NOTES

MUCH ADO ABOUT NOTHING: HOW THE SECURITIES SRO STATE ACTOR CIRCUIT SPLIT HAS BEEN MISINTERPRETED AND WHAT IT MEANS FOR DUE PROCESS AT FINRA

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I. INTRODUCTION

More than two years after the passage of Dodd–Frank,[1] the chatter concerning regulatory reform of the U.S. financial markets has yet again reached a deafening level. Largely spurred on by the political storm surrounding the recent presidential election, the discussion has naturally focused on the substance of the securities laws—whether regulations should be ratcheted up to protect consumers against greedy and predatory financial institutions[2] or eased to nurse job growth and recovery in the markets.[3] Yet seemingly lost among the crossfire rhetoric is the fact that the regulatory system at the heart of one of the world's largest financial markets is in the midst of a fundamental and highly consequential identity crisis.

A major issue facing the financial industry is whether, and to what extent, the "independent" organizations responsible for regulating securities trading in the United States, namely the Financial Industry Regulatory Authority (FINRA), should be considered government entities. The U.S. secondary securities market—the financial market where securities that have already been sold to an initial investor are subsequently bought and sold—was conceived to function under a system of private, self-governing regulation.[4] From the beginning, the primary authority to create and enforce industry rules upon broker-dealers, as well as the responsibility to enforce federal securities laws, has been vested in private bodies of industry professionals known as self-regulatory organizations (SROs), as opposed to a federal administrative agency. Securities exchanges, such as the New York Stock Exchange (NYSE) and the National Association of Securities

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[1] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[2] *See, e.g.*, Patrice Hill, *"Too Big To Fail" Bank Law Seen as Too Weak To Work*, WASH. TIMES, July 21, 2011, http://www.washingtontimes.com/news/2011/jul/21/too-big-to-fail-bank-law-seen-as-too-weak-to-work/?page=all (discussing criticism that the law will not end bailouts of large banks).

[3] *See, e.g.*, Stephanie Condon, *GOP Targets Wall Street Reform, Says It's Hindering Job Growth*, CBSNEWS (Mar. 15, 2011, 2:03 PM), http://www.cbsnews.com/8301-503544_162-20043420-503544.html (discussing Republican proposals to repeal the Dodd–Frank Act).

[4] *See infra* Part II.A.*1*.

Dealers Automated Quotation (NASDAQ), have primarily assumed this self-regulatory role, governing their members while also carrying out their commercial functions.[5]

Throughout the latter half of the twentieth century, however, SROs' regulatory authority was increasingly brought under tighter government control, causing the distinction between private and public regulation of Wall Street to become greatly muddled. Periodic increases in the federal government's role in overseeing SROs[6] paired with decreases in private-industry autonomy[7] caused the regulation of the securities-trading market to appear progressively more like the work of the Securities and Exchange Commission (SEC, or the Commission).[8] Private SROs' rule-making and disciplinary functions became subject to numerous federal restrictions as well as review and amendment by the SEC.[9] Additionally, the SEC forced major changes to the corporate-governance structure of SROs, separating commercial and regulatory functions and greatly limiting the number of securities-industry professionals who could take part in industry regulation.[10] The product of this transformation in today's securities regulatory framework is "a peculiar mix of private sector self-regulation and delegated governmental regulation."[11]

Not surprisingly, the swelling SEC control over SROs did not sit well with securities professionals. In the 1970s, broker-traders began seeking asylum from SRO disciplinary actions in federal court, petitioning for constitutional protections predominantly

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[5] *See* Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71,256 (Dec. 8, 2004) ("Most, but not all, SROs also operate and regulate markets or clearing services.").

[6] *See infra* Part II.A.*2.*

[7] *See infra* Part II.A.*3.*

[8] *See generally* Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151 (2008) (providing an extensive account of both the merging roles of SROs and the SEC and their remaining differences in an effort to determine whether modern SRO action should be attributed to the government).

[9] *See infra* Part II.A.*2.*

[10] *See infra* Part II.A.*3.*

[11] Karmel, *supra* note 8, at 151.

under the Due Process Clause of the Fifth Amendment.[12] If SROs are to be the puppet of the federal government, industry professionals argued, their proceedings should be held accountable to the constitutional restrictions on state action.[13] The foundation for these lawsuits was the state actor doctrine, under which a court will treat a private actor as a public actor when that entity has "take[n] on the government mantle."[14]

Unfortunately, whether SROs had reached this level of government functioning was extremely difficult for the courts to ascertain. As a result, an exceptionally convoluted circuit split has developed on the issue over the past four decades. Still unresolved, the SRO state actor controversy has experienced a resurgence of interest among securities professionals and legal scholars due to the 2007 creation of FINRA, a single SRO with a monopoly of self-regulatory authority in the U.S. trading market.[15] Created by the divestiture and subsequent merger of the regulatory function of the market's two largest SROs, the NYSE and the National Association for Security Dealers (NASD), FINRA is the largest independent regulator of security professionals conducting business in the United States.[16] Due to the government's continued control of FINRA, now "essentially the only self-regulatory organization for Wall Street," security professionals have resumed their state actor argument with increased exigency, advocating that the creation of a single SRO

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[12] *See* Steven J. Cleveland, *The NYSE as State Actor?: Rational Actors, Behavioral Insights & Joint Investigations*, 55 AM. U. L. REV. 1, 9–12 (2005) (summarizing early cases involving SROs).

[13] *See id.* at 10–11 (describing an early court case where the court agreed with a company that the SRO's close cooperation with the SEC meant the Fifth Amendment due process protections applied to the SRO's actions).

[14] *Id.* at 2.

[15] *See, e.g.*, Karmel, *supra* note 8, at 153–54 ("Now that the broker-dealer regulatory functions of the NYSE and NASD have merged, the monopoly status of FINRA strengthens its role as a regulator of broker-dealers . . . . Is FINRA, now organized and recognized, and functioning only as a regulator under the aegis of the SEC, a government regulator?").

[16] *About the Financial Industry Regulatory Authority*, FINRA, http://www.finra.org/AboutFINRA/ (last visited Apr. 2, 2013).

whose sole purpose is market regulation has unequivocally tipped the scales in favor of finding FINRA to be a government entity.[17]

The resolution of the SRO state actor inquiry is highly significant to the operation of the secondary securities market. Principally, because the Constitution only governs state action, if SROs are deemed to be public actors, they would become subject to constitutional imperatives that would not apply if they were private entities.[18] Indeed, the securities professionals' motive in petitioning the courts to label SROs as state actors is to access fundamental constitutional protections in SRO disciplinary proceedings.[19] Beyond disciplinary procedures, however, the state actor analysis further implicates a range of constitutional and administrative law issues, such as: whether SROs are subject to the transparency requirements of public agencies; whether SROs may enjoy public immunity from suit; and whether SROs' rules may preempt state law.[20]

Given FINRA's primary function as a regulator, however, the focus of the SRO state actor controversy has generally been due process. As an enforcer of securities laws, FINRA possesses the power to fine, suspend, and even expel its members from market activities,[21] sanctions that constitute a deprivation of "life, liberty, or property."[22] Consequently, if found to be a government body, FINRA would be compelled to offer procedural protections in the creation and enforcement of regulations in accordance with the Due Process Clause.[23] As could be predicted, the popular opinion on Wall Street is that FINRA "should be obligated to provide Due Process protections" when serving in its regulatory capacity.[24]

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[17] *See* Bill Singer, *11th Circuit Raises FINRA Due Process Dilemma in* Busacca *Appeal*, FORBES (Jan. 6, 2012, 8:12 AM), http://www.forbes.com/sites/billsinger/2012/01/06/11th-circuit-raises-finra-due-process-dilemma-in-busacca-appeal/ (arguing that FINRA is "at least a quasi-governmental actor").

[18] Karmel, *supra* note 8, at 156.

[19] *See* Cleveland, *supra* note 12, at 9–12.

[20] *See generally* Karmel, *supra* note 8 (discussing extensively SROs and state actor issues).

[21] 15 U.S.C. § 78o-3(b)(7) (2006).

[22] U.S. CONST. amend. V.

[23] Karmel, *supra* note 8, at 183.

[24] Singer, *supra* note 17.

