA's investigatory demands. FINRA is nothing but a creature of contract, with power to govern and control only the securities professionals who agree to FINRA's governance.

Forcing customers like Petitioner to defend themselves in FINRA's private, interminable kangaroo court is neither lawful nor just. Indeed, at oral argument, the Second Circuit was skeptical of FINRA's claim that it could discipline anyone in the world without subjecting itself to a district court declaratory judgment.

Despite its concerns, the Second Circuit rejected Petitioner's claim anyway, holding that § 78y—which provides that litigants may appeal "final [SEC] orders" directly to federal courts of appeals—somehow prohibits the district courts from adjudicating whether FINRA breaks federal securities law when it purports to "discipline" securities customers like Petitioner. Both the district court and Second Circuit ignored the Complaint's plain, copious allegations of FINRA's misconduct and dismissed the Complaint by relying on the defendant's self-serving characterization of Mr. Fife as nothing but a sore loser. And as in Axon and the three-judge panel in Cochran, the Second Circuit reached the wrong result by flatly ignoring § 78y's plain text and reading Free Enterprise Fund far too narrowly.

Granting certiorari will be particularly appropriate if this Court rules for the citizenry in Axon and Cochran. Since the SEC anointed FINRA as the securities industry's sole SRO, FINRA—emboldened by Congress's post-financial crisis statutes, and unlike prior SROs, unchecked by any competitors—has "regulated" the world's premier securities industry in an increasingly arbitrary manner.

FINRA's insistence on fighting Mr. Fife demonstrates just how power-mad the "quasi-administrative" non-profit can be. Despite the fact that Mr. Fife has never submitted an application or been registered with FINRA, let alone owned or controlled a FINRA member firm, FINRA has refused to just correct its own 11-year-old error: at any point, FINRA or the SEC could have just nullified the its extrajurisdictional suspension and bar. ."

If FINRA were any other private party, federal courts would not hesitate to exercise their "exclusive jurisdiction" to determine whether FINRA has violated federal securities law. FINRA's status as the SEC's stepchild should not compel a different result.

At the end of the day, Mr. Fife asks this Court to decide whether private not-for-profit FINRA can cloak itself in administrative law to avoid direct judicial review—and therefore whether, especially after Cochran, the SEC can outsource its dirty work to FINRA while insulating itself from Constitutional claims or citizen complaints. If "justice delayed is justice denied," why must a private citizen fight through eleven layers of quasi-administrative and agency procedure before he can get any federal court—the only truly capable forum—to decide whether FINRA broke federal law?

If the SEC—FINRA's neglectful supervisor—is a "'fourth branch'" agency "that does not answer even to the one executive official who is accountable to the body politic," what does that make FINRA? See Collins v. Yellen, 141 S.Ct. 1761, 1797 (2021) (Gorsuch, J., concurring). The Court must not let this "fifth branch," the SEC's hired gun, wriggle away from accountability by expanding its own jurisdiction past the strict limits set by Congress.

I. The Court Should Grant Certiorari to Decide Whether Congress Impliedly Stripped Federal District Courts of Their "Exclusive Jurisdiction" to Determine Whether FINRA Violates the Exchange Act When It Purports to Exercise Its Disciplinary Jurisdiction Beyond the Bounds Set by Congress

The crucial question presented by this case is whether a disciplinary target like Mr. Fife can bring a district court action seeking direct review of FINRA's subject matter and personal jurisdiction, instead of being forced to litigate the issue against FINRA in FINRA's own ten-level disciplinary process before Mr. Fife can even seek agency review by the SEC and then—eleven steps, several years, and millions of dollars later, judicial review in the court of appeals.

1. In Free Enterprise Fund, this Court held that Congress did not impliedly strip district courts of their jurisdiction to hear structural constitution challenges to agencies' internal adjudications. In Axon, this Court is deciding whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the FTC's structure, procedures, and existence. In Cochran, this Court is deciding whether district courts have jurisdiction to hear suits in which the plaintiff seeks to enjoin a pending SEC proceeding because the proceeding is constitutionally defective.

This case asks the Court to follow Free Enterprise Fund, Axon, and Cochran to their logical conclusion: if Congress never intended to give governmental agencies like the SEC and FTC the exclusive authority to determine whether they violated the Constitution, surely Congress did not intend to allow "private," "not-for-profit," "quasi-governmental" FINRA to be the sole arbiter of whether it has complied with the Exchange Act's jurisdictional grants.

2. In deciding that the district court lacked subject matter jurisdiction to hear Mr. Fife's Complaint, both lower courts ignored § 78y and misread Free Enterprise Fund. Among other plain text problems, here, Mr. Fife was never a FINRA "associated person," and no "final order of [the SEC]" exists. See 15 U.S.C. §§ 78s, 78y.

Furthermore, the statute's plain text shows that § 78y's purpose is to **expand and strengthen** judicial review, not restrain it. For example, the statute **allows** citizens to jump straight past the district court to the appellate court—an efficiency **benefit** granted with the permissive "may," not mandatory "shall;" allows private parties to **consolidate** such proceedings with enforcement actions filed by the SEC in district court; and gives the citizen a process by which to strip the **SEC** of jurisdiction. See 15 U.S.C. §§ 78y(a)(1); 78y(a)(3); 78y(c)(3).

Making matters worse, the Second Circuit added even more nonexistent terms to § 78y by deciding that the **reason** there was no SEC "final order" somehow both took Mr. Fife out of the statute's plain text and yet also ensnared him in its jurisdictional trap. In other words, in just one footnote, the Second Circuit both (1) recognized that this case fails to present the "final order" necessary to trigger § 78y's relevance and yet (2) condemned Mr. Fife for failing to follow § 78y's procedures. This Catch-22 m is unmoored from § 78y's text and Congress's manifested intention.

