NETWORK 1 FINANCIAL
SECURITIES, INC.

26 June 2018

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Comment Submitted via Email:
pubcom@finra.org

Re: Comment to Regulatory Notice 18-16
Proposed Rule Amendments Relating to High-Risk Brokers and Firms that Employ Them

Dear Ms. Mitchell:

This letter is being timely filed with FINRA in response to certain proposed amendments identified in FINRA Regulatory Notice 18-16.

Regulatory Notice 18-16 identifies desirable amendments to the Rule 9200 Series (Disciplinary Proceedings); to the Rule 9300 Series (Review of Disciplinary Proceedings by the National Adjudicatory Council and FINRA Board, including application for SEC Review; to the Rule 9520 Series (Eligibility Proceedings); to Rule 8312 (FINRA BrokerCheck Disclosure); and finally, to the NASD Rule 1010 Series (Membership Proceedings).

This Comment Letter's analysis will follow the order corresponding to the order in which these proposals are presented in Regulatory Notice 18-16. This Comment Letter will analyze each proposal separately: firstly, from the perspective of consistency with FINRA's mission; secondly, from the perspective of consistency with principles of jurisprudence and other criteria higher than this mission; and lastly, from the perspective of an industry member, *recommendations to remedy* what we have identified as deficiencies that come to light as a result of this comparison.

With this perspective in mind, Network 1 Financial Securities expresses sincere appreciation for this opportunity to respond to the proposals set forth in Regulatory Notice 18-16. Network 1 Financial Securities is an industry member that has been engaged primarily in investment banking and secondarily in securities brokerage, since 1983.

1. Whether Proposed Rule 9285 (relating to Interim Orders While on Appeal) is Consistent with FINRA's Mission.

Under proposed Rule 9285(a), conditions and restrictions can be imposed against a broker who, in an enforcement action, loses his case. Such conditions and restrictions can be requested by FINRA's Department of Enforcement, or a Hearing Officer or Hearing Panel can take it upon themselves to order such conditions and restrictions as they deem "reasonably necessary for the purpose of

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preventing customer harm."[1] Additionally, such conditions and restrictions would not be stayed during the pendency of the appeal to the National Adjudicatory Council (NAC).[2]

Appreciating the severity of this measure, FINRA aims to bring things into a more equitable balance by extending the losing broker the opportunity to request that NAC expeditiously review and, hopefully from the broker's perspective, modify some or all of the restrictions imposed by the Office of Hearing Officers (OHO).

Under proposed Rule 9285(b), the NAC would have no more than thirty (30) days to rule on the broker's motion for reconsideration of the OHO's imposition of these conditions and restrictions.[3]

That said, the burden of persuasion appears to rest on the broker to show that the conditions or restrictions imposed on the broker are not necessary for the purpose of preventing customer harm.

Given that FINRA's mission is "to provide investor protection and promote market integrity";[4] and, because this proposed Rule 9285(b) attempts to ameliorate the rather draconian aspects of Rule 9285(a), proposed Rule 9285 is consistent with this mission and, on the whole, appears to be both balanced and fair on the basis of these two perspectives.

1.A Whether Proposed Rule 9285 is Consistent with Principles of Fundamental Law.

Whether these proposals are, *objectively*, truly fair and balanced as defined by higher principles, these proposed amendments must be judged by principles that are fundamental to American jurisprudence.

In matters that are judicial in nature or, in the case of enforcement actions, quasi-judicial in nature the operating principle – *that adjudicatory determinations must be made by a neutral decision- maker* - is and should be the final arbiter.[5]

"Determination by a neutral decision maker" is so fundamental to adjudicatory justice that no reasonable person would waste time questioning the relevancy of this principle inherited from ancient

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[1] Regulatory Notice 18-16, p. 6.

[2] Regulatory Notice 18-16, p. 7.

[3] Regulatory Notice 18-16, p. 7.

[4] https://www.finra.org/about/our-mission.

[5] *See e.g.*, Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982): "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *See also* Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 475 (1986), *supra* note 3, at 475: "*participation of an independent adjudicator*" is the core procedural due process requirement, *more paramount even than* participatory rights to notice and an opportunity to be heard." (Emphasis supplied)

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English common law and engrafted onto American constitutional law since the time of our country's Founding, and is now the rock bed of American understanding of what is just.[6]

"Determination by a neutral decision maker" translates to impartiality; and, impartiality is the heart of procedural justice. As the courts have put it, "[p]rocedural fairness requires internal separation between advocates and decision-makers to preserve neutrality."[7]

Accordingly, the following constitutionally recognized principles need to be in play in order for proposed Rule 9285 to be judged consistent with principles of fundamental justice:

- As enshrined in the traditional statement of due process: "No man shall be a judge in his own cause", and therefore *a decision-maker cannot act as both a party and a neutral*, because the two roles are fundamentally incompatible.[8] (Emphasis supplied)

- A neutral decision-maker is not simply a person without a financial interest in the outcome of the case, but *more broadly a person who is not affiliated with, or biased in favor of or against, one side or the other.*[9] (Emphasis supplied)

- The decision-maker must be scrupulously neutral - neither biased in favor of either side, *nor charged with responsibilities that would interfere with his ability* "to hold the balance nice, clear and true" between the parties.[10] (Emphasis supplied)

1.B The Structure of FINRA Disciplinary Proceedings: Impartiality Presumed.

FINRA states that the "Office of Hearing Officers is an independent office of impartial adjudicators who preside over disciplinary cases brought by FINRA's Department of Enforcement."[11]

This statement about impartiality claimed by FINRA notwithstanding, as well as FINRA's assertion about separation of powers (i.e., judiciary and enforcement powers),[12] it must still be asked: Does the

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[6] Justice Black noted in his opinion for the Court in Chapman v. California, 386 U.S. 18, 23 (1967), that "there are some constitutional rights *so basic to a fair trial* that their infraction can never be treated as harmless error." (Emphasis supplied). Relevant to this Comment Letter, Justice Black cites Tumey v. Ohio, 273 U.S. 510 (*impartial decision-maker*).

[7] Withrow v. Larkin, 421 U.S.35, 47, 51-52 (1976). *And see* Morongo Band of Mission Indians v. California State Water Resources Control Bd., 45 C4th 731 (2009), at 737, citing Department of Alcohol Beverage Control v. Alcohol Beverages Appeals Bd. (2006) 40 Cal.4th 1, 10.

[8] *See* Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part) (quoting Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (King's Bench, 1610).

[9] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 486 (1972).

[10] Tumey v. Ohio, 273 U.S. 510, 532 (1927). *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (O'Connor, J., plurality opinion) (noting that due process requires an "impartial adjudicator").

[11] FINRA, Office of Hearing Officers, http://www.finra.org/industry/oho.

[12] FINRA states: "The Office of Hearing Officers maintains strict independence from FINRA's regulatory and enforcement programs, and is physically separated from other FINRA departments. Hearing Officers are not involved in the investigative process. Furthermore, employment protections exist for Hearing Officers to ensure their independence. Only FINRA's Chief Executive Officer can terminate a Hearing Officer, and the termination can be appealed to the Audit Committee of FINRA's Board of Governors." http://www.finra.org/industry/guide-disciplinary-hearing-process.

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structure of the FINRA adjudicatory process support these claims? Is this process entitled to a presumption of impartiality? It is in the light of these two questions in conjunction with American principles of fundamental justice that proposed FINRA Rule 9285 must be judged.

According to current FINRA Rule 9231(a), the Chief Hearing Officer appoints the Hearing Panel or Extended Hearing Panel who, for all intents and purposes, acts as the "trial court" in a FINRA enforcement action.[13]

But who qualifies to be Chief Hearing Officer?

According to FINRA rule 9120(b), the Chief Hearing Officer is an individual "designated by the Chief Executive Officer of FINRA to manage the Office of Hearing Officers". With this management mission in mind, it would not be unreasonable to infer that the Chief Hearing Officer, at a minimum, has a "financial interest" in appointing to Hearing Panels individuals who are loyal to FINRA's mission, which is "to provide investor protection and promote market integrity".

Therefore, who qualifies to be Hearing Officers?

According to FINRA Rule 9120(r), a Hearing Officer is "an employee of FINRA, or former employee of FINRA who previously acted as a Hearing Officer, who is an attorney and who is appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicative responsibilities and duties" that are part and parcel of the process set forth in the Rule 9200 series, which relates to enforcement and adjudication of violations of FINRA rules as well as federal securities laws and regulations.

As such, it would not be unreasonable to infer that a Hearing Officer, at a minimum, has a "financial interest" in being and continuing to be loyal to FINRA's mission, which is "to provide investor protection and promote market integrity".

The Hearing Officer serves as the chair of the Hearing Panel.[14] According to FINRA Rule 9210(w), a Panelist is "a member of a Hearing Panel or Extended Hearing Panel who is not a Hearing Officer".

Therefore, who qualifies to serve on the Hearing Panel for disciplinary proceedings purposes (i.e., for "trial" as opposed to "appellate" purposes)?

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[13] The authors fully appreciate all that is involved in the technical distinction between a "hearing" and "trial". The purpose of using "trial court" in this Comment Letter is to commence this discussion with a layman's appreciation of the common ground between the aforementioned technical distinction, namely, the taking of testimony under oath subject to cross-examination, the weighing of evidence by a decider of fact and law who is impartial, and the rendering of a decision either in favor or against the accused consistent with relevant legal principles applied to the weight of this evidence. For the reader of this Comment Letter who is not an industry member, the word "trial court" is likely to be the more common expression that captures the essence of this "common ground".

[14] Rule 9231(b).

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According to FINRA Rule 9231(b), it depends:

- If the Enforcement Complaint alleges at least one cause of action alleging violations of law involving the quotation of securities, the execution of transactions, the reporting of transactions, and trading practices, including rules prohibiting manipulation and insider trading, the Chief Hearing Officer is at liberty to appoint to the Hearing Panel an individual who "currently serves on the Market Regulation Committee or who previously served on the Market Regulation Committee...."[15]

- Otherwise, the Hearing Officer is required to select as a Panelist a person who "currently serves or previously served on a District Committee; previously served on the National Adjudicatory Council; previously served on a disciplinary subcommittee of the National Adjudicatory Council or the National Business Conduct Committee, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or, previously served as a Director or a Governor, but does not serve currently in any of these positions."[16]

In short, in order to be a "judge", so to speak, in a FINRA disciplinary "trial", one needs to be a current or former FINRA employee – *in contradistinction to a current industry participant in a FINRA member broker/dealer.* Moreover, this individual needs to have performed a function in one of FINRA's important Committees relevant to market conduct and regulatory governance. In short, this individual must be one who is committed, first and foremost, to FINRA's mission – in contradistinction to being committed, first and foremost, to member issues in the competitive market place. While both commitments should and must center on justice,[17] it is this difference in perspective or nuance that is at the heart of the discussion in the next section.

1.C FINRA Enforcement Process Examined under the Microscope of Fundamental Law.

To summarize, the Chief Hearing Officer, the Hearing Officer, and the members of the Hearing Panel appointed by Hearing Officer, as well as members of the National Adjudicatory Council, are current or former employees of FINRA. It has already been pointed out that, as employees of FINRA, they have a "financial interest" in being and continuing to be loyal to FINRA's mission, which is "to provide investor protection and promote market integrity".

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[15] Rule 9231(b)(2).

[16] Rule 9231(b)(1)(A) through (E), inclusive.

[17] The fundamental understanding of justice in Western Civilization is grounded in the maxim: *Justitia suum cuique distribuit* - Justice renders to everyone his due. *See e.g.*, Plato, The Republic, 4.433; Aristotle, Nichomachean Ethics, 1131 a 29 ("distributive" or proportionate justice); Cicero, De Legibus (c. 43 BC), I, 15; Justinian, Corpus Juris Civilis, book 1, title 1; Aquinas, Summa Theologica, IIaIIae58: "Justice comes down to "giving to each his due". Thus, justice from a FINRA perspective is focused on the investor and giving to the investor protection from bad brokers. From a FINRA member firm's perspective justice is focused devising just rules that level the playing field for brokers so that good brokers are not disadvantaged by the actions of bad brokers in a super competitive marketplace. *Accord* William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, at pages 9 – 12, and 33 – 35: "In a world in which investors cannot readily distinguish between "good" and "bad" brokers before choosing one, perversely good brokers are worse off and better brokers are better off. But if good brokers can somehow differentiate themselves in advance, they can charge more for their services. This discrimination might be hard to effectuate without a neutral third party [e.g., an SRO committed to effecting this justice?] to serve as a credible source of enforcing regulation that distinguish between the two." Id. at 34.

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But there is another conflict of substantial importance that is even more compelling when scrutinizing *impartiality*:

- The Chief Hearing Officer, Hearing Officer, and members of the Hearing Panel appointed by Hearing Officer, as well as members of the National Adjudicatory Council, are persons who are *affiliated* with FINRA. This is an important factor when scrutinizing impartiality.

- The fundamental principle that is the foundation of impartiality as stated in Supreme Court cases – namely, that a neutral decision-maker is not simply a person without a financial interest in the outcome of the case, *but more broadly a person who is not affiliated with ... one side or the other*[18] – is violated.

- It begs the obvious, that there are no industry participants from FINRA member broker/dealers on the Hearing Panel to balance the clearly one-sided participation of the regulator who both brings charges against brokers and decides outcomes in enforcement matters that, when considering the number of enforcement cases that result in a bar from the industry, amounts to "capital punishment."[19]

Granted, FINRA's espoused purpose in keeping the Hearing Officer (as well as Hearing Panel members and members of the National Adjudicatory Council) *all-in-the-family* is to tap into the advantage of having "experienced, licensed attorneys who have previously acted in the same adjudicative role and fulfilled the same adjudicative responsibilities and duties for FINRA"[20] as well as taking "advantage of the expertise of former Hearing Officers who remain well-versed in the typical law violations that are resolved in FINRA disciplinary proceedings."[21] And, granted, these former

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[18] *See e.g.*, Morrissey v. Brewer, 408 U.S. 471, 486 (1972)

[19] The use of this word, "capital punishment" is not hyperbole. It is the language of the U.S. Court of Appeals for D.C. Circuit. In Saad v. Securities and Exchange Commission, No. 15-1430, 2017 WL 4557511, at *5–6 (D.C. Cir. Oct. 13, 2017) ***remanding*** Saad v. SEC, 718 F.3d 904 (D.C. Cir. 2013), FINRA brought a disciplinary proceeding against John M.E. Saad, a broker at a FINRA member firm, charging the broker with violating FINRA rules when he submitted false expense reports for reimbursement for nonexistent business travel and for a fraudulently purchased cellular telephone. The Office of Hearing Officers found that the broker violated NASD Conduct Rule 2010 and sanctioned the broker with a permanent bar against his association with a member firm in any capacity. This sanction was affirmed by FINRA's National Adjudicatory Counsel and later by the U.S. Securities and Exchange Commission. In his petition to the D.C. Circuit for review, the broker did not contest his culpability, but instead argued only that the SEC abused its discretion in upholding the lifetime bar. The Court pointed out that, when reviewing a disciplinary sanction imposed by FINRA, the SEC must determine whether this sanction is excessive or oppressive as measured by the "due regard for the public interest and the protection" standard. The Court reminded the SEC that, as part of its review, the SEC must carefully consider whether there are any aggravating or mitigating factors that are relevant to the SEC's determination of an appropriate sanction. Then the Court, citing the previously decided D.C. Circuit decision of PAZ Sec. Inc. v. SEC, 494 F.3d 1059, 1065 (2007), reminded the SEC: "***This review is particularly important when the respondent faces a lifetime bar, 'the securities industry equivalent of capital punishment.***' " (Emphasis supplied) The D.C. Circuit then remanded the case back to the SEC for further consideration of its sanction in light of this Court's opinion. Source: https://www.cadc.uscourts.gov/internet/opinions.nsf/0/45CCF265B19136C4852581B8004DE8C5/$file/15-1430.pdf

It bears mentioning here that, next to the U.S. Supreme Court, the D.C. Circuit stands superior to the other Circuit Courts. It has been recently stated: "In contrast, even in comparison to other regional circuits, ***the D.C. Circuit enjoys unmatched prestige***. Such prestige results at least in significant part from (1) the D.C. Circuit's role as a "feeder court" for four of the Supreme Court's current nine Justices [citation omitted] and (2) the D.C. Circuit's regular handling of high-profile administrative law cases involving questions of broad significance. [citation omitted] ***When the D.C. Circuit addresses questions*** such as the constitutionality of legislative vetoes of agency rulemaking [citation omitted] or the validity of agency rules of facially national scope * * * [citation omitted] ***the significance for policymakers and members of the general public is plain***." (Emphasis supplied) *See* John Golden, The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts, 78 George Washington Law Review 553, 554 (2010). Source: http://www.gwlr.org/wp-content/uploads/2012/08/78-3-Golden1.pdf

[20] Securities and Exchange Commission, Release No. 34-72543, Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Definition of Hearing Officer to Include Former FINRA Employees Who Previously Worked as Hearing Officers (3 July 2014), at page 3.

[21] Id at 4.

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employees would, according to FINRA, "be subject to the same rules in the Code of Procedure … with respect to prohibited communications, independent advice, conflicts of interest, and bias."[22]

These credentials, experiences, and code of conduct formalities notwithstanding, it nonetheless must be asked: Can the Hearing Officers and Panel Members be truly neutral and impartial when they are in fact long term employees – and *therefore affiliates* - of FINRA (as opposed to outsiders, as for example, defense attorneys at law firms that represent brokers in regulatory enforcement cases)?

But these affiliates of FINRA are not simply employees of an ordinary not-for profit organization – they are employees whose bias is, naturally, tied-at-the-hip with its very important and very focused mission: FINRA's mission being "to provide investor protection and promote market integrity".[23]

Before we consider the issue of bias, or potential for bias and/or prejudice in the FINRA enforcement process that includes prosecuting enforcement attorney and the OHO panel alike, let us consider, ***analogously***, the experience in criminal prosecutions in the court or judicial system.

Consider the mission statement of the Manhattan District Attorney's Office: "Moving Justice Forward". What does "moving justice forward" likely mean for a prosecutor?

One former prosecutor answers this question this way:

> "Just as the brotherhood of prosecutors was premised on shared experience, it was also premised on shared fear. As a defense attorney, I fear that I'll fail my client and they will be unjustly imprisoned. But as a prosecutor, the culture taught me to fear that I'd make a mistake and a guilty defendant would go free to wreak havoc on society. That fear constantly colored my assessment of legal issues."[24] (Emphasis supplied)

Surely most prosecutors in a criminal case can and do intellectually assent to the important constitutional doctrine of presumption of innocence; but, do they really passionately embrace presumption of innocence?

The same former prosecutor answers this question pointedly:

> "Three types of culture—the culture of the prosecutor's office, American popular culture, and the culture created by the modern legal norms of criminal justice—shaped how I saw the rights of the people I

[22] Id at 5. It bears noting that "responsibilities and duties *for* FINRA" is the only relevant experience required.

[23] https://www.finra.org/about/our-mission

[24] Ken White, Confessions of an Ex-Prosecutor: Culture and law conspire to make prosecutors hostile to constitutional rights. (June 23, 2016) Source: http://reason.com/archives/2016/06/23/confessions-of-an-ex-prosecutor. *Accord* Christine Alice Corcos, Prosecutors, Prejudices, and Justice: Observations on Presuming Innocence in Popular Culture and Law, 34 University of Toledo Law Review 793, 794 (2003), where this law review commentator writes: "[W]e do not find the presumption of innocence easy or natural to adopt, particularly in times of crisis. It runs counter to our intuition and makes us uncomfortable. If the individual on trial might be innocent, then the guilty person is still "out there" and leads to the conclusion that the legal system is not infallible. Therefore, an innocent person could be accused and convicted. If the innocent can be convicted and the guilty go free, where is justice? And of what use is the legal system." Source: https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1254&context=faculty_scholarship.

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> prosecuted. If you had asked me, I would have said that it was my job to protect constitutional rights and strike only what the Supreme Court once called "hard blows, not foul ones." But in my heart, and in my approach to law, I saw rights as a challenge, as something to be overcome to win a conviction. Nobody taught me that *explicitly*—nobody had to." [25] (Emphasis via underlining, supplied; italics in original)

Analogously, would not the same factors (personal ethos, cultural philosophy, internal training at the prosecutor's office, or simply many years on the job trying and winning cases, not wanting the guilty to go free and harm the public) operate and create a bias in favor of the investor and a prejudice against the broker in the FINRA Enforcement Process?

This may very well be a matter of nuance: namely, that while a prosecutor may assent intellectually to presumption of innocence, in practice, the scales of justice are always or nearly always tipped, consciously or subconsciously, in favor of "moving justice forward" towards obtaining a conviction; but, this nuance is exactly what differentiates and separates prosecutor from defense attorney as a career move, *and likewise makes enforcement attorney and ultimately hearing officers and adjudicators in FINRA enforcement hearings and appeals choose not to become a securities broker defense attorney.*

As stated now many times, the mission of FINRA is "to provide investor protection and promote market integrity". It is expected that hearing officers and adjudicators in this Enforcement Process intellectually assent to, and fully intend to extend the presumption of innocence to the broker;[26] but, the perception of the members of the industry is that the scales of presumption seem always or nearly always tipped *against the broker as guilty* in favor of the innocence of the investor – even when investors are "innocent as a fox".

There are important factors imbedded in the FINRA Enforcement Process that support this prejudice on the part of the members of the securities industry:

- There is *no* FINRA *requirement* that the attorney who will sit on a Office of Hearing Officers Panel in judgment of broker conduct in Enforcement cases, or for that matter who will review broker sanctions on appeal to the National Adjudicatory Council have experience as either an industry participant at a FINRA member broker/dealer or defense litigation experience at a law firm representing brokers.

If neutrality and impartiality is standard of measure in matters of fundamental law, the failure to have this "other side of the house" experience in the OHO and the NAC is one very important factor that, not only argues that the FINRA process falls short of being truly impartial or neutral, but also gives rise to the question whether "the Code of Procedure … with respect to prohibited communications,

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[25] Ken White, Confessions of an Ex-Prosecutor: Culture and law conspire to make prosecutors hostile to constitutional rights. (June 23, 2016) Source: http://reason.com/archives/2016/06/23/confessions-of-an-ex-prosecutor (Retrieved 8 June 2018).

[26] The authors fully appreciate the fact that FINRA Enforcement cases are not criminal cases and that this legal term of art, "presumption of innocence", is or may not be used in this forum, at least not regularly; that said, we don't think we want to go in the direction of saying that innocence presumed is not applicable in enforcement actions, which would be translated into a presumption that brokers are and should be presumed guilty. Therefore, this doctrine in criminal law has, we think, analogous application in enforcement cases and is at least implicitly accepted by FINRA OHO and NAC has having operation in rendering justice in their decisions.

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independent advice, conflicts of interest, and bias"[27] are ultimately adequate to overcome healthy skepticism about the Process' impartiality and neutrality -- especially in view of the momentous changes that FINRA seeks to make to the Rule 9200 Series (relating to Disciplinary Proceedings) and the Rule 9300 Series (relating to Review of Disciplinary Proceedings by National Adjudicatory Council and FINRA Board and Application for SEC Review).

This in turn gives rise to a serious doubt, at this point, that the proposed Rule 9285 is consistent with *fundamental law*. For, as the U.S. Supreme Court has written: The decision-maker must be scrupulously neutral - neither biased in favor of either side, *nor charged with responsibilities that would interfere with his ability* "to hold the balance nice, clear and true" between the parties.[28]

There is an additional consideration – the positive law consideration – that augments the fundamental law argument in this Section I.C. This positive law aspect is considered in the following section to this Comment Letter.

1.D FINRA Enforcement Process Examined under "Fair Principle" Doctrine of the Exchange Act.

Disciplinary proceedings against members of an exchange and their associated persons are governed by Section 6(b)(7) of the Exchange Act, which provides that an exchange may not be registered with the Commission unless its rules "provide a fair procedure for the disciplining of members and persons associated with members[.]"[29]

Section 19(e)(1)(A) of the Exchange Act governs the SEC's review of disciplinary actions taken by self-regulatory organizations ("SROs"), such as FINRA.

Section 19(e)(1)(A) provides that, in reviewing an SRO proceeding, the SEC shall determine whether the member or person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act.[30]

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[27] SEC Release No. 34-72543; File No. SR-FINA-2014-031 (3 July 2014) (Self-Regulatory Organizations; Financial Industry Regulatory Authority; Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Definition of Hearing Officer to Include Former FINRA Employees Who Previously Worked as Hearing Officers), at page 5. Source: https://www.sec.gov/rules/sro/finra/2014/34-72543.pdf

[28] Tumey v. Ohio, 273 U.S. 510, 532 (1927). *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (O'Connor, J., plurality opinion) (noting that due process requires an "impartial adjudicator").

[29] 15 U.S.C. § 78f(b)(7) (1994).

[30] 15 U.S.C. § 78s(e)(1)(A) (1994).

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In applying this section, the SEC has consistently held that a fundamental principle governing all SRO disciplinary proceedings is *fairness*.[31]

When submitted to the SEC for approval, the SEC is required to review proposed FINRA Rule 9285 in light of the "fair principle" doctrine.

In the course of its "fair principle" review, we believe the SEC should and will review proposed FINRA Rule 9285 in the light of the principle of "impartiality and neutrality", grounded in fundamental law.

Rule 9285, as proposed, appears at this juncture to violate fundamental law relevant to "impartiality and neutrality", and the "fair principle" doctrine that derives from Section 19(e) of the Exchange Act for the reasons set forth in Sections 1.A, 1.B, and 1.C in this Comment Letter.

2. Whether Proposed Rule 9523 (relating to Eligibility Proceedings) is Consistent with FINRA's Mission.

FINRA states that brokers who have engaged in the types of misconduct specified in the Exchange Act's statutory disqualification provisions must undergo special review by FINRA before they are permitted to re-enter or continue working in the securities industry. The Exchange Act sets out the types of misconduct that presumptively exclude brokers from engaging in the securities business, identified as statutory disqualifications ("SDs").