Unfortunately, the SRO state actor circuit split provides no valid guidance for the resolution of the SRO state actor issue. In fact, a recent Eleventh Circuit decision reveals that the circuits have fundamentally misinterpreted the law.[25] Although widely cited as a split between a few jurisdictions that categorize SROs as state actors and a few that refuse to do so, in actuality the vast majority of circuits have remained silent on whether SROs are state actors under the Constitution.[26] Rather, the holdings of these cases have largely been limited to whether adequate process was given in the proceeding in question.[27]

This Note examines the circuit split, ultimately concluding that, although these decisions are unhelpful in gauging whether FINRA is a state actor, properly understood the circuits' decisions offer important revelations on the due process debate at the heart of the SRO state actor controversy. Part II.A retraces the history of securities SROs and the mounting government controls over them, an essential step in understanding the statutory framework that currently controls the regulatory actions of FINRA. Part II.B. investigates the development of the SRO state actor issue and dissects the complex circuit split that has formed on the issue. Part III reveals the key revelation of the correctly interpreted SRO state actor jurisprudence—regardless of whether FINRA is labeled a government actor, the organization already provides constitutionally adequate due process because it is required by the Exchange Act to do so. Finally, this Note concludes by examining the implications of this revelation for the future of the FINRA due process controversy.

II. BACKGROUND

A. THE SELF-REGULATION OF WALL STREET—PAST AND PRESENT

1. Establishment of Self-Regulation in the Secondary Securities Market. The concept of self-regulation—the exercise of some

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[25] *See infra* Part III.A.
[26] *See infra* Part III.B.
[27] *See infra* Part III.B.

degree of regulatory authority by a private industry over its own actions[28]—is intimately intertwined with U.S. securities exchanges, growing in tandem with the exchanges nearly since their inception in the budding years of the United States. Emerging in the late-eighteenth and early-nineteenth centuries, U.S. securities exchanges were originally created as professional organizations by brokers and traders primarily looking to capitalize on the exploding economic growth of the Industrial Revolution by centralizing and cornering the trading of securities.[29] As these organizations grew, however, so too did the threat of government intervention; eventually, exchange members succumbed to the financial disclosure and governance standards imposed by their own exchanges as an alternative to state "blue sky" laws[30] and federal regulation.[31] Consequently, the first exchanges ordained themselves as SROs and continued their sovereignty over security trading, unimpeded by federal law, until the 1930s.[32]

The Stock Market Crash of 1929, however, marked both an end to the exchanges' monopoly over securities regulation and the beginning of the federal government's presence in the securities markets.[33] For their role in fostering the widespread manipulative and speculative activity at the heart of the financial crisis, the

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[28] Margot Priest, *The Privatization of Regulation: Five Models of Self-Regulation*, 29 OTTAWA L. REV. 233, 237–38 (1997).

[29] Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. RICH. L. REV. 1069, 1071–72 (2005). The creation of exchanges was also influenced by complications in early American security trading, such as the government bond scandal that helped prompt the creation of the New York Stock Exchange in 1792. Karmel, *supra* note 8, at 159.

[30] "Blue sky" laws represented the states' individual efforts in the early 1900s to curb abuses in the public securities markets. Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348 (1991). These laws imposed basic reporting and review requirements on securities and the professionals that dealt in them. *Id.* at 348–49. The standard view is that these laws were "flawed but well-intentioned precursors to the beneficial system of federal regulation adopted by Congress" in the 1930s. *Id.* at 349.

[31] *See* Dombalagian, *supra* note 29, at 1073–74 (describing the NYSE's adoption of financial-disclosure requirements and governance standards).

[32] *Cf.* Macey & Miller, *supra* note 30, at 348 ("Only with the Securities Act of 1933, adopted by Congress at a time of national economic collapse, did federal regulation begin to any significant extent.").

[33] *Id.*

exchanges earned themselves the full attention of the Depression-era Congress.[34] Following the Securities Act of 1933 (Securities Act)[35]—which focuses on securities in the primary market—Congress fixed its crosshairs on the secondary market and passed the Securities Exchange Act of 1934 (Exchange Act).[36] The hallmark of the Exchange Act was the creation and deputization of the SEC, a federal agency designed "to enforce the newly-passed securities laws, to promote stability in the markets and, most importantly, to protect investors."[37] To further these aims, the exchanges were placed under the oversight umbrella of the SEC and subjected to extensive registration and reporting obligations.[38]

Although lawmakers gave the Commission broad authority over securities matters, they nevertheless decided to retain the existing self-regulatory framework for enforcing the new securities laws among the exchanges.[39] A self-regulatory framework, Congress determined, provided "a workable balance between federal and industry regulation" considering the prohibitive cost of regulating the securities industry, the complexity of securities trading practices, and the inability of the SEC to match the proscriptive standards of just and equitable principles of trade and detailed

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[34] *See* Dombalagian, *supra* note 29, at 1074 ("[T]he hearings leading up to the adoption of federal securities legislation largely focused on trading activity in stock exchanges."); *see also* Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71,256, 27,2157 (Dec. 8, 2004) ("Federal regulation of exchanges, and their formal recognition as self-regulatory organizations, followed a number of significant events, including the stock market crash of 1929 and the evidence of NYSE investigatory failures related to market manipulation . . . .").

[35] Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)).

[36] Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2006)).

[37] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Apr. 2, 2013).

[38] *See* 15 U.S.C. §§ 78f, 78l (2006) (promulgating registration requirements for securities transactions on national securities exchanges); *see also* Dombalagian, *supra* note 29, at 1076 (explaining that Congress established a regulatory regime under which the SEC had the power to seek voluntary governance reforms at the exchanges).

[39] *See* Concept Release Concerning Self-Regulation, 69 Fed. Reg. at 71,527 (concluding that self-regulation "was a mutually beneficial balance between government and securities industry interests").

business conduct standards that the SROs could set.[40] Thus, the Exchange Act made the regulatory function of the exchanges obligatory, allowing an exchange to register as a qualifying national securities exchange only if:

> The rules of the exchange provide that . . . its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of [the Exchange Act], the rules or regulations thereunder, or the rules of the exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.[41]

Otherwise, the Exchange Act gave the exchanges wide breadth to develop those rules that would govern its members, only establishing broad requirements that the exchanges' rules be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . and, in general, to protect investors and the public interest."[42]

By legitimizing the self-regulatory framework, the federal government solidified the exchanges' self-appointed position in the markets as SROs.[43] In the years following the Securities and Exchange Acts, Congress has revisited the regulation of securities exchanges several times but has never broken from the regime of self-regulation they affirmed in the early 1930s.

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[40] *Id.* at 71,526. However, Professor Dombalagian argues that despite other scholars' suggestions that the self-regulatory framework was retained for the sake of operational familiarity, reputation interest, financial ability, voluntariness of regulation, or industry accountability, Congress was actually primarily motivated by the convenience offered by building on a pre-existing regulatory regime. Dombalagian, *supra* note 29, at 1095–1100.

[41] 15 U.S.C. § 78f(b)(6).

[42] *Id.* § 78f(b)(5).

[43] *See* Concept Release Concerning Self-Regulation, 69 Fed. Reg. at 71,257 (explaining how the stock market crash of 1929 and reports of NYSE investigatory failures led to the federal regulation of exchanges "and their formal recognition as self-regulatory organizations").

2. Co-evolution of SROs and the SEC. Despite numerous incidents that have rattled consumer confidence in the self-regulation of security exchanges, Congress has at every opportunity decided to maintain the self-regulation framework since the passage of the Exchange Act.[44] Rather than strip the exchanges of their regulatory authority, Congress has repeatedly opted to expand the SEC's authority over the SROs.[45] With two pieces of legislation in particular, the SEC vastly increased its involvement in the governance, rule-making, and disciplinary functions of the SROs.

Following the Exchange Act, Congress first expanded the SEC's authority over the self-regulation of securities trading in 1938. The Maloney Act[46] created a set of SROs called "national securities associations" to regulate over-the-counter transactions—securities trading conducted by brokers and dealers who were not members of a national security exchange.[47] The national securities associations, like the national securities exchanges, were set up as SROs, yet the level of autonomy and the extent of the SEC involvement differed drastically between these two types of organizations.[48] Whereas the Exchange Act originally declined to extend the SEC's oversight of the national security exchanges beyond the basic registration and disciplinary requirements,[49] the Maloney Act narrowly defined the rules that the national

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[44] *See id.* at 71,256–57 ("While steps have been taken over time to redress perceived shortcomings, the SRO structure has been repeatedly reaffirmed both by Congress and the Commission.").