3. Moreover, this Court has repeatedly recognized that litigants are entitled to "**meaningful** judicial

review," not just **any** "judicial review." See, e.g., Free Enterprise Fund, 561 U.S. at 490 (observing that PCAOB's interpretation of § 78y would prohibit petitioners from "meaningfully pursu[ing] their constitutional claim"); Thunder Basin, 510 U.S. at 212–13 (holding that it would uphold district court jurisdiction "particularly where a finding of preclusion could foreclose all meaningful judicial review.").

Forcing Mr. Fife to fight through ten layers of FINRA "discipline," plus another layer of SEC review, before he can ever seek judicial intervention, is ten steps farther away from a "'meaningful' avenue of relief" than the already-deficient §78y processes pushed by the Government in Cochran and Free Enterprise Fund. FINRA's unlawful jurisdiction **is** the harm that Mr. Fife seeks to avoid; adopting the lower courts' interpretation of § 78y would mean that "by the time the day for judicial review comes, [Mr. Fife would] already have suffered the jury that [he is] attempting to prevent. While there may be review, it cannot be considered truly 'meaningful' at that point." Tilton v. SEC, 824 F.3d 276, 298 (2d Cir. 2016) (Droney, J., dissenting).

Just as in Free Enterprise Fund, there is no reason to think that Congress considered § 78y's administrative appeals process to be a "meaningful" substitute for the district court's traditional jurisdiction to issue declaratory judgment and "exclusive" statutory jurisdiction to judge whether a private party violated the Exchange Act. Judicial review simply is not "meaningful" if it comes after the allegedly-wrongful act "would have already taken place." See Jennings v. Rodriguez, 138 S.Ct. 830, 840 (2018) (Alito, J.); accord Tilton, 824 F.3d at 298–99 (Droney, J., dissenting) (citing Free Enterprise, 561 U.S. at 513) ("[T]he Supreme Court considers the very **process** of enforcement by an unconstitutional body to be an injury that can be relevant to the determination of whether post-proceeding review is 'meaningful.'") (emphasis in original).

Deferring judicial review not only allows irreparable injury to persist in the short term, but also creates remedial complications in the long run. Despite being a private party, FINRA is immune from money damages claims, and has virtually-unlimited litigation funds (which it extracts from every single broker–dealer and individual who wants to work in the American securities industry). The most straightforward fix for FINRA's abuse of power is to allow litigants to go straight to district court instead of forcing them to fight through FINRA's ten-layer "discipline" process.

Moreover, as in Axon, Mr. Fife's complaint is not about the **merits** of FINRA's decision—nobody contests that Mr. Fife refused to fly to FINRA's Manhattan office in 2011—but instead to FINRA's unlawful **process**: the very act of subjecting Mr. Fife, a securities customer, to FINRA's jurisdiction "is the harm in and of itself." Axon Enterprise, Inc. v. FTC, 985 F.3d 1173, 1192 (9th Cir. 2021) (Baumatay, J., dissenting). Unless a district court can exercise its "exclusive" jurisdiction to hear Exchange Act violations, most of the harm that FINRA and the SEC would inflict upon Mr. Fife would have been done long before he could obtain judicial review. Cf. Bowsher v. Synar, 478 U.S. 714, 727 n.5 (1986) (concluding that a separation-of-powers violation may create a "here-and-now" injury that can be remedied by a court).

II. The Question Presented is Exceptionally Important and This is an Excellent Vehicle to Address It

This case is important because it is the best vehicle to prevent the SEC from abusing FINRA's private status to avoid the implications of Free Enterprise Fund, Axon, and Cochran.

"[I]t makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals." Axon Enterprise, Inc. v. FTC, 986 F.3d 1173, 1184 (9th Cir. 2021). It makes even less sense to force a party to fight through a "quasi-governmental" proceeding for **ten stages** before it even gets to the SEC administrative proceeding—and even less sense than that when the party's argument is that the quasi-governmental, private non-profit violated both its subject matter and personal jurisdictional authority granted by Congres via the Exchange Act.

Interminably delaying district court jurisdiction not only is inequitable, but also leaves successful litigants without meaningful judicial review or remedy. It is hard to overstate just how much power FINRA already exercises: in 2020, FINRA reported included 3,435 member firms 617,549 registered representatives—not including the millions of other Americans, such as Mr. Fife, whom courts have never determined to be FINRA associated persons, yet whom FINRA can discipline anyway without Congressional authorization, so long the lower courts' decision stands.

The Second Circuit's decision in this case would force Mr. Fife to endure even more interminable processes than those faced by Raymond J. Lucia, whose troubles this Court knows quite well. The administrative proceedings against Mr. Lucia began in September 2012. After a hearing before an unconstitutionally-appointed SEC ALJ and an appeal to a Commission that itself is insulated from Presidential control, Mr. Lucia was found to have violated the Advisers Act, directed to pay a penalty, and barred from ever again working in the securities business (which he had done, for more than two decades). In 2018, this Court ruled in Mr. Lucia's favor on his Appointment Clause claim. Lucia v. SEC, 138 S.Ct. 2044 (2018). But that just led to another administrative proceeding in which the new ALJ declined to break from his predecessor's views. See In re Raymond J. Lucia Companies, Inc., Adm. Proc. File No. 3-15006 (S.E.C. June 16, 2020). Mr. Lucia's decade-long nightmare is just one example of why it is virtually impossible to gain meaningful review or relief when the district courts refuse their responsibility to determine whether an administrative—or, worse here, "quasi-governmental"—process breaks federal law.