Despite the requirement of heightened supervision to receive approval of an SD Application, FINRA points out that there is currently no explicit rule requirement that these SD individuals be placed on heightened supervision by their employing member firm *during the pendency* of the SD Application review.

This is the issue that FINRA seeks to address in proposing amendments to Rule 9253: FINRA is proposing to require a member firm *to immediately place an individual on an interim plan of heightened supervision once a Statutory Disqualification Application is filed*[32] and FINRA would require that a copy of the interim plan of heightened supervision[33] be submitted with the SD

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[31] "In applying Section 19(e)(1)(A) of the Exchange Act, 15 U.S.C. Section 78s(e)(1)(A), which governs our review of disciplinary actions taken by SROs, we have indicated that a fundamental principle governing all SRO disciplinary proceedings is fairness." U.S. Associates, Inc., 51 S.E.C. 805, 810 (1993). *See also* Scattered Corporation, 53 S.E.C. 948, 958 (Commission must first examine whether SRO's disciplinary proceeding was fair, noting that past cases involving "fairness" analyses "have focused on the fairness of the SRO's internal procedures, ***including organization structure as it affects the fairness and impartiality of the course of the proceeding.***") (Emphasis supplied)

[32] Regulatory Notice 18-16, p. 11.

[33] Because "reasonable criteria" is a fundamental aspect of American understanding of what is just, FINRA would require the interim plan of heightened supervision to be tailored to the disqualified individual, and to take into account the nature of the disqualification, the nature of the firm's business, the disqualified person's current and proposed activities at the firm, and the qualifications of the supervisor.

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Application, and that the plan be in effect throughout the entire SD Application review process. Other specifics are set forth in Regulatory Notice 18-16.

FINRA unabashedly states that it seeks to exclude brokers who pose a risk of recidivism from continuing in the securities business, subject to the limits developed in SEC case law.[34] But this is consistent with FINRA's mission, which is "to provide investor protection and promote market integrity".[35]

2.A Whether Proposed Rule 9523 (relating to Eligibility Proceedings) is Vague and Overbroad.

The proposed amendments to Rule 9523 relating to heightened supervision and statutory disqualification did not spend much time on the important related issue, which is paying compensation to a broker who *may or may not* be statutorily disqualified during operation of the amended rules. As this issue can be of paramount importance to the firm – the firm can face seriously rule violation charges if the firm does not get this right – the proposed Rule 9523 changes must first be analyzed in the light of the compensation issue.

Prior to the proposed Rule 9523 amendments, the Eligibility Process was already confusing about whether a member Firm can or cannot pay a broker subject to Statutory Disqualification:

> FINRA does write that "Generally speaking, a person who is subject to disqualification may not associate with a FINRA member in any capacity unless and until approved in an Eligibility Proceeding * * * However, a person who is currently associated with a FINRA member at the time the disqualifying event occurs may be permitted to continue to work in limited circumstances, provided that:
>
> - The member and the person are in compliance with FINRA Rule 8311,[36] and,
> - The member promptly files a Form MC-400 application."[37]

[34] Regulatory Notice 18-16, pp. 4, 10.

[35] https://www.finra.org/about/our-mission

[36] According to Regulatory Notice 15-07 (relating to Payments to Unregistered Persons), FINRA offers this explanation: "Rule 8311 provides that if a person is subject to a sanction or other disqualification, a member firm may not allow such person to be associated with it in any capacity that is inconsistent with the sanction imposed or disqualified status, including a clerical or ministerial capacity. A member firm may not pay or credit to any person subject to a sanction or disqualification, during the period of the sanction or disqualification or any period thereafter, any salary, commission, profit, or any other remuneration that the person might accrue, not just earn, during the period of the sanction or disqualification. However, a member firm may make payments or credits to a person subject to a sanction that are consistent with the scope of activities permitted under the sanction where the sanction solely limits an associated person from conducting specified activities (such as a suspension from acting in a principal capacity) or to a disqualified person that has been approved (or is otherwise permitted pursuant to FINRA rules and the federal securities laws) to associate with a member firm."

[37] FINRA, Special Permission to Continue in or Enter the Securities Industry Notwithstanding a Disqualification. Source: http://www.finra.org/industry/general-information-finras-eligibility-requirements

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It is this clause – "may be permitted to continue to work in limited circumstances" – is a source of vagueness in the SD application process. Until one can figure out, prior to resolution at the conclusion of the MC-400 application, whether a broker's statutory disqualification status prohibits or permits a firm to pay a broker, the member firm operates in a mine field, always at risk of violating the FINRA prohibition against paying securities transaction based compensation to an "unregistered person", i.e., a broker subject to disqualification.

Figuring out whether a broker is or is not disqualified (again, prior to final disposition) is anything but clear. As one practicing attorney in the securities industry puts it:

> I feel like I know as much about statutory disqualification as anyone in the industry, yet, I keep a copy of Reg Notice 09-19 handy on my desk because at least a couple of times each week I find a need to refer to it to ensure that my understanding of what triggers a statutory disqualification, and the consequences of being statutorily disqualified, is correct. Even so, I still call FINRA's Registration and Disclosures group regularly with questions, as 09-19 is hardly a model of clarity.[38]

So the question is begged: Why would a member firm, *especially a Small Broker/Dealer*,[39] expend its very limited resources – taking compliance personnel off of their daily routine, already working several jobs and working at one pay grade or, alternatively, paying outside legal counsel at high hourly rates – to draft a heightened supervisory program for (let alone put heightened supervision into action for) a broker for whom the firm is anything but clear about the broker's being in compliance with Rule 8311?

The practical result incentivizing a member firm *against hiring* a broker amounts to enforcing a *de facto* bar of the broker from the securities business without the broker having been properly adjudicated a "bad broker".

Indeed, this appears to be FINRA's motivation. FINRA has stated that it seeks to exclude brokers who pose a risk of recidivism from continuing in the securities business,[40] subject to the limits developed in SEC case law. Again, this is consistent with FINRA's mission;[41] but, is it fair from the perspective of higher principles that operate in American jurisprudence, such as "Void for Vagueness" and "Overbroad" constitutional standards?

"Void for Vagueness" standard:

As one Law Commentator explains this standard in Plain English:

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[38] Alan Wolper, Esq., Statutorily Disqualified? FINRA Says "Deal With It", (November 18, 2016) Source: https://www.bdlawcorner.com/2016/11/statutorily-disqualified-finra-says-deal-with-it/

[39] FINRA defines a small firm as a member with at least one and no more than 150 registered persons. *See* Regulatory Notice 18-16, p. 35, note 41.

[40] Regulatory Notice 18-16, pp. 4, 10, 13.

[41] https://www.finra.org/about/our-mission.

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> The "void for vagueness" doctrine argues that a law cannot be enforced if it is so vague or confusing that the average person could not figure out what is being prohibited or what the penalties are for breaking that law. Vagueness is generally considered to be a **due process** issue, because a law that is too vague to understand does not provide adequate notice to people that a certain behavior is required or is unacceptable.[42] * * * A law can be unconstitutionally vague in one of two main ways. First, the law may be void for vagueness if it does not adequately explain or state what behavior the law is meant to affect. If the average citizen cannot figure out from reading the law what he should or should not do, a court may find that the law violates due process. Second, a law may be void for vagueness if it does not adequately explain the procedures that law enforcement officers or courts must follow when enforcing the law or handling cases that deal with certain legal issues. Specifically, a law may be found to be unconstitutionally vague if it gives a judge no idea how to approach or handle a case based on that law.[43] (Emphasis in original)

"Overbroad" Standard:

As the same Law Commentator explains this standard in Plain English:

> The "overbreadth" doctrine is related to the vagueness doctrine. Under the overbreadth doctrine, a law is unconstitutional or void for being too broad if it covers activities that are protected by the federal Bill of Rights[44] or the rights listed in state constitutions. * * * Overbreadth is related to vagueness because an overbroad law is often too vague for a reasonable person to understand what behavior is covered and what behavior is not. In order to avoid breaking an overbroad law, then, many people will voluntarily

[42] Law Commentator's statements are corroborated in a recent U.S. Supreme Court decision dealing with the "void for vagueness" doctrine. *See e.g.,* Sessions, Attorney General v. Dimaya,584 U.S. ___ (2018), *affirm'd*, 803 F. 3d 1110 (9th Cir.2015), where Justice Gorsuch, concurring in the Court's ruling that 18 U.S.C. §16(b)'s residual clause is unconstitutionally vague, argues (as summarized in the syllabus) that "the void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution." Note that *Dimaya* was not cited by this Law Commentator; rather, *Dimaya* is cited by the authors of this Comment Letter as support for the Law Commentator's statement. That said, Justice Gorsuch writes: "Vague laws invite arbitrary power. * * * Today's vague laws may not be as invidious [as the laws imposed on the Colonies by Great Britain at the time of the American Revolution], but they ***can invite the exercise of arbitrary power*** all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up. * * * Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, ***it would be a mistake to overlook the doctrine's equal debt to the separation of powers***. * * * Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies ***that strip persons of their professional licenses and livelihoods***, and the power to commit persons against their will indefinitely * * * [Vagueness in statutes and regulations alike] ***leaves the people to guess about what the law demands—and leaves judges to make it up***." (Emphasis Supplied)

[43] This entire quote is taken from the Rottenstein Law Group article: What does it mean when a law is "void for vagueness" or "overbroad"? http://www.rotlaw.com/legal-library/what-does-it-mean-when-a-law-is-void-for-vagueness-or-overbroad/

[44] There is a constitutionally protected right, under the Commerce Clause of the U.S. Constitution, to engage in interstate commerce. *See* Dennis v. Higgins, 498 U.S. 439, at 448 (1991): "The Court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulation. In Crutcher v. Kentucky, 141 U. S. 47 (1891), in which the Court struck down a license requirement imposed on certain out-of-state companies, the Court stated: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it ***is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States***." Id. at 141 U. S. 57 (Emphasis supplied). Similarly, Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U. S. 1, 216 U. S. 26 (1910), referred to "the substantial rights of those engaged in interstate commerce." And Garrity v. New Jersey, 385 U. S. 493, 385 U. S. 500 (1967), declared that engaging in interstate commerce is a "righ[t] of constitutional stature." More recently, Boston Stock Exchange v. State Tax Comm'n, 429 U. S. 318 (1977), held that ***regional stock exchanges had standing to challenge a tax on securities transactions as violating the Commerce Clause*** because, among other things, the exchanges were "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right."

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> choose not to engage in behavior protected by law or another basic right, just to be sure they're not accidentally breaking the overbroad law.[45] (Emphasis supplied)

Proposed Rule 9523 (relating to Eligibility Proceedings) is Vague precisely because the Rule 9520 series, as expounded by Regulatory Notice 09-19, is already "hardly a model of clarity" [46] – confusing, in other words.

When coordinated with Rule 8311 (relating to Payments to Unregistered Persons), the average broker and his firm cannot figure out, after reading the rules and their corresponding official guidance, what the broker and his firm *should or should not do*. This is the essence of the constitutional probation against laws that are *Vague and therefore Void.*

Because of this, member firms – especially Small Broker/Dealers – will *voluntarily choose not to hire a broker whose statutory disqualification status is anything but clear* because of the expense and regulatory risk. Why? Because proposed Rule 9523 requires the member firm to create a heightened supervisory program in advance of conclusion to the Form MC-400 Application, Small Broker/Dealers will need to either pay outside legal counsel at high hourly rates or take compliance personnel (already working several jobs but working at one pay grade) away from their daily routine to draft a heightened supervisory program for the broker. Either way, this is expensive (especially for Small Broker/Dealers) and will be an otherwise *unnecessary* cost when a broker is found not to be statutorily disqualified.

To this expensive cost is added the risk of violating the Rule 8311 if the firm pays commissions to the broker during the limbo period – what reasonable broker is going to work for free in advance of conclusion to the Form MC-400 Application? But paying the broker involves risk to the firm of violating Rule 8311[47] if, at the conclusion that the MC-400 application, the broker is found by FINRA to be statutorily disqualified. Because of this regulatory exposure risk and the significant monetary cost involved, a member firm, *especially a Small Broker/Dealer*, will choose not to engage in hiring the broker to engage in securities business – an act that is otherwise protected by common law property principles and by the Commerce Clause to the U.S. Constitution. Voluntarily choosing not to engage in behavior that is a basic right protected by law just to be sure that one is not accidentally breaking the law is the essence of the constitutional prohibition against laws that are *Overbroad.*

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[45] In a non-First Amendment situation (such as a claim for constitutionally protected conduct under the Commerce Clause to the U.S. Constitution), the Court will simply void the application of an unconstitutional statute, regulation, or rule (e.g., an SRO rule) to constitutionally protected conduct. *See e.g.*, Kunz v. New York, 340 U.S. 290 (1951); Aptheker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967); Zwickler v. Koota, 389 U.S. 241 (1967); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Massachusetts v. Oakes, 491 U.S. 576, 581 (1989).

[46] Alan Wolper, Esq., Statutorily Disqualified? FINRA Says "Deal With It", (November 18, 2016) Source: https://www.bdlawcorner.com/2016/11/statutorily-disqualified-finra-says-deal-with-it/

[47] As well as violating FINRA Rule 2010 (relating to Commercial Honor and Principles of Trade): "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." The violation of most FINRA rules almost always triggers violation of Rule 2010.

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Member Firms – again, *especially Small Broker/Dealers* – will be "chilled" from exercising their constitutionally protected conduct under the Commerce Clause to the U.S. Constitution as well as common law and state constitutionally protected property rights, as an employer, to expand their interstate securities business through hiring brokers, precisely because (1) proposed Rule 9523 and 8311 are vague and overbroad, and (2) precisely because the risk of violating these rules are so high – and expensive, *especially to Small Broker/Dealers* – that firms will simply "voluntarily choose not to engage in behavior protected by law or another basic right, just to be sure they're not accidentally breaking the overbroad law." This amounts to Regulatory Taking of Property without just compensation under state and federal constitutions,[48] triggering the Doctrine of Unconstitutional Conditions.[49]

Regulatory Taking is a situation in which a government regulation – including a state actor's regulation[50] – limits the use of private property to such a degree that the regulation effectively deprives the property owner of economically reasonable use or value of his/her property, even though the regulation does not formally divest them of title to it.[51]

In addition to constitutional law, Regulatory Taking violates federal statutory law: "[T]he obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" is a violation of the Hobbs Act.[52] And courts have found that the Hobbs Act protects such intangible property rights "as the right to hire employees and to solicit customer accounts,"[53] as well as the right to continue to operate one's business.[54]

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[48] The Fifth and Fourteenth Amendments to the U.S. Constitution restrict the power of federal and state governments (and their "state actors") from infringing on the rights or life, liberty and property, requiring the government and their "state actors" to bear the burden of demonstrating the need for government involvement. U.S. Const. amends. V, XIV, §1: "No person shall be ... deprived of life, liberty, or property, without due process of law."

[49] The Doctrine of Unconstitutional Conditions can be traced back to Home Ins. Co. of New York v. Morse, 87 U.S. 445, 451 (1874)("A man may not barter away his life or his freedom, or his substantial rights.")

[50] *See* Section 4.B, *infra*, addressing "Whether the Proposal to Amend the NASD Rule 1010 Series (MAP Rules) Amounts to Taking of Property Making FINRA a "State Actor"?"

[51] The Supreme Court first held that state regulations that go too far may effect a taking in the 1922 case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In this decision, Justice Holmes, writing for the majority, stated that "*[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*"

[52] 18 U.S.C. § 1951(b)(2) (1994).

[53] The Fourth Circuit held in United States v. Santoni that "the property extorted was the right ... to make a business decision free from outside pressure"; extortion of this right was sufficient to invoke the Hobbs Act. United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); *see also* United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). (including the right to "make business decisions ... free from wrongful coercion" in the definition of property). *And see* Feminist Women's Health Ctr. v. Roberts, No. C86-161Z, 1989 WL 56017, at *7 (W.D. Wash. May 5, 1989); United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987); United States v. Hoelker, 765 F.2d 1422, 1425 (9th Cir. 1985), *cert. denied*, 475 U.S. 1024 (1986); United States v. Nadaline, 471 F.2d 340, 344 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973); United States v. Tropiano, 418 F.2d 1069, 1075-76 (2d. Cir 1969), *cert. denied*, 397 U.S. 1021 (1970).

[54] "The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution (Louis K. Liggett Co. v. Baldridge, 278 U. S. 105 (1928); cf., Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465 (1921)" quoted in Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 414 (2003) (J. Stevens, dissenting). *See also* United States v. Lewis, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987); United States v. Hoelker, 765 F.2d 1422, 1425 (9th Cir. 1985), *cert. denied*, 475 U.S. 1024 (1986); United States v. Nadaline, 471 F.2d 340, 344 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973); United States v. Tropiano, 418 F.2d 1069, 1075-76 (2d. Cir 1969), *cert. denied*, 397 U.S. 1021 (1970).

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The Doctrine of Unconstitutional Conditions states that the government (including state actor) may never grant a privilege subject to the condition that the recipient not exercise a constitutional right; placing such pressure upon constitutional rights is absolutely prohibited under this version of the doctrine.[55]

Accordingly, convincing is the argument that proposed Rule 9523 (relating to Eligibility Proceedings) especially in relation to Rule 8311 (relating to Payment to Unregistered Persons) is unconstitutionally vague, and therefore void, as well as overbroad – chilling a broker/dealer's constitutionally protected common law property right of an employer to "hire, fire, promote, or demote", thereby forcing member firms, *especially Small Broker/Dealers*, to "voluntarily choose not to engage in behavior protected by law or another basic right" (in this instance, the right to hire brokers to increase their interstate securities business protected by the Commerce Clause to the U.S. Constitution)[56] "just to be sure they're not accidentally breaking the overbroad law".

This "chilling" effect violates the Doctrine of Unconstitutional Conditions, as well as violates FINRA member firms' – *especially Small Broker Dealers'* – constitutionally protected conduct under the Commerce Clause. In so doing, proposed Rule 9523 (relating to Eligibility Proceedings) especially in relation to Rule 8311 triggers Regulatory Taking.

3. Whether the Proposal to Amend Rule 8312 (Identifying "Bad Brokers" as former associates of "Disciplined Firms" in a BrokerCheck Disclosure) is Consistent with FINRA's Mission.

FINRA is proposing to amend Rule 8312 to disclose the *status of a member firm* as a "taping firm"[57] under Rule 3170 (Tape Recording of Registered Persons by Certain Firms) through BrokerCheck.[58]

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[55] The mention of the phrase "unconstitutional conditions" by the U.S. Supreme Court occurred in Doyle v. Continental Ins. Co., 94 U.S. 535, 543 (1976) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.") *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 359 n.13 (1976); Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See also* L. Tribe, American Constitutional Law, 510 (1978)("government may not condition the receipt of its benefits upon the non-assertion of constitutional rights even if receipt of such benefits is in all other respects a 'mere privilege' "); Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935). note 4, at 321 ("a condition attached by a state to a privilege is unconstitutional if it requires the relinquishment of [a] constitutional right"); Danielle Stampley, Comment, New Life for the Doctrine of Unconstitutional Conditions?, 58 Wash. L. Rev. 679 (1983) note 8, at 680 ("The doctrine of unconstitutional conditions prevents the government from conditioning the grant of a benefit upon the waiver of a constitutional right.").

[56] *See* Dennis v. Higgins, 498 U.S. 439, at 448 (1991), *infra*: "The Court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulation. *Accord* Boston Stock Exchange v. State Tax Comm'n, 429 U. S. 318 (1977), holding that ***regional stock exchanges*** had standing to challenge a tax on securities transactions as violating the Commerce Clause because, among other things, the exchanges were "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right."

[57] Regulatory Notice 18-15, note 5. When a firm hires numerous individuals from a "disciplined firm", the Hiring Firm can become a "taping firm," and be required to tape record all of its registered persons' phone calls with investors.

[58] Under Rule 3170, a member that hires a specified percentage of registered persons from disciplined firms is designated as a "taping firm" and must establish, maintain, and enforce special written procedures for supervising the telemarketing activities of all its registered persons."

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Pursuant to Rule 3170, FINRA already publishes on its website a "Disciplined Firms List" identifying those member firms that meet the definition of "disciplined firm."[59]

FINRA states in Regulatory Notice 18-16 that it believes that disclosing the status of a member firm as a "taping firm" through BrokerCheck will help inform investors of the heightened procedures required of the firm, "which may incent the investors to research more carefully the background of a broker associated with the firm."[60]

FINRA is also clear about its motive: Disclosing the status of a firm as a "taping firm" through BrokerCheck may also further deter firms from hiring or retaining brokers that previously were employed by disciplined firms in order to avoid getting the "taping firm" disclosure on BrokerCheck.[61]

To better inform investors, the *proposed amendment would permit FINRA to release information through BrokerCheck, in general*, as to whether a particular member is subject to the provisions of Rule 3170: That is, whether the member firm (1) is a "taping firm"; (2) is a "disciplined firm"; (3) is a firm that has hired a specified percentage of registered persons from a firm that has already been identified as a "disciplined firm"; and (4) should be "researched more carefully" in regards to the "background of a broker [or brokers] associated with" this "disciplined firm".

As stated in Section 1 of this Comment Letter, FINRA's stated mission is "to provide investor protection and promote market integrity".[62]

And as one Law Commentator has written: "Brokerage is amenable to self-regulation because the harm caused by bad brokers (that is, ones taking too little care or engaging in too much deleterious activity) is primarily borne by the individuals who are in a contractual relationship with the broker."[63]

Aptly, Regulatory Notice 18-16 is captioned, "High-Risk Brokers", and this particular proposed amendment to Rule 8312 clearly aims at informing and ultimately protecting investors against bad brokers by identifying them specifically.

That said, FINRA's proposed amendment to Rule 8312 does need to be read against the backdrop of the SEC's recently expressed intent to create a website that will contain "a searchable database of

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[59] FINRA defines "disciplined firm" in Rule 3170(a)(2)(A), in part, as follows: "For purposes of this Rule, the term "disciplined firm" means: (A) a member that, in connection with sales practices involving the offer, purchase, or sale of any security, has been ***expelled*** from membership or participation in any securities industry self-regulatory organization or is ***subject to an order of the SEC revoking its registration*** as a broker-dealer; * * * " (Emphasis supplied)

[60] Regulatory Notice 18-16, pp. 13, 21.

[61] Regulatory Notice 18-16, pp. 4, 20.

[62] https://www.finra.org/about/our-mission.

[63] *See* William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, at page 10.

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individuals" who have been barred or suspended as a result of federal securities law violations, according to SEC Chairman Jay Clayton.[64]

Hence there may be some duplication with the SEC effort and the FINRA proposal to amend Rule 8312 identifying "Bad Brokers" and linking them to "Disciplined Firms" in a BrokerCheck Disclosure. It is expected that FINRA would point out that the proposal to amend the Broker/Check disclosure to connect "bad brokers" with "disciplined firms" goes one step beyond the SEC's intended project. In any event, the FINRA proposal aims at intending to be consistent with its mission.

That said, there are legitimate concerns that need to be addressed beyond the duplication issue surrounding the SEC and FINRA effort.

3.A Whether the Proposal to Amend Rule 8312 (Identifying "Bad Brokers" as former associates of "Disciplined Firms" in a BrokerCheck Disclosure) Violates Fundamental Justice.[65]

As the previously cited Law Commentator writes: "The problem that observers encounter in evaluating the efficacy and legitimacy of self-regulation is that the steps to create and enforce a cartel[66] are hard to distinguish from steps necessary to help investors through the policing of bad brokers."[67] (Emphasis supplied)

As this concern relates to the proposed amendment to Rule 8312 identifying "Bad Brokers" and linking them to "Disciplined Firms" in a BrokerCheck Disclosure, the authors of this Comment Letter have this additional concern: What is this going to look like on the *individual's* BrokerCheck, especially when the individual *has no disciplinary history yet works at a* "Disciplined Firm"? In other words, how does FINRA intend to address this *association*?

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[64] *See* Melanie Waddell, Think Advisor, "SEC Creating Searchable Database of Bad Brokers" (November 08, 2017). This intention was announced by SEC Chairman, Jay Clayton, at the Practising Law Institute's 49th Annual Institute on Securities Regulation conference in New York on Wednesday November 8th 2017. Source: https://www.thinkadvisor.com/2017/11/08/sec-creating-searchable-database-of-bad-brokers/. It should be noted that the authors of this Comment Letter has not, as of this writing, located any SEC Press Release on its official website confirming this "searchable database".

[65] This phrase – "fundamental justice" – is a term used by Justice Sonia Sottomayor when she delivered the opinion of the Supreme Court in Peugh v. United States, 569 U.S. __, at 15; 133 S. Ct. 2072 (2013), writing: "... contrary to the dissent's view, *see post*, at 11–13, the Ex Post Facto Clause does not merely protect reliance interests. It also reflects principles of "fundamental justice." *Carmell*, 529 U. S., at 531." (Emphasis supplied).

[66] "*Cartel*, noun, Late 19th century: from German *Kartell*, from French *cartel*, from Italian *cartello*, diminutive of *carta*, from Latin *carta* (card). It was originally used to refer to the coalition of the Conservatives and National Liberal parties in Germany (1887), and hence any political combination; later to denote a trade agreement (early 20th century)." Source: **Google Dictionary** https://www.google.com/search?ei=1TpRW57_F437zgKIoLiACw&q=definition+of+%22cartel%22&oq=definition+of+%22cartel%22&gs_l=psy-ab.12..0l5j0i22i30k1l4j0i22i10i30kl3j0i22i30k1l2.2056.2956.0.13361.1.1.0.0.0.0.121.121.0j1.1.0....0...1.1.64.psy-ab..0.1.120....0.0i5iNd3NOYml

Birdthistle and Henderson's use of the word "cartel" (see footnote immediately below) refers to the combination of Self-Regulators, or the combination of FINRA and the SEC, with the object of promoting their common interest, which is, protecting the investing public; but, Birdthistle and Henderson's concern is that, because the line is not a bright line, this mission can cross over into a monopoly that ends up as a tyranny that adversely impacts personal liberty, private enterprise, capital formation, and ultimately the nation's economy.