[45] *See* Karmel, *supra* note 8, at 153 ("From the enactment of [the Exchange Act] until the present, Congress and the SEC have struggled to convert SROs from 'private clubs' to public bodies, frequently exploiting scandals to impose governance reforms on exchanges and the NASD.").

[46] Pub. L. No. 75-719, 52 Stat. 1070 (codified as amended at 15 U.S.C. § 78o (2006)).

[47] *See* Dombalagian, *supra* note 29, at 1076–77 (explaining the context of the passage of the Maloney Act in 1938).

[48] *Id.* at 1077.

[49] *See* Securities Exchange Act of 1934, ch. 404, § 6(c), 48 Stat. 881, 886 (1934) ("Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.").

securities associations could create and granted the SEC much greater authority to control how these SROs enforced those rules.[50]

Although the Maloney Act applied only to over-the-counter transactions and thus did not pertain to the exchanges, the law, characterized by its heightened level of SEC oversight, served as a model for later modifications to the self-regulatory framework of the exchanges.[51] Further, the most prevalent of the few national securities associations to be registered under the Maloney Act—the National Association of Securities Dealers (NASD) founded in 1939—would become an integral cog in the formation of the modern self-regulatory system.[52]

The second and most substantial expansion of the SEC into the self-regulatory framework of the exchanges came in 1975, following a period of significant market abuse in the 1950s, 1960s and 1970s.[53] Guided by "elaborate studies of the securities markets" conducted by both House and Senate committees,[54] Congress developed and enacted the Securities Acts Amendments of 1975 (1975 Amendments).[55] The 1975 Amendments sought to bring the framework of federal oversight for the national securities exchanges up to par with that the Maloney Act established for the national securities associations as well as increase the SEC's oversight of SROs across the board.[56] Although the Act retained

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[50] *See* Dombalagian, *supra* note 29, at 1077 (finding that among other differences between the Exchange Act and the Maloney Act, under the Maloney Act "the scope of the NASD's self-regulatory responsibilities was narrowly defined by statute, and the Commission had greater authority to oversee the NASD's disciplinary and enforcement processes").

[51] *See infra* note 56 and accompanying text.

[52] *See* Dombalagian, *supra* note 29, at 1077 & n.36 (explaining the NASD's narrowed but continuing role in self-regulation); Karmel, *supra* note 8, at 160–61 (describing the functions of the NASD).

[53] *See* Dombalagian, *supra* note 29, at 1078–79 (explaining how a "crisis of investor confidence" led to the Securities Acts Amendments of 1975); Karmel, *supra* note 8, at 162 (listing market abuses that undermined support for self-regulation).

[54] *See* Philip A. Loomis, Jr., Comm'r, Sec. & Exch. Comm'n, The Securities Act Amendments of 1975, Self-Regulation and the National Market System, Address at the Joint Securities Conference 3 (Nov. 18, 1975), *available at* http://www.sec.gov/news/speech/1975/111875loomis.pdf (describing the studies).

[55] Pub. L. No. 94-29, 89 Stat. 97 (1975).

[56] *See* Loomis, *supra* note 54, at 7 ("In all of [the 1975 Amendments], the pre-existing distinction between the jurisdiction of the Commission over the exchanges and its

the exchanges self-regulatory structure, the 1975 Amendments significantly overhauled many key aspects of it.[57]

Addressing the Joint Securities Conference only months after the law's passage, the Commissioner of the SEC characterized the 1975 Amendments as a "major broadening of SEC authority over the rules of the exchanges and the NASD."[58] First, the 1975 Amendments placed the exchanges' rule-making powers completely within the authority of the SEC. They made it so that "any new rule or change in the rules of a self-regulatory organization must be filed with the Commission, and with minor exceptions, must be approved by the Commission, in accordance with a rather detailed procedural scheme, before it becomes effective."[59] Second, the Amendments empower the SEC to "abrogate or amend any rule of such an organization,"[60] thereby allowing the SEC to unilaterally set the rules of any SRO "as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of [the Exchange Act] . . . or otherwise in furtherance of the purposes of [the Exchange Act]."[61]

Next, the Commissioner explained that under the 1975 Amendments "[d]isciplinary actions by exchanges are now subject to review by the Commission."[62] Actually, they not only placed the disciplinary and enforcement duties of SROs under SEC review[63]

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jurisdiction over the NASD are almost wholly eliminated."); *see also* Dombalagian, *supra* note 29, at 1080 ("The 1975 Amendments significantly changed the framework for exchanges by importing many of the features of the NASD model.").

[57] *See generally* Loomis, *supra* note 54 (describing the significant changes brought about by the 1975 Amendments).

[58] *Id.* at 6.

[59] *Id.* at 1; *see also* 15 U.S.C. § 78s(b) (2006) (requiring SROs to file notices with the SEC of any new rule or proposed rule changes).

[60] Loomis, *supra* note 54, at 1; *see also* 15 U.S.C. § 78s(c) (permitting the SEC to "abrogate, add to, and delete from" SRO rules).

[61] 15 U.S.C. § 78s(c).

[62] Loomis, *supra* note 54, at 1; *see also* 15 U.S.C. § 78s(d)–(e) (providing review procedures for SRO final disciplinary sanctions).

[63] *See* 15 U.S.C. § 78s(d)(2) (stipulating that any final disciplinary action taken by an SRO against any member "shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby").

but also installed a set of baseline procedural protocols for SROs to follow in disciplinary proceedings against their members.[64] These requirements include: providing notice to the member, bringing specific charges that identifies the alleged act or omission constituting a specific rule violation, providing the member an opportunity for a hearing, and keeping a record of the proceedings.[65] The 1975 Amendments extended similar notice, hearing, and recording requirements, as well as Commission review to the exchanges' membership decisions.[66]

Though absent from the Commissioner's address, the 1975 Amendments are also significant because they put in place the first requirements concerning the composition and oversight of the governance structure of SROs.[67] The 1975 Amendments obligated SROs to "assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer."[68] From this initial foray into the corporate governance of SROs, the SEC has continued to exert influence over the corporate organization and leadership structure of the private exchanges, gradually molding SROs into their present form.

3. Creation of FINRA. Despite the major foothold that the Maloney Act and the 1975 Amendments created, the SEC was not yet comfortable with the operation of securities market SROs. An SEC concept release published in 2004 reveals that the

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[64] *See id.* § 78f(d)(1) (2006) (requiring national securities exchanges to "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record").

[65] *Id.*

[66] *See id.* § 78f(d)(2) (requiring that in any proceeding to deny a person membership of the exchange, "the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record"); *see also id.* § 78s(d)(2) (stipulating that any action by an SRO to deny membership or participation to any applicant shall also be subject to review by the appropriate regulatory authority).

[67] Karmel, *supra* note 8, at 162.

[68] 15 U.S.C. § 78f(b)(3); *see also id.* § 78o-3(b)(4) (2006) (setting forth an identical requirement for national securities associations).

Commission was particularly concerned with the broad conflict of interest inherent in the self-regulatory system—conflict that exists "when an organization both serves the commercial interests of and regulates its members or users."[69] A number of member firms were also concerned with this conflict, predominantly because a handful of larger firms had increasingly become responsible for a disproportionately large portion of SROs funding and thus could "wield significant influence with respect to their regulator SROs."[70] These concerns underlie the transformation of the self-regulatory framework in the 1990s and 2000s and help to explain how and why the SEC forced dramatic corporate reorganizations of key SROs.

By the turn of the last century, two SROs in particular dominated the enforcement of securities laws and SRO rules: the NASD and the NYSE.[71] Following its inception in 1792, the NYSE quickly developed into one of the country's preeminent financial institutions, and with the global rise of the U.S. economy, the NYSE became the largest securities exchange in the world.[72] Likewise, the NASD, although significantly younger than the NYSE, had assumed a similar position of prominence in the market, largely due to a 1983 amendment to the Exchange Acts which made membership in the NASD mandatory for all independent broker-dealers[73] and the NASD's founding of the widely used computerized NASDAQ exchange.[74] Together, by the

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[69] Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71,256 (Dec. 8, 2004).

[70] *Id.* at 71,260.

[71] *See* Dombalagian, *supra* note 29, at 1118 (stating that the NYSE and NASD "predominate enforcement of securities law and SRO rules").

[72] *New York Stock Exchange*, NYSE EURONEXT, http://www.nyx.com/who-we-are/history/new-york (last visited Feb. 23, 2013).