Here, Mr. Fife would have faced an even longer road than Mr. Lucia's decade-long fight: FINRA's own internal disciplinary procedures would have forced Mr. Fife to lose **ten separate times** in FINRA's own internal disciplinary system before Mr. Fife could reach Mr. Lucia's first stage. Indeed, the few times that the SEC has issued any relevant decisions show that even "expedited" reviews of individuals' refusal to respond to 8210s can take nearly a decade. See, e.g., In re Bradley C. Reifler, No. 3-19589, Release No. 94026 (Jan. 21, 2022) (five years between first

FINRA discipline contact and SEC decision); In re Shlomo Sharbat, No. 3-19870, Release No. 93757 (Dec. 13, 2021) (nine years); In re Trevor Michael Saliba et ano., Nos. 3-18989, 3-18990, Release No. 91527 (Apr. 9, 2021) (nine years).

Early judicial resolution of jurisdictional issues is a matter of not just fundamental fairness and Constitutional rights, but also administrative and judicial efficiency. Accord, e.g., Am. School v. McAnnulty, 187 U.S. 94, 110 (1902) (holding that courts "must have power in a proper proceeding to grant relief" where an agency makes "a clear mistake of law"). Even the Administrative Procedure Act allows parties "suffering legal wrong" or "adversely affected or aggrieved" by agency action to file a district lawsuit "seeking relief other than money damages." 5 U.S.C. § 702.

Given FINRA's contractual nature, perhaps the clearest indication of this efficiency is settled federal arbitration law, which holds that unless the relevant arbitration contract states otherwise, public courts have the power to determine whether any given dispute is arbitrable. See, e.g., AT&T Technologies, Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986) ("[T[he question of arbitrability [. . .] is undeniably an issue for judicial determination."); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.").

Just as "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," FINRA's discipline, too, is a "matter of contract"—

FINRA "derive[s its] authority [. . .] only because [its members] have agreed in advance" to FINRA's disciplinary jurisdiction. See AT&T, 475 U.S. at 648–49. Accordingly, in the arbitration context, district courts regularly decide whether parties are FINRA members, associated persons, or customers.

Furthermore, while this Court previously has confronted thorny severability and remedial questions, Mr. Fife's case would allow the Court to work on the cleanest slate. See, e.g., Collins, 141 S.Ct. at 1795–99 (Gorsuch, J., concurring in part); United States v. Arthrex, Inc., 141 S.Ct. 1970, 1988–94 (2021) (Gorsuch, J., concurring in part and dissenting in part). Mr. Fife essentially defaulted rather than subject himself to FINRA's unlawful "discipline," and neither FINRA nor the SEC has ever made any findings regarding whether Mr. Fife actually was an associated person; instead, FINRA only implicitly assumed that he was when it issued the 8210 Demand and purported to suspend and then bar him. In other words, Mr. Fife's declaratory judgment case presents is a purely legal question with no contested facts: does the district court lose its "exclusive jurisdiction" to hear violations of the Exchange Act simply because the defendant is "quasi-governmental" FINRA?

Moreover, this case shows exactly what happens when we leave FINRA beholden to nobody but the SEC, the most self-interested babysitter. Both the SEC and FINRA have made clear that they believe FINRA can be the prosecutor, judge, and jury of any person at all, whether or not Congress authorized FINRA's jurisdiction or the SEC actually fulfills its statutory responsibility to supervise FINRA. Deploying FINRA's unlawful Bar in the Enforcement Action, the SEC is only further flaunting its ability to disregard due process by simply outsourcing its dirty work to "private not-for-profit" FINRA. But FINRA's Exchange Act-granted authority "is **entirely** derivative and ultimately belongs to the SEC." NASD v. SEC, 431 F.3d 803, 811 (D.C. Cir. 2005).

Here, we have one of the "[f]ew things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who **is** accountable to the body politic"—a *de facto* fifth branch that relies on its "quasi-governmental" status to run roughshod over individuals while claiming its own immunity from suit or damages, yet invokes its "private" nature when its victims complain about due process. See Collins, 141 S.Ct. at 1797 (Gorsuch, J., concurring) (quoting FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)).

Particularly if the Court rules for the citizenry in Axon and Cochran, it also should close off the SEC's easiest method of dodging its Constitutional responsibilities: further outsourcing its dirty work to FINRA, which, in turn, has pointed to its own "private not-for-profit" status to deny that its adversaries have any Constitutional rights, while invoking the immunity and administrative processes historically reserved for Government actors. But see Collins v. Yellen, 141 S.Ct. 1761, 1795 (2021) (Gorsuch, J., concurring) ("[G]overnmental action[] taken by someone erroneously claiming the mantle of executive power [is] taken with no authority at all.").

It is black-letter law that forcing a non-consenting party into arbitration—including FINRA arbitration—comprises irreparable injury *per se*. That reasoning is even more important when it comes to FINRA's derivative disciplinary authority: if FINRA really is a mere private party with private rights, not governmental responsibilities, it is just as harmful to force Mr. Fife to subject himself to FINRA's private caprices for **ten stages**, several years, and millions of dollars, before he can even ask a public court to exercise its "exclusive" jurisdiction to determine whether private FINRA broke federal securities law. As in arbitration, there is no law or logic that requires Mr. Fife to expend such energy, time, and resources before he can even ask the district courts to hear his declaratory judgment claim.

Therefore, the Court should grant certiorari and ensure that district courts fulfill their "exclusive" Congressional mandate to ensure that all parties follow federal law—even when the SEC conveniently disregards its own responsibility to police its "quasi-governmental" mall cop.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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March 20, 2023

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand twenty-two.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
BARRINGTON D. PARKER,
MICHAEL H. PARK,
Circuit Judges.