[67] *See* William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, at page 12.

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That is, if a Hiring Firm becomes a "Taping Firm" by virtue of hiring "bad brokers"[68] from a "Disciplined Firm", *then in the public's mind the Hiring Firm is also a "Disciplined Firm"*. There is little likelihood that the public will drill down through Rule 3170 in order to differentiate "Disciplined Firms" from "Taping Firms". For all intents and purposes, the Hiring Firm now has a *Scarlet Letter.*[69]

But it is not only the Hiring Firm that may be wearing a Scarlet Letter. It could be every associated person at the Hiring Firm – including, especially, brokers with clean records, operations personnel with clean records, compliance personnel with clean records, and senior management with clean records. As the saying goes, "the devil is in the details", and the FINRA proposal does not spell out very clearly what the BrokerCheck Disclosure for will actually look like for brokers with clean records, operations personnel with clean records, compliance personnel with clean records, and senior management with clean records.

We get the general picture: The "disciplined firm" and the "bad broker" will be linked, somehow, on BrokerCheck.

But what will BrokerCheck actually look like in the public's eye for those who are not "bad brokers" as well as for those associated persons who work in operations and compliance departments of "taping firms" – or more accurately, "disciplined firms by association", who, themselves, have no disciplinary history?

In short, what is FINRA going to do to avoid "guilt by association"? This may be an innocent oversight, but this concern is not clearly, if at all, addressed in Regulatory Notice 18-16.

More than two hundred years of Federal jurisprudence, not to mention more than eight hundred years of Common Law jurisprudence,[70] is premised on the fundamental principle of law[71] that the innocent

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[68] It bears repeating, here, that it is by no means very clear that a "bad broker" is or should be adjudged "bad" because of arbitration cases being brought against him by "Non-Attorney Representation" firms that are essentially nuisance cases that the broker settles, not because the claimant's case has merit, but because it is more costly to settle than to continue his/her defense. *See* Section 4.A below for complete discussion of the complexity of this problem.

[69] The term "scarlet letter" comes from the Nathaniel Hawthorne novel, The Scarlet Letter: A Romance. Its fundamental theme centers on ***shaming and social stigmatizing***, In the novel, Hester Prynne, a young woman who has given birth to a baby of unknown parentage. She is required to wear a scarlet "A" on her dress when she is in front of the townspeople to shame her. The letter "A" stands for adulteress.

[70] Writing for the U.S. Supreme Court, in Coffin v. United States, 156 U.S. 432; 15 S. Ct. 394 (1895), Justice Edward Douglass White traced the doctrine of presumption of innocence to English common law (i.e., Fortescue, Hale, Blackstone), as well as to American common law (Lilienthal v. United States, 97 U.S. 237; Hopt v. Utah, 120 U.S. 430; Commonwealth v. Webster, 5 Cush. 295, 320; State v. Bartlett, 43 N.H. 224; Alexander v. People, 96 Illinois, 96; People v. Fairchild, 48 Michigan, 31; People v. Millard, 53 Michigan, 63; Commonwealth v. Whittaker, 131 Mass. 224; Blake v. State, 3 Tex. App. 581; Wharton v. State, 73 Alabama 366; State v. Tibbetts, 35 Maine 81; Moorer v. State, 44 Alabama 15) and ultimately back to Ancient Greece, Ancient Rome, Medieval Canon Law, and back to Deuteronomy.

[71] *See* Michael Heyman, Due Process Limitations to Accomplice Liability, 99 Minnesota Law Review 132, 139-140 (2015): "That necessary link between personal fault and criminal liability is too basic, ***too fundamental to even require explanation***. It so inheres in our notion of criminal responsibility as not ***even to require justification***, as we cannot properly assign blame—or even conceive of doing so—in the absence of personal wrongdoing . . . ***substantive Due Process that cannot tolerate punishment without fault*** . . . Perhaps Justice Kagan's language reflects that [citing Rosemond v. United States, 134 S. Ct. 1240 (2014)]. But those comments do not stand alone. ***Analyzing decades of Supreme Court opinions***, one commentator noted that: 'At its core, the rule prohibits 'guilt by association' in the absence of a substantial relationship between the defendant and the third party's criminal activity. An individual cannot be held vicariously liable merely because she associates with a group or third party that commits a crime. There must be a sufficient, 'non-tenuous,' link between her association and the third party's criminal actions.' " (Emphasis supplied) Source: http://www.minnesotalawreview.org/wp-

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are not to be adjudged guilty by nothing more than association[72] with those who are truly guilty. Presumption of innocence is a fundamental principle of American jurisprudence that is centuries older than the Constitution, itself.

If FINRA does not correctly address and more importantly resolve this issue, FINRA risks crossing over from self-regulation designed to protect investors to self-regulation that results in monopoly or worse – *cartelization*, in other words.[73]

4. Whether the Proposal to Amend the NASD Rule 1010 Series (MAP Rules) is Consistent with FINRA's Mission.

FINRA proposes amendments to the Membership Application Program (MAP) rules to impose additional obligations on member firms that associate with persons who have, in the prior five years, either one or more final criminal matters, or two or more "specified risk events". The proposed amendments to the MAP rules would allow FINRA to review and potentially restrict or deny a member firm from allowing such a person to become an owner, control person, principal or registered person.

Under this proposed amendment, whenever a firm seeks to register additional reps – even if only a single rep – the firm is encouraged, but not required, to undertake a "materiality consultation" or MatCon with FINRA for each rep who has "one or more final criminal matters or two or more specified risk events" in the five years prior to registering the individual(s).

That said, if the firm registers a "bad broker", without first undertaking a materiality consultation, the firm risks violating its membership agreement with FINRA, triggering enforcement proceedings.

The proposed rule enumerates certain "bad broker" criteria. If the individual falls within this criteria, the firm's "materiality consultation" will invariably conclude that the addition of this broker constitutes a material change to the firm's membership agreement with FINRA. This, in turn, triggers need for the firm to file a continuing membership application (CMA) with FINRA under Rule 1017.

If during the "materiality consultation" FINRA determines that the "change" (that is, the hiring of a broker) is not material (because the hired broker is not a "bad broker"), the registration of the subject individual does not trigger a 1017 CMA with FINRA's MAP program.

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content/uploads/2015/08/Heyman_1fmt1.pdf, *citing* Alex Kreit, Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton, 57 AM. U. L. REV. 585, 606 (2008).

[72] The U.S. Supreme Court has declared guilt-by-association "alien to the traditions of a free society and the First Amendment itself". NAACP v Claiborne Hardware, 458 US 886, 932 (1982). In Scales v United States, 367 US 203, 225-226 (1961), the Supreme Court stated: "***In our jurisprudence guilt is personal***, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity, … that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." (Emphasis supplied)

[73] *See* William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, at page 12.

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In other words, the proposed amendment will make the Safe Harbor for Business Expansions set forth in IM-1011-1 unavailable to a firm that seeks to register a potentially "bad broker" – that is, a broker who has "one or more final criminal matters or two or more specified risk events" in the five years prior to registering the individual(s).[74]

Because this proposed amendments to the NASD Rule 1010 Series (MAP Rules) aims at keeping "bad brokers" from participating in the securities industry; and, because FINRA's mission is "to provide investor protection and promote market integrity", these proposed amendments appear to be consistent with this mission.

But there is another aspect of the proposed amendments to Rule 1010 Series (MAP Rules) that needs to be seriously considered.

We believe that FINRA should disregard, for purposes of the proposed amendments to the Rule 1010 Series (MAP Rules), any consideration of arbitrations brought against a broker by a "Non-Attorney Representative" "stock loss recovery" firm (such as but not limited to Cold Springs Advisory Group), no matter what the dollar amount of the settlement.

Based on our assessment of and reliance on fundamental law, "nuisance-value" cases brought by Non-Attorney Representative "stock loss recovery" firms should always be held suspect for reasons explained in Section 4.A *infra* – and therefore should be excluded from MAP consideration – precisely because, to not do so, detracts from FINRA's legitimate mission.

4.A Whether FINRA Should Exclude Certain Arbitration Settlements Entirely From "Materiality" Considerations in the Proposal to Amend the NASD Rule 1010 Series (MAP Rules).

Appreciating the severity of proposed MAP measures, FINRA aims at bringing things into a more equitable balance by deciding that, when a customer complaint triggers a "specified risk event" for FINRA consideration, only "final" customer complaints will be considered – customer arbitration awards or civil judgments or settlements. FINRA has set the finality of these events at "in excess of $15,000".[75]

While "finality" of customer initiated arbitration awards and civil judgments, arguably, helps bring back into balance the scales of justice, the settlement of arbitration and civil lawsuits at, below, ***or above*** the $15,000 threshold does not, ***when the underlying case is a "nuisance-value" case.***

[74] Regulatory Notice 18-16, pp. 13, 14.

[75] Regulatory Notice 18-16, pp. 21, 25, especially note 50.

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"Nuisance-value" cases are claims without legal merit. These are routinely brought against brokers with a specific litigation strategy in mind: That being, from the time of retaining the customer and filing the statement of claim, the representative (attorney or otherwise), knowing that the claim has no merit, goes ahead with filing the claim anyway with the express and deliberate intent of maneuvering the broker into ***settling the claim at or near the FINRA U-4 Reporting threshold amount*** (currently at $15,000) short of going to trial.

Advocates who bring "nuisance-value" claims (whether in arbitration or in a judicial forum) on behalf of customers know right-out-of-the-gate that, while their case has no merit in the law, the case ***does have economic value*** as far as the opponent (broker) is concerned – namely the cost of retaining legal counsel for defense against the claim, payment of court or arbitration filing costs, payment of mediator/arbitrator fees, ***plus that intangible value to the broker of*** "just making the customer go away").

As one Law Commentator has bluntly put the matter in plain English:

> All this fuss is still about the same thing: there are lots of reps in the industry who are fantastic, who provide a wonderful service to their clients, but who have to deal with the fact that they live in a day and age in which it is ridiculously easy for a customer to lodge a complaint and exact a nuisance settlement from the BD, resulting in a permanent mark on the reps' U-4. Granted, there are also reps with marks on their U4s who are bad apples, true recidivists who don't care about rules or fiduciary duty or suitability or whatever. But, the problem is that FINRA cannot distinguish between these two groups, so its solution is to treat them all the same, which is, in essence, to presume everyone is a bad apple.[76] (Emphasis supplied)

Litigation lawyers – plaintiffs'/claimants' counsel and defense counsel, alike – understand this. Plaintiffs'/claimants' counsel understand that, ***whatever*** the dollar threshold set by FINRA (currently set at $15,000) can be exploited for settlement purposes in ***their*** favor in "nuisance-value" cases.

FINRA's point – that the "proposed $15,000 threshold for customer settlement corresponds to the reporting threshold for the Uniform Registration Forms and for the settlement information to be displayed through BrokerCheck [and as] a result, brokers and firms already have incentives to settle below the $15,000 amount[77] – is one-sided to a fault. FINRA fails to take into consideration what really happens when a "nuisance-value" case is brought against a broker: *It is plaintiff's/claimant's counsel who is seeking to exploit whatever the reporting threshold turns out to be.*

The "nuisance-value" claimant already knows that his case lacks merit and therefore, as a matter of law, is *worthless*. The "nuisance-value" claimant, therefore, wants to get as much money as he can, as close to this reporting threshold (currently, the $15,000) figure as possible, knowing that the broker is very likely "to put something on the table just to make the claimant go away". Therefore, ***a worthless***

[76] Alan Wolper, Esq., FINRA Knows Best – At Least According To FINRA – When It Comes To Hiring Decisions (4 May 2018) https://www.bdlawcorner.com/2018/05/finra-knows-best-at-least-according-to-finra-when-it-comes-to-hiring-decisions/

[77] Regulatory Notice 18-16, note 50.

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case has economic value just shy of whatever the FINRA reporting threshold is (again, currently $15,000).

In short, the U-4 requirement settlement reporting requirement just below the reporting threshold (currently, $15,000) ***incentivizes, first and foremost, the "nuisance-value" claimant.*** It incentivizes the claimant to get the broker to settle when the broker shouldn't be settling at all.

If the $15,000 threshold incentivizes the broker at all, it incents the broker to opt for being practical over trying his hand at playing Don Quixote: Instead of the latter, the broker pays a hefty price (in terms of money plus reporting of a bogus DRP[78]) despite being not at all at fault, "just to make the case go away" so that the broker can focus again on his securities business without anxiety, interruption, and disruption of his daily routine, which is so essential to earning a living.

FINRA's preconception that brokers settle, or attempt to settle, all cases just below the $15,000 in order to avoid DRP reporting fails to account for the reality in the practice of law that many, if not most, of these broker cases settle even though they have no merit whatsoever; they settle precisely because the high cost of defending the claim, both in terms of money as well as intangibles like anxiety and distraction of one's focus from conducting business day-to-day, makes settlement of "nuisance-value" cases "always the better option".[79] Practitioners of "barratry" know this.[80]

Accordingly, a case that has no merit violates fundamental justice precisely because justice is not its objective – exploiting economic value of a case that has no merit and therefore no legal value is the objective of a "nuisance-value" case. For this reason, "nuisance-value" cases should not be included in the MAP Rules calculus, as a matter of public policy.

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[78] DRP stands for "Disclosure Reporting Pages", which are pages on Form U-4 where a broker is required to report certain disciplinary related disclosures. Effectively, these DRPs are equivalent to a Scarlet Letter.

[79] *See* David Rosenberg and Randy J. Kozel, Solving the Nuisance-Value Settlement Problem: Manadatory Summary Judgment, 90 Virginia Law Review 1850, 1851-1852 (2004): "***The civil justice system is rife with situations in which the difference in cost between filing and ousting meritless claims or defenses makes the nuisance-value strategy profitable***" (emphasis supplied) *citing* Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 758 (9th Cir. 2002) (Kozinski, J., dissenting) ("By paying a $150 filing fee (and then sitting back), plaintiff launched a lawsuit that dragged on for over thirteen months and caused defendants to spend over $10,000, not including the time they spent on the rule 60(b) motion, the motion for reconsideration or this appeal."). This Law Commentator continues: "How big is the problem of nuisance-value litigation? Reported instances of abuse abound. See, e.g., Burlington Indus. v. Dayco Corp., 849 F.2d 1418, 1422 (Fed. Cir. 1988) (characterizing the frequent filing of groundless charges of inequitable conduct in patent cases as an "absolute plague"); Restatement (Second) of Contracts § 176 cmt. d (listing cases refusing enforcement of settlement agreements in frivolous suits on grounds of duress); Barry F. McNeil & Beth L. Fancsali, Mass Torts and Class Actions: Facing Increased Scrutiny, 167 F.R.D. 483 (1996) (asserting that defendants in the asbestos litigation are being pressured by high litigation costs to settle non-meritorious claims in both separate and class action contexts); Jonathan D. Glater, California Says State Law Was Used as Extortion Tool, N.Y. Times, Apr. 5, 2003, at A8 (discussing a California law firm alleged to have ***filed lawsuits against "thousands of small businesses" to extract nuisance-value settlements***). This experience has prompted calls for stronger judicial and regulatory efforts to deal with the nuisance-value settlement problem. *See, e.g.*, Warren E. Burger, Annual Report on the State of the Judiciary-1980, 66 A.B.A. J. 295, 296 (1980) (focusing attention of trial judges on problem of frivolous litigation). Notable recent responses include the 1983 and 1993 revisions of Federal Rule of Civil Procedure 11 and The Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1-78u-5 (2000). Despite the general consensus that a problem exists, there is a paucity of empirical research substantiating its extent. ***Notably, the field of securities litigation*** has yielded studies of both class and separate actions. *See, e.g.*, Roberta Romano, The Shareholder Suit: Litigation without Foundation?, 7 J.L. Econ. & Org. 55 (1991); Eric Helland, A Secondary Market Test of the Merits of Class Action Securities Litigation: Evidence from the Reputation of Corporate Directors, (Contracting and Organizations Research Institute, Working Paper No. 2004-05, 2004), at http://ssm.com/abstract=517183 (on file with the Virginia Law Review Association).

[80] See Section 6.B below for more detailed discussion.

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Admittedly, both FINRA and the industry venture into murky waters when attempting to draw a "settlement dollar amount" bright line for purposes of when to report and when not to report an "arbitration settlement" for purposes of proposed MAP Rules.

That said, there is a certain group of "Nuisance-value cases" that FINRA should exclude from the proposed MAP rule, as a matter of policy. This should be done in order to remedy or set right the inequity of allowing "Nuisance-value cases" to be brought in FINRA Arbitration by non-lawyer "arbitration mills", otherwise known in the securities industry as "Non-Attorney Representative" stock loss recovery firms or NARs,[81] precisely because customers in these cases do not have the protections afforded the public when brought by attorneys subject to the oversight of their respective State Supreme Court disciplinary arms.

Research has been conducted on the FINRA Arbitration website on the cases brought by Cold Spring Advisory Group. The results are as follows and the supporting documentation appears as Appendix A to the Comment Letter:

- During the review period (1 January 2016 to 27 June 2018), there were 35 cases that Cold Spring Advisory brought to arbitration on behalf of the customers.

[81] For example, Cold Spring Advisory Group. The Cold Spring Advisory Group *modus operandi* appears to be set forth in a recent lawsuit brought against Cold Spring Advisory Group LLC. The case is Hilton M. Weiner vs. Frank Mulligan, Marianne Mulligan, Cold Spring Advisory Group, LLC, Jennifer Tarr, et al., Supreme Court of New York, Suffolk County, Dkt. Index No. 602501/17, filed 18 April 2017, https://securitiesarbitrations.com/wp-content/uploads/2017/09/HWSUIT4.pdf

- Cold Spring Advisory Group is not a law firm but a Nevada limited liability company; is owned by a former executive officer of EKN Financial Services, a former broker/dealer that was expelled from its FINRA membership in 2015 for violating federal and state securities laws as well as FINRA rules and SEC regulations. In 2017, this owner himself was barred from associating with any FINRA member broker/dealer in any capacity. (¶4, ¶14 of Plaintiff's Complaint).
- Cold Spring Advisory Group engages in telemarketing practices that targets individuals from around the world who at one time or another maintained an account or accounts at FINRA member broker/dealer firms located in the United States. (¶15 of Plaintiff's Complaint).
- Cold Spring Advisory Group "pitches" FINRA arbitration to the recipient at the other end of the call for the recovery of losses in the recipient's account (hereafter, "client"). (¶16 of Plaintiff's Complaint).
- Cold Spring Advisory Group requires the "client" to pay a substantial sum of money up front to conduct forensics study of the "client's" account with the FINRA member broker dealer, charging the "client" anywhere from $10,000 to $25,000 for this forensics investigation. (¶16, ¶18 of Plaintiff's Complaint).
- Cold Spring Advisory Group then refers the "client" to an attorney duly admitted to practice the law in the appropriate jurisdiction; the attorney works the case pursuant to a Legal Services Contract (usually, a contingent fee arrangement) with the "client"; and then Cold Spring Advisory Group contacts the "client" and convinces the "client" that the "client" would be better served by withdrawing his/her contingent fee arrangement with the lawyer and, instead, allow Cold Spring Advisory to take over the case, raising the "client's" expectation that the case will be more expeditiously settled. (¶19 through ¶31 of Plaintiff's Complaint).
- Cold Spring Advisory Group would then proceed to negotiate a settlement of the "client's" FINRA Arbitration case through FINRA mediation, in effect keeping the $10,000 - $25,000 "forensics" investigation and then taking a percentage of the "client's" mediation / settlement arrangement, cutting out the attorney's share that would have been paid via the Legal Services Contract, as evidenced by seven (7) other similar cases referenced in ¶80 of Plaintiff's complaint.

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- There were twenty-five (25) cases that meet the criteria for "nuisance-value lawsuits",[82] or 71.428%
- There were three (3) cases that meet, in-part, the criteria for "nuisance-value lawsuits", or 8.572%
- There are seven (7) cases that did not meet the criteria for "nuisance-value lawsuits", or 20.000%

- At least two (2) cases were dismissed because Cold Spring Advisory Group engaged in the unauthorized practice of law under the laws of Arizona and Kansas law.
- There were four (4) cases where the arbitration panel granted expungement.

In the meantime, here are a few of the many reasons why arbitration cases brought by NARs should not be considered whatsoever by FINRA for MAP purposes:

- Whenever a NAR is allowed to bring a customer claim against a broker in FINRA arbitration, FINRA facilitates this non-lawyer in the unauthorized practice of law.[83]
- Often, the final outcome of the case is detrimental to the very investors whose mission it is for FINRA to protect.[84]
- The "advocate" acting on behalf of the NAR representing a customer in FINRA arbitration is not an attorney admitted to the Bar(s) in any jurisdiction in the United States, and therefore has no formal legal advocacy training and no formal

[82] Again, any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

[83] *See e.g.*, In Disciplinary Counsel v. Alexicole Inc., 822 N.E.2d 348 (Ohio 2004), an Ohio court enjoined a corporation owned by a layperson from representing clients in arbitrations venued in Ohio. In that case, a non-lawyer was found to be engaging in the unauthorized practice of law when he "regularly prepares statements of claim, conducts discovery, participates in prehearing conferences, negotiates…settlements, and participates in mediation and arbitration hearings, all on behalf of Alexicole clients." That being the case, FINRA arguably facilitates the unauthorized practice of law, at least in the State of Ohio, whenever a non-lawyer represents a customer in FINRA arbitration. *See also* Illinois State Bar Association Professional Advisory Opinion, Opinion No. 13-03 (January 2013), advising ***attorneys who assist non-lawyers representing customers in FINRA arbitration*** run the risk of violating the Illinois prohibition against ***facilitating the unauthorized practice of law***. Source: http://lawprofessors.typepad.com/files/ill.13-031.pdf. Ergo: if a lawyer facilitating a non-lawyer in FINRA arbitration equals facilitating unauthorized practice of law, should not FINRA be held to same standard since FINRA is the forum that facilitated the lawyer for doing so? This may be the next unanswered question to be decided by the courts, namely, that by allowing NARs to arbitrate cases in the FINRA arbitration forum FINRA either engages in or facilitates the unauthorized practice of law.

[84] Again, FINRA's mission is "to provide investor protection and promote market integrity". Source: https://www.finra.org/about/our-mission. ***But see*** A Menace to Investors: Non-Attorney Representatives in FINRA Arbitration, Andrew Stoltmann, Stoltmann Law Offices, Chicago, Illinois; and David Neuman, Partner, Israels & Neuman PLC, Seattle, Washington: "NARs [non-attorney representatives] have been alleged to have ***charged investors $25,000 in non-refundable deposits for representation***; ***taken settlement money that the investors were not aware of***; and represented ***some investors without their consent***. FINRA is fully aware of these issues. In October 2017, FINRA Director of Dispute Resolution, Richard Berry, discussed these allegations in a public forum. FINRA is not alone in recognizing the problems associated with NARs - ***the SEC have*** [sic] ***also warned the public about "recovery companies" that charge a fee to assist individuals to recover money from investment scams***." At page 6 Source: https://piaba.org/system/files/2017-12/PIABA%20Report%20-%20Non-Attorney%20Representatives%20%28December%2018%2C%202017%29.pdf

In support of these statements, these authors cite: Rita Raagas de Ramos, FINRA Warns Against Rogue Non-Lawyer Reps, FINANCIAL ADVISOR IQ (Oct. 13, 2017); What You Should Know About Asset Recovery Companies, SEC (Aug. 9, 2016)] and NASAA (the North American Securities Administrators Association) [citing Securities Industry Conference on Arbitration, Report on Representation of Parties in Arbitration by Non-attorneys, 22 FORDHAM URB. L.J. 507, 512 (1995); Ariel Kaminer, Swatting at Wall Street from a Bunker in Brooklyn, N.Y. TIMES (May 21, 2010) (quoting one defense lawyer as stating that dealing with a particular NAR "is one of the most frustrating experiences I've ever dealt with…It's like hondling at a flea market with these guys"); Adam J. Gana, Should Non-Attorneys Represent Parties in FINRA Arbitration for Compensation?, NYSBA JOURNAL (Jan. 2015); Aegis J. Frumento & Stephanie Korenman, Rethinking Non-Lawyer Advocacy in FINRA Customer Arbitrations, SECURITIES ARBITRATION COMMENTATOR Vol. 16, No. 8 (Mar. 2017)

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license evidencing an objectively ascertainable threshold of knowledge of the law in regards to both the law of securities, law of pleading, and law of evidence, and other relevant areas of the law.

- As a result, the "advocate" representing a customer in FINRA arbitration is not subject to liability for damages and professional license penalties for engaging in abuse of process, malicious prosecution, and/or filing frivolous arbitration (i.e., bringing a meritless claim) against a broker, which conduct is actionable at common law, under statutory law, and prohibited by the Codes of Professional Responsibility adopted by the several States' Supreme Courts.[85]

- The "advocate" represents customers in FINRA arbitration in the several States, yet is not or is rarely prosecuted for engaging in the unauthorized practice law, which means the "advocate" generally "flies under the radar" as far as consumer protection is concerned, and therefore FINRA facilitates this avoidance of consumer protection.