[73] *See* Pub. L. 98-38, sec. 3(a), 97 Stat. 206 (1983) (codified at 15 U.S.C. §§ 78o(b)(8)–(9) (2006)) (making it unlawful for any broker or dealer to engage in a transaction of a security "unless such broker or dealer is a member of a securities association registered pursuant to [15 U.S.C. § 78o-3] or effects transactions in securities solely on a national securities exchange of which it is a member").

[74] *See What is NASDAQ?*, NASDAQ OMX, http://www.nasdaqomx.com/aboutus/whatisnasdaq/ (last visited Apr. 2, 2013) ("The NASD wanted to create a way for investors to buy and sell stocks on a computerized, transparent, and fast system. . . . [W]e are proud that the revolutionary, disruptive model that the NASD developed in 1971 is now the standard for markets worldwide.").

twenty-first century the NYSE and NASD overwhelmingly dominated the market share of securities trading[75] and had assumed responsibility for the regulation of thousands of member firms.[76] Simply put, together the NYSE and NASD constituted the dominant self-regulatory authority of the modern U.S. securities trading market.[77]

In the 1990s and 2000s, however, both the NASD and NYSE found themselves at the mercy of their own federal regulators. Throughout the past twenty years the SEC opportunistically leveraged scandals at the NASD and NYSE and the two organizations' decisions to turn into public companies to separate the market and regulatory functions of the organizations and consolidate regulatory power in the markets.[78] In 1996, a Department of Justice and SEC investigation concluded that the integrity of the NASD had been compromised by NASDAQ market makers exercising undue influence over "rule-making, the disciplinary process and the admission of new members."[79] In settling these claims, the SEC forced the NASD to reorganize its corporate structure, splitting the market and regulatory function of the company into two subsidiaries, NASDAQ and NASD Regulation, Inc. (NASDR).[80] Further, the SEC required that the boards of these companies be separate and comprised of a majority of non-industry members.[81] Shortly thereafter, the NASD decided to go public.[82] After years of negotiations with the SEC, the NASD

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[75] *See* Concept Release Concerning Self-Regulation, 69 Fed. Reg. at 71,258 (finding that although competition had increased in recent years, "the NYSE . . . historically dominated trading in [its] listed securities, and market makers dominated trading in Nasdaq stocks").

[76] Dombalagian, *supra* note 29, at 1118 n.246 ("The NYSE is the designated examining authority for approximately 280 of its member firms. The NASD regulates approximately 5100 firms.").

[77] *Id.* at 1118.

[78] *See* Karmel, *supra* note 8, at 166 (discussing governance changes at the NASD and NYSE).

[79] *Id.* at 163.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 164.

was granted a public offering in 2006, but only after agreeing to completely divest the NASDAQ from its corporate umbrella.[83]

In 2003, after suffering a series of scandals of its own, the NYSE began a similar transformation. Charged by the SEC with failing to police the illegal activities of its security firms and stock exchange specialists as well as faced with intense scrutiny for the massive compensation package of its departing chairman and CEO, the NYSE restructured its board and enacted a requirement that all board members except the CEO be independent of management, members, and listed companies.[84] Following this reorganization, "the NYSE also demutualized and become a public company."[85] As part of this process and under pressure from the SEC, the NYSE spun off its regulatory capacity into a not-for-profit subsidiary, NYSE Regulation, Inc. (NYSE Regulation).[86]

Although the SEC addressed the conflict of interest in the self-regulatory system by orchestrating the separation of the market and regulatory functions of the two largest exchanges, the Commission as well as members of the NASD and NYSE still believed the regulatory framework was imperfect and overly complicated, largely due to duplicative rules and conflicting interpretation of rules among the two SROs.[87] Thus, the final step in the formulation of the modern U.S. self-regulatory framework occurred in 2007, when the NYSE and NASD agreed to merge their member regulation operations into a single SRO.[88] Per this agreement, the NASD absorbed the member firm regulatory and

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[83] In order for the NASD to turn public, it was first necessary for the NASDAQ, which had technically been registered up to that point as a "securities information processor," to become a registered national stock exchange. *Id.* However, before the SEC would grant the NASDAQ registration as an exchange, it required that NASDAQ be transformed from a subsidiary of NASD into its own separate company. *See id.* (explaining NASD's lengthy process of going public during which the SEC "forced a complete separation of Nasdaq from NASDR").

[84] *Id.* at 164, 165 & n.67.

[85] *Id.* at 165.

[86] *Id.*

[87] *See generally* Order Approving Proposed Rule Change To Amend the By-Laws of NASD To Implement Governance and Related Changes To Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc., 72 Fed. Reg. 42,169 (Aug. 1, 2007).

[88] *Id.* at 42,170.

enforcement functions of NYSE Regulation and changed its name to the Financial Industry Regulatory Authority.[89]

Today, due to the size of its predecessors, FINRA serves as the largest private regulator of securities firms in the United States.[90] In total, "FINRA oversees about 4,275 brokerage firms, about 161,550 branch offices, and approximately 629,980 registered securities representatives."[91]

B. THE SRO STATE ACTOR CONTROVERSY

1. Issues and Implications. Federal involvement with the regulation of securities exchanges has drastically changed since the passage of the Exchange Act. Time and time again, and despite heralding the "mutually beneficial balance between government and securities industry interests" struck by the self-regulatory system,[92] lawmakers and regulators have tipped the balance of private and public control in favor of the government by, for example, passing the Maloney Act and the 1975 Amendments and pressuring the reorganization and consolidation of the NYSE and NASD.[93] The effect of this shift, as articulated by Roberta Karmel, is that in the decades since the Exchange Act much of the "self" has been taken out of self-regulation.[94]

This transformation has not gone unnoticed on Wall Street. As the SEC has amassed growing control over the membership, rule-making, disciplinary procedures, and governance of SROs, securities professionals have grown increasingly skeptical of the "private" nature of their regulators. Beginning in the 1970s, brokers and traders began challenging in court whether, and to what extent, SROs had constructively evolved into government

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[89] *Id.*

[90] *About FINRA*, FIN. INDUS. REGULATORY AUTH., http://www.finra.org/AboutFINRA/ (last visited Apr. 2, 2013).

[91] *Id.*

[92] Concept Release Concerning Self-Regulation, 69 Fed. Reg. at 71,257; *see also* Loomis, *supra* note 54, at 4 (explaining that although change was needed in the system, self-regulation "is highly desirable if, [sic] not essential").

[93] *See* Karmel, *supra* note 8, at 152 (explaining that the reason for the consolidation was to create "a monopoly SRO under the active and direct oversight of the SEC").

[94] *Id.* at 165.

entities.[95] This legal question evoked the state action doctrine, where the court treats a private entity as the government when it has "take[n] on the governmental mantle."[96] Believing that the government's control of the SROs' regulatory authority had exceeded the threshold where SROs could still be considered private bodies, securities professionals in these cases petitioned the courts to appropriately label SROs government actors.[97]

For brokers and traders, challenging the private nature of SROs was motivated by tactical concerns. Since the Constitution limits government but not private action, an SRO that is held to be a state actor would become subject to an array of constitutional imperatives it otherwise would not face as a private entity.[98] Therefore, in attempting to have SROs qualified as government actors, securities professionals sought to access fundamental constitutional protections only made available to the recipients of government action.[99]

Whether an SRO qualifies as a private or government entity carries critical and far-reaching consequences for the operation of securities trading regulation.[100] The constitutional issues implicated by the SRO state action inquiry are numerous and significant, ranging from operational transparency and immunity

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[95] *See* Cleveland, *supra* note 12, at 9–12 (summarizing early challenges to SRO actions).

[96] *Id*. at 2; *see also* Karmel, *supra* note 8, at 158 ("Under the state action doctrine, the courts examine whether the conduct or activities of a private party can be attributed to the government . . . .").

[97] *See* Cleveland, *supra* note 12, at 9–12 (explaining courts' reasoning in declaring SROs state actors).

[98] Karmel, *supra* note 8, at 156.

[99] *See* Cleveland, *supra* note 12, at 10–11 (explaining a company's arguments in a case where it sought Fifth Amendment due process protections from an SRO's decision to de-list it).