22-750-cv

JOHN M. FIFE,
Plaintiff-Appellant,

—v.—

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,
Defendant-Appellee.

For Plaintiff-Appellant:

MARTIN H. KAPLAN (Kari Parks, *on the brief*), Gusrae Kaplan Nusbaum PLLC, New York, NY.

For Defendant-Appellee:

JOHN P. MITCHELL, Faegre Drinker Biddle & Reath LLP, New York, NY.

Appeal from a judgment of the U.S. District Court for the Southern District of New York (Torres, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant John M. Fife ("Fife") appeals from the March 29, 2022, order of the U.S. District Court for the Southern District of New York granting the motion of Defendant- Appellee Financial Industry Regulatory Authority, Inc. ("FINRA") to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). On appeal, Fife asserts that the district court has jurisdiction to hear his claim under Section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78aa. For the reasons set forth below, we disagree. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

"We review a district court's grant of a motion to dismiss *de novo*." *Fiero v. Fin. Indus. Regul. Auth., Inc.*, 660 F.3d 569, 573 (2d Cir. 2011). We also review a "district court's legal conclusions, including the interpretation of a federal statute," *de novo*. *Id.*

Fife's complaint seeks a declaratory judgment that FINRA's suspension and bar of Fife are null and void, on the ground that FINRA lacked jurisdiction to take disciplinary action against Fife. App'x at A-24 to -25. Because this contention should properly be contested under the administrative- and judicial-review scheme set forth by the Exchange Act, we conclude that the district court lacked subject-matter jurisdiction over his claim. *See* 15 U.S.C. § 78s(d)(2) (providing for review of FINRA disciplinary actions by the Securities and Exchange Commission ("SEC")); *id.* § 78y(a)(1) (providing for review of SEC final orders in "the United States Court of Appeals"); *see also Altman v. U.S. S.E.C.*, 768 F. Supp. 2d 554, 558 (S.D.N.Y. 2011) (noting that under 15 U.S.C. § 78y "district courts lack jurisdiction to hear post-enforcement challenges [by the SEC] seeking declaratory and injunctive relief related to disciplinary proceedings—such challenges must proceed in accordance with the statutory scheme"), *aff'd*, 687 F.3d 44 (2d Cir. 2012) (per curiam).

Notwithstanding Fife's arguments to the contrary, 15 U.S.C. §§ 78s(d)(2) and 78y apply to him. First, Fife asserts that § 78s(d)(2) does not apply because it incorporates § 78s(d)(1), which references "final disciplinary sanction[s] [imposed] on any *person associated with a member*," 15 U.S.C. § 78s(d)(1) (emphasis added), but he was never a FINRA "associated person" nor otherwise under FINRA's jurisdiction. But an agency always has "the primary authority . . . to determine its own jurisdiction."[1] *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 647 (1972) (internal quotation marks, alteration, and citation omitted).

Second, Fife asserts that § 78y does not apply because it provides appeal procedures for "[a] person aggrieved by a final order of the Commission," 15 U.S.C. § 78y(a)(1), but here there was no SEC "final order." Under the doctrine of exhaustion of administrative remedies, "a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003) (internal quotation marks and citation omitted). We have held the exhaustion requirement to apply to review of disciplinary actions by self-regulatory organizations, such as FINRA. *See Barbara v. N.Y. Stock Exch., Inc.*,

[1] Moreover, Fife's challenge to his classification as an "associated person" is not the sort of "constitutional claim[] . . . outside the [SEC's] competence and expertise" that the Supreme Court has permitted to bypass the Exchange Act's exclusive review scheme. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489–91 (2010). Whether Fife is an "associated person" under the Exchange Act is a fact-bound issue well within the competence and expertise of FINRA and the SEC to resolve in the first instance.

99 F.3d 49, 57 (2d Cir. 1996), *abrogated on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374 (2016); *MFS Sec. Corp. v. S.E.C.*, 380 F.3d 611, 621–22 (2d Cir. 2004). Here, the reason there is no SEC final order is because Fife chose not to appeal the FINRA disciplinary action and thus failed to exhaust. He cannot now use that decision to skirt the statute's prescribed review process.[2] Accordingly, Fife is subject to the Exchange Act's administrative- and judicial-review scheme, and we affirm the district court's conclusion that it lacked subject-matter jurisdiction to hear his claim.

* * *

We have considered Fife's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk
[SEAL]

[2] Although the district court declined to reach the issue of exhaustion, Fife's failure to exhaust after the FINRA bar and suspension is relevant to the jurisdictional question of whether there is a "final order of the Commission" subject to the exclusive review procedures of the Exchange Act, 15 U.S.C. § 78y.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20 **CIVIL** 10716 (AT)

JUDGMENT

JOHN M. FIFE,
Plaintiff,

—against—

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,
Defendant.

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated March 29, 2022, Defendant's motion to dismiss is GRANTED and this case is DISMISSED without prejudice; accordingly, the case is closed.

Dated: New York, New York
March 29, 2022

RUBY J. KRAJICK

Clerk of Court

BY: **/s/ K. Mango**

Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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20 Civ. 10716 (AT)

ORDER

JOHN M. FIFE,
Plaintiff,

—against—

FINANCIAL INDUSTRY REGULATORY
AUTHORITY, INC.,
Defendant.

ANALISA TORRES, District Judge:

In this action, Plaintiff, John M. Fife, seeks a judgment declaring null and void Defendant, the Financial Industry Regulatory Authority, Inc.'s ("FINRA"), disciplinary action against him. *See generally* Compl., ECF No. 1. Defendant moves to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(l) and 12(b)(6). Def. Mot., ECF No. 22. For the reasons stated below, Defendant's motion is GRANTED and the case is DISMISSED without prejudice.