- The "advocate" acting on behalf of a NAR is permitted under FINRA rules to file arbitration in a State where an attorney cannot represent his broker client: That is, non-lawyers can represent a claimant in a State [e.g., New York] without fulfilling any requirement to be admitted to the Bar in that State [e.g., New York] but, because the attorney is duly admitted *in the States of Connecticut or Maine*, the attorney is precluded from representing his client broker in the FINRA forum located in New York since the attorney is not admitted in that State [i.e., New York]:[86] This is an absurd result.[87]

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[85] *Compare* how the State courts and legislatures handle Vexatious Litigants. *See* Brett Herbert, Serial Suers and Vexatious Litigants: Can Courts Prevent Someone From Filing a Lawsuit? (July 5, 2017) ("The Court ultimately adopted the Fourth Circuit Court of Appeals' (the federal circuit court of appeals that encompasses Virginia) framework and held that pre-filing injunctions are appropriate in certain circumstances. The Court decided that the factors a court should look at in determining whether to enter a pre-filing injunction are: (i) a history of filing vexatious and duplicative lawsuits, (ii) without any good faith basis, (iii) at the expense of opposing parties and the court system, and (iv) the adequacy of alternative sanctions to stop the abuse. The Court specifically noted that ***imposing sanctions (monetary and other penalties) against Ms. Adkins would not be sufficient to curb the abuse because she could still persist in filing pleadings*** even if sanctions were imposed. After considering all of these factors, the Court imposed the pre-filing injunction against Ms. Adkins. Accordingly, ***Ms. Adkins is prohibited from filing any further pleading whatsoever with the Court unless she (i) hires a Virginia attorney, or (ii) obtains permission from the Court. Vexatious litigants are a real and expensive problem in the legal system.***") (Emphasis supplied) Source: https://estateconflicts.com/serial-suers-and-vexatious-litigants-can-courts-prevent-someone-from-filing-a-lawsuit/. The State of Nevada maintains a Vexatious Litigants List. Source: https://nvcourts.gov/AOC/Administration/Judicial_Council/Vexatious_Litigant_List/ (click Download Vexatious Litigant List). The State of California likewise maintains a Vexatious Litigant List. Source: http://www.courts.ca.gov/12272.htm (click Vexatious Litigant List).

[86] New York, allows NARs to represent investors as long as the forum's (FINRA's) rules allow such representation. Yet, an attorney admitted to the Connecticut or Maine Bar cannot represent a broker unless the attorney is also admitted to the New York Bar. *See* DePalo v. Lapin, Index No. 114656/2008 (Sup. Ct. NY June 30, 2009) (stating that "New York has no prohibition which would have prevented Lapin from representing an individual in a FINRA arbitration") (citing Williamson v. John D. Quinn Construction, 537 F.Supp. 613, 616 (S.D.N.Y. 1982) (noting that under New York law representation of a party in an arbitration proceeding by a non-lawyer does not constitute the unauthorized practice of law). *And see* In re Glatthaar, No. CV054015630, 2005 WL 3047275, at *1 (Conn. Super. Ct. Oct. 24, 2005) (finding that Connecticut's *pro hac vice* admission procedures did not apply to arbitrations, thus the court could not allow the New York attorney to represent his clients in Connecticut arbitration). *See also* Committee on Arbitration, Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York, 63 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 700, at 730 (June 2008) (noting that a state court in Maine held that no rule or statute permitted the court to grant permission to out-of-state attorneys to practice before arbitrators) (citing State v. Shimko, No.CV-06-053, at *3 (Me. Super. Ct. Apr. 26, 2006)). For those States that are silent on this issue, *see* Andrew Stoltmann and David Neuman, A Menace to Investors: Non-Attorney Representatives in FINRA Arbitration, p. 9. Source: https://piaba.org/system/files/2017-12/PIABA%20Report%20-%20Non-Attorney%20Representatives%20%28December%2018%2C%202017%29.pdf

[87] There is an ancient common law principle called "the absurd result principle": "The Law Abhors an Absurd Result". *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results.") and notes 108-11 (discussing how judicial use of absurd result principle involves notions of ***rationality and common sense***):

> "[I]t is a venerable principle that a law will not be interpreted to produce absurd results."The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire-'for he is not to be hanged because he would not stay to be burnt." KMart Corp

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- Despite the fact that FINRA's mission is "investor protection", FINRA, pointedly, does not disclose to the investing public on an especially identifiable web page that the ***owners*** of many/most of these "Non-Attorney Representative" "stock loss recovery" firms have been ***barred*** from associating with FINRA member firms or otherwise ***expelled*** from the industry.[88]

- At this time, FINRA's only "sanction" against NARs is a *caveat emptor* to the investor.[89]

- Despite the fact that FINRA does not specifically point out to the investing public that the owners of many of these "Non-Attorney Representative" (NAR) "stock loss recovery" firms have been barred from associating with any FINRA member firms in any capacity, FINRA still allows their "Non-Attorney Representative" "stock loss recovery" firms to continue to conduct business in the FINRA arbitration forum as non-attorney advocates for customers – even though lawyers whose licenses are suspended in the FINRA venue are not permitted to represent their broker clients.[90]

In short, the NAR has nothing to lose and everything to gain when it files a "nuisance-value case" in FINRA arbitration. For these reasons, any arbitration brought *by any* "Non-Attorney Representative" should be excluded from FINRA calculation in the proposed amendments to the Membership Application Program (MAP) rules.

Whenever any "Non-Attorney Representative" firm (such as but not limited to Cold Spring Advisory Group) brings and settles a claim with a broker, the presumption should not be that the broker is a "bad apple", for all the reasons that have been set forth in this Section 4.A.

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v. Cartier, Inc., 486 U.S. 281,325 (1988) (Scalia, J., concurring in part and dissenting in part) (quoting United States v. Kirby, 74 U.S. 482, 487 (1868)).

[88] If the investor knows the name of the owner of a particular NAR, the investor of course can search FINRA Broker/Check. But, given the fact that the NAR is acting in the public forum ***as if it were a law firm***, it is not immediately obvious to the investor that he/she should search the owner of the NAR for broker violations on BrokerCheck. That said, the Public Investors Arbitration Bar or PIABA ***has*** issued such an investor alert that should be issued by FINRA: Non-Attorney Representatives Are Real and Growing "Menace to Investors" in FINA Arbitration: NAR Firms Found to Include Individual Who Pled Guilty in Insurance Scheme and Brokers Barred from Industry: Unwary Investors have None of the Protections of Dealing with Attorneys and Often Recover Little of Lost Funds. (December 18, 2017, 13:57 ET). Source: https://piaba.org/piaba-newsroom/report-nar In this alert, PIABA summarizes the disciplinary history of the owners of and key figures in (1) Cold Spring Advisory Group; (2) Stock Market Recovery Consultants; (3) Investors Arbitration Specialists; (4) Investors Recovery Service; and (5) Vindication Recover Services. The PIAB specifically point out that ***"Non-attorney representatives often do not maintain malpractice insurance, have no ethical code or constraints like attorneys do not face potential sanctions from any regulatory or licensing body like a state bar association. Essentially, this system exposes the investor who was victimized by his or her broker to potential further victimization, with little chance of recovering damages caused by an unscrupulous or negligence NAR."*** (Emphasis supplied)

[89] *See* FINRA Investor Alerts, It Can Be Hard to Recover from "Recovery" Scams: (19 September 2016) Source: https://www.finra.org/investors/alerts/it-can-be-hard-to-recover-from-recovery-scams "It's an alluring offer. You hear from someone who claims to be able to help you recover money you lost from a previous investment. The information sounds credible and the organization sounds legitimate. Documents you receive also look authentic, and the money that's promised is not only welcome, but seems well-deserved compensation for previous losses. The catch? They want you to pay money upfront for the recovery "services," which in some cases are purely fraudulent. In addition to the original money you lost, you now may lose more money at the hands of professional con artists." (19 September 2016) (Emphasis supplied)

[90] Note also that FINRA would ***not*** allow to practice before FINRA arbitration those ***attorneys whose law licenses are suspended***. *See* FAQ - Arbitration & Mediation Rules, Question No.1: "Parties to an arbitration or mediation may represent themselves or ***be represented by an attorney admitted to practice and in good standing in any jurisdiction***." Source: http://www.finra.org/arbitration-and-mediation/faq-rules-faq. Attorneys who are not in "good standing" are attorneys whose law license has been suspended. ***Thus suspended attorneys cannot practice in FINRA Arbitration but owners of NARs who are themselves barred from the industry can engage in the unauthorized practice of law in FINRA arbitration***! Once more: "The Law Abhors an Absurd Result". *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988).

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Because this proposed amendments to the NASD Rule 1010 Series (MAP Rules) aims at keeping "bad brokers" from participating in the securities industry, FINRA should not treat good brokers as bad brokers: Thus, when certain settled cases are founded on illegal grounds – cases lacking in merit brought by non-lawyers engaged in the unauthorized practice of law with no risk of penalty or liability for bringing frivolous claims – FINRA is encouraged to disregard, as a matter of policy, any consideration of arbitrations brought against a broker by a NAR, ***no matter what the dollar amount of the settlement is.***

For these reasons, FINRA Should Exclude "Non-Attorney Representative" stock loss recovery firm Arbitration Settlements entirely from "Materiality" considerations in the proposal to amend the NASD Rule 1010 Series (MAP Rules).

4.B Whether the Proposal to Amend the NASD Rule 1010 Series (MAP Rules) Amounts to Taking of Property thereby Making FINRA a "State Actor".

One Law Commentator has recently queried: "Under current case law, it is unclear ***what it would take*** to make FINRA a state actor subject to constitutional claims."[91]

The answer to this question may be that the proposed amendments set forth in Regulatory Notice 18-16, starting with the proposed amendments to the NASD Rule 1010 Series affecting the MAP rules, gives answer to this question. Why? Because the proposed amendments to the NASD Rule 1010 Series will grant FINRA powers (much broader than those already possessed by FINRA) to dictate *whom* member firms are permitted hire, and also *how many* brokers a firm may hire.

Right now, FINRA does not interfere with whom a member hires, and interferences, only somewhat, with the number of new hires that member firms can register.

Currently, the Safe Harbor for Business Expansions, as set forth in IM-1011-1, does limit the number of new hires that a member firm can register, but this limitation is mathematically formulated (and therefore, in the main, objective) and is also progressive in the sense that a member firm can, generally speaking, increase annually the number of brokers it can hire without seeking any formal approval from FINRA. If the broker turns out to be a "bad apple", FINRA can ultimately, through its enforcement process, suspend or even bar the broker from association with any FINRA member firm. But a so-called "bad broker" is not currently precluded *a priori* from being hired by a FINRA member firm. When all the dust settles, right now it is the member firm who is in charge of *whom* it hires and, for the most part, *how many* brokers the firm hires.

The proposed amendments would change this. If the SEC approves the proposed amendments to the NASD Rule 1010 Series, it will be FINRA – not the member firm – ***that holds the power to hire.***

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[91] *See* Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 23-24, *citing* Michael Deshmukh, Is FINRA a State Actor? A Question That Exposes the Flaws of the State Action Doctrine and Suggests a Way to Redeem It, Vanderbilt Law Review 67, no. 4 (2014), at 1173.(Emphasis supplied)

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This may seem to be a matter of insignificant nuance, but it is not. This proposed change opens the door to ramifications that will change the course of the economic freedom inherited from our common law and therefore transform the status of FINRA as a "self-regulatory organization" to "government regulator". As one Law Commentator states the case: "As FINRA expands its regulatory reach beyond broker-dealer oversight, it will look even less like an SRO and more like a governmental regulator."[92]

We begin with basics: Economic Freedom.

At common law, the role of government was to enforce, not interfere with, contracts. This means that, at common law, an employer would not be prohibited from hiring, firing, promoting, or demoting whomever he wants and for whatever reason he wants.[93] Fundamentally, this is a question of property rights, according to common law. Common law respects and reinforced the principle that, "if another person owns a business, I do not have a right to interfere with his choices as to what he does with his property".[94] That said, today we have seen this principle whittled away by the condition subsequent: "so long as the employer does not interfere with statutes and regulations of the government regulating the labor market."

And so, today we know that government can and does step in the hiring and firing, promotion and demotion process, when an employer discriminates based on race, color, religion, sex, or national origin.[95] As a result, an employer cannot fire an employee because of an employee's inability to work on Saturdays when the employee chooses to honor Saturday as a Sabbath on religious conviction.[96] Employers can suffer liability for damages when failing to promote an employee because of her gender, despite qualifications.[97] And more recently, state governments have entered into the "hiring,

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[92] Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 24. https://www.mercatus.org/system/files/Peirce-FINRA.pdf

[93] *See* Clyde W. Summers, Employment At Will in the United States: The Divine Right of Employers, 3.1 U. PA. Journal of Labor and Employment Law 65 (2000): "The Tennessee Supreme Court articulated the employment at will doctrine in 1884, thus endowing employers with divine rights over their employees. This doctrine has been, and still is, a basic premise undergirding American labor law. The United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice." Source: https://www.law.upenn.edu/journals/jbl/articles/volume3/issue1/Summers3U.Pa.J.Lab.&Emp.L.65(2000).pdf *And see* Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974) where selling-company (or transferor), had a collective agreement which prohibited discharge without cause and provided for arbitration of discharges. When the buying-company (or transferee) refused to continue to employ many of the employees, the union sought arbitration of their discharge. The Supreme Court held that the transferee (i.e., the new employer) had the right not to hire any of the transferor's (i.e., the former employer's) employees, and that the transferee/new employer was not bound by the transferor/old employer's collective agreement to arbitrate.

[94] *See* David J. Mitchell, Government Intervention in Labor Markets: A Property Rights Perspective, 33 Villanova Law Review 1043, 1051 (1988). https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2620&context=vlr

[95] 42 U.S.C. Section 200003-2 (1982).

[96] Drazewski v. Waukeegan Dev. Center, 651 F.Supp. 754 (N.D. Ill. 1986).

[97] Thurber v. Jack Reilly's, Inc., 521 F.Supp. 238 (D.Mass. 1981), *aff'd*, 717 F.2nd 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984).

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firing, promoting, or demoting" arena, with at least 25 States having passed one form or another of "right-to-work" laws.[98]

The point here is that, *interfering* with an employer's traditional common law prerogative of "hiring, firing, promoting, or demoting" *is precisely what state and federal governments do* these days. Interfering with an employer's traditional common law prerogative of "hiring, firing, promoting, or demoting" is an accepted action of the state.[99] It is "state action" pure and simple.

And the point here is that the proposed amendments to the NASD Rule 1010 Series giving FINRA power to dictate *whom* member firms are *can* hire drags FINRA across the threshold of becoming a "state actor".

Next basic: Governmental Regulator.

FINRA has consistently maintained that it is not a "state actor" – despite the fact that, in *Standard Investment Chartered Inc. v. National Association of Securities Dealers*, NASD (now FINRA) affirmatively argued and the Second Circuit U.S. Court of Appeals agreed that FINRA and its predecessor organization (NASD and NYSE) *are government actors* on grounds that "... The statutory and regulatory framework highlights to us the extent to which an SRO's bylaws are intimately intertwined with the regulatory powers delegated to SROs by the SEC ..."[100] (Emphasis added).

It should be noted that, in *Standard Investment*, FINRA wanted the Court to hold that FINRA is a "government actor" because, in that lawsuit, FINRA wanted immunity from private lawsuits. This benefit notwithstanding, FINRA has consistently maintained that it is not a "state actor".[101]

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[98] *See* National Conference of State Legislatures, Right-to-Work Resources, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx#chart

[99] *See generally* Daniel J. Mitchell, Government Intervention in Labor Markets: A Property Rights Perspective, 33 Villanova Law Review 1043 (1988). Under Title VII of the Civil Rights Act of 1964 and related federal laws enforced by Equal Employment Opportunity Commission, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. ***Federal law forbids discrimination in every aspect of employment***. A majority of states also have wrongful termination laws that prevent employers from terminating employees for all of the reasons listed under the federal laws. Some states also take their wrongful termination laws further and add more "protected classes." *See* U.S. Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices. Source: https://www.eeoc.gov/laws/practices/

[100] 637 F.3d 112 (9th Cir. 2012). But this is not the only case in which NASD (now FINRA) argued that it should be treated as if it were a "government actor". *And see* Ross v. Bolton, 106 F.R.D. 315 (S.D.N.Y. 1984). NASD argued that ***when it is exercising its law enforcement functions, NASD acts as a governmental body***. *See also* the 2017 Eleventh Circuit decision, Turbeville v. FINRA, 2017 WL 4938821 (11th Cir. Nov. 1, 2017), where a panel of the Eleventh Circuit held that a former registered representative's purported state-law claims against FINRA were properly dismissed because there exists no private right of action against FINRA, a self-regulatory organization ("SRO"). The Court held that "When exercising these [disciplinary and disclosure action] functions, ***SROs act under color of federal law as deputies of the federal government.*** To sue these actors, a litigant must obtain permission from the federal sovereign; otherwise, any state-law claims asserted against them for carrying out their federally mandated duties crash headlong into the shoals of preemption" *citing* McCulloch v. Maryland, 4 Wheat. 316, 317 (1819). (Emphasis supplied)

[101] *See e.g.* D'Alessio v. N.Y. Stock Exch., Inc., 258 F.3d 93, 105 (2d Cir. 2001); *see also* Scher v. Nat'l Assoc. of Sec. Dealers, Inc. (NASD), 218 Fed. App'x 46 (2d Cir. 2007) (holding that NASD actions were actions within the scope of regulatory authority and were correspondingly entitled to immunity); Barbara v. N.Y. Stock Exch., 99 F.3d 49 (2d Cir. 1996) (concluding that NASD had absolute immunity from liability arising out of administration of its disciplinary function).

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Putting aside this question for the moment, the evidence is persuasive that FINRA is no longer a *true* "self-regulatory organization" (SRO), as it was originally organized under the Maloney Act, amending the Exchange Act of 1934. Although FINRA's predecessor organizations (NASD and the NYSE's regulatory arm) were once *true* SROs, FINRA is not, at least according to a number of highly respected Law Commentators.[102]

While once a *voluntary* membership organization, this ceased to be the case in 1983, when membership with NASD (now FINRA) became mandatory (unless the broker/dealer was a member of an Exchange, such as the NYSE).[103] When the Regulatory Arm of the NYSE merged with NASD to become FINRA in 2007, there effectively became only one "SRO" for the securities industry – namely, FINRA.[104] As one Law Commentator states the case:

> The bottom line is this. FINRA has a monopoly. It is the only SRO for broker-dealers. Broker-dealers must be a member of FINRA in order to do business. Quitting FINRA is not an option given the legal requirement to be a member of an SRO.[105]

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[102] *See* David R. Burton, Reforming FINRA, Backgrounder No. 3181 (The Heritage Foundation, February 2017). *See also* William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, pp. 1-69; Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015); Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?, 14.1 Stanford Journal of Law & Finance, 151, at 163-164 (Fall 2008); Onnig H. Dombalagian, Self and Self-Regulation: Resolving the SRO Identity Crisis, Brook. J. Corp. Fin. & Com. L., Vol. 1, Issue 2, Article 4, 317-353 (2007); Richard L. Stone and Michael A. Perino, Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law, 1-1-1995 St. John's University School of Law 453 (1995).

In an interesting twist that somewhat defies logic, several State Securities Administrators have complained that FINRA withheld information from them in order to avoid being classified as a state actor. *See* Steven Irwin, Scott Lane, Carolyn Mendelson, and Tara Tighe, Self-Regulation of the American Retail Securities Markets – An Oxymoron for What is best for Investors, 14.4 University of Pennsylvania Journal of Business Law 1055, 1070 (2012): "While FINRA's capacity to compel its members to cooperate with investigations without triggering the "state actor" doctrine is undoubtedly important, ***FINRA's interpretation of its limitations under the "state actor" doctrine is problematic***. Under current FINRA policy, FINRA will not conduct "joint" examinations or investigations with state securities regulators, nor will it provide state securities regulators access to open FINRA investigations. Because FINRA and the states have overlapping jurisdiction and responsibilities, the sharing of information is vital to regulatory cost, conservation, and effectiveness." (Emphasis supplied) Source: https://www.law.upenn.edu/journals/jbl/articles/volume14/issue4/IrwinLaneMendelsonTighe14U.Pa.J.Bus.L.1055(2012).pdf

[103] In 1983, Congress amended the Exchange Act of 1934 to eliminate the direct oversight of broker-dealers by the SEC. Congress maintained the exception from membership in an Association in Section 15(b)(8) of the Act for those broker-dealers that effected transactions in securities only on an exchange of which they were a member. Under the Rule as amended in 1983, a broker-dealer was not required to become a member of an Association if: (1) It was a member of a national securities exchange, (2) carried no customer accounts, and (3) had annual gross income no greater than $1,000 that was derived from securities transactions effected otherwise than on a national securities exchange of which the broker-dealer was a member. 15 U.S.C. 78o(b)(8), *as amended* by Pub. L. 98-38, 97 Stat. 205, 206 (1983). *See also* H.R. Rep. No. 98-106, at 597 (1983) *See* SEC, 49th Annual Report of the Securities and Exchange Commission for the Fiscal Year Ended September 30, 1983 (Washington, DC: SEC, 1984), vi, https://www.sec.gov/about/annual_report/1983.pdf. *See also* Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?, 14.1 Stanford Journal of Law & Finance, 151, at 168 (Fall 2008) ("***Further, although FINRA continues to be a membership organization, it is no longer a voluntary SRO.***" (Emphasis in original) Source: https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1376&context=faculty

[104] *See* FINRA Regulatory Notice 07-52 (November 2007), at 2: "As part of the consolidation of NASD and the member regulatory functions of NYSE Regulation, Inc. into FINRA … the SEC approved a rule change to the definition of "member organization" in NYSE Rule 2(b) to require all member organizations that are currently or propose to become, NYSE Member Organizations to become members of FINRA", citing Exchange Act Release No. 56654 (October 12, 2007), 72 FR 59129 (October 18, 2007) (File No. SR-NYSE-2007-67); see also File No. SR-FINRA-2007-019. True, the Municipal Securities Rulemaking Board (MSRB) is the "other" securities SRO; however, while the MSRB writes rules for municipal securities markets, FINRA - not MSRB – is the SRO that is authorized to enforce the municipal securities market rules. *See* MSRB, "Market Regulation" at http://www.msrb.org/About-MSRB/Programs/Market-Regulation.aspx

[105] David R. Burton, Reforming FINRA, Backgrounder No. 3181 (The Heritage Foundation, February 2017), at pp. 4-5. https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf. *Accord* Fiero v. Financial Industry Regulatory Authority, 660 F.3d 569, 576 (2nd Cir.

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Law Commentators have pointed out that "*self*" in the phrase "self-regulatory organization" has ceased to apply to FINRA because, despite being mandatory members of this SRO, members of the securities industry (i.e., broker/dealer members of FINRA) do not control FINRA.[106] They point to these factors:

- FINRA is governed by a 23 member board; but pursuant to Article 8 of its Articles of Incorporation, the numbers of "public governors" are required to exceed the number of Industry Governors – that is, those governors on the FINRA Board who are elected by the securities industry.

- Thus, today, there are 10 Industry Governors and 12 Public Governors,[107] which means that the industry controls only 43% of the Board of a membership organization to which the securities industry is required to be a member if it wants to participate in the offering, distribution, and sale of securities in the American market place.

One Law Commentator has concluded this fact to be significant: "The board structure, which is intentionally weighted away from the [securities] industry, is not consistent with self-regulation. An organization run by a board that is dominated by people who are not in the industry is not an SRO; it is [only] a regulator with industry representation."[108] (Emphasis supplied)

This Law Commentator goes one step further:

> The independence from the industry extends beyond the board. Omnig H. Dombalagian, professor of law at Tulane University School of Law, has documented the trend away from an SRO staff with deep industry expertise and its replacement with a bureaucratized staff.[109] (Emphasis supplied)

The reason why FINRA is no longer a *true* "self-regulatory organization" is persuasive: Securities industry members are not regulating themselves; they are being regulated by a "bureaucratized" organization that is "dominated by people who are not in the securities industry" – FINRA – just as

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2011): "One cannot deal in securities with the public without being a member of FINRA. When a member fails to pay a fine levied by FINRA, FINRA can revoke the member's registration, resulting in exclusion from the industry."

[106] David R. Burton, Reforming FINRA, Backgrounder No. 3181 (The Heritage Foundation, February 2017), at p. 2 ("Because the industry does not control FINRA, it is inappropriate to regard FINRA as an SRO."); Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 27 ("FINRA has become a very powerful force in the securities markets. As its choice to characterize itself as an "independent regulator" reflects, FINRA is not a self-regulator. Its members are not regulating themselves; they are being regulated by FINRA, just as they are regulated by the SEC.")

[107] According to article VII, Section 4(a) of FINRA *ByLaws of the Corporation*, "public governors" cannot have any "material business relationship" with a broker, a dealer, or another SRO.

[108] Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 18. https://www.mercatus.org/system/files/Peirce-FINRA.pdf

[109] Id. at 18, *citing* Onnig H. Dombalagian, Self and Self-Regulation: Resolving the SRO Identity Crisis, Brooklyn Journal of Corporate Finance & Commercial Law, Vol. 1, Issue 2, Article 4, 317, 329-330 (2007). Source: https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1179&context=bjcfcl

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they are regulated by the SEC.[110] In other words, FINRA is a ***government regulator with industry representation.***[111]

And indeed a former SEC Commissioner has raised similar concerns about the true nature of today's FINRA, as well as its perhaps too-close-relationship with the SEC. Former Commissioner Daniel M. Gallagher writes:

> This decrease in the "self" aspect of FINRA's self-regulatory function has been accompanied by an exponential increase in its regulatory output. As FINRA acts more and more like a "deputy" SEC, concerns about its accountability grow more pronounced.[112] (Emphasis supplied)

As Professor Karmel has correctly assessed:

> Although FINRA may not be a government entity,[113] in all or virtually all of its activities, it can be viewed as exercising powers delegated to it by the SEC.[114]

Finally, Professors Birdthistle and Henderson argue that FINRA is a subordinate agency of the SEC:

> SROs do not enjoy full and independent control of their regulatory authority but rather now exist as subordinate agents of the governmental entities that ultimately control their activities.[115]

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[110] Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 27. https://www.mercatus.org/system/files/Peirce-FINRA.pdf

[111] Id. at 18.

[112] Hon. Daniel M. Gallagher, U.S. Broker-Dealer Regulation, Chapter 6. Reframing Financial Regulation: Enhancing Stability and Protecting Consumers. Arlington, VA: Mercatus Center at George Mason University, 2016, p. 149. https://www.mercatus.org/system/files/peirce_reframing_ch6.pdf. Daniel M. Gallagher served as a Commissioner of the U.S. Securities and Exchange Commission (SEC) from November 7, 2011 to October 2, 2015. Commissioner Gallagher was appointed to the SEC by President Barack Obama. Former Commissioner Gallagher is currently President of Patomak Global Partners, LLC.