[100] *See, e.g.*, Karmel, *supra* note 8, at 183–84 (finding that if FINRA were held to be a government entity, the organization's disciplinary actions could become accountable to the Constitution, the Administrative Procedure Act, the Freedom of Information Act, and the Government in the Sunshine Act, as well as "[a] wide variety of other statutes and regulations [that] could apply to the funding, budgeting, contracting activities and other operations of the SROs"); Alan Lawhead, *Useful Limits to the Fifth Amendment: Examining the Benefits That Flow from a Private Regulator's Ability To Demand Answers to Its Questions During an Investigation*, 2009 COLUM. BUS. L. REV. 210, 265–83 (arguing that FINRA should not be considered a government agent because it would spoil the many positive effects that the securities industry experiences as a private actor, such as SROs not being required to honor Fifth Amendment protection against self-incrimination).

from suit to protections against self-incrimination and preemption concerns.[101] However, considering that the principal function of SROs is to enforce securities regulation through the criminal prosecution of industry professionals, one of the chief constitutional concerns undoubtedly is whether the disciplinary procedures utilized by an SRO must meet the Constitution's requirement of procedural due process.[102]

2. The Due Process Requirement and Its Application to SROs. The Fifth Amendment constrains the federal government from actions that may deprive an individual of "life, liberty, or property, without due process of law."[103] The Supreme Court has made clear that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[104] Rather, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[105] Despite its amorphousness, some concrete principles of constitutional process have arisen from the Court's procedural due process jurisprudence. Foremost among these principles is that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[106] Consequently, the "Court consistently has held that

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[101] *See* Karmel, *supra* note 8, at 171–96 (surveying the range of consequences that are triggered by the SRO state actor controversy).

[102] *Cf.* Cleveland, *supra* note 12, at 4 ("When parties have challenged the actions of an SRO on constitutional grounds, their arguments have concentrated on illegal seizures in violation of the Fourth Amendment and violations of the Fifth Amendment in the form of compelled testimony or denials of due process.").

[103] U.S. CONST. amend. V.

[104] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)) (internal quotation marks omitted).

[105] *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). When considering the level of process that is due in each situation, the Supreme Court utilizes a balancing test of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

[106] *Id.* at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

some form of hearing is required before an individual is finally deprived [by the government] of a property interest."[107] The extent of the procedures required in that hearing, however, is situation-specific, determined by balancing the governmental and private interests that are affected under each set of circumstances.[108]

Perhaps unsurprising considering SROs' principal regulatory function (which includes the power to fine, suspend, and expel brokers and dealers from market participation), the constitutional challenges to SROs have generally alleged insufficient due process in an SRO's disciplinary action.[109] However, the state actor doctrine, notorious for its lack of certainty and consistency,[110] has proved difficult for the courts to administer in the context of SROs.[111] As a result, the current body of law on whether SROs constitute state actors subject to constitutional imperatives amounts to a complicated circuit split—a series of contradictory court decisions largely devoid in their reasoning of "any overriding constitutional law principles."[112]

3. The Circuit "Split." In 1971, the Fifth Circuit became one of the first jurisdictions to weigh in on the issue of SROs as

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[107] *Id.*

[108] *Id.* at 334.

[109] Cleveland, *supra* note 12, at 4.

[110] *See, e.g.*, *id.* at 2–3 ("Anything but clear is the dividing line between those situations in which private actors are simply private actors and those situations in which private actors are treated as governmental actors. This area of law has been described as a disaster area and the justices appear willing to acknowledge the attendant uncertainty." (footnotes omitted)). The current view of the state action doctrine is that in order for a private actor to be deemed a government entity, "there must be a close nexus between the government and the challenged action such that seemingly private behavior may fairly be attributed to the government." *Id.* at 13 (citing Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)). In making this determination, the Supreme Court has relied on a number of factors including whether the government: (1) has exercised coercive power over the private entity; (2) has exercised significant encouragement over the private entity; (3) was a willful and joint participant with the private entity; (4) has delegated a public function to the private entity that is traditionally performed exclusively by the government; and (5) has become entwined in the management or control of the private actor to achieve governmental objectives. *Id.*; Karmel, *supra* note 8, at 158–59.

[111] *See* Karmel, *supra* note 8, at 152 (listing the various diverging ways that different courts have categorized SROs in answering the state action inquiry).

[112] *Id.*

government entities. In *Intercontinental Industries, Inc. v. American Stock Exchange*, the corporate plaintiff sued the American Stock Exchange[113] alleging that the Exchange had deprived it of the "full and fair hearing demanded by the due process clause of the Constitution" when the Exchange delisted the plaintiff's stock for supposedly violating the rules of the Exchange.[114] In response to the Exchange's position that constitutional due process is not required since the Exchange is not a governmental agency, the Fifth Circuit held that "[t]he intimate involvement of the Exchange with the Securities and Exchange Commission brings it within the purview of the Fifth Amendment controls over governmental due process."[115] Notably, however, the court found that sufficient process had been afforded the plaintiff by the Exchange's disciplinary procedure.[116]

The Fifth Circuit was later joined by the Tenth Circuit. In *Rooms v. SEC*, the NASD had permanently banned Rooms from the securities industry for deliberately attempting to deceive an NASD official during an examination.[117] Rooms argued that he had been sanctioned for conduct not enumerated plainly in the NASD rules, constituting a violation of his due process right to receive adequate notice of prohibited conduct before being disciplined for that conduct.[118] Citing a line of ambiguous and conclusory cases, the court agreed with Rooms's position that "[d]ue process requires that an NASD rule give fair warning of prohibited conduct before a person may be disciplined for that conduct."[119] Ultimately, however, the *Rooms* court also found that

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[113] Originally called the "curb market" because its brokers traded outdoors in the street, the American Stock Exchange was one of the most preeminent U.S. financial institutions until 2008, when it was purchased by the NYSE. *New York Stock Exchange*, NYSE EURONEXT, http://www.nyx.com/who-we-are/history/new-york (last visited Apr. 2, 2013).

[114] 452 F.2d 935, 940 (5th Cir. 1971).

[115] *Id.* at 941.

[116] *See id.* at 940–43 (finding that the Exchange gave the plaintiff adequate notice of the action and an adequate hearing prior to final adjudication).

[117] 444 F.3d 1208, 1210 (10th Cir. 2006).

[118] *Id.* at 1213.

[119] *Id.* at 1214 (citing Handley Inv. Co. v. SEC, 354 F.2d 64, 66 (10th Cir. 965) (finding that "[t]he requirements of procedural due process were fully met" in an NASD disciplinary

Rooms had been provided with adequate notice through the SRO proceedings.[120]

In contrast to the Fifth and Tenth Circuits, the Second Circuit has determined that SROs are not state actors, but only in narrow contexts outside the exchanges' disciplinary functions. In *United States v. Solomon*, the Second Circuit found that the NYSE was not a government actor for the purpose of the Fifth Amendment protection against self-incrimination but declined to "decide whether stock exchanges may be subject to some due process requirements for [disciplinary] action."[121] Years later, in *Desiderio v. NASD*, the Second Circuit took a stronger stance and held that "[t]he NASD is a private actor, not a state actor," in a case involving the NASD's requirement that its members agree to mandatory arbitration to resolve trading disputes.[122]

Recently in *D'Alessio v. SEC*, however, the Second Circuit carefully scaled back its *Desiderio* holding to avoid precluding constitutional accountability in the realm of SROs' disciplinary functions. In *D'Alessio*, an appeal alleging that an NYSE disciplinary action was constitutionally invalid because it was not handed down by an impartial adjudicator, the court found it unnecessary to decide whether the NYSE constitutes a state actor in order to answer whether due process was required.[123] Instead, the court found that the Exchange Act's "provision of a fair procedure in SRO disciplinary proceedings gives rise to a due-process-like requirement that the decision-maker be impartial."[124] Thus, the court considered D'Alessio's appeal based upon the

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action, without ever first establishing that due process is a requirement of NASD disciplinary action)).

[120] *Id.*

[121] 509 F.2d 863, 871 (2d Cir. 1975).

[122] 191 F.3d 198, 206 (2d Cir. 1999). The *Desiderio* court reasoned that the NASD "is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee." *Id.*

[123] *See* 380 F.3d 112, 121 (2d Cir. 2004) ("But whatever the merits of the constitutional argument, we need not reach it today. . . . [W]hether the norm arises out of the statute or the constitution, we conclude that impartial adjudicators are required.").