BACKGROUND[1]

In 2011, Fife became a customer of Gordon & Co. ("Gordon"), a broker-dealer registered with FINRA. Compl. ¶¶ 65, 67, 70. Over time, he opened "multiple customer accounts with Gordon," *id.* ¶ 72, and became "one of Gordon's two primaiy customers," *id.* ¶ 79. Further, a family trust associated with Fife invested in Gordon, becoming a 12.5% holder of Gordon's non-voting Class B shares. *Id.* ¶¶ 72-73.

On October 18, 2011, FINRA sent Fife and his wife[2] a request to give testimony in an ongoing investigation of Gordon. *Id.* ¶ 86. Fife was aware that FINRA could suspend or bar him for failing to comply with the request, however, he "had no reason to expect that either sanction would have any practical effect on [his] li[fe], businesses, or investments." *Id.* ¶ 92. Fife's counsel advised "that FINRA lacked jurisdiction to compel [his] testimony or discipline [him]." *Id.* ¶ 91. Fife decided not to testify. *See id.* ¶¶ 14, 119.

On January 3, 2012, FINRA issued notices of suspension to both Fife and his wife. *Id.* ¶ 95. The notices informed them that FINRA would "suspend

[1] The facts are drawn from the complaint and presumed to be true. *See Atlantic Mut. Ins. Co. v. Balfour Maclaine Intern. Ltd.,* 968 F.2d 196, 198 (2d Cir. 1992).

[2] Although the complaint discusses Mrs. Fife alongside her husband, it does not give her name, name her as a plaintiff, or seek relief on her behalf. *See generally* Compl.

[them] from associating with any FINRA member in any capacity because [they] failed to provide information to FINRA." *Id.* (alterations in original). FINRA gave Fife and his wife three months to "request termination of the suspension" and warned that they would "automatically be barred on April 6, 2012 from associating with any FINRA member in any capacity." *Id.* ¶ 96. They "did not respond to the notice[s] or otherwise challenge the [s]uspension." *Id.* ¶ 97. On April 6, 2012, Fife and his wife were notified that they were barred pursuant to FINRA Rule 9552(h). *Id.* ¶ 98. Again, they did not challenge the bar because "it simply was not worth the time, energy, and expense." *Id.* ¶ 18.

For years, the bar did not impact Fife or his businesses. *See id.* ¶¶ 21–22, 26, 100. In September 2013, the Securities and Exchange Commission ("SEC") changed its regulations to create "new consequences for those barred by FINRA." *Id.* ¶¶ 20, 100. Fife continued to believe that he had not suffered adverse consequences from the FINRA bar. *Id.* ¶¶ 22, 100. Then, in September 2020, the SEC filed a civil action against Fife, alleging that he had violated Exchange Act § 15(a)(1) and that he is a "recidivist violator of the federal securities laws," invoking the FINRA bar as an example. *Id.* ¶¶ 23–25, 103, 106–08. In this action, Fife seeks a "judgment nullifying the FINRA [s]uspension and [b]ar." *Id.* ¶ 110.

ANALYSIS

FINRA moves to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Def. Mot. The Second Circuit has instructed courts to "consider the Rule 12(b)(1) challenge first since 'if [the Court] must dismiss the complaint for lack of subject matter jurisdiction the [defendant's] defenses and objections become moot and do not need to be determined.'" *Daly v. Citigroup Inc.*, 939 F.3d 415, 426 (2d Cir. 2019) (quoting *Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990)). The Court finds it lacks subject matter jurisdiction, and therefore, does not consider the arguments under Rule 12(b)(6).

I. Legal Standard

A federal court must ensure it has subject matter jurisdiction. *See Transatl. Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 107–08 (2d Cir. 1997); *see also* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Plaintiff bears the burden of proving by a preponderance of the evidence that the court has subject matter jurisdiction. *Id.* (citation omitted).

II. Application

FINRA contends that because Fife did not exhaust his administrative remedies, the Court lacks subject matter jurisdiction. Def. Mem. at 6–9, ECF No. 22-1. Plaintiff argues that exhaustion was not required, Pl. Mem. at 12–16, ECF No. 26, and if it was, there was good reason for Fife not to exhaust the administrative remedies available to him, *id.* at 27–29. Plaintiff further contends that Defendant's arguments related to subject matter jurisdiction are foreclosed by *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). Pl. Mem. at 12, 14. The Court need not reach the issue of exhaustion.

The statute at issue in this case permits judicial review, and provides that an adversely- affected person, after exhausting administrative remedies, including an appeal to the SEC, 15 U.S.C. § 78s(d)(2), "may obtain review" of a FINRA disciplinary order "in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia." 15 U.S.C. § 78y(a)(1); *see also North v. Smarsh*, 160 F. Supp. 3d 63, 83 (D.D.C. 2015). The appeal must be taken within sixty days of the final order. 15 U.S.C. § 78y(a)(1). Although the use of "may" might seem to imply that district courts also have jurisdiction, it is the law of this Circuit that clauses containing "a specific statutory grant of jurisdiction to the court of appeals . . . should be construed in favor of review by the court of appeals." *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (collecting cases); *see also Altman v. SEC*, 768 F. Supp. 2d 554, 558 (S.D.N.Y. 2011), *aff'd*, 687 F.3d 44 (2d Cir. 2012). Under § 78y of the Exchange Act, "district courts lack jurisdiction to hear post-enforcement challenges seeking declaratory and injunctive relief related to disciplinary proceedings—such challenges must proceed[] in accordance with the statutory scheme." *Altman*, 768 F. Supp. 2d at 558. *Free Enterprise Fund* does not command a different result. *See id.* at 559–62. Therefore, even assuming, *arguendo*, that Fife is excused from exhausting the administrative remedies, this Court lacks subject matter jurisdiction over this action.[3]

CONCLUSION

Accordingly, Defendant's motion to dismiss is GRANTED and this case is DISMISSED without prejudice. The Clerk of Court is directed to terminate all pending motions and close the case.