[113] It is worth mentioning that another federal government agency – the Internal Revenue Service of the U.S. Treasury Department – concurs, stating: "***FINRA is a corporation serving as an agency or instrumentality of the United States***" for purposes of determining whether FINRA fines are deductible expense as a business expense. *See* Internal Revenue Service, Memorandum No. 201623006, Office of Chief Counsel, 3 June 2016. https://www.irs.gov/pub/irs-wd/201623006.pdf: "FINRA has been delegated the right to exercise part of the sovereign power of a government, it performs an important governmental function, and it has the authority to act with the sanction of government behind it. Moreover, FINRA has absolute immunity with respect to actions taken in furtherance of its regulatory duties. Lobaito v. Fin. Indus. Regulatory Auth., Inc., 599 Fed. Appx. 400 (2d Cir. 2015), *cert. denied*, 193 L. Ed. 2d 445 (2015); Santos-Buch v. Fin. Indus. Regulatory Auth., Inc., 591 Fed. Appx. 32 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 43 (2015). Therefore, under the *Guardian Industries* test, ***FINRA is a corporation serving as an agency or instrumentality of the government*** of the United States for purposes of section 1.162-21(a)(3) when it is performing its federally-mandated duties under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., of conducting enforcement and disciplinary proceedings relating to compliance with federal securities laws, regulations, and FINRA rules promulgated pursuant to that statutory and regulatory authority. We note that section 162(f) would not apply to a fine paid to FINRA solely for a violation of a "house-keeping" rule that is a matter of private contract between FINRA in its capacity as a professional association and its members. It should be noted that, ***because FINRA is a quasi-governmental agency (i.e., a corporation serving as an agency or instrumentality of the United States),*** a penalty paid to FINRA – and therefore to a government for the violation of any law – is not a deductible expense under IRC Section 162(f)." (Emphasis supplied)

[114] Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?, 14.1 Stanford Journal of Law & Finance, 151, at 196 (Fall 2008). Professor Karmel asks this question: "Have the SEC's dictates regarding board composition and governance for FINRA and NYSE Regulation transformed these SROs into government agencies?" Professor Karmel answers in the affirmative, stating: "FINRA was created in large part to further the SEC's objectives regarding self-regulation, and the SEC structured its board. So FINRA comes very close to being an organization that would qualify as a government agency." Id. at 168. Source https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1376&context=faculty

[115] *See* William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, pp.. https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4613&context=clr

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Hence, SEC Commissioner Gallagher has, on a separate occasion asked the rhetorical but incisive question: *Is FINRA becoming a "deputy SEC"?*[116]

As a "deputy SEC" having power and authority to dictate whom member firms are permitted hire (assuming FINRA goes forward with its proposal to amend the NASD Rule 1010 Series and MAP Rules and assuming the SEC approves), FINRA arguably crosses the threshold of "Becoming a Fifth Branch" of government[117] - the Fourth Branch being the administrative agencies (as for example, the SEC) of the federal government. As the D.C. Circuit Court recently put the matter: "… administrative agencies today are rightly said to comprise the 'fourth branch of the U.S. Government,' exerting significant power over the economic and social life of the Nation."[118]

This is important because FINRA makes its own rules and enforces them – in other words, acts as "judge, jury, and executioner" (as that age old adage goes) without meaningful accountability. The following examples of "immunity from accountability" underscore this point, and this has an important bearing (as will later be demonstrated) for Proposed Rule 9285:

- FINRA can set its own rulemaking and disciplinary agendas and budget without SEC input.[119]
- FINRA rules do not typically attract close attention from the SEC's commissioners;[120] in fact, the SEC almost never disapproves a FINRA rule because of "double deference in administrative law".[121]

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[116] Hon. Daniel M. Gallagher, Comm'r, Sec. & Exch. Comm'n. Market 2012: Time for a Fresh Look at Equity Market Struction and Self-Regulation, Speech to SIFMA's 15gh Annual Market Structure Conference (Oct. 4, 2012): https://corpgov.law.harvard.edu/2012/10/19/time-for-a-fresh-look-at-equity-market-structure-and-self-regulation/

[117] *See* William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, pp. 36, citing 15 U.S.C. § 78s (2012) (requiring registration of SROs with the SEC).

[118] PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1, 6 (D.C. Cir. 2016)("*PHH I*"), *vacated, reinstated in part, and remanded*, __F.2d __, 2018 WL 627055 (D.C. Cir. January 31, 2018)(*en banc*).

[119] *See* Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 19. https://www.mercatus.org/system/files/Peirce-FINRA.pdf

[120] *See* Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 19: "Although the SEC has the power to approve or disapprove FINRA rules, the SEC's Division of Trading and Markets typically exercises this authority through a delegation from the commission [17 C.F.R. Section 230.30-3(a)(12]. To rescind the delegation, two commissioners must object in writing within five days of being notified of staff plans to disapprove a rule. [Id.] As a consequence, FINRA rules do not typically attract close attention from the SEC's commissioners." This Law Commentator's opinion is corroborated, ironically, by the dissent of SEC Commissioners Daniel M. Gallagher and Troy A. Paredes voiced, in 2012, against the SEC's approval of an SRO rule on grounds that ***SEC review lacked rigorous analysis***. Commissioner's Gallagher and Paredes write: "If there is any question as to the rigor of an SRO's analysis, then it is all the more paramount that the Commission not defer to the SRO's claims, conclusions, and judgments. The Commission has a fundamental oversight role with respect to SROs, ***and undue deference to an SRO in the SRO rulemaking process undercuts the basic structure of that regulatory relationship***." (Emphasis supplied) *See* Daniel M. Gallagher and Troy A. Paredes, "Statement Regarding Commission Approval of MSRB Rule G-17 Interpretive Notice", SEC, Washington, DC, 14 May 2012: https://www.sec.gov/news/public-statement/2012-spch051412dmgtaphtm.html.

[121] *See* Emily Hammond, Double Deference in Administrative Law, Columbia Law Review, Vol. 116, No. 7 (November 2016), who writes: " * * * the 'understanding' is that SEC review is deferential", *citing* Saule T. Omarova, Rethinking the Future of Self-Regulation in the Financial Industry, 35 Brook. J. Int'l 665, 695 (2010) (arguing that while the SEC has an independent statutory authority to regulate activities of broker-dealers and other market intermediaries directly, in reality it fully delegates these regulatory functions and merely "functions" as the watchful guard and supervisor". Professor Harmond also cites David G. Tittsworth, H.R. 4624: https://financialservices.house.gov/uploadedfiles/hhrg-112-ba-wstate-dtittsworth-20120606.pdf and citing Tittsworth: The Pitfalls of a Self-Regulatory Organization for Investment Advisers and Why User Fees Would Better Accomplish the Goal of Investment Adviser Accountability, 87 St. John's L. Rev. 477, 486 (2013) (noting that "the SEC's oversight of SRO rulemaking may have been largely

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- FINRA's policies can be reviewed by the SEC; however, the SEC's formal power to influence FINRA policy is less than what the Supreme Court in *Free Enterprise Fund*[122] found to be constitutionally sufficient because the SEC does not have the ability to remove FINRA board members – even for cause.[123]

- FINRA enforces its own rules and federal securities laws, *but also enforces the rules of another SRO* – the Municipal Securities Rulemaking Board (MSRB)[124] – in short FINRA has "expansive powers to govern an entire industry".

- FINRA is authorized to bring disciplinary actions when FINRA finds violations of its rules, the rules of the MSRB, and/or violations of federal securities laws.[125]

- FINRA rules can create a conflict with state laws or federal anti-trust laws; but when this happens, FINRA rules can displace state law and anti-trust laws whenever FINRA rules are viewed as federal securities regulation.[126]

- FINRA executive compensation packages are, as matter of practice, subject to limited or no oversight by the SEC, according to the General Accountability Office.[127]

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deferential," due to the SEC's not being required to weigh in on the merits of SRO rules.) (Emphasis supplied) Source: https://columbialawreview.org/content/double-deference-in-administrative-law/.

[122] Free Enterprise Fund et al. v. Public Company Accounting Oversight Board, 130 S.Ct. 3138 (08-861)(June 28, 2010).

[123] *See* Joseph McLaughlin, Partner Sidney Austin Law Firm, Financial Services & E-Commerce: Is FINRA Constitutional? (September 2011), at page 113-114. Source: https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/LU1iFewui2fC3Y2T38B5dK1m88ohNDt1zFtDZMtH.pdf

[124] *See* Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 13.

[125] Id. at 14.

[126] Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies? 14.1 Stanford Journal of Law & Finance 151, at 186 (Fall 2008). *See also* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975); United States v. NASD, Inc., 422 U.S. 694 (1975). In *Gordon*, the Supreme Court held that the New York Stock Exchange ("NYSE") possessed implied antitrust immunity from a federal antitrust suit challenging its fixed-rate commission structure. 422 U.S. at 691. Implied antitrust immunity was necessary, the Court explained, because allowing the antitrust suit to proceed would have subjected the NYSE to conflicting standards of conduct and "unduly interfere[d] . . . with the operation of the Securities Exchange Act." Id. at 686. In *NASD*, the Supreme Court held that an antitrust suit could not be brought challenging agreements fixing the price of mutual funds. 422 U.S. at 694. The suit alleged that mutual fund underwriters and broker-dealers had entered into agreements requiring the broker-dealers to maintain the pre-determined public offering price when selling mutual fund shares. Id. at 702 n.11. The Court held that the SEC had the power to authorize stock price restrictions under the Investment Company Act of 1940, even though the SEC had not exercised that authority. Id. at 729. The Court reasoned that the antitrust laws had to "give way" to ensure the viability of the mutual fund regulatory scheme and that there was "no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws." Id. at 722. In short, The Supreme Court has repeatedly found conflicts between the antitrust laws and the securities laws, including SEC and FINRA rules. The securities laws have prevailed when the Court has found—using either a test of plain repugnancy or clear incompatibility—that the antitrust laws would produce conflicting guidance in an area that is addressed by the securities laws. Department of Enforcement v. Charles Schwab & Company, Inc., Complaint No. 2011029760201 (FINRA Board of Governors, April 24, 2014) at p. 21.

[127] Government Accountability Office, Securities Regulation: Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority (2012), 7, 18-19: "**Executive compensation**. OCIE has obtained information and data on FINRA executive compensation, including retirement plans and incentive compensation for its executives. OCIE staff have been reviewing the data, specifically focusing on compensation FINRA pays its senior executives and the annual goals set by FINRA's Management Compensation Committee. These goals include those that FINRA senior executives must meet to qualify for incentive compensation and the analysis and deliberations undertaken by FINRA, the Management Compensation Committee, and FINRA's Board of Governors in connection with the award of incentive compensation. According to OCIE's analysis, OCIE officials are also reviewing the firms or entities that FINRA uses for compensation benchmarking purposes and examining studies conducted by FINRA's compensation consultant. [citation omitted] We reviewed the three most recently completed compensation studies conducted by the consultant—in 2009, 2010, and 2011—and found that these studies concluded that FINRA's pay levels are appropriate relative to certain comparable regulators, exchanges, and financial services organizations engaged in brokerage or related banking." Source: https://www.gao.gov/assets/600/591222.pdf *But see* below, where the GAO matrix shows "Never" in connection with "Frequency of SEC's reviews" with respect to FINRA "Executive Compensation":

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These bullets are particularly important when read in light of Justice Alito's recent concurring opinion in *Department of Transportation v. Ass'n of American Railroads.*[128] According to Justice Alito, *if* a private actor (read: FINRA, according to its claim that it is not a government actor) *can make law but is not subject to* the structural protections of the Constitution – because the actor is not part of the constitutional scheme at all – the *constitutional accountability of the actor is simply nonexistent.*

Justice Alito begins his concurring opinion forcefully:

> This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a vital constitutional principle must not be forgotten: **Liberty requires accountability**.
>
> When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government. *Lebron v. National Railroad Passenger Corporation*, 513 U. S. 374, 390 (1995)." (Emphasis supplied)

Table 1: SEC's Oversight of FINRA, 2005 to 2010

Areas for SEC oversight of FINRA identified in Section 964 of the Dodd-Frank Act	Frequency of SEC's reviews		
	Annually or continuous[a]	Occasionally[b]	Never
Examinations and expertise of examiners[c]	√		
Advertising	√		
Rules	√		
Arbitration service		√	
Governance		√	
Funding		√	
Post-employment of former employees[d]		√	
Executive compensation			√
Cooperation with states securities regulators			√
Transparency of governance			√

That said, there appears to have been some improvement since 2012, as the GAO 2016 Report states: "Since our 2012 report, OCIE—primarily through its Market Oversight program—has taken steps to enhance its FINRA oversight by incorporating oversight of certain Section 964 areas into inspections of other FINRA programs and operations (beginning with inspections initiated in fiscal year 2014). Our review of Market Oversight documents, such as scope and planning memorandums and document requests, from inspections not specific to Section 964 areas that were in progress as of June 2014 found evidence of inquiries into or plans to review certain Section 964 areas in all but one open inspection. [citation omitted] Furthermore, plans to conduct some oversight of all but two of the Section 964 areas were included in at least one of these inspections.[41]" That said, footnote 41 is noteworthy: "***Our review of OCIE documents found that OCIE did not incorporate*** arbitration (or FINRA Dispute Resolution) or ***executive compensation into its inspections of other FINRA programs and operations for fiscal year 2014***. According to OCIE staff, both areas are monitored on an ongoing basis as part of OCIE's risk-based approach in order to determine when to conduct inspections focusing on or incorporating these areas." (Emphasis supplied) Source: https://www.gao.gov/assets/670/669969.pdf

And see FINRA 2016 Annual Financial Report, https://www.finra.org/sites/default/files/2016_AFR.pdf, especially page 25 (Management Compensation Committee Report) (FINRA 2017 Annual Financial Report due to be published sometime in June 2018). *Compare* SEC Compensation for Senior Management and Executive Officers: https://www.sec.gov/ohr/sec-compensation.

[128] 135 S. Ct. 1225, 1237-38 (2015) (Alito, J., concurring). https://supreme.justia.com/cases/federal/us/575/13-1080/concur4.html

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Under the current state of affairs in the courts, FINRA is a "state actor" for tax purposes[129] and for purposes of protecting FINRA from liability when sued (***sovereign immunity***, in other words),[130] ***but is not*** a "state actor" for purposes of extending 4th and 5th and 6th Amendment ***constitutional protections to brokers*** when investigated by FINRA, served with Rule 8210 requests, and required to appear before on-the-record (deposition-like) regulatory interrogations[131] – even though FINRA actively refers potential civil and criminal cases to governmental regulators where a broker's unprotected testimony in a FINRA OTR can become the broker's death knell in an SEC and the Department of Justice proceeding.[132]

Being and at the same time *not being* a "state actor" has important implications for accountability that will be discussed on the following page; but as an aside, ***being and not being*** something at the same time violates Aristotle's greatest contribution to Western Civilization, The Principle of Non-Contradiction, which is:

> It is impossible that the same thing ***both be and not be*** the same thing at the same time and in the same respect.[133]

The importance, and relevance, of this principle is enormous. Positively, it is the foundation of logic, science, and ultimately truth in discourse. Negatively, it is the greatest enemy to arbitrariness in governance.[134]

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[129] *See* Internal Revenue Service, Memorandum No. 201623006, Office of Chief Counsel, 3 June 2016. https://www.irs.gov/pub/irs-wd/201623006.pdf: "FINRA has been delegated the right to exercise part of the sovereign power of a government, it performs an important governmental function, and it has the authority to act with the sanction of government behind it. Moreover, FINRA has absolute immunity with respect to actions taken in furtherance of its regulatory duties."

[130] *See* Zanford v. Nat'l Ass'n of Secs Dealers, 30 F.Supp.2d 1 (D.D.C. 1998) (when SEC set aside NASD sanction, broker sued NASD for malicious prosecution; the court held that, when NASD investigators are acting in a prosecutorial capacity – even though, technically they are not prosecutors – NASD investigators are entitled to absolute immunity from suit.) *See also* Standard Investment Chartered, Inc. et al v. National Association of Securities Dealers, Inc, 637 F.3d 112 (2d Cir. 2011): "There is no question that an SRO and its officers are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities." *See* DL Capital Group, LLC v. Nasdaq Stock Mkt., Inc., 409 F.3d 93, 96 (2d Cir.2005); see also In re NYSE Specialists Sec. Litig., 503 F.3d 89, 96 (2d Cir.2007); D'Alessio v. NYSE, Inc., 258 F.3d 93, 105 (2d Cir.2001); Barbara v. NYSE, 99 F.3d 49, 59 (2d Cir.1996); *accord* Scher v. Nat'l Ass'n of Sec. Dealers, Inc., 218 F. App'x 46, 47-48 (2d Cir.2007) (summary order). This immunity extends both to affirmative acts as well as to an SRO's omissions or failure to act. *See, e.g.*, NYSE Specialists, 503 F.3d at 97 (failure to supervise); Gurfein v. Ameritrade, Inc., 411 F.Supp.2d 416, 423 (S.D.N.Y.2006) (same); Dexter v. DTC, 406 F.Supp.2d 260, 263 (S.D.N.Y.2005) (setting of ex-dividend date); Am. Benefits Group, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., No. 99 Civ. 4733, 1999 WL 605246, at *4 (S.D.N.Y. Aug. 10, 1999) (creation of reporting requirements for companies included in the OTC Bulletin Board)."

[131] Department of Enforcement v. Mark C. Cohen, OHO Order 18-01 (2014040761001) *citing* Epstein v. SEC, 416 Fed. Appx. 142, 148 (3d Cir. 2010) (unpublished opinion) ("Epstein cannot bring a constitutional due process claim against [FINRA], because [FINRA] is a private actor, not a state actor."); D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002) ("It has been found, repeatedly, that [FINRA] itself is not a government functionary."); Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999) ("[T]he fact that a business entity is subject to 'extensive and detailed' state regulation does not convert that organization's actions into those of the state."); U.S. v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975) (SRO testimony does not implicate fifth amendment protections because "NYSE's inquiry … was in pursuance of its own interests and obligations, not as an agent of the SEC.")."

[132] FINRA referred **785** cases for prosecution to the SEC and other federal or state law enforcement agencies in 2016. *See* 2016 FINRA Annual Financial Report, Source: https://www.finra.org/sites/default/files/2016_AFR.pdf page 4 (Report retrieved on 8 June 2018) (2017 FINRA Annual Financial Report not issued as of this writing.)

[133] Aristotle, Metaphysics §1005b19-20. (Emphasis supplied)

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By avoiding the "state actor" classification, FINRA has managed to exercise governmental powers without governmental accountability, and this has an important bearing (as will later be demonstrated) for Proposed Rule 9285:

- FINRA escapes mechanisms comparable to those that hold government regulators accountable to Congress, the President, and the public.[135]

- FINRA escapes operation of the Appointments Clause of the U.S. Constitution[136] – this clause of the Constitution requires the President to nominate Department heads and "principal officers" of government agencies, such as Commissioners of the SEC, who are then subject to confirmation hearings and vote in the Senate – but, FINRA's equivalents of the SEC Commissioners avoid this public scrutiny.[137]

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[134] ***Nemo iudex in causa sua*** (or *nemo iudex in sua causa*) is a Latin phrase and is the common law principle that means, literally, "no-one should be judge in his own case." Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (King's Bench, 1610). It is a principle of natural justice that no person can judge a case in which he or she has an interest. This is the universally recognized principle that is the foundation for the American constitutional doctrine of ***separation of powers***: Let no man be judge, jury, and executioner. This principle goes to the heart of American and English common law ***protection against arbitrariness in governance***. *See e.g.* Rv Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233) is a leading English case on the impartiality and recusal of judges. It is famous for its precedence in establishing the principle that the mere appearance of bias is sufficient to overturn a judicial decision. It also brought into common parlance the oft-quoted aphorism "Not only must Justice be done; ***it must also be seen to be done.***" (Emphasis supplied).

[135] William A. Birdthistle and M. Todd Henderson, Becoming a Fifth Branch, Cornell Law Review, Vol. 99, Issue 1, November 2013, at p. 6, cited in Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 21.

[136] Article II, Section 2, Clause 2 of the United States Constitution, which empowers the President of the United States to nominate, and with the advice and consent (confirmation) of the United States Senate. *See* Joseph McLaughlin, Partner Sidney Austin Law Firm, Financial Services & E-Commerce: Is FINRA Constitutional? (September 2011): " . . . it may be that FINRA's structure violates ***not only the separation of powers but also*** the Appointments Clause since FINRA's Board members are collectively just as much "inferior officers" as the PCAOB's board members [referring to the U.S. Supreme Court decision in Free Enterprise Fund et al. v. Public Company Accounting Oversight Board, 130 S.Ct. 3138 (08-861)(June 28, 2010)] and whose appointments should therefore be vested in the SEC. * * * the emphasis under *Free Enterprise Fund* has to be whether the President has the ability to control executive action, and that ability can only be achieved for separation of powers purposes by removal authority directly or through an officer whom the President can remove at all." Id. at 114. That FINRA exercises "executive action" is demonstrated, according to Attorney McLaughlin, in virtue of the fact that "[t]here is no question but that FINRA, even more so than the PCAOB, exercises investigative and prosecutorial functions. Those functions relate not only to FINRA's own rules but also to the provisions of the 1934 Act and the SEC's antifraud, anti-manipulation, and record-keeping rules. * * * There is also no question but that such functions are clearing within the "executive Power" [citing Morrison v. Olson, 487 U.S. 654, 691 (1988) for authority on grounds that] "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaking by officials within the Executive Branch." Financial Services & E-Commerce: Is FINRA Constitutional?, *supra* at 113.

[137] Things could change however, and have consequences for FINRA OHO hearing officers and NAC adjudicators down the road. *See* Lucia v. Securities and Exchange Commission, __ U.S. __ (2018). In this case a former investment adviser Raymond J. Lucia appeals sanctions handed down by an SEC in-house judge – an administrative law judge or ALJ. The SEC has traditionally hired its ALJs through a competitive merit-based process without involvement from the SEC's presidentially appointed chairman and other commissioners. Lucia argues that the ALJ who fined him and barred him for life from investment adviser work is a constitutional "officer" subject to the Appointments Clause who was required to be appointed directly by the president or a "head of department," in this case the SEC's commissioners. In sum, Lucia says his rights were violated because the judge who heard his case wasn't constitutionally authorized to wield such power. The case is being closely watched because it will determine if ALJs should be appointed by the president or head of a federal agency, as is required under the Appointments Clause, or hired as regular government employees, as has been the practice historically. ***Chief Justice John Roberts said accountability was a primary reason the drafters of the Constitution gave the president the authority to appoint officers. In Lucia's case, however, that accountability doesn't exist, Roberts said, adding that its absence allows the SEC commissioners and the president to deflect blame in controversial cases because they didn't appoint the ALJ in question.*** *See* Dunstal Prial, High Court Split On Accountability Issue In Lucia Arguments, Law360 (April 23, 2018, 7:01 PM EDT) and Daniel Walfish, If Lucia Wins On SEC Judges, What Comes Next?, Law360 (April 20, 2018, 8:19 PM EDT). A ruling in favor of Lucia could potentially have broad ramifications for an array of federal agencies that employ in-house judges. If SEC administrative law judges are deemed to be principal officers of the SEC, as per the Appointments Clause of the U.S. Constitution, then it will be an easy leap towards deciding that FINRA OHO hearing officers and NAC adjudicators – the FINRA equivalents of SEC ALJs – should likewise be appointed by the SEC once it is decided that FINRA is an "SEC deputy", according to former SEC Commissioner Daniel M. Gallagher. *See* Official U.S. Supreme Court Oral Argument Transcript: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-130_41p3.pdf. At the submission of this Comment Letter, the Supreme Court rendered a decision in *Lucia*. ***In a 7 to 2 decision, Securities and Exchange Commission administrative law judges are "officers of the United States," subject to the Constitution's Appointments Clause.***

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- FINRA escapes operation of the Freedom of Information Act:[138] This federal statute enables the public to obtain documents from government agencies.[139]

- FINRA escapes operation of congressional appropriations which enables Congress to exercise some control over federal government agencies, such as the SEC:

  - Thus, while the SEC receives fees on securities transactions to cover its costs, the Congress determines how much the SEC may spend;[140] but FINRA determines the annual fees that it charges its members (including increasing fees) without any requirement of Congressional oversight or SEC approval, and neither Congress nor the SEC determine how much FINRA can spends or for what purpose FINRA should earmark its spending.[141]

  - Similarly, penalties and disgorgement collected by the SEC are used to compensate victims or are paid to the US Department of the Treasury, and are not used to supplement the SEC's budget.[142]

  - In comparison, fines collected by FINRA are retained by FINRA and its use of fine monies "is limited to capital expenditures and specified regulatory projects that promote compliance and improve markets."[143] Thus FINRA fines do not necessarily go to wronged investors.[144]

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[138] 5 U.S. Code Section 552.

[139] *See* Ross v. Bolton, 106 F.R.D. 315 (S.D.N.Y. 1984). This is a very interesting case. NASD argued that when it is exercising its law enforcement functions, NASD acts as a governmental body. In this case, Ross argued alleged wrongdoing on the part of Bolton in connection with certain OTC trading. NASD had conducted its own investigation of this customer complaint, including taking the testimony of witnesses that Ross believed might be favorable to his case against Bolton. Ross therefore subpoenaed NASD – which was not a party to this lawsuit – demanding production of the transcripts of the witness testimony taken by NASD. Ross filed a motion to compel when ***NASD refused to comply with the subpoena, arguing that NASD is a quasi-governmental entity and is therefore privileged from having to produce the documents "on ground that its law enforcement duties make it a quasi-governmental agency and that, as a result, its investigative files are entitled to the same privilege against discovery as that afforded to a governmental investigative body***." 106 F.R.D. 315, 315-316. (Emphasis supplied) *See* Richard L. Stone and Michael A. Perino, Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law, 1-1-1995 St. John's University School of Law 453, 485 (1995). Source: https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1072&context=faculty_publications. Here, the Court skirted the issue. But what is significant is the fact that NASD argued, and convincingly believed, that it is a quasi-governmental agency when engaged in its law enforcement function. And, of course, ***proposed Rule 9285 (relating to Interim Orders While on Appeal) is unquestionably directly invokes FINRA's law enforcement function, while the remaining proposed rule amendments that the subject matter of Regulatory Notice 18-16 arguably indirectly invoke FINRA's law enforcement function.*** And, as Attorneys Stone and Perino point out: Regulatory investigations in the course of a regulator's law enforcement duties is "exactly the type of activity the public function concept [evidencing when a private actor is engaged in state action] was designed to capture." Id. at 485.