[124] *Id.* (internal quotation marks omitted).

statutory-fairness requirement, ultimately concluding that fair process was given.[125]

Joining the Second Circuit, the Seventh Circuit employed the same reasoning as *D'Alessio* in *Gold v. SEC*.[126] In *Gold*, the plaintiff broker-trader, who had been charged with violating five NYSE rules, contested the NYSE's jurisdiction, alleging that it had failed to serve adequate and timely notice as required by the Due Process Clause.[127] The Seventh Circuit acknowledged that "[a]s a preliminary matter, we are faced with the question of whether the NYSE, a private organization regulated by the federal government, is a governmental actor whose jurisdictional rules and enforcement actions are subject to due process analysis."[128] However, the court found that Gold had waived this argument by not raising it in his written brief or at oral argument.[129] Instead, the court analyzed the merits of Gold's appeal based on the Exchange Act's statutory-fairness requirement, finding it "closely related to the fairness requirements derived from the Fifth Amendment's Due Process Clause" and, ultimately, concluding that Gold had received constitutionally adequate process.[130]

4. Eleventh Circuit Weighs In, Cops Out in Busacca. Still largely unsettled, the securities SRO state actor inquiry has received amplified attention in recent years with the aggregation of the securities trading markets' self-regulatory authority into FINRA—"a single SRO for broker-dealers."[131] Security professionals in particular point to FINRA, with its concentrated regulatory power and comprehensive SEC compliance, as evidence that this SRO has evolved into at least a quasi-governmental entity and thus should be required to comply with certain

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[125] *Id.*

[126] 48 F.3d 987 (7th Cir. 1995).

[127] *Id.* at 989–91.

[128] *Id.* at 991.

[129] *See id.* ("Gold's due process argument presumes that the NYSE, when it acts to enforce its own rules and regulations as well as the federal securities laws, should be regarded as an agent of the SEC bound by constitutional due process requirements. . . . Because neither party to this dispute presented [the state actor] question squarely to the court, we consider it waive on appeal.").

[130] *Id.* at 991–92.

[131] Karmel, *supra* note 8, at 170.

constitutional directives.[132] Others counter that FINRA retains enough independence to remain a private entity and warn that labeling the SRO otherwise would undermine the benefits Congress originally sought to reap by preserving the self-regulatory scheme.[133]

A point on which nearly all parties agree, however, is that the uncertainty in the law regarding the SRO's state actor status needs to be resolved. The magnitude of this problem was best captured by Steven Irwin, the Pennsylvania Securities Commissioner, in his recent testimony before the House Subcommittee on Capital Markets and Government Sponsored Enterprises.[134] Warning that the unsettled state actor issue had begun to cause FINRA to resist cooperation with government regulators out of an "extreme sensitivity to being labeled a state-actor,"[135] Irwin advised lawmakers that "[s]ettling 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."[136]

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[132] *See, e.g.*, Singer, *supra* note 17 (finding it deeply troubling that it is unclear whether FINRA, "essentially the only self-regulatory organization for Wall Street," must provide due process); Hester Peirce, *In Finance, Private Regulation vs. Government Regulation*, REAL CLEAR MKTS. (June 6, 2012), http://www.realclearmarkets.com/articles/2012/06/06/in_finance_private_regulation_vs_government_regulation_99705.html ("[I]n the securities industry, self-regulation is just another name for government regulation. It is worth considering whether we'd be better off shedding the euphemism and holding Washington's so-called self-regulators to the same standards to which government regulators are held.").

[133] *See, e.g.*, Karmel, *supra* note 8, at 186 (finding that, although the lack of a due process requirement possibly exposes an SRO's disciplinary action to adverse court review, "[t]o subject disciplinary proceedings and rule-making to greater scrutiny by declaring that SROs are subject to the constitutional and administrative law protections applicable to government agencies would probably ossify the work of SROs, and would not necessarily be useful"); Lawhead, *supra* note 78, at 213–14 (concluding that "FINRA should continue to act as a nongovernmental entity and enforce with vigilance its rule that requires individuals who are employed by FINRA member firms to testify during FINRA investigations.").

[134] *Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals To Improve Investment Advisor Oversight: Hearing Before the H. Subcomm. on Capital Mkts. and Gov't Sponsored Enters.*, 112th Cong. (2011) (statement of Steven D. Irwin, Comm'r, Pennsylvania Securities Commission, and Chairman, Federal Legislative Committee of the North American Securities Administrators Association, Inc.).

[135] *See id.* at 7 (explaining that FINRA, in order to avoid a state actor classification, has in some instances refused to engage in "basic and vital types of regulatory coordination and information-sharing with state regulators").

[136] *Id.*

However, given the relatively recent formation of FINRA, only one circuit to date has taken up the specific issue of whether FINRA is a government actor that must provide constitutional due process.[137] In 2011, on the heels of the formation of FINRA, this question came before the Eleventh Circuit in *Busacca v. SEC*.[138] In this case, Busacca, formerly the president of the securities firm North American Clearing, Inc. (North American), appealed a disciplinary action imposed by FINRA and later upheld on review by the SEC.[139] Through its adjudication process, FINRA had found misconduct in Busacca's management of North American and consequently fined him $30,000 and suspended him from serving in any principal securities capacity for a period of six months.[140] On petition for review to the Eleventh Circuit, Busacca contended that FINRA had "denied him due process of law" during the disciplinary proceedings by rejecting his request to compel the production of certain documents from North American "vital to his defense."[141]

In considering Busacca's petition, the Eleventh Circuit acknowledged that "[t]he Fifth Amendment's Due Process Clause generally requires notice and the opportunity to be heard incident to the deprivation of life, liberty, or property at the hands of the government," but the court emphasized that it had "not yet determined whether FINRA is a government actor subject to the Clause's requirements."[142] The court found that this threshold issue as applied to one of FINRA's predecessors, the NASD, had caused other circuits to reach "conflicting holdings on this

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[137] Although courts have considered this question as applied to other SROs, including the predecessors of FINRA, *see supra* Part II.B.*2*, only the Eleventh Circuit has dealt with this question as it specifically applies to FINRA, *see* Busacca v. SEC, 499 F. App'x 886, 890–91 (11th Cir. 2011).

[138] 449 F. App'x at 886.

[139] FINRA found Busacca guilty of "fail[ing] to exercise reasonable supervision over North American's operations and compliance functions in violation of NASD Conduct Rules 3010 and 2110." *Id.* at 888.

[140] *Id.*

[141] *Id.* at 890.

[142] *Id.* (quoting Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003)) (internal quotation marks omitted).

question."[143] To illustrate this tension among the circuits, the court contrasted the Second Circuit's finding in *D'Alessio* that the NASD "is not a state actor subject to due process requirements"[144] with the Tenth Circuit's finding in *Rooms* that "due process requirements apply to the NASD."[145]

Rather than weigh in on the split it perceived between the Second and Tenth Circuits, however, the *Busacca* Court skillfully circumvented the underlying issue of whether FINRA is required to honor constitutional protections.[146] Without categorically defining FINRA as either a public or private entity, the court began with a backward investigation of whether Busacca had received sufficient process "[*a*]*ssuming* that FINRA constitutes a government entity subject to the Due Process Clause."[147]

Proceeding under this conditional framework, the Eleventh Circuit rebutted Busacca's claim that he had been denied due process when FINRA denied his production demands upon North American.[148] The court pointed out that one of FINRA's rules established a mechanism for compelling evidence production from member firms, subject to certain conditions,[149] but that Busacca, "despite ample opportunity to obtain the requested documents from North American, failed to satisfy the requirements of [this

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[143] *Id.*

[144] *Id.* (quoting D'Alessio v. SEC, 380 F.3d 112, 120 n.12 (2d Cir. 2004)) (internal quotation marks omitted).

[145] *Id.* (construing Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006)).

[146] *See id.* at 891 (concluding that Busacca was not denied due process regardless of whether FINRA was as state actor or not).

[147] *Id.* (emphasis added).

[148] *See id.* (explaining that Busacca "was afforded a meaningful opportunity to be heard during the disciplinary proceedings").