SO ORDERED.

Dated: March 29, 2022
New York, New York

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

[3] The Court need not reach the timing of the filing of this action, which is years past the sixty-day appeal window. *See* 15 U.S.C. § 78y(a)(1). It also need not address that even if filing this action in a district court was permissible, which it is not, this would be an improper forum as Fife does not reside in this district, Compl. ¶ 28, nor does he allege that his principal place of business is in this district, *see generally id.*, and this is not the district court for the District of Columbia. *See* 15 U.S.C. § 78y(a)(1).

Appendix D
RELEVANT STATUTES

28 U.S. Code § 1331 – Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85–554, § 1, July 25, 1958, 72 Stat. 415; Pub. L. 94–574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96–486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

15 U.S. Code § 78aa – Jurisdiction of offenses and suits

(a) In general

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

(b) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

(1)

conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2)

conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(June 6, 1934, ch. 404, title I, § 27, 48 Stat. 902; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch.

646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 100–181, title III, § 326, Dec. 4, 1987, 101 Stat. 1259; Pub. L. 111–203, title IX, §§ 929E(b), 929P(b)(2), July 21, 2010, 124 Stat. 1853, 1865.)

15 U.S. Code § 78s – Registration, responsibilities, and oversight of self-regulatory organizations

(a) Registration procedures; notice of filing; other regulatory agencies

(1) The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 78f, 78*o*–3, or 78q–1 of this title, respectively, publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall—

(A)

by order grant such registration, or

(B)

institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of a publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if it finds that the requirements of this chapter and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

(2)
With respect to an application for registration filed by a clearing agency for which the Commission is not the appropriate regulatory agency—

(A)
The Commission shall not grant registration prior to the sixtieth day after the date of publication of notice of the filing of such application unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that such clearing agency is so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible and that the rules of such clearing agency are designed to assure the safeguarding of such securities and funds.

(B)
The Commission shall institute proceedings in accordance with paragraph (1)(B) of this subsection to determine whether registration should be denied if the appropriate regulatory agency for such clearing agency notifies the Commission within sixty days of the date of publication of notice of the filing of such application of such appropriate regulatory agency's (i) determination that such clearing agency may not be so organized or have the capacity to be able to

safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency may not be designed to assure the safeguarding of such securities and funds and (ii) reasons for such determination.

(C)

The Commission shall deny registration if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (1)(B) of this subsection of such appropriate regulatory agency's (i) determination that such clearing agency is not so organized or does not have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency are not designed to assure the safeguarding of such securities or funds and (ii) reasons for such determination.

(3)

A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

(b) Proposed rule changes; notice; proceedings

(1)

Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, as soon as practicable after the date of the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Approval process.—

(A) Approval process established.—

(i) In general.—Except as provided in clause (ii), not later than 45 days after the date of publication of a proposed rule change under paragraph (1), the Commission shall—

(I)

by order, approve or disapprove the proposed rule change; or

(II)

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

(ii) Extension of time period.—The Commission may extend the period established under clause (i) by not more than an additional 45 days, if—

(I)
the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(II)
the self-regulatory organization that filed the proposed rule change consents to the longer period.

(B) Proceedings.—
(i) Notice and hearing.—If the Commission does not approve or disapprove a proposed rule change under subparagraph (A), the Commission shall provide to the self-regulatory organization that filed the proposed rule change—

(I)
notice of the grounds for disapproval under consideration; and

(II)
opportunity for hearing, to be concluded not later than 180 days after the date of publication of notice of the filing of the proposed rule change.

(ii) Order of approval or disapproval.—

(I) In general.—
Except as provided in subclause (II), not later than 180 days after the date of publication under paragraph (1), the Commission shall issue an order approving or disapproving the proposed rule change.

(II) Extension of time period.—The Commission may extend the period for issuance under clause (I) by not more than 60 days, if—

(aa)
the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(bb)
the self-regulatory organization that filed the proposed rule change consents to the longer period.

(C) Standards for approval and disapproval.—
(i) Approval.—
The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.

(ii) Disapproval.—
The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make a finding described in clause (i) .

(iii) Time for approval.—
The Commission may not approve a proposed rule change earlier than 30 days after the date of publication under paragraph (1), unless the Commission finds good cause for so doing and publishes the reason for the finding.

(D) Result of failure to institute or conclude proceedings.—A proposed rule change shall be deemed to have been approved by the Commission, if—
(i)
the Commission does not approve or disapprove the proposed rule change or begin proceedings under subparagraph (B) within the period described in subparagraph (A) ; or

(ii)
the Commission does not issue an order approving or disapproving the proposed rule change under subparagraph (B) within the period described in subparagraph (B)(ii) .

(E) Publication date based on federal register publishing.—
For purposes of this paragraph, if, after filing a proposed rule change with the Commission pursuant to paragraph (1), a self-regulatory organization publishes a notice of the filing of such proposed rule change, together with the substantive terms of such proposed rule change, on a publicly accessible website, the Commission shall thereafter send the notice to the Federal Register for publication thereof under paragraph (1) within 15 days of the date on which such website publication is made. If the Commission fails to send the notice for publication thereof within such 15 day period, then the date of publication shall be deemed to be the date on which such website publication was made.

(F) Rulemaking.—
(i) In general.—
Not later than 180 days after July 21, 2010, after consultation with other regulatory agencies, the Commission shall promulgate rules setting forth the procedural requirements of the proceedings required under this paragraph.