[140] *See* SEC, Section 31 Transaction Fees, https://www.sec.gov/fast-answers/answerssec31htm.html

[141] David R. Burton, Reforming FINRA, Backgrounder No. 3181 (The Heritage Foundation, February 2017), at p. 11 ("FINRA fees are not voluntary. As a matter of economics, though not law, they are effectively a tax. And, at $789 million in 2015, they are substantial. The businesses that pay these fees must recover the costs. Before raising these fees, FINRA should be required to obtain an affirmative vote by Congress or, at least, by the SEC. * * * Currently, it is FINRA policy that FINRA fines are used to fund "capital expenditures and specified regulatory projects. * * * Congress should consider making FINRA "on budget" for purposes of the federal budget, along with various other government-sponsored enterprises, quasi-governmental entities, agency-related nonprofit organizations, and the like that currently escape congressional oversight during the budget process." FINRA fines, in other words, do not go to the U.S. Treasury, unlike SEC fines. *See* Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 21-22: "Most federal agencies are subject to congressional appropriations, which enables Congress to exercise some control over them. The SEC is no exception. Although the SEC receives fees on securities transactions to cover its costs, Congress determines how much the SEC may spend. The penalties and disgorgement collected by the SEC are used to compensate victims or are paid to the US Department of the Treasury; they are not used to supplement the SEC's budget. * * * FINRA, as stated in table 1 [omitted here], uses fines to cover capital expenditures. This practice gives the regulator an incentive to impose fines and thus potentially clouds its disciplinary discretion."

[142] *See* SEC, Fiscal Year 2018 Congressional Budget Justification Annual Performance Plan: "Any funds not returned to investors are sent to the U.S. Treasury or the Investor Protection Fund established pursuant to Section 21F(g) of the Securities Exchange Act of 1934. Neither disgorgement nor penalties are used for the SEC's own expenses." Source: https://www.sec.gov/files/secfy18congbudgjust.pdf , at page 38.

[143] FINRA Fines Policy, Item #4. http://www.finra.org/industry/fines-policy. According to FINRA, "FINRA recognizes fines upon issuance of a written consent or disciplinary decision. We do not view fines as part of our operating revenues. The use of fine monies is limited to capital expenditures and

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- And, unlike the Public Accounting Company Oversight Board ("PCAOB"), whose assessment of finds and penalties cannot exceed $15 million for a firm or $750,000 for an individual, FINRA may impose monetary fines and penalties in an *unlimited* amount.[145]

Accountability is the fundamental concern about the proposed amendments to the FINRA rules that are the subject matter of Regulatory Notice 18-16.

There is no debating whether the proposed amendments are consistent with FINRA's mission. They are.

The debate, rather, is whether FINRA crosses the "state actor" threshold by interjecting itself into the constitutionally protected common law property right of an employer to "hire, fire, promote, or demote" in the name of protecting the investing public, while historically avoiding extending constitutional protections to brokers who are, after all, vicarious members of FINRA through their association with their FINRA member broker/dealers.

Hence, this "state actor" issue is brought to a head by Regulatory Notice 18-16.

But this is a good thing, for as one State Securities Administrator has summed things up hitting the bull's eye:

> Congress should refrain from considering expansion of the SRO model until such time as FINRA correctly interprets the state actor issue, or until the issue is adequately addressed by legislation. Settling the question of whether or not FINRA or any other SRO is or is not a "state-actor" is of vital importance to effective regulation.[146] (Emphasis supplied)

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regulatory projects, such as our efforts to leverage technology innovations and the Cloud initiative, and other projects as appropriate, which are reported to and approved by our Finance, Operations and Technology Committee and Board." *See* 2016 FINRA Annual Financial Report at p. 13. Source: https://www.finra.org/sites/default/files/2016_AFR.pdf (2017 FINRA Annual Report to be published sometime in June 2018). As Hester Peirce points out, "FINRA is a not-for-profit organization that is incorporated in Delaware. It funds itself with a mix of fees and fines * * * FINRA * * * uses fines to cover capital expenditures. This practice gives the regulator an *incentive to impose fines and thus potentially clouds its disciplinary discretion.*" (Emphasis supplied) *See* Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Center Working Paper, George Mason University (January 2015), at 21- 22.

[144] Accordingly, in March 2018, Senator Elizabeth Warren (D. Mass.) has introduced a bill (S. 2499) to address this. Warren's legislation would eliminate the budgetary incentive for FINRA to impose "penalties" (i.e., fines). Instead, "penalties" (i.e., fines) would be imposed to the degree they are warranted in light of the gravity of the offense. Rather than send revenue from fines to FINRA to use as it sees fit, Warren's legislation would require that the fine revenue be used to create a fund to compensate wronged investors who are unable to collect arbitration awards from broker-dealers or registered representatives.

[145] *See* Joseph McLaughlin, Partner Sidney Austin Law Firm, Financial Services & E-Commerce: Is FINRA Constitutional? (September 2011), at page 111. Source: https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/LU1iFewui2fC3Y2T38B5dK1m88ohNDt1zFtDZMtH.pdf

[146] Testimony of Steven D. Irwin Pennsylvania Securities Commissioner and Chairman, Federal Legislation Committee North American Securities Administrators Association, Inc. Before the House Subcommittee on Capital Markets and Government Sponsored Enterprises "Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight, (September 13, 2011), at p. 7. https://financialservices.house.gov/uploadedfiles/091311irwin.pdf

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What is not in dispute is the fact that:

> FINRA derives its executive authority from Section 15A of the 1934 Act (added in 1938 by the Maloney Act). * * * FINRA's powers are based on the SEC's recognition of FINRA as a national securities association. Thus armed, FINRA may adopt rules to prevent fraud and manipulation, to promote "just and equitable principles of trade" and to subject its "members" to fines, penalties, suspension, and expulsion for any violation of the 1934 Act, the SEC's rules, or FINRA's rules. FINRA can thus be said to be "exercising significant authority pursuant to the laws of the United States" within the meaning of Article II, §2, clause 2 of the Constitution,[147] an activity that is not typical of "private" organizations that are not "Government-created" or "Government-appointed".[148]

In other words, even if FINRA contends that it is not a "state actor", the evidence is mounting that FINRA is at the brink of crossing the threshold and the proposals set forth in Regulatory Notice 18-16 has probably inched FINRA over that precipice.

5. Constitutional Protections for Brokers Should Be "Quid Pro Quo" for Implementation of Amendments to Rules Proposed in Regulatory Notice 18-16.

Should FINRA withdraw the aforementioned proposed Rule amendments identified in Regulatory Notice 18-16, or should the SEC conduct the kind of rigorous analysis that former Commissioners Gallagher and Paredes urge in order to overcome the "undue deference to an SRO in the SRO rulemaking process" controversy,[149] the "state actor" issue will go away – at least right now, to be revisited another day.

But in the absence of either event, constitutional protections for brokers are and should be the "quid pro quo" for implementing these proposed Rule amendments since Congress, as well as the federal courts, can now appreciate the pivotal fact that interfering with the constitutionally protected common law property right of an employer to "hire, fire, promote, or demote" in the course of conducting interstate securities business crosses the threshold of acting on behalf of the state. On this foundation, the mission of protecting the investing public can no longer withstand the constitutional crisis that has come about as a result of crossing this "state actor" threshold.

As one Law Commentator has prophetically written:

> Because FINRA is tasked with enforcing the securities laws, and its board and officers are not removable for cause, and SEC Commissioners are only removable for cause, it is quite possible that a court would conclude that FINRA, as currently structured, violates the separation-of-powers clause [of the U.S.

[147] This is the language of the U.S. Supreme Court in Buckley v. Valeo, 424 U.S. 1, 126 (1976) (*per curiam*).

[148] *See* Joseph McLaughlin, Partner Sidney Austin Law Firm, Financial Services & E-Commerce: Is FINRA Constitutional? (September 2011), at page 112. Source: https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/LU1iFewui2fC3Y2T38B5dK1m88ohNDt1zFtDZMtH.pdf

[149] Law Professor Emily Hammond refers to FINRA's current status as "double deference", referring to undue deference given to FINRA by both the SEC and the federal courts. Professor Hammond writes: ". . . the combination of oversight agencies' deference to SROs and judicial deference to oversight agencies undermines both the constitutional and regulatory legitimacy of SROs." *See* Emily Hammond, Double Deference in Administrative Law, Columbia Law Review, Vol. 116, No. 7 (November 2016), at 46. https://columbialawreview.org/content/double-deference-in-administrative-law/

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> Constitution]. * * * So the central question becomes whether FINRA is exercising "executive power" within the meaning of the Constitution, or whether it is a truly private self-regulatory organization.[150]

Remedies are necessary to redress the balance between protecting the investing public from "bad brokers" while preserving the presumption of innocence of all brokers until found "guilty"[151] of being a "bad broker", as well as protecting the broker's constitutional rights of due process in all aspects.

Accordingly, to quote Professor Hammond, the reforms proposed in this Comment Letter aim at "better promot[ing] accountability and guard against arbitrariness not only for SROs but also for the modern regulatory state."[152]

5.A FINRA Rule 8210 vs. the U.S. Constitution and Due Process.

One practicing attorney has succinctly spelled out the constitutional due process deficiencies[153] of Rule 8210:[154]

> FINRA Rule 8210 requires members and their associated persons to provide documents, information, and testimony "with respect to any matter involved in the investigation, complaint, examination, or proceeding." Because of the exceedingly broad scope of FINRA Rule 2010 (which requires firms and individuals, "in the conduct of [their] business, [to] observe high standards of commercial honor and just and equitable principles of trade"), the subject matter of an investigation can encompass anything business-related. Moreover, FINRA alone determines what is relevant to its investigations.
>
> Rule 8210 is a tremendous power. If a registered rep does not comply with a request for documents, information, or testimony, FINRA can have the rep barred from the securities industry. [Citation omitted] Once barred, an individual becomes subject to statutory disqualification, which has implications

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[150] David R. Burton, Reforming FINRA, Backgrounder No. 3181 (The Heritage Foundation, February 2017) at p. 5. Source: https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf

[151] Again, the authors appreciate the fact that a FINRA enforcement action is not a criminal matter. That said, it bears repeating the D.C. Circuit's opinion that, "***when a broker faces a bar from the securities industry, this is tantamount to "capital punishment***". (Emphasis supplied). Saad v. Securities and Exchange Commission, No. 15-1430, 2017 WL 4557511, at *5–6 (D.C. Cir. Oct. 13, 2017), *remanding* Saad v. SEC, 718 F.3d 904 (D.C. Cir. 2013).

[152] *See* Emily Hammond, Double Deference in Administrative Law, Columbia Law Review, Vol. 116, No. 7 (November 2016), p.46. Source: https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2487&context=faculty_publications.

[153] *See* Michael Gross, Esq., Ulmer & Berne, The Unassailable FINRA Rule 8210, (30 June 2017) https://www.bdlawcorner.com/2017/06/the-unassailable-finra-rule-8210/ We have decided to quote this article in its entirety rather than paraphrase, restate, or summarize this explanation of the constitutional problem that has already been so well written.

[154] Documentary requests and requests for live testimony are made by FINRA pursuant to Rule 8210. In laymen's terms, an 8210 request is *like* a subpoena. But the similarity ends here. When a state or federal law enforcement agency issues a subpoena, the recipient has many constitutional rights and, under both federal and state rules of procedure and evidence, the recipient of the subpoena can, at a minimum, challenge the subpoena as being ***"irrelevant, overly broad, or unduly burdensome"*** and the challenge is made to a third party (i.e., a state or federal magistrate) who is independent and has no interest in the outcome. At this time, a broker has no such constitutional rights when challenging an 8210 request. Of course, the broker can go through the motion of challenging an 8210 request as being "irrelevant, overly broad, or unduly burdensome". But, as one law practitioner has explained: "If FINRA does not agree to withdraw or limit the request, you have two choices. First, you can provide the requested documents and information. The case law on this issue is clear: ***only FINRA determines what documents and information are relevant to its investigation***. If you elect not to do that, your only alternative * * * is defend yourself in an Enforcement action. ***If you lose***, however, the consequence is not simply that you have to produce the document or information; the consequence is that ***you will get barred***." (Emphasis supplied) *See* Broker Dealer Law Corner, Frequently Asked Questions About FINRA Rule 8210 (October 3, 2016). Source: https://www.lexology.com/library/detail.aspx?g=f3dbaec8-ae31-4335-8a12-9fb81b8c883c

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beyond the ability to function as a registered rep. Simply put, FINRA's power through Rule 8210 extends beyond the securities industry it governs.

Next, this practicing attorney identifies the potential for FINRA abuse:

> With this much power, Rule 8210 has the potential for abuse. FINRA can seek to expel those whom it deems to be undesirable by making compliance with the nature, volume, or scope of Rule 8210 requests so undesirable or burdensome that providing the requested documents or information is not a real option.
>
> There is no limit on the number of document and information requests that FINRA can issue. It is not uncommon for FINRA to issue pages upon pages of document and information requests, and to follow up one set of overly broad and unduly burdensome set of requests with another set of the same. There likewise is no limit on the number of hours or days for which FINRA can take a rep's testimony. [Citations omitted] Multiple-day on-the-record interviews are not uncommon. Under Rule 8210, FINRA can even compel a rep, who lives within walking distance of its New York office, to travel across the country at his own expense to provide testimony in its Los Angeles office.
>
> In addition, there generally is no limit on the scope of document and information requests that FINRA can issue. [Citations omitted] For example, a rep may possess confidential medical records regarding a client to whom he sold an annuity (which is not a security). FINRA can demand those records, even if the rep did not conduct any securities business with the client. By further example, it may be a violation of state, federal, or international law or a breach of contract to provide certain confidential documents that a rep possesses by virtue of his non-securities-related business, but FINRA still can requests that those documents be produced.
>
> Further, there is no time limitation on the length of a FINRA inquiry. [Citations omitted] It is not uncommon for FINRA to investigate matters long after the fact, or to conduct inquiries that can be measured in years, not months. It likewise is not uncommon from FINRA to receive a response to a Rule 8210 request, not communicate with the rep for months or longer, and then continue to pursue the inquiry. Lengthy inquiries can be quite stressful to those under scrutiny, as well as their families.
>
> The potential for abuse is there. And there are plenty of firms and reps that will testify that they have been harassed by FINRA through its seemingly limitless Rule 8210 power.

Finally, this practicing attorney identifies what we have already said, namely, that FINRA makes its own rules and enforces them – in other words, acts as "judge, jury, and executioner" (as that age old adage goes) without meaningful accountability:

> If a rep believes that FINRA is abusing its Rule 8210 powers, he has limited options – none of which provide appropriate due process.
>
> The first option is to complain to FINRA. This can be done through complaints at the district and national levels or to its Office of the Ombudsman. This route leaves a rep at the mercy of FINRA – the very same people who issued the requests (and who feel compelled to defend the actions of their organization). This is not due process.
>
> The second option is to not provide the requested documents and information. This is a very risky route. It requires a rep to put his license on the line to assert that FINRA has overstepped the bounds of Rule 8210. If FINRA determines that it is entitled to the requested documents and information (which

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> presumably will be the case), then it likely will initiate a disciplinary proceeding in its forum, the Office of Hearing Officers (OHO), which can be appealed to another one of its forums, the National Adjudicatory Council (NAC). If those tribunals, and any tribunals to which subsequent appeals are lodged, determine that any of the requested materials should have been provided, the likely result is a bar from the securities industry. Needless to say, this method of "due process" discourages challenges to Rule 8210 requests, gives FINRA a tremendous amount of leverage in any attempt to negotiate a limit to the scope of Rule 8210 requests, and emboldens FINRA to push the boundaries of the Rule.
>
> There is no body, independent or otherwise, from which a rep can seek interlocutory relief from overly broad, unduly burdensome, harassing, or otherwise abusive Rule 8210 requests, without running the risk of being barred from the securities industry. Given the power that FINRA wields through Rule 8210, there should be.

The potential for and actual abuse that securities industry members privately complain about among themselves can only be rectified by granting brokers *all* the protections afforded by the Fourth, Fifth, and Sixth Amendments – the same protections that the same broker would enjoy if he were being investigated by a federal government agency instead of FINRA.

This is a particularly necessary relief for *Small Broker/Dealers* whose compliance staff is almost always small in size and routinely overwhelmed with multiple Rule 8210 requests by separate FINRA departments, oftentimes addressing the same or closely related potential rule violation with which FINRA is concerned. Sometimes different divisions or departments within FINRA will make 8210 requests in the course of simultaneous investigation investing essentially the same facts, the same or similar compliance issues, and the same or similar purported rule violations. The average person would read harassment into this technique; but neither harassment nor common sense is a defense to Rule 8210 requests. Often the cost of compliance simply drives *Small Broker/Dealers* out of the business – evidenced by the fact that in 2007 there were approximately 5,000 broker/dealer FINRA member firms that reduced to less than 4,000 firms in September 2016.[155]

6. Remedies: Recommendations for Fixing Deficiencies in Amendments Proposed in Regulatory Notice 18-16.

The authors of this Comment Letter offer the following proposed remedies in the spirit of good faith based upon the comprehensive, fair and balanced legal analysis hereinabove conducted.

6.A Necessity for Substantive Fairness in Enforcement Proceedings: Employing Securities Industry Participants as Adjudicator in OHO and NAC Proceedings to Guarantee Neutrality and Impartiality of Decision-Makers.

As has been demonstrated:

[155] David R. Burton, Reforming FINRA, Backgrounder No. 3181 (The Heritage Foundation, February 2017), at p 10. Source: https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf.

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- The OHO Chief Hearing Officer, at a minimum, has a "financial interest" in appointing a Hearing Panel that is loyal to FINRA's mission is "to provide investor protection and promote market integrity".

- Hearing Officers on the Hearing Panel are attorneys who have acted in adjudicative roles on behalf of FINRA.

In short, the attorneys sitting as adjudicators of alleged broker misconduct in enforcement proceedings are attorneys who, themselves, have "tried cases against" – as opposed to "defended" – brokers in FINRA enforcement proceedings.

Experientially (read: enforcement prosecutor), ideologically (read: loyalty to FINRA's stated mission), and financially (read: past, present, and continuing employment with FINRA), the interests of such hearing officers and adjudicators align integrally with FINRA, and not with anything or anyone else. No matter how professional that every attorney aspires to be, attorneys who have actually tried cases know that many cases turn on nuance:

- A prosecutor will see a certain compelling fact as inching in the direction of "conviction".

- A defense attorney will see the same fact as inching in the direction of "acquittal".

Especially in ***close*** cases, the feather that tips the scales of justice in a case whose standard is "clear and convincing evidence" often turns on nuance. This is the essence of conflict in every court room (or hearing room, for that matter). No trial lawyer worth his salt would insist that this just doesn't happen where he or she is concerned. It does. This is the reason why representing both plaintiff and defendant in a civil trial, and government and defendant in a criminal trial, and government agency and respondent in an enforcement matter is a non-waivable conflict of interest.[156] ***This is why there are jury trials in the criminal as well as in civil cases.***

The FINRA enforcement system is fraught with conflicting interests: ***the*** factor that tilts the scales in favor of changing the playing field by employing securities industry attorneys as adjudicators in OHO and NAC proceedings in order to guarantee neutrality and impartiality of decision-makers is the "financial interest" factor.

Financial interest in one of the parties to litigation is one of those fundamental, non-waivable conflicts of interest, especially in the federal judiciary.[157] The outcome is the same in state judiciary.[158] Here,

[156] *See e.g.*, American Bar Association Rule 1.7(a)(3): (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or * * * (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: * * * (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal ** *. In other words, "a lawyer may not represent adverse parties in litigation even with their consent. For example, a lawyer may not represent both plaintiff and defendant in a lawsuit requesting an amicable divorce." *See* Lisa G. Lerman, Philip G. Schrag, Ethical Problems in the Practice of Law: Concise Edition, p. 257.

[157] 28 U.S. Code § 455 (relating to disqualification of justice, judge, or magistrate judge): (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. See also Canon 3 (relating to Judge Should Perform the Duties of the Office Fairly, Impartially, and Diligently): (C) *Disqualification.* (1) A judge ***shall disqualify*** himself or herself in a proceeding

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OHO and NAC adjudicators are employees (or former employees) of FINRA and in an enforcement matter, FINRA, operating through its Department of Enforcement, is the party to the action being brought against the broker. In a FINRA enforcement matter, prosecutor and hearing officer are on the same side.

While things may in fact be different "on the inside", certainly from the "outsider's point of view" it is the "financial interest" of the FINRA employee / OHO and/or NAC adjudicator – that is, demonstrating ongoing loyalty to FINRA's mission "to provide investor protection and promote market integrity" – that is likely to prove more important than the "experience" and/or "ideological" factors that leads an adjudicator towards bias for FINRA or prejudice against the broker when deciding the outcome in an enforcement case. The kernel of this truth has been reported by one Law Commentator, influenced by certain United States Supreme and Circuit Court decisions:

> Bias has been defined as the propensity, or leaning, toward a certain object or view. It results indirectly from the combination of functions in that there is agency control over the decision making body of the organization. The result of this exercise of control, to a certain extent, forces the policy of the agency or agency head on the decision making body. Then too, the fact that a given hearing examiner's job depends

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in which the ***judge's impartiality might reasonably be questioned***, including but not limited to instances in which: * * * (c) the judge knows that the judge* * * has ***a financial interest in*** the subject matter in controversy or ***in a party to the proceeding***, or any other interest that could be affected substantially by the outcome of the proceeding * * *" *See also* Disqualification Under 28 U.S.C. § 455: §455(b)(4) requires judges to disqualify themselves for financial interest and §455(d) adds "however small", which necessarily includes an interest so small that it could not reasonably call the judge's impartiality into question. Section 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety. *See* § 455(d)(4); In re Cement and Concrete Litigation, 515 F.Supp. 1076 (Ariz.1981), *mandamus denied*, 688 F.2d 1297 (CA9 1982), *aff'd, by absence of quorum*, Arizona v. United States District Court, 459 U.S. 1191 (1983), cited in Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 n.8 (1988) The conflicts enumerated in § 455(b) require automatic disqualification—even if the judge believes he or she is capable of impartial judgment; even if he or she believes that a reasonable person would not question his or her impartiality; and even if the parties are willing to waive any objections. Section 455(f), however, provides an opportunity for the judge to "cure" certain § 455(b) conflicts. The Second Circuit held that a district judge who had unknowingly possessed a substantial financial stake in one of the plaintiffs (i.e., "Chemical Bank (now known as The Chase Manhattan Bank) during a bench trial could not cure this conflict by divesting himself of the interest on remand. Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 131 (2d Cir. 2003). In this case, the financial interest was non-waivable; therefore Second Circuit held that the district judge's denial of Affiliated's recusal motion was an abuse of discretion, and reversed, vacated all decisions and orders made in this case. Significantly, the Second Circuit held that "where an earlier 'appearance' of a potentially disqualifying interest mandated recusal under Section 455(a), a divestiture years later cannot cure a judge's presiding over significant proceedings in a case—here rendering a decision after a bench trial—in the intervening years. This raises the point that the only way that only divestiture of employment with FINRA may be sufficient to overcome an otherwise valid motion for recusal in an enforcement action against a broker.

Understood: The FINRA hearing panel members are not federal judges or magistrates. But, aside from the fact that the principles set forth 28 U.S. Code § 455 and Code of Conduct of United States Judges Canon 3(C)(1)(c) are principles of fundamental fairness universally applicable and certainly inherent in the SEC "fair principle" doctrine required by Sections 6(b)(7) and Section 19(e)(1)(A) of the Exchange Act, the U.S. Supreme Court recently heard oral argument in *Lucia v. Securities and Exchange Commission* to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) have been properly appointed. In particular, the Court was asked to determine whether SEC ALJs are "Officers" within the meaning of the Appointments Clause of the United States Constitution. The SEC has historically taken the view that its ALJs are employees (rather than Officers) and do not need to be appointed pursuant to the Appointments Clause. The Supreme Court's questioning focused on competing principles of ***judicial independence and political accountability***. If the Supreme Court finds that SEC ALJs are "officers" and not just employees of the SEC, this outcome will redound to FINRA, especially because of its close relationship with the SEC – FINRA being a "deputy of the SEC". At the submission of this Comment Letter, the Supreme Court rendered a decision in *Lucia*. ***In a 7 to 2 decision, Securities and Exchange Commission administrative law judges are "officers of the United States," subject to the Constitution's appointments clause.***

[158] *See* State of Florida, Supreme Court Judicial Ethics Advisory Committee, Opinion Number: 00-34 (Date of Issue: October 25, 2000): May a judge preside over a case in which a former law partner is an attorney of record, and the attorney's law firm is making payments to the judge pursuant to the terms of a promissory note? **ANSWER:** No. "This Committee concludes that disqualification is required pursuant to Florida Code Judicial Conduct, Canon 3E(1), if a judge is receiving payments from a former law firm pursuant to the terms of a promissory note." Source: http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2000/2000-34.html

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> at times upon the carrying out of the agency policy, must influence his decision, even if only subconsciously."[159] (Emphasis supplied).

In ***close*** cases where a compelling fact that could go either for the investor as witness for FINRA's Department of Enforcement or for the broker, "financial interest" is very likely to be the factor that turns the case against the broker: "Then too, the fact that a given hearing examiner's job depends at times upon the carrying out of the agency policy, must influence his decision, even if only subconsciously."[160] Again, this is how an "outsider" is going to see things. This is inescapable. Appearance is everything in close cases – and, even ones that are not so close.