[149] FINRA Rule 9252 governs mandatory evidence production in FINRA disciplinary proceedings. *Id.* at 890–91. This rule requires that a request for document production specifically state the type of documents sought, the reasons why those documents are material, and the requesting party's previous efforts to obtain those documents. *Id.* at 891 (construing FINRA Rule 9252(a)). Under this rule, a request to compel document production from a member firm will only be granted if the requesting party can show that the "information sought is relevant, material, and non-cumulative, and the requesting party has previously attempted in good faith to obtain the desired [d]ocuments . . . through other means" to no avail. *Id.* at 890–91 (alterations in original) (quoting FINRA Rule 9252(b)) (internal quotation marks omitted). For the complete text of FINRA's rules, see http://finra.complinet.com.

rule]."[150] Regardless, the court explained, "in the context of criminal cases, the Supreme Court has emphasized that '[t]here is no general constitutional right to discovery' and that 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.' "[151] "*To the extent* the Due Process Clause applies to FINRA proceedings," the court clarified, "its core demand is an opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[152] Here, because Busacca "was afforded a meaningful opportunity to be heard during the disciplinary proceedings," the Eleventh Circuit concluded that "he was not denied any process to which he *may* have been entitled."[153] Consequently, his petition for review was denied.[154]

III. ANALYSIS

A. READING BETWEEN THE LINES OF *BUSACCA*

The Eleventh Circuit has drawn criticism for its apparent evasion of the state actor issue as it applies to FINRA's regulatory actions.[155] Granted, *Busacca* failed to shed much-needed clarity on the convoluted circuit split regarding whether SROs are required to provide constitutional due process. Additionally, nothing in the decision suggests how the concentration of regulatory authority in FINRA should or will affect the SRO state actor calculus.

Yet, despite its shortcomings—and possibly in spite of the Eleventh Circuit's best efforts—*Busacca* illuminates several issues previously left in the dark in the SRO due process debate. Namely, the holding reveals that disciplinary procedures already satisfy the FINRA's threshold constitutional requirements of procedural due process, and that it is required to do so by federal

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[150] *Id.* at 891.

[151] *Id.* at 890 (quoting Weatherford v. Bursey, 429 U.S. 545, 559 (1977)).

[152] *Id.* (emphasis added) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[153] *Id.* (emphasis added).

[154] *Id.* at 893.

[155] *See, e.g.*, Singer, *supra* note 17 ("What does deeply trouble me about the Circuit Court's Opinion is the reference to the issue of *Due Process* at FINRA . . . . [T]he unsettled nature of *Due Process* at FINRA reminds us that the core issue of 'whether FINRA is a government actor subject to the Clause's requirements,' is still in dispute among the circuits.").

law.[156] Further, the discussion in *Busacca* unearths the existence of a widespread and fundamental misunderstanding of the case law forming the SRO state actor circuit split. Rather than being in conflict, the vast majority of circuits already agree that the SRO's disciplinary procedures meet the constitutional test of due process. From this insight, valuable inferences can be drawn from *Busacca* concerning the future of the SRO state actor debate and due process requirements at FINRA: first, it is highly unlikely that a pronouncement designating FINRA as a state actor will come by means of judicial review of an insufficient procedural due process claim; and second, if FINRA were deemed a state actor, this determination would have little, if any, practical effect on the specific procedures utilized by FINRA in carrying out its regulation of the securities markets.

B. CLEARING UP THE CASE LAW

The Eleventh Circuit's reference in *Busacca* to the "conflicting holdings" regarding whether FINRA is a government actor subject to the Due Process Clause's requirements[157] inadvertently highlights its misinterpretation of the cases that have created this circuit split. While the Eleventh Circuit correctly identifies that some circuits find that there is a constitutional requirement that FINRA provide due process in its regulatory functions,[158] it incorrectly asserts that other circuits definitively hold that such a constitutional due process requirement does not exist.

In *Busacca*, the Eleventh Circuit cited a footnote in *D'Alessio* to suggest that the Second Circuit has held that FINRA's predecessor

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[156] *See infra* Part III.C.

[157] *Busacca*, 449 F. App'x at 890.

[158] *See* Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006) (concluding in a case involving the NASD, a predecessor of FINRA, that "[d]ue process requires that an NASD rule give fair warning of prohibited conduct before a person may be disciplined for that conduct"); Intercont'l Indus., Inc. v. Am. Stock Exch., 452 F.2d 935, 941 (5th Cir. 1971) (concluding in a case involving the American Stock Exchange, also a predecessor of FINRA, that "[t]he intimate involvement of the [American Stock] Exchange with the Securities and Exchange Commission brings it within the purview of the Fifth Amendment controls over governmental due process").

SROs are not state actors subject to constitutional requirements.[159] While the Second Circuit has reached this conclusion in certain contexts, such as the NASD's commercial arbitration function[160] and the protection against self-incrimination in disciplinary hearings,[161] it has explicitly refused to extend this holding to due process in the SROs' disciplinary proceedings.[162] Although it had the opportunity to do so in *D'Alessio*, the Second Circuit opted instead to bypass the state actor argument and decide the case based on the "due-process-like requirement" found in the Exchange Act's requirements for SROs.[163] The same *D'Alessio* footnote cited by the Eleventh Circuit goes on to say:

> In considering an Exchange disciplinary proceeding, such as the present one, in which the disciplinary violations alleged include violations of federal securities laws and SEC regulations, the argument that the nexus between the State and the challenged proceeding is sufficiently close that the Exchange's behavior may be fairly attributable to the State may not be trivial. However, we need not, and do not, address this issue here.[164]

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[159] *Busacca*, 449 F. App'x at 890 (citing D'Alessio v. SEC, 380 F.3d 112, 120 n.12 (2d Cir. 2004)).

[160] *See* Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999) ("[W]e find no state action in the application or enforcement of the arbitration clause of Form U-4.").

[161] *See* United States v. Solomon, 509 F.2d 863, 871 (2d Cir. 1975) ("We deal here with special factors concerning the privilege against self-incrimination and, although we do not think this decisive, even with that only in a preliminary investigation rather than a formal disciplinary proceeding.").

[162] *See, e.g.*, *id.* ("We need not here decide whether stock exchanges may be subject to some due process requirements for certain types of action as stated in dictum in *Intercontinental Industries, Inc. v. American Stock Exchange* [and other cases dealing with SROs' regulatory actions].").

[163] *See D'Alessio*, 380 F.3d at 121 ("But whatever the merits of the constitutional argument, we need not reach it today. . . . [W]e think that provision of 'a fair procedure' in SRO disciplinary proceedings gives rise to a due-process-like requirement that the decision-maker be impartial. Thus, whether the norm arises out of the statute or the constitution, we conclude that impartial adjudicators are required.").

[164] *Id.* at 120 n.12.

Therefore, contrary to what *Busacca* suggests, the Second Circuit has not held that FINRA is not a state actor required to provide due process in its disciplinary proceedings but rather has remained silent on the matter. Unfortunately, confusion like this is not limited to the Eleventh Circuit. The SRO state actor jurisprudence, splintered into countless factions based on the various functions of SROs and the varying constitutional imperatives asserted, has made it difficult for courts and legal commentators to ascertain whether SROs are required to provide constitutional due process in their regulatory capacity.[165]

In actuality, among the circuits that have taken up this specific issue, *no jurisdiction* has held that an SRO operating in its regulatory capacity is a purely private actor free from the requirements of the Due Process Clause. The only jurisdictions that have made a definitive ruling on the SRO state actor issue in this context are the Fifth[166] and Tenth Circuits,[167] both circuits reaching conclusory holdings, void of any significant state actor analysis, that SROs *should* be considered government entities required to provide constitutional due process in their disciplinary proceedings. And while, the Second,[168] the Seventh,[169] and now

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[165] *See, e.g.*, *id.* (citing *Perpetual Securities, Inc. v. Tang*, 290 F.3d 132 (2d Cir. 2002) and *Desiderio*, both cases dealing with the NASD's commercial arbitration function, to illustrate how the court has ruled that the NASD "is not a state actor subject to due process requirements"); Cleveland, *supra* note 12, at 21 n.118 (citing *Desiderio* and *Duffield v. Robertson Stephens & Co.*, neither of which deals with the due process requirement of a SRO in its regulatory capacity, to support a generalization that recent courts have concluded that the actions of the SROs should not be attributed to the government); Singer, *supra* note 17 ("In the 2nd Circuit, *D'Alessio* holds that the NASD . . . 'is not a state actor subject to due process requirements.' In contradistinction, the 10th Circuit held in *Rooms* that 'due process requirements apply to the NASD.' ").

[166] *See* Intercont'l Indus., Inc. v. Am. Stock Exch., 452 F.2d 935, 940–41 (5th Cir. 1971) (deeming the American Stock Exchange a state actor).

[167] *See* Rooms v. SEC, 444 F.3d 1208, 1213–14 (10th Cir. 2006) (applying due process standards to an NASD disciplinary action).

[168] *See D'Alessio*, 380 F.3d at 121 ("But whatever the merits of the constitutional argument, we need not reach it today.").