(ii) Notice and comment not required.—
The rules promulgated by the Commission under clause (i) are not required to include republication of proposed rule changes or solicitation of public comment.

(3)

(A)

Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change shall take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2) .

(B)

Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C)

Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable

Federal and State law. At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1), the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) to determine whether the proposed rule should be approved or disapproved. Commission action pursuant to this subparagraph shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be "final agency action" for purposes of section 704 of title 5.

(4) With respect to a proposed rule change filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency—

(A)

The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing whereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(B)

The Commission shall institute proceedings in accordance with paragraph (2)(B) of this subsection to determine whether any such proposed rule change should be disapproved, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of publication of notice of the filing of the proposed rule change of such appropriate regulatory agency's (i) determination that the proposed rule change may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(C)
The Commission shall disapprove any such proposed rule change if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (2)(B) of this subsection of such appropriate regulatory agency's (i) determination that the proposed rule change is inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(D)
(i) The Commission shall order the temporary suspension of any change in the rules of a clearing agency made by a proposed rule change that has taken effect under paragraph (3), if the appropriate regulatory agency for the clearing agency notifies the Commission not later than 30 days after the date on which the proposed rule change was filed of—

(I)
the determination by the appropriate regulatory agency that the rules of such clearing agency, as so changed, may be inconsistent with the safeguarding

of securities or funds in the custody or control of such clearing agency or for which it is responsible; and

(II)
the reasons for the determination described in subclause (I) .

(ii)
If the Commission takes action under clause (i), the Commission shall institute proceedings under paragraph (2)(B) to determine if the proposed rule change should be approved or disapproved.

(5)
The Commission shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor. If the Secretary of the Treasury comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission, that such rule, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(6)
In approving rules described in paragraph (5), the Commission shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers.

(7) Security futures product rule changes.—
(A) Filing required.—
A self-regulatory organization that is an exchange registered with the Commission pursuant to section 78f(g) of this title or that is a national securities association registered pursuant to section 78o–3(k) of this title shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule change or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this paragraph collectively referred to as a "proposed rule change") that relates to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such self-regulatory organization's obligation to enforce the securities laws. Such proposed rule change shall be accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, promptly publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit data,

views, and arguments concerning such proposed rule change.

(B) Filing with cftc.—
A proposed rule change filed with the Commission pursuant to subparagraph (A) shall be filed concurrently with the Commodity Futures Trading Commission. Such proposed rule change may take effect upon filing of a written certification with the Commodity Futures Trading Commission under section 7a–2(c) of title 7, upon a determination by the Commodity Futures Trading Commission that review of the proposed rule change is not necessary, or upon approval of the proposed rule change by the Commodity Futures Trading Commission.

(C) Abrogation of rule changes.—
Any proposed rule change of a self-regulatory organization that has taken effect pursuant to subparagraph (B) may be enforced by such self-regulatory organization to the extent such rule is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal law. At any time within 60 days of the date of the filing of a written certification with the Commodity Futures Trading Commission under section 7a–2(c) of title 7, the date the Commodity Futures Trading Commission determines that review of such proposed rule change is not necessary, or the date the Commodity Futures Trading Commission approves such proposed rule change, the Commission, after consultation with the Commodity Futures Trading Commission, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1), if it appears to the Commission that such proposed rule change unduly burdens competition or efficiency, conflicts with the

securities laws, or is inconsistent with the public interest and the protection of investors. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be a final agency action for purposes of section 704 of title 5.

(D) Review of resubmitted abrogated rules.—
(i) Proceedings.—Within 35 days of the date of publication of notice of the filing of a proposed rule change that is abrogated in accordance with subparagraph (C) and refiled in accordance with paragraph (1), or within such longer period as the Commission may designate up to 90 days after such date if the Commission finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall—

(I)
by order approve such proposed rule change; or

(II)
after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved. Proceedings under subclause (II) shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within 180 days after the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings, the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so

finding or for such longer period as to which the self-regulatory organization consents.

(ii) Grounds for approval.—
The Commission shall approve a proposed rule change of a self-regulatory organization under this subparagraph if the Commission finds that such proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. The Commission shall disapprove such a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(8) Decimal pricing.—
Not later than 9 months after the date on which trading in any security futures product commences under this chapter, all self-regulatory organizations listing or trading security futures products shall file proposed rule changes necessary to implement decimal pricing of security futures products. The Commission may not require such rules to contain equal minimum increments in such decimal pricing.

(9) Consultation with cftc.—
(A) Consultation required.—
The Commission shall consult with and consider the views of the Commodity Futures Trading Commission prior to approving or disapproving a proposed rule change filed by a national securities association registered pursuant to section 78o–3(a) of this title or a national securities exchange subject to the provisions of subsection (a) that primarily

concerns conduct related to transactions in security futures products, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(B) Responses to cftc comments and findings.—If the Commodity Futures Trading Commission comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving or disapproving the proposed rule. If the Commodity Futures Trading Commission determines, and notifies the Commission, that such rule, if implemented or as applied, would—

(i)

adversely affect the liquidity or efficiency of the market for security futures products; or

(ii)

impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section,

the Commission shall, prior to approving or disapproving the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Commodity Futures Trading Commission's determination.

(10)[1] **Rule of construction relating to filing date of proposed rule changes.—**

(A) In general.—

For purposes of this subsection, the date of filing of a proposed rule change shall be deemed to be the date on which the Commission receives the proposed rule change.