The critical problem in enforcement proceedings – for FINRA and every agency enforcement proceeding – is the appearance of impartiality, not just the fact of impartiality.[161] When all three members of an OHO or NAC proceeding are FINRA employees, suspicion of bias, prejudice, partiality, presumption of "guilt" in the minds of securities industry member and their brokers is not only to be expected, *it is reasonable*.

Therefore, for each OHO and NAC panel, there should be one (1) attorney who has a demonstrated history of representing brokers or member firms, whether in a litigation or staff attorney capacity representing the interests of his firm's Compliance Department. In short, this attorney is to be chosen because of his securities industry experience, knowledge of federal securities laws and regulations, FINRA rules, and both knowledge of and experience in industry practices in the investment banking and securities business.

Equally important, FINRA needs to establish a process for soliciting bona fide *neutrals* to sit on the OHO and NAC. Certain jurisdictions require attorneys to present their "neutral" credentials to an appropriate authority demonstrating the fact that they have represented "plaintiffs" and "defendants" / "claimants" and "respondents" / "customers" and "brokers and firms" in both litigation and commercial transactions – allowing to determine whether the attorney's demonstrated experience proves to the satisfaction of this authority that the proposed neutral attorney is more likely than not to be a *bona fide* neutral.

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[159] *See* The Hoover Report – Procedural Due Process in Required Administrative Hearings, Vol. 30, Issue 2, Number 2, Article 6, St. John's Law Review (May 1956), p. 257, *citing* United States ex rel Accardi v. Shaughnessy, 219 F.2d 77 82 (2d Cir.), *rev'd*, 349 U.S. 280 (1955); Marcello v. Bonds, 349 U.S. 302 (1955); NLRB v. Pittsburgh S.S. Co., 37 U.S. 66 (1949); Fry Roofing Co. v. NLRB, 222 F.2d 938 (1st Cir. 1955); United Statesv. Peebles, 220 F.2d 114 (7th Cir. 1955); NLRB v. Phelps, 146 F.2d 562 (5th Cir. 1943); *and see* Schwartz, Administrative Law 1955 Annual Survey of American Law, 31 N.Y.U.L. Rev. 93, 101 (1956). The authors of this Comment Letter acknowledge that the FINRA would contend that it is not a "government agency" and therefore this law review article is inapplicable. However, as has been articulated generally in Section 4.B of this Comment Letter, the mounting evidence is that FINRA has stepped over the "government actor" line. The Hoover Report is relevant, certainly analogously, for the purpose of identifying those factors that contribute towards bias in an individual functioning as finder of fact and law in evidentiary hearings, whether the individual is an administrative law judge in an agency enforcement or a hearing officer in a FINRA enforcement case.
Source: https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=4659&context=lawreview

[160] Id.

[161] Rv Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233) "Not only must Justice be done; ***it must also be seen to be done.***" (Emphasis supplied).

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With these improvements, FINRA enforcement proceedings can begin to come closer to the fundamental principle that is the foundation of impartiality: Namely, that a neutral decision-maker (here, the collective Panel sitting as a OHO Panel or an NAC Panel) is both a person without a financial interest in the outcome of the case, a person (collectively) who is not affiliated with one side or the other.[162]

6.B FINRA Should Exclude Certain Arbitration Settlements Entirely From "Materiality" Considerations in the Proposal to Amend the NASD Rule 1010 Series (MAP Rules).

As demonstrated above,[163] certain "Non-Attorney Representative" "stock loss recovery" firms or NARs engage in "barratry".[164] Arbitration settlements reached by companies that engage in barratry should be excluded from FINRA's calculation when determining whether a particular broker is a "bad broker" based on a check-the-box for Specified Risk Events.

Approximately 115 and 170 firms will be impacted by this Rule proposal, of which fifty percent (50%) will be *Small Broker/Dealers*.[165] This means that a lot of Small Broker/Dealers that are not and should not be "taping" firms will become "taping" firms – and in the public's minds' eyes will be identified as being "Disciplined Firms" – if FINRA allows "nuisance-value" settlements worked by NARs to be part of the MAP calculation. The injustice here is that "nuisance-value" cases are inherently flawed from the judgment of fundamental law. Thus, a lot of Small Broker/Dealers will be wearing the "taping/disciplined" firm Scarlet Letter, by virtue of having brokers who cross the "bad broker" threshold mainly, if not solely, because they have "nuisance-value" cases having been brought against them by NARs.

These cases, therefore, should be excluded from "bad broker" calculations because the settlements of these cases lack probative value because these cases are what defense lawyers, and insurance adjustors, call "nuisance-value settlement cases".

It bears repeating here: A nuisance-value settlement is an early out of court settlement, made even though the claim is frivolous (i.e., without merit). It is generally accepted among the defense bar and

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[162] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 486 (1972)

[163] *See* Section 4A *supra* [relating to "Whether FINRA Should Exclude Certain Arbitration Settlements Entirely From "Materiality" Considerations in the Proposal to Amend the NASD Rule 1010 Series (MAP Rules)"].

[164] "Ambulance chasing" is a synonym for "barratry", which refers to the practice of soliciting business from accident victims or their families at the scene of an accident or disaster, even harassing " victims and their families with hopes of signing them up as clients. Non-lawyers who engage in this activity are called 'case runners' ". Approximately twenty-three (23) jurisdictions in the United States have statutes that proscribe "barratry" in some form or another. *See* Case Runners: The Real Ambulance Chasers. http://www.dopplr.com/ambulance-chasers-and-case-runners/

[165] Without differentiating between the various criteria (i.e., criminal specified events vs. arbitration specialized events), FINRA statistics that impact this amendment rule proposal is as follows: "FINRA also analyzed firms that employed individuals who would be directly impacted by this proposal. The analysis shows that in each year over the review period, there were between 115 and 170 firms employing individuals meeting the proposed conditions. Approximately 50 percent of these firms were small, 13 percent were mid-sized and the remaining 37 percent were large firms.58 FINRA estimates that approximately 38 percent of the individuals meeting the proposed criteria were employed by small firms, 17 percent by mid-sized firms and 45 percent by large firms." *See* Regulatory Notice 18-16, at p. 23.

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their insurance company clients that some people will file any case, with no concern for the merit of their case, in the hope of achieving a settlement, even if only a very small dollar settlement: The nuisance-value plaintiff or claimant knows that certain defendants will pay something, even a small amount of money, to enable the defendant to rid himself of the nuisance-value claim.[166] Such frivolous lawsuits are called "nuisance-value cases" because, by bringing the suit, the plaintiff is causing a nuisance to the defendant.

This is bad enough when perpetrated by lawyers who see the practice of law as a business rather than a profession or a vocation; it is even worse when perpetrated by non-lawyers engaged in the unauthorized practice of law.

In the first instance, the public is at least protected by oversight of the Supreme Courts of the several States and their respective Bar Associations charged with enforcing their respective codes of professional responsibility against lawyers who file frivolous lawsuits. There are real consequences for lawyers who bring frivolous law suits, ranging from substantial fines to loss of professional license.[167] But, in the second instance, the public has little or no protection at all against NARs, especially in those States that have very weak or no "unauthorized practice of law" statutes.

In short, settlements wrought from claims pursued by "stock loss recovery" non-lawyer firms (1) have little no probative value for assessing whether a broker is a "bad broker" because these settlements, by

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[166] A "frivolous suit" is defined as "a lawsuit having no legal basis, often filed to harass or extort money from the defendant." Black's Law Dictionary, 7th ed (1999), p 678. *See e.g.* Belfer v. Merling, 322 N.J.Super. 124, 144 (App. Div. 1999), ***citing*** Fagas v. Scott, 251 N.J. Super. 169, 189 (Law Div. 1991): "A claim will be deemed frivolous or groundless when no rational argument can be advanced in its support, when it is ***not supported by any credible evidence***, when **a *reasonable person could not have expected its success,* or** when it is ***completely untenable***." (Emphasis supplied)

[167] *See* Martha Neil, Federal judge plans to sanction 16 lawyers for 'gamesmanship' and 'forum shopping, ABA Journal (April 15, 2016, 1:00 PM CDR) Source: http://www.abajournal.com/news/article/federal_judge_sanctions_16_lawyers_in_class_action_for_gamesmanship_in_movi; Joseph Robinson & Robert Schaffer, Federal Circuit Upholds Sanctions and Attorney's Fees for Vexatious Litigation and Frivolous Appeal, IPWatchdog (January 15, 2017) Source: http://www.ipwatchdog.com/2017/01/15/sanctions-attorneys-fees-vexatious-litigation-frivolous-appeal/id=77051/; Andrew J Kennedy, Litigation News Associate Editor, Lawyer Sanctioned for Pursuing Baseless Case to Summary Judgment, Litigation News from the ABA Litigation Section (June 30, 2016) ("Vigorous advocacy crosses the line into sanctionable conduct when an attorney pursues a suit long after it becomes clear there is no evidence to support the claims. * * * It should not chill future cases—it should chill this attorney from filing a case just to strong-arm a settlement from the other side.") Source: https://apps.americanbar.org/litigation/litigationnews/mobile/article-sanction-summary-judgement.html; Martin H. Orlick, United States Supreme Court Refuses to Entertain Appeal by Frivolous, Vexatious Litigant in Federal Courts: Good news for retailers, restaurants, hotels, other places of public accommodation and the disabled community, (November 20, 2008) Source: https://www.jmbm.com/docs/mho_frivolous.pdf., Martha Neil, 7th Circuit Affirms $80K Sanction: If Lawyer Can't Pay, Bankruptcy Is Next Step, ABA Journal (February 28, 2009, 1:59 AM CST) (sanctions for vexatious litigation under 28 U.S.C. § 1927)
Source: http://www.abajournal.com/news/article/7th_circuit_affirms_80k_sanction_bankruptcy_is_next_step_if_lawyer_cant_pay

Louisiana lawyers have been disciplined for filing wholly meritless lawsuits. *See, e.g.*, In re Harvin, 117 So. 3d 907, 913 (La. 2013) (suspending lawyer for 30 days for causing unnecessary litigation when the lawyer filed notice of *lis pendens* for client who had no claim to the property in question). In re Cook, 932 So.2d 669, 676 (La. 2006) (disciplining lawyer for filing "repetitive and unwarranted pleadings" and making "frivolous and harassing claims for discovery"); In re Zohdy, 892 So. 2d 1277 (La. 2005) (suspending lawyer for six months for, among other offenses, unjustifiably obstructing a class action lawsuit); In re Stratton, 869 So. 2d 794 (La. 2004) (suspending lawyer for three years for filing frivolous lawsuit "designed to harass" former secretary); In re Hackett, 701 So. 2d 920 (La. 1997) (reprimanding lawyer for filing meritless motion to dissolve temporary restraining order); In re Caulfield, 683 So. 2d 714 (La. 1996) (disbarring a lawyer for staging fake automobile accident to defraud rental car company); In re Forman, 634 So.2d 330 (La. 1994) (suspending a lawyer for six months for filing frivolous fee-collection lawsuit); In re Williams-Bensaadat, 181 So.3d 684, 691-92 (La. 2015) (suspending lawyer for instituting a lawsuit against a former client instead of endorsing a settlement check and resolving fee dispute through *concursus* proceeding). A lawyer can also be disciplined for vexatious litigation conduct. *See, e.g.*, In re DuBarry, 814 So. 2d 1273 (La. 2002); *see also* In re Lester, 133 So.3d 1248 (La. 2014) (disbarring lawyer for engaging in "frivolous and vexatious litigation," among other rule violations).

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definition, have no merit and (2) are actually injurious to customers because of the hidden costs[168] of utilizing these non-lawyer firms.[169]

For these reasons, FINRA should undertake appropriate steps to discourage NAR participation in FINRA arbitration forums, starting with excluding these "stock loss recovery" non-law firm cases and their settlements from being treated as a "materiality" consideration in the proposal to amend NASD Rule 1010 Series (MAP) Rules.

6.C FINRA Should Exclude Certain Arbitration Settlements Entirely BrokerCheck Disclosure.

Given that "NARs have been alleged to charge investors $25,000 in non-refundable deposits for representation take [from] settlement money that the investors were not aware of and represented some investors without their consent";[170] and,

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[168] *See e.g.* Jesse Greenspan, Counting the Cost of a True Nuisance Settlement, Law360 (August 28, 2008) https://www.law360.com/articles/67683/counting-the-true-cost-of-a-nuisance-settlement.

[169] In these jurisdictions, the customer who retains a Cold Spring Advisory-type of non-lawyer "stock loss recovery firm" – in order to "break even" – must:

- Recoup the $10,000 to $25,000 forensics investigation fee paid to the "stock loss recovery firm".
- Pay to the "stock loss recovery firm" the "client's" share of the contingent fee arrangement.
- Pay the cost of hiring a defense attorney to represent the "client" in an attorney lien (and related causes of actions) brought by originally hired by the "client" on referral from the "stock loss recovery firm".
- Pay the compensatory damages won by the attorney who brings the charging lien claim against the "client" for breaching the Legal Services Contract at the prompting of the "stock loss recovery firm".
- Pay for other damages, such as punitive damages, for participating in ruining the attorney's business reputation.

See FINRA Investor Alerts, It Can Be Hard to Recover from "Recovery" Scams: (19 September 2016) Source: https://www.finra.org/investors/alerts/it-can-be-hard-to-recover-from-recovery-scams "It's an alluring offer. You hear from someone who claims to be able to help you recover money you lost from a previous investment. The information sounds credible and the organization sounds legitimate. Documents you receive also look authentic, and the money that's promised is not only welcome, but seems well-deserved compensation for previous losses. The catch? They want you to pay money upfront for the recovery "services," which in some cases are purely fraudulent. In addition to the original money you lost, you now may lose more money at the hands of professional con artists." (19 September 2016).

Accord The Giuliano Law Firm, Securities Regulators Caution Suckers to Avoid Fake Lawyers: "* * * Welcome to the 'Sucker's List'. * * * These persons [Non-Attorney Representatives or NARs] are not lawyers nor are from law firms, but generally are in fact former boiler room operators themselves, brokers barred from the business, seeking to further exploit investor victims. Because they have a list, they generally know the exact securities and the exact firm or firms where the investor lost money. ***They are not lawyers, they do not try cases, but they do offer their "services" often in consideration for an up-front fee of as much as $5,000 to $10,000 to perform an "analysis" of the account, and sometimes as much as 50% of whatever they may be able to recover for investors.***" (Emphasis supplied) (26 September 2016). Source: https://securitiesarbitrations.com/securities-regulators-caution-suckers-avoid-fake-lawyers/.

[170] *See* Public Investors Arbitration Bar or PIABA ***has*** issued such an investor alert that should be issued by FINRA: Non-Attorney Representatives Are Real and Growing "Menace to Investors" in FINA Arbitration: NAR Firms Found to Include Individual Who Pled Guilty in Insurance Scheme and Brokers Barred from Industry: Unwary Investors have None of the Protections of Dealing with Attorneys and Often Recover Little of Lost Funds. (December 18, 2017, 13:57 ET). Source: https://piaba.org/piaba-newsroom/report-nar

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Given that "Non-attorney representatives often do not maintain malpractice insurance, have no ethical code or constraints like attorneys do not face potential sanctions from any regulatory or licensing body like a state bar association. Essentially, this system exposes the investor who was victimized by his or her broker to potential further victimization, with little chance of recovering damages caused by an unscrupulous or negligence NAR":[171] and,

Given that "The success rate of these NARs has been sub-par. For example, Cold Spring Advisory Group has been involved in at least 27 arbitration cases. In those cases, CSAG sought a total of $2,352,274 on behalf of its clients. CSAG's clients were award a zero in 19 out of 27 cases, resulting in investors receiving a positive award in only 29.63 percent of CSAG's cases, compared to the national average, which was most recently 41-42 percent However, CSAG's clients were likely only awarded a total of $86,216, or 3.66 percent of the damages sought for all its 27 cases. Other NAR firms are believed to recover even lower amounts for their clients:"[172]

Given the aforementioned, this Comment Letter recommends that:

- Whenever any "Non-Attorney Representative" firm (such as *but not limited to* Cold Spring Advisory Group) brings and settles a claim with a broker, and whenever the arbitration panel enters an award in favor of the broker, all reference should be removed from the broker's public record.

- Whenever any "Non-Attorney Representative" firm (such as *but not limited to* Cold Spring Advisory Group) brings and settles a claim with a broker, such claims should not be made available to the public at all because no arbitration award entered was entered in favor of the claimant.

- So long as the claim is in arbitration and until the claims resolved favorably for the claimant in an express award, his/her claim should be treated as a kind of *motion in limine*.[173]

In short, until there is an award in favor of the claimant in these "nuisance-value" cases, no reference should be made to this case in the broker's public record: *A Bell Once Rung Cannot Be Unrung*.[174]

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[171] Id.

[172] Id.

[173] *See* Brodit v. Cambra, No. 02-15323 (9th Cir. November 26, 2003): "California state courts recognize pretrial motions in limine as useful tools precisely because such motions allow parties to resolve evidentiary disputes ahead of trial, without first having to present potentially prejudicial evidence in front of a jury. * * * Kelly v. New W. Fed. Savs., 49 Cal.App.4th 659, 56 Cal.Rptr.2d 803, 808 (1996) (noting that ***pretrial motions in limine to preclude the introduction of prejudicial evidence "avoid the obviously futile attempt to 'unring the bell' " once the evidence is aired before the jury***).

[174] *See e.g.* United States v. Maria Aide Delgado, No. 07-41041 (5th Cir. January 19, 2011): "[A]s this Court observed in overturning a conviction because of improper prosecutorial comment, despite a curative instruction, once such statements are made, the damage is hard to undo: 'Otherwise stated, ***one cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it***' " citing United States v. Garza, 608 F.2d 659, 666 (5th Cir.1979) (quoting Dunn v. United States, 307 F.2d 883, 886 (5th Cir.1962).(Emphasis supplied). *See also* United States v. Under Seal, No. 15-4539, No. 15-4569 (4th Cir. April 5, 2017): "When Appellant's identity was disclosed to the Adult Defense Attorneys, the affront to Appellant's privacy interest in his identity was completed. Appellant's identity is now known to the Adult Defense Attorneys; we cannot unring that bell." *And see* United States v. Smith, No. 14-60936 (5th Cir. February 10, 2016): " * * *the generic instruction given prior to the prosecutor's summation does not persuade us that the jury was unaffected by the prosecutor's misconduct. We have repeatedly observed, in like circumstances, that the damage resulting from such statements is difficult to undo—"[o]therwise stated, one 'cannot unring a bell' " citing United States v. Garza, 608 F.2d 659, 666 (5th Cir.1979) (quoting Dunn v. United States, 307 F.2d 883, 886 (5th Cir.1962).

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Publication of "nuisance-value" NAR settled cases in public forums violates Due Process because there simply are no powers[175] to remedy substantial harm to personal protected rights,[176] namely, the inflammatory and defamatory effect on a good broker's reputation.[177]

Furthermore, in the event of winning a "nuisance-value" case brought by a NAR, the broker, having already paid an expensive legal fee for defense in a bogus arbitration claim, should not need to expend additional expense of retaining legal counsel to pursue an expungement proceeding after winning or settling this bogus claim.

For these reasons, Arbitration Cases brought by NARs against brokers should not be reported on BrokerCheck.

6.D FINRA Should Amend Rule 8312 (Identifying "Bad Brokers" and Linking them to "Disciplined Firms" in a BrokerCheck Disclosure) to Avoid "Guilt by Association" in Violation of Fundamental Law.

When FINRA links a "disciplined firm" and the "bad broker" on BrokerCheck, FINRA needs to avoid "disciplined firm" guilt by association for those associated persons who work in operations and compliance departments of "Taping Firms" who, themselves, *have no disciplinary history.*

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[175] *See especially* Opala v. Watt, 454 F.3d 1154 (10th Cir. 2006), *cert. denied*, 549. U.S. 1078 (2006) (where 85-year-old Oklahoma Supreme Court Justice Marian Opala, who alleged that the state high court's other eight justices discriminated against him because of his age and the 10th Circuit stated that it lacks the power to resolve this dispute, writing: " * * * we lack the power to "reinstate the pre-determined sequential order to that which existed prior to the Rule 4 amendment." We simply cannot make Justice Opala Vice-Chief Justice again. This is precisely the type of retroactive equitable relief prohibited under the Ex Parte Young doctrine. The relief sought in the complaint-a declaration that New Rule 4 is unconstitutional - would not place Justice Opala in the position he was in on November 3, 2004. ***There is no prospective remedy that can unring that bell.*** Justice Opala's claimed injury is simply not redressable with prospective relief. Thus, the federal courts ***lack the power to resolve*** this dispute.")

[176] *See* United States v. Ferguson, ___ F.3d ___, 2017 U.S. App. LEXIS (3d Cir. Nov. 28, 2017). "We thus concluded that the district court had erred in the same way as had the *Berry* court: it impermissibly allowed a bare arrest record to influence the sentencing decision. Id. at 554. When such influence is evidenced in the record, a new sentencing is required. Notwithstanding a district court's subsequent consideration of factors appropriate under the Guidelines or §3553(a), ***most likely the court will not have been able to "unring the bell," and ipso facto the defendant will have been prejudiced by the error***. Id. In other words, when a district court relies on mere arrests to determine a sentence, it is likely to engage in the kind of "unsupported speculation" forbidden in *Berry* and *Mateo-Medina* and thus to commit "plain error that ***affects substantial rights***. Fed. R. Crim. P. 52(b)." *See* United States v. Murray, 784 F.2d 188, 189 (6th Cir.1986) (not even a curative instruction could "unring [the] bell" of a prejudicial reference to a polygraph examination; curative instruction not enough to remedy experienced FBI agent's deliberate statement that he had asked defendant to take a polygraph test).

[177] In certain jurisdictions, ***reputation*** is a ***state constitutionally protectable interest***. *See e.g.*, Commonwealth of Pennsylvania Constitution Article I, Section 1 which designates the right to reputation as an inherent and indefeasible right:

> All men are born equally free and independent, and have certain i***nherent and indefeasible rights, among which are those of enjoying and defending*** life and liberty, of acquiring, possessing and protecting property ***and reputation***, and of pursuing their own happiness. (Emphasis supplied)

Additionally, Article I, Section 11 of the Pennsylvania Constitution provides for a remedy through the courts for injury to a person's reputation:

> All courts shall be open; and every man for an injury done him in his lands, goods, person ***or reputation shall have remedy by due course of law***, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct. (Emphasis supplied)

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When constructing its BrokerCheck for associated persons who work in operations and compliance departments of "Taping Firms" who, themselves, *have no disciplinary history,* FINRA should see to it that no "guilt by association" is communicated to the public simply because their employment is held at a "Taping Firm". That is, for clean record employees of "Taping Firms", the "disciplined firm" *Scarlet Letter* should not be communicated to the public.

Failure to do so will violate more than two hundred years of Federal jurisprudence, not to mention more than eight hundred years of Common Law jurisprudence.

6.E FINRA Should Amend Rule 8312 (Identifying "Bad Brokers" and Linking them to "Disciplined Firms" in a BrokerCheck Disclosure) to Avoid *Ex Post Facto* "Guilt by Association" of Hiring Firms.

FINRA's proposed rules that connect "bad broker" / "high-risk brokers", "disciplined firm",[178] and "taping firm"[179] do not address, from the perspective of fundamental law, the scenario where a Hiring Firm takes on a brokers who:

- Have no "specified risk event"[180] that is a *matter of public record* while at the "Disciplined Firm" and at the time of hire by the Hiring Firm.

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[178] FINRA defines "disciplined firm" in Rule 3170(a)(2)(A), in part, as follows: "For purposes of this Rule, the term "disciplined firm" means: (A) a member that, in connection with sales practices involving the offer, purchase, or sale of any security, has been ***expelled*** from membership or participation in any securities industry self-regulatory organization or is ***subject to an order of the SEC revoking its registration*** as a broker-dealer; * * * " (Emphasis supplied)

[179] See Rule 3170(5):

(A) For purposes of this Rule, the term "taping firm" means:

(i) A member with at least five but fewer than ten registered persons, where 40% or more of its registered persons have been associated with one or more disciplined firms in a registered capacity ***within the last three years***;

(ii) A member with at least ten but fewer than twenty registered persons, where four or more of its registered persons have been associated with one or more disciplined firms in a registered capacity ***within the last three years***;

(iii) A member with at least twenty registered persons where 20% or more of its registered persons have been associated with one or more disciplined firms in a registered capacity ***within the last three years***.

(B) For purposes of calculating the number of registered persons who have been associated with one or more disciplined firms in a registered capacity within the last three years pursuant to this subparagraph (5), members should not include registered persons who:

(i) have been registered for an aggregate total of 90 days or less with one or more disciplined firms within the past three years; and

(ii) do not have a disciplinary history.

[180] In its proposed amendment to FINRA Rule 1011(o) (relating to Definitions), FINRA will define "The term 'specified risk event' [to]mean any one of the following events that are disclosed, or are or were required to be disclosed, on an applicable Uniform Registration Form;

(1) a final investment-related, consumer-initiated customer arbitration award or civil judgment against the person for a dollar amount at or above $15,000 in which the person was a named party;

(2) a final investment-related, consumer-initiated customer arbitration settlement or civil litigation settlement for a dollar amount at or above $15,000 in which the person was a named party;

The Galleria ▪ Suite 241 ▪ Building 2
2 Bridge Avenue ▪ Red Bank, NJ 07701-1106
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- Are not "bad brokers" *when hired* by the Hiring Firm.

- Have "specified risk event(s)" that come to light *after starting* employment at the Hiring Firm: Brokers are, for example, served with "nuisance-value" arbitration(s) or lawsuit(s) *after* brokers are already working at the Hiring Firm.

- Defend these "nuisance-value" arbitration(s) or lawsuit(s) while employed at the Hiring Firm, but the underlying allegations of the unsuitability, breach of fiduciary duty, breach of contract, negligence, etc. claim(s) against brokers relate to *activities that took place solely when brokers were employed at the Disciplined Firm*.