(B) Exception.—

A proposed rule change has not been received by the Commission for purposes of subparagraph (A) if, not later than 7 business days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change, except that if the Commission determines that the proposed rule change is unusually lengthy and is complex or raises novel regulatory issues, the Commission shall inform the self-regulatory organization of such determination not later than 7 business days after the date of receipt by the Commission and, for the purposes of subparagraph (A), a proposed rule change has not been received by the Commission, if, not later than 21 days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with

[1] Notwithstanding paragraph (2), the time period within which the Commission is required by order to approve a proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved is stayed pending a determination by the Commission upon the request of the Commodity Futures Trading Commission or its Chairman that the Commission issue a determination as to whether a product that is the subject of such proposed rule change is a security pursuant to section 8306 of this title.

the rules of the Commission relating to the required form of a proposed rule change.

(c) Amendment by Commission of rules of self-regulatory organizations The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(1)
The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2)

The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3)
A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of

the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)

(A)

Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of title 5 for rulemaking not on the record.

(B)

Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this chapter.

(C)

Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this chapter to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5)

With respect to rules described in subsection (b)(5), the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1)

If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2)

Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) . Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 78f(g) of this title or a national securities association registered pursuant to section 78*o*–3(k) of this title only to the extent that such exchange or association imposes any final disciplinary sanction for—

(A)

a violation of the Federal securities laws or the rules and regulations thereunder; or

(B)

a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under this section, except that, to the extent that the exchange or association rule violation relates to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction) —

(A)

if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B)

if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2)
If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) Dismissal of review proceeding
In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by

order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

(g) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A)

in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B)

in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C)

in the case of a registered clearing agency, with its own rules by its participants.

(2)

The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions

(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance—

(A)

in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B)
in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C)
in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 78*o*(b)(4) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction—

(A)
in the case of a national securities exchange, any provision of the Securities Act of 1933[15 U.S.C. 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], this chapter, or the rules or regulations under any of such statutes;

(B)
in the case of a registered securities association, any provision of the Securities Act of 1933, the

Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C)
in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 78*o*(b)(6) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction—

(A)
in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, or the rules or regulations under any of such statutes; or

(B)
in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment

Company Act of 1940, this chapter, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to remove from office or censure any person who is, or at the time of the alleged misconduct was, an officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated any provision of this chapter, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance—

(A)

in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B)

in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C)

in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

(i) Appointment of trustee

If a proceeding under subsection (h)(1) of this section results in the suspension or revocation of the registration of a clearing agency, the appropriate regulatory agency for such clearing agency may, upon notice to such clearing agency, apply to any court of competent jurisdiction specified in section 78u(d) or 78aa of this title for the appointment of a trustee. In the event of such an application, the court may, to the extent it deems necessary or appropriate, take exclusive jurisdiction of such clearing agency and the records and assets thereof, wherever located; and the court shall appoint the appropriate regulatory agency for such clearing agency or a person designated by such appropriate regulatory agency as trustee with power to take possession and continue to operate or terminate the operations of such clearing agency in an orderly manner for the protection of participants and investors, subject to such terms and conditions as the court may prescribe.

(June 6, 1934, ch. 404, title I, § 19, 48 Stat. 898; Pub. L. 87–196, Sept. 5, 1961, 75 Stat. 465; Pub. L. 87–561, July 27, 1962, 76 Stat. 247; Pub. L. 90–438, July 29, 1968, 82 Stat. 453; Pub. L. 91–94, Oct. 20, 1969, 83 Stat. 141; Pub. L. 91–410, Sept. 25, 1970, 84 Stat. 862; Pub. L. 94–29, § 16, June 4, 1975, 89 Stat. 146; Pub. L. 103–202, title I, § 106(c), Dec. 17, 1993, 107 Stat. 2350; Pub. L. 105–353, title III, § 301(b)(11), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106–554, § 1(a)(5) [title II, § 202(b), (c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–418, 2763A–421; Pub. L. 111–203, title VII, § 717(c), title IX, §§ 916, 929F(e), July 21, 2010, 124 Stat. 1652, 1833, 1854.)

15 U.S. Code § 78y – Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1)

A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2)

A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28 and the Federal Rules of Appellate Procedure.

(3)

On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4)

The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5)
If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1)
A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k–1, 78o(c)(5) or (6), 78o–3, 78q, 78q–1, or 78s of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2)
A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein,

all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3)
On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4)
The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5)
If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which

the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1)

No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2)

The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3)

When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

(d) Other appropriate regulatory agencies

(1)

For purposes of the preceding subsections of this section, the term "Commission" includes the agencies enumerated in section 78c(a)(34) of this title insofar as such agencies are acting pursuant to this chapter and the Secretary of the Treasury insofar as he is acting pursuant to section 78o–5 of this title.

(2)

For purposes of subsection (a)(4) of this section and section 706 of title 5, an order of the Commission pursuant to section 78s(a) of this title denying registration to a clearing agency for which the Commission is not the appropriate regulatory agency or pursuant to section 78s(b) of this title disapproving a proposed rule change by such a clearing agency shall be deemed to be an order of the appropriate regulatory agency for such clearing agency insofar as such order was entered by reason of a determination by such appropriate regulatory agency pursuant to section 78s(a)(2)(C) or 78s(b)(4)(C) of this title that such registration or proposed rule change would be inconsistent with the safeguarding of securities or funds.

(June 6, 1934, ch. 404, title I, § 25, 48 Stat. 901; June 7, 1934, ch. 426, 48 Stat. 926; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 10, Aug. 28, 1958, 72 Stat. 945; Pub. L. 94–29, § 20, June 4, 1975, 89 Stat. 158; Pub. L. 99–571, title I, § 102(k), Oct. 28, 1986, 100 Stat. 3220; Pub. L. 101–432, § 6(b), Oct. 16, 1990, 104 Stat. 975.)