The customer's NAR "advocate" takes a "shot-gun" approach and sues the Hiring Firm along with the brokers since the "Disciplined Firm" is now out of business and the Hiring Firm is viewed as a potential "deep pocket" – especially for "nuisance-value" settlement purposes.

As a result of the "shot-gun" approach, the owners of the Hiring Firm are either named directly named as parties or otherwise indirectly impugned by these arbitrations or lawsuits.

But the owners of the Hiring Firm had no interaction with the complaining customers – the claimants in this/these arbitration(s) or plaintiff(s) in this/these "nuisance-value" cases.

Moreover, the owners of the Hiring Firm had no supervisory responsibilities over the brokers' market conduct activities at any time relevant to the unsuitability, breach of fiduciary duty, breach of contract, negligence, etc. claim(s) brought against brokers.

The "Disciplined Firm" goes out of business less than three (3) years after brokers are hired by the Hiring Firm.

Moreover, when a "good broker" becomes a "bad broker" *after the fact* (from the perspective of broker *status at the time of hire*), the Hiring Firm's Rule 3170(5) ("taping rule) percentage moves upwards to a threshold (depending on the number of brokers hired) where the Hiring Firm can become "back-doored" into become a "taping firm" – even when the hired brokers have committed no market conduct violations during their employment with the Hiring Firm.

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(3) a final investment-related civil action where the total monetary sanctions (including civil and administrative penalties or fines, disgorgement, monetary penalties other than fines, or restitution) were ordered for a dollar amount at or above $15,000; and

(4) a final regulatory action where (A) the total monetary sanctions (including civil and administrative penalties or fines, disgorgement, monetary penalties other than fines, or restitution) were ordered for a dollar amount at or above $15,000; or (B) the sanction against the person was a bar (permanently or temporarily), expulsion, rescission, revocation, or suspension from associating with a member."

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In virtue of these proposed Rules, the Hiring Firm now becomes *ex post facto*[181] "guilty by association"[182] with the "Disciplined Firm".

It is duly noted that the United States Supreme Court has held, since its ruling in Calder v. Bull,[183] that the constitutional prohibition against *ex post facto* laws applies only to criminal matters, not civil matters. It is likewise duly noted that FINRA regulations are not criminal statutes.

Just the same, Thomas Jefferson has written that *ex post facto* laws are as "equally unjust in civil as in criminal cases".[184] Similarly Alexander Hamilton has written: "[I]t is easy for men … to be zealous advocates for the rights of the citizens when they are invaded by others, and as soon as they have it in their power, to become the invaders themselves." [185] In a word, the Founders and Framers were on heightened alert for and were particularly averse to anything that might crack a window of opportunity for arbitrary governance.

In short, the concern here is that, while not technically a constitutional violation, the amendments to Rule 8312 proposed by FINRA, violate the *spirit* of the fundamental law principle prohibiting "inflicting punishment upon a person for some prior act that, at the time it was committed, was not illegal."

In this regard, it is respectfully requested that FINRA address this inherent injustice when a Hiring Firm obtains a Scarlet Letter (i.e., becoming a "bad broker/dealer") as a result of hiring "bad brokers" who *at the time of hire* were "good brokers".

At a minimum, when reconstructing the operation of FINRA Rule 9520 Series (Eligibility Proceedings) and FINRA Rule 8312 (BrokerCheck Disclosure) and NASD Rule 1010 Series (MAP Rules), FINRA is respectfully requested to take into consideration the unreasonably prejudicial effect on brokers by operation FINRA Rule 12206 requiring claims to be filed within six years from the date of the transaction or occurrence).

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[181] Latin for "from a thing done afterward." *Ex post facto* refers to laws that provide for the infliction of punishment upon a person for some prior act that, at the time it was committed, was not illegal.

[182] *See* Michael Heyman, Due Process Limitations to Accomplice Liability, 99 Minnesota Law Review 132, 139-140 (2015): 'At its core, * * * 'guilt by association' [means that an] ***individual cannot be held vicariously liable merely because she associates with a group or third party that commits a crime***. There must be a sufficient, 'non-tenuous,' link between her association and the third party's criminal actions.' " (Emphasis supplied) Source: http://www.minnesotalawreview.org/wp-content/uploads/2015/08/Heyman_1fmt1.pdf; *citing* Alex Kreit, Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton, 57 AM. U. L. REV. 585, 606 (2008).

[183] 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798),

[184] Thomas Jefferson to Isaac McPherson Monticello (August 13, 1813): "Every man should be protected in his lawful acts, and be certain that no ex post facto law shall punish or endamage him for them. * * * ***The sentiment that ex post facto laws are against natural right***, is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. The federal constitution indeed interdicts them in criminal cases only; ***but they are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing what is wrong***. Nor ought it to be presumed that the legislature meant to use a phrase in an unjustifiable sense, if by rules of construction it can be ever strained to what is just." (Emphasis supplied)

[185] A. Hamilton, Esq., Second Letter from Phocion (New York, April, 1784).

The Galleria ▪ Suite 241 ▪ Building 2
2 Bridge Avenue ▪ Red Bank, NJ 07701-1106
Phone: 732-758-9001 ▪ Toll Free: 800-886-7007 ▪ Fax: 732-758-6671

Since Rule 12206 gives the "nuisance-value" claimant six (6) years to bring a meritless claim in arbitration against a broker, it is respectfully requested that all such claims filed with FINRA arbitration and brought on behalf of a customer by a NAR be excluded from FINRA's calculations in connection with implementation and impact of these Rules, as they may be amended, with respect to the Hiring Firm becoming "back-doored" into "taping firm" status and a "Disciplined Firm" by reason of "guilty by association".

6.F FINRA Should Address the Vagueness, Overbreadth, Unconstitutional Conditions, Regulatory Taking Issues in Proposed Rule 9523 and Existing Rule 8311.

As written, the proposed Rule 9523, when read in conjunction with existing Rule 8311, is Vague and Overbroad.

It is very important that FINRA clarifies when it "may be permitted to continue to work in limited circumstances". (Emphasis in original) Under existing Rule 8311, when it is permitted to do so is anything but clear.

Until a member firm can with confidence determine when it *can pay* a broker having a statutory disqualification status – prior to resolution at the conclusion of the MC-400 application – most member firms will opt not to hire such brokers – let alone expend time, effort and funds to create a heightened supervision.

The goal here for securities industry members and FINRA alike is to rid themselves of brokers who are truly "bad brokers" (not brokers who have "specified risk events" created by nuisance-value arbitrations and settlements).

While ridding the industry of "bad brokers" through the proposed amendments to Rule 9523 are consistent with FINRA's mission, this underlying motivation becomes unconstitutional,[186] when proposed Rule 9523, read in conjunction with existing Rule 8311, is so vague and overbroad that it creates a scenario where FINRA interferes with an employer's common law property right to "hire, fire, promote, and demote" employees that is protected by the Commerce Clause of the U.S. Constitution.

It is in FINRA's best interest to address and resolve this "void for vagueness" and "overbroad" issue in accord with constitutional law principles because, failure to do so risks FINRA crossing over from

[186] It bears repeating, that proposed Rule 9523 (relating to Eligibility Proceedings) especially in relation to Rule 8311 is Vague and Overbroad hardly needs to be stated. Member Firms – again, especially Small Broker/Dealers – will be "chilled" from exercising their constitutionally protected conduct under the Commerce Clause to the U.S. Constitution as well as common law and state constitutionally protected property rights, as an employer, to expand business through hiring brokers, precisely because proposed Rule 9523 and 8311 are so vague, and precisely because the risk of violating these rules are so high – and expensive, especially to Small Broker/Dealers – that firms will simply "voluntarily choose not to engage in behavior protected by law or another basic right, just to be sure they're not accidentally breaking the overbroad law." This amounts to Regulatory Taking of Property without just compensation under state and federal constitutions, triggering the Doctrine of Unconstitutional Conditions.

The Galleria ▪ Suite 241 ▪ Building 2
2 Bridge Avenue ▪ Red Bank, NJ 07701-1106
Phone: 732-758-9001 ▪ Toll Free: 800-886-7007 ▪ Fax: 732-758-6671

self-regulation designed to protect investors to self-regulation that results in monopoly or even tyranny – *cartelization*, in other words.

6.G FINRA Adopt Due Process Safeguards That Brokers have in SEC Enforcement Actions.

In the event that FINRA decides to go forward with implementing the proposed amendments set forth in Regulatory Notice 18-16, FINRA should embrace the same Due Process safeguards that Brokers have in SEC Enforcement Actions.

These safeguards include:

- The Fifth Amendment Right to not incriminate oneself.
- The right to exercise this constitutional right when responding to Rule 8210 requests.
- The right to exercise this constitutional right when giving live testimony in On-The-Record interviews with FINRA.
- The right of broker's legal counsel to object to improper questions (as defined under Federal Rules of Evidence) at OTRs with FINRA.
- The right of broker's legal counsel to instruct the broker not to answer improper questions (as defined under Federal Rules of Evidence) at OTRs with FINRA.
- The right of broker's counsel to ask questions of the broker at OTRs with FINRA for the purpose of clarifying statements made by the broker in order to prevent a misleading official record being created.
- The Fourth Amendment right against unreasonable searches and seizures.
- The Sixth Amendment right to an impartial hearing panel and adjudicatory on appeal.
- The Sixth Amendment right to be informed about the nature of the charges and evidence against a broker prior to giving on-the-record testimony.

7. Concluding Remarks

At the close of the Federal Constitutional Convention in September of 1787, Benjamin Franklin was queried as he left Independence Hall on the final day of deliberation. A lady approached Dr. Franklin, and asked: "Well Doctor what have we got, a republic or a monarchy?" Franklin replied, "A republic . . . Madame, … if you can keep it."

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2 Bridge Avenue ▪ Red Bank, NJ 07701-1106
Phone: 732-758-9001 ▪ Toll Free: 800-886-7007 ▪ Fax: 732-758-6671

What was Ben Franklin getting at? The clue is in his April 17th 1787 unpublished letter to Abbés Chalut and Arnoux, wherein Dr. Franklin wrote: "... Let me add, that only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters."[187]

In other words, the need for legislation – rulemaking, in our present case – rises in direct proportion to the degree to which we stray from virtue in the public market place. "Bad brokers" are a problem that taints members of the securities industry who are not. Hence we have the real need for a solution to the problem.

FINRA's proposed amendments as set forth in Regulatory Notice 18-16 have been crafted with this problem in mind and are consistent with its mission to "to provide investor protection and promote market integrity".[188]

That said, there are deficiencies in the current state of these proposed rules. These deficiencies are serious in nature because, as crafted, the proposed amendments are not consistent with fundamental law and these are constitutional in dimension. This Comment Letter was drafted with addressing, respectfully, these deficiencies.

Going back to Dr. Franklin's unpublished letter, securities industry members and FINRA, both, need to refocus their efforts at bringing FINRA back to what it was intended to by the Maloney Act – a truly *self*-regulatory organization.

If we don't, then Ben Franklin's prophecy will come to pass: we will "have more need of masters." The constitutional remedies offered in this Comment Letter aim at preventing that from happening, because such event is inconsistent with "small 'r' " republican government.

Granted "that *the steps to create and enforce a cartel* are hard to distinguish from steps necessary to help investors through the policing of bad brokers", effort nevertheless has to be made, *increasingly by securities industry members especially*, because, if their efforts are unsuccessful, the industry will "have more need of masters."

This dilemma is at least as old as our Country's Founding when, in Federalist 51, James Madison wrote: "You must first enable the government to control the governed; *and in the next place oblige it to control itself*."

In the final analysis, this is the reason for authoring this Comment Letter.

[187] Source: http://franklinpapers.org/franklin/framedVolumes.jsp?vol=44&page=605

[188] https://www.finra.org/about/our-mission

The Galleria ▪ Suite 241 ▪ Building 2
2 Bridge Avenue ▪ Red Bank, NJ 07701-1106
Phone: 732-758-9001 ▪ Toll Free: 800-886-7007 ▪ Fax: 732-758-6671

NETWORK 1 FINANCIAL
SECURITIES, INC.

Respectfully submitted,

NETWORK 1 FINANCIAL SECURITIES, Inc.

BY: _____
Damon D. Testaverde
Director

BY: _____
William R. Hunt, Jr.
President

BY: _____
Joseph C. Cascarelli, Esq.
Corporate Counsel

cc: Michael Molinaro,
Chief Compliance Officer

The Galleria ▪ Suite 241 ▪ Building 2
2 Bridge Avenue ▪ Red Bank, NJ 07701-1106
Phone: 732-758-9001 ▪ Toll Free: 800-886-7007 ▪ Fax: 732-758-6671

NETWORK 1 FINANCIAL
SECURITIES, INC.

APPENDIX "A"

Analysis of Arbitration Cases Brought Against Brokers by Non-Attorney Representative – Cold Spring Advisory Group

The Galleria ▪ Suite 241 ▪ Building 2
2 Bridge Avenue ▪ Red Bank, NJ 07701-1106
Phone: 732-758-9001 ▪ Toll Free: 800-886-7007 ▪ Fax: 732-758-6671

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
Summary						
	Time Range of Review		1 January 2016	25 June 2018		
	Source of Search: FINRA Arbitration Awards Online		https://www.finra.org/arbitration-and-mediation/arbitration-awards-online?search=%22Cold%20Spring%20Advisory%20Group%22&page=1			
	Search Criteria		"Cold Spring Advisory Group"	"CSAG"	"Jennifer Tarr"	
	Number of Cases Reported and Reviewed		35		100%	
	Number of Cases Fit Criteria for Nuisance Lawsuits		25	25/35		71.428%
	Number of Cases Fit Criteria for Nuisance Lawsuits – IN PART		3	3/35		8.572%
	Number of Cases Do NOT Fit Criteria for Nuisance Lawsuits		7	7/35		20.000%
1	18-00498	Unsuitability; Overconcentration; Failure to Supervise; Breach of Fiduciary Duty; Negligence; Breach of Contract; and a claim for lost opportunity damages.	$22,490.00 Compensatory	Claimant's claims are denied in their entirety	14 June 2018	Yes
2	18-00027	Breach of the duty of Care and Negligence.	$9,606.47 Compensatory $19,212.94 Treble Damages	(1) Claimant's claims are denied in their entirety (2) Claimant's request for punitive and	7 June 2018	Yes

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
			$21,180.59 Punitive	treble damages is denied. 3) All other relief requests are denied.		
3	16-01128	Unsuitability, Unauthorized transactions, Failure to Supervise, and Breach of Fiduciary Duty.	$112,991.00 Compensatory	Broker is pay to Claimant $83,491.00 compensatory Broker to pay to Claimant $68,271.00 disgorgement damages.	11 May 2018	No
4	17-02491	Unsuitable high-risk investments for Claimant's age and income.	$10,180.00 Compensatory	Claimant reached settlement with Respondent, dismissal of case with prejudice.	31 May 2018	Yes
5	16-03026	Unauthorized Transactions, Failure to execute trades, Breach of fiduciary duty, Unsuitability, Negligence, Failure to Supervise, Excess Compensation, Securities Fraud and Respondeat Superior.	$2.7 million to $5.4 Million Compensatory	Parties reached a settlement in mediation. Significantly, "The Panel recommends the expungement of all references to the above-captioned arbitration from registration records" for Broker. See page 3 of Award.	15 May 2018	Yes

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
6	16-01128	Unsuitability and Unauthorized Transactions, Failure to Supervise, and Breach of Fiduciary Duty; Failure to adhere to their basic duties when opening, administering, and supervising accounts.	$112,991.00 Compensatory	Broker liable to pay Claimant $83,491.00 in compensatory damages. Broker to pay $68,271.00 in disgorgement damages.	11 May 2018	No
7	17-02040	breach of contract for compensation/commissions owed; defamation on the Form U5; securities fraud; and failure to supervise	$1,291,358.90 Compensatory Additional compensatory damages for lost wages and loss of career in the amount of $500,000.00.	Claimant's claims are "denied in their entirety." Significantly, "The Panel recommends the expungement of the Termination Comment in Question 3 from Ryan Kuhn's (CRD# 6670036) Form U5". See page 2 of Award.	30 April 2018	Yes
8	17-01059	Unsuitable (qualitative suitability) transactions; failure to supervise; respondeat superior	$43,823.00 Compensatory	Claimant's claims dismissed, without prejudice to file in Court.	6 April 2018	Yes
9	16-00402	Unsuitability; failure to supervise; breach of fiduciary duty	$308,703.00 Compensatory	$233,703.00 in compensatory damages.	22 November 2017	No
10	16-03566	Unsuitability and unauthorized transactions; failure to	$36,351.00 Compensatory	Claimant failed to prove losses stemmed from	9 November 2017	Yes

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
		supervise; breach of fiduciary duty		unsuitable investments; no basis for negligent supervision.		
11	17-00104	Excessive Trading (quantitative suitability); churning; unsuitable transactions (qualitative suitability); failure to supervise; respondeat superior; violation of FINRA Rules	$50,000.00 Compensatory	Claimant's claims against Firm dismissed with prejudice; Claimant's remaining claims are "denied in their entirety."	11 September 2017	Yes
12	16-03559	Excessive Trading; Suitability; Churning; Unauthorized Transactions	$29,949.00 Compensatory	Claimant's claims are "denied in their entirety". Respondents' requests for expungement are granted.	30 May 2017	Yes
13	16-02665	Unsuitability; Unauthorized Transactions; Failure to Supervise; Breach of Fiduciary Duty	$38,084.00 Compensatory	Claimant withdrew all claims without prejudice against all Respondents	18 May 2017	Yes
14	16-01643	Unsuitability; Failure to Supervise; Breach of Fiduciary Duty	$22,269.00 Compensatory	Claimant withdrew all claims without prejudice against all Respondents	8 March 2017	Yes

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
15	16-00519	Unsuitability; Failure to Supervise; Breach of Fiduciary Duty; Unsuitable recommendations and over-concentrated account with certain investments.	$19,772.00 Compensatory plus $27,128.00 punitive	Claimant's claims denied in their entirety.[1]	1 March 2017	Yes
16	16-01655	Unsuitability; Unauthorized Transactions; Failure to Supervise; Breach of Fiduciary Duty.	$50,000.00 Compensatory	Claimant's claims against Brokers #1, #2, #3, and #4 are denied in their entirety. Claimant dismissed with prejudice claim against Broker #5 because of settlement.	27 February 2017	Yes
17	16-00350	Suitability; Failure to Supervise; Breach of Fiduciary Duty; Failure to adhere to basic duties when opening, administering, and supervising brokerage accounts; Unsuitable recommendations.	$294,316.00 Compensatory	Broker #1 liable for $83,000 in compensatory damages. Broker #2 liable for $20,000 in compensatory damages. Broker #3 liable for $195,737 in compensatory damages.	24 February 2017	In Part

[1] "Under FINRA Code of Arbitration Procedure, and as limited by Kansas law, the [Claimant's] pleadings are stricken, as neither Cold Spring Advisory Group nor non-attorney Jennifer Tarr can represent Claimant in this arbitration, and even if we were to address the merits, Claimant has not met his burden of proof on any count, so all awards are in favor of Respondents." (Emphasis supplied) See award page 9 of 11.

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
				Claimant dismissed with prejudice all claims against Broker #4. Claimant dismissed with prejudice all claims against Broker #5.		
18	16-00441	Breach of Fiduciary Duty; Suitability; Failure to Supervise; Inappropriate recommendations; Failure to adhere to basic duties when opening, administering, and supervising brokerage accounts.	$30, 236.00 Compensatory $14,164.00 Punitive	Claimants' claims against Broker #1 and Broker #2 are "dismissed with prejudice". Claimant's claim against Broker #3 is dismissed without prejudice for lack of perfected service. Broker #4 and Firm are liable to pay $32,517 to Claimants.	10 February 2017	In Part
19	15-01228	Churning; Unauthorized Trading; Breach of Fiduciary Duty; Breach of Contract; Elder Abuse;	$715,204.54 Compensatory	Claimants claims, "each and all, are dismissed with prejudice."[2]	20 January 2017	Yes

[2] The Arbitrator writes: "Claimant ... failed and refused to participate in a pre-hearing telephone conference ... Claimant failing to provide a reasonable and non-evasive explanation for his actions." See page 4 of Award.

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
		Disciplinary History and Failure to Supervise; and Quantum Meruit – Disgorgement.				
20	15-01225	Churning; Unauthorized Trading; Breach of Fiduciary Duty; Breach of Contract; Elder Abuse; Disciplinary History and Failure to Supervise; and Quantum Meruit – Disgorgement.	$123,553.46 Compensatory	Claimants to pay $37,500 to Respondents (Firm and Broker) on Counter-Claim.[3] Claimants to pay $7,500 to Respondents on Motion for Sanctions. "The Panel does not find the Claimants' allegations credible." Page 5 of Award.	6 January 2017	Yes
21	16-01121	Unauthorized Trading; Unsuitability; Failure to Supervise	$24,955.00 Compensatory	Claimant's claims are "denied in their entirety".	28 December 2016	Yes
22	16-00673	Suitability; Failure to Supervise; Churning; Breach of Fiduciary Duty; Unsuitable Strategy – investments in inferior quality companies; Over-	$50,000.00 Compensatory	Broker #1 and #2 liable for $46,500 in compensatory damages. Claimant dismissed with	22 December 2016	No

[3] The Arbitrator writes: "The Panel does not find the Claimants' allegations credible." (Emphasis supplied) See page 5 of Award.

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
		concentrated positions.		prejudice claim against Broker #3 because of settlement.		
23	15-03326	Unsuitability; Breach of Fiduciary Duty	$86,524.00 Compensatory	Claimant's claim is "denied in its entirety."[4]	24 October 2016	Yes
24	15-02865	Suitability; Churning; Failure to Supervise; Unauthorized Trading.	$33,306.00 Compensatory	Claimant's claims are "denied in their entirety." Claimant is entitled to "No Award against Respondents either because of (a) the invalidity of Claimant's prior submissions,[5] and/or (b) the evidence submitted by Claimant, as refuted by Respondents, is insufficient * * * Claimant shall be responsible for 100% of FINRA	13 October 2016	Yes

[4] The Arbitrator writes:

- "The claim, allegation, or information is factually impossible or clearly erroneous, and
- "The claim, allegation, or information is false." (Emphasis added) See page 4 of Award.

[5] The Arbitrator writes: "IT IS HEREBY ORDERD that under Rule 12208 of the FINRA Code of Arbitration Procedure, as limited by Arizona law, CSAG [Cold Spring Advisory Group] and Ms. Tarr cannot represent Claimant in this arbitration." [Citations omitted with respect to state law prohibitions against non-attorney representation of clients in non-judicial proceedings.]

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
				Forum fees related to this arbitration." See pages 5-6 of Award.		
25	16-00201	Unsuitability; Failure to Supervise; Breach of Fiduciary Duty.	$39,605.00 Compensatory	Claimant's claims are "denied in their entirety".	30 September 2016	Yes
26	16-00786	Unsuitability; Unauthorized Trading; Failure to Supervise; Breach of Fiduciary Duty.	$42,459.00 Compensatory	Claimant's claims are "denied in their entirety."	16 September 2016	Yes
27	15-03282	Unsuitability; Failure to Supervise; Breach of Fiduciary Duty.	$31,258.00 Compensatory	Claimants' claims are "denied in their entirety."	18 August 2016	Yes
28	15-02851	Unsuitability; Failure to Supervise; Overconcentration; Churning.	$44,734.00 Compensatory $2,500.00 Punitive	Broker #1 is liable to pay Claimant $44,734.00. Claimant withdrew without prejudice claim against Broker #2.	29 July 2016	In Part
29	16-00351	Unsuitability; Failure to Supervise; Breach of Fiduciary Duty; Day-Trading and Unsuitable Recommendations.	$50,000.00 Compensatory	Broker's #1, #2, #3, and #4 liable to pay Claimant $50,000 in compensatory damages.	19 July 2016	No
30	15-02570	Unsuitability; Failure to Supervise; Churning.	$24,610.00 Compensatory $20,390.00	Claimant's claims are "denied in their entirety".	22 June 2016	Yes

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.

Cold Springs Advisory Group cases in FINRA Arbitration

No.	Docket Number	Nature of Claim	Dollar Amount Claims	Award	Date of Award	Fits Criteria for Nuisance Lawsuit?
			Punitive Damages			
31	15-03158	Unsuitability; Failure to Supervise; Fraud; Misrepresentation.	$50,000.00 Compensatory	Claimant's claims are "denied in their entirety".	3 June 2016	Yes
32	15-01416	Churning; Unsuitability; Failure to Supervise; Breach of Fiduciary Duty; Breach of Contract; Fraud; Misrepresentation.	$27,242.84 Compensatory	Claimant's claims are "denied in their entirety". Expungement recommended by Arbitrator.	17 May 2016	Yes
33	15-03002	Unsuitability; Failure to Supervise; Fraud; Misrepresentation.	$50,000.00 Compensatory	Broker's #1, #2, and #3 are jointly and severally liable to pay Claimant $50,000.	16 May 2016	No
34	15-01160	Churning; Unsuitability; Failure to Supervise; Unauthorized Trading; Breach of Fiduciary Duty; Breach of Contract; Fraud and Misrepresentation.	$26,336.57 Compensatory	Claimant's claims are "denied in their entirety".	5 May 2016	Yes
35	15-01911	Churning; Unsuitability; Failure to Supervise; Unauthorized Trading; Breach of Fiduciary Duty; Breach of Contract; Fraud and Misrepresentation.	$41,842.00 Compensatory	Respondents are liable to pay Claimant $41,842.	8 April 2016	No

Criteria for Nuisance-Value. Any combination of the following: relatively insignificant amount of damages claimed; cases that settle under these circumstances; cases that are dismissed with and without prejudice; claims denied in their entirety (with polite reprimand commentary by arbitrators); arbitrator grant of expungement; knowing that the claim has no merit; maneuvering the broker into settling the claim at or near this dollar amount short of going to trial, etc.