[169] *See* Gold v. SEC, 48 F.3d 987, 991 (7th Cir. 1995) ("As a preliminary matter we are faced with the question of whether the NYSE, a private organization regulated by the federal government, is a governmental actor whose . . . enforcement actions are subject to due process analysis. . . . Because neither party to this dispute presented this question squarely to the court, we consider it waived on appeal.").

the Eleventh[170] Circuit have taken up the issue, all have ultimately remained silent on whether due process is required in SRO disciplinary actions.

C. THE TRUE LESSON OF THE SRO STATE ACTOR JURISPRUDENCE

Properly understood, the circuit split appears at first glance to be rather unhelpful in resolving the FINRA due process debate. This is only partially true. Deconstructed, the SRO state actor controversy is really a combination of two questions. The first—is FINRA a state actor—is a largely conceptual question, contemplating when a private organization should be held accountable to the Constitution like a public organization. If FINRA is a state actor, a second question is triggered—what must FINRA change in order to bring the organization's current practices within constitutional guidelines, specifically the Due Process Clause? This second question is a "practical" inquiry because it focuses on the tangible consequences of classifying a private organization as a state actor.

The SRO state actor jurisprudence is worthless in gauging the merits of the threshold conceptual inquiry regarding FINRA. The decisions of the circuit courts have been essentially void of any substantive state actor analysis or definitive categorizations. Conversely, however, the circuit split holdings signal a common theme that is of vital importance to the practical state actor inquiry concerning due process at FINRA. Every circuit that has taken up the issue of due process in an SRO's regulatory functions has found that the SRO provided sufficient constitutional due process in the disciplinary action in question.[171] In effect, the SRO

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[170] *See* Busacca v. SEC, 449 F. App'x 886, 891 (11th Cir. 2011) ("Assuming that FINRA constitutes a governmental entity subject to the Due Process Clause, Busacca was not deprived of any process he was due.").

[171] *See Rooms*, 444 F.3d at 1214 ("Because Mr. Rooms had fair notice that his conduct was contrary to [the NASD rule he was accused of violating], we reject his due process argument."); *D'Alessio*, 380 F.3d at 121 (evaluating the biased-adjudicator claim against the same constitutional standard used for the SEC and concluding that "the hearing officer's participation in the petitioner's disciplinary proceeding did not render the proceeding unfair"); *Gold*, 48 F.3d at 993 ("We hold that the NYSE's retention of jurisdiction to investigate and later adjudicate Gold's alleged rules violations through constructive notice

state actor jurisprudence has bypassed the threshold conceptual inquiry and arrived at a unanimous conclusion on the practical question. This is exemplified in the Eleventh Circuit's conclusion in *Busacca* that FINRA's disciplinary procedures already afford adequate Fifth Amendment due process protection to securities professionals, regardless of whether SROs qualify as state actors in the first place.[172]

While the importance of the circuit courts' decisions on the state actor question has been deemphasized by scholars,[173] the universal endorsement of SROs' disciplinary proceedings should come as no surprise in light of the requirements placed on SROs in the Exchange Act.[174] Principally, SROs are required to conduct all regulatory actions in accordance with rules that "provide a fair procedure for the disciplining of members and persons associated with members."[175] The Senate report leading up to the 1975 Amendments reveals that, unlike the modern controversy over the issue, Congress considered it a principle "firmly established that a person directly affected by self-regulatory action is entitled to the due process protections of the Fifth Amendment."[176] In putting the fair-process requirement in place in 1975, therefore, lawmakers had in mind not simply generic concepts of fairness but rather specific constitutional concepts of due process. Several decisions within the SRO circuit split have interpreted the Exchange Act's

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was proper and constitutionally adequate."); *Intercont'l Indus.*, 452 F.2d at 941–43 (finding that the American Stock Exchange provided the appellant adequate constitutional due process in the punitive delisting of the appellant's stock).

[172] *See Busacca*, 449 F. App'x at 891 (holding that because Bucassa was "afforded a meaningful opportunity to be heard during the disciplinary proceedings" and failed to take advantage of FINRA's mechanism to compel the production of evidence from his previous firm, "he was not denied any process to which he may have been entitled").

[173] *See, e.g.*, Karmel, *supra* note 8, at 152 ("The cases addressing these issues are contradictory, and generally not based on any overriding constitutional law principles.").

[174] For instance, although Professor Karmel does not address the circuit decisions except to cast them aside as unhelpful in the state actor debate, these decisions confirm her prediction that, due to the Exchange Act, the disciplinary procedures that FINRA must provide "[i]n most respects . . . are similar to the rights granted to persons subject to SEC disciplinary proceedings." *Id.* at 185.

[175] 15 U.S.C. § 78f(b)(7) (2006).

[176] STAFF OF S. SUBCOMM. ON SECURITIES, COMM. ON BANKING, HOUS. & URBAN AFFAIRS, SECURITIES INDUSTRY STUDY, S. REP. NO. 93-13, at 151 (1973).

statutory-fairness requirement according to this original intent, finding that the "provision of a 'fair procedure' in SRO disciplinary proceedings gives rise to a due-process-like requirement."[177] Thus, these courts have equated an appeal based on the statutory-fairness requirement with constitutional due process analysis.[178]

Congress was not content, however, with leaving the courts to ensure that SROs afforded members constitutional process based on the statutory fairness requirement, so with the 1975 Amendments lawmakers went further to weave the traditional procedural elements of due process into the Exchange Act. Weary that due process protection for securities broker-traders "may be slow in coming and expensive to obtain if it is necessary for every adversely affected person to ask a court to determine if the procedures followed in the proceeding against him afforded due process," Congress mandated that "self-regulatory agencies, no less than federal administrative agencies, have clearly prescribed procedures that meet constitutional requirements of fairness."[179] Consequently, Congress expressly integrated the fundamental features of constitutional due process into the Exchange Act for all SROs, including the obligation to bring specific charges, give notice, provide an opportunity for a hearing, state in any adverse action the act which constitutes the violation of a specific rule, and allow review of disciplinary actions by the SEC.[180]

With this legislative history as context, it makes perfect sense that every circuit court reviewing SRO disciplinary actions for due process has found that adequate process was present. While the

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[177] D'Alessio v. SEC, 380 F.3d 112, 121 (2d Cir. 2004); *see also* Gold v. SEC, 48 F.3d 987, 991 (7th Cir. 1995) ("This statutory fairness requirement is closely related to the fairness requirements derived from the Fifth Amendment's Due Process Clause. We have therefore assessed the fairness of the NYSE's jurisdictional rules and enforcement action against Gold by relying on traditional due process principles.").

[178] *See D'Alessio*, 380 F.3d at 121 (linking the requirement for "a fair procedure with due process"); *Gold*, 48 F.3d at 991 (noting the "statutory fairness requirement is closely related to" due process).

[179] S. REP. NO. 93-13, at 151.

[180] *See id.* at 151–52 (advocating the extension of these procedures to all SROs); *see also* 15 U.S.C. § 78f(d)(1) (requiring exchanges to "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges" in their disciplinary proceedings).

spirit behind the 1975 Amendments may have been lost in the revived debate over whether SROs should be required to provide constitutional due process, the laws themselves have remained in effect to ensure that SROs provided the crucial procedural elements of constitutional process over the past four decades. Looking to the future of the SRO state actor debate, FINRA too will be required to abide by the Exchange Act's stipulations for SRO's disciplinary proceedings, ensuring that securities professionals will continue to receive, among other things, notice of specific charges against them, a hearing in front of an impartial adjudicator, and an opportunity for review. Any question whether these statutory requirements are sufficient to satisfy the Fifth Amendment's procedural due process protection has been soundly answered by the SRO state actor jurisprudence.

D. IMPLICATIONS FOR THE FUTURE OF DUE PROCESS AT FINRA

Interestingly, legal scholarship surrounding the FINRA due process debate has focused on the conceptual inquiry into whether SROs should be considered state actors and has neglected the practical inquiry of what process must be in place. However, especially for securities industry professionals, this latter question may be of greater importance. After all, the broker-traders' sole purpose in raising the state actor argument against SROs was not an academic exercise but rather an effort to secure procedural protections of the Constitution, chiefly the Due Process Clause. The revelation that SROs have already been found to provide constitutional due process and in fact have already been required to do so by the Exchange Act for several decades holds several critical implications for the future of the FINRA due process controversy.

First, despite vying for the courts to resolve the uncertainty in the SRO state actor debate,[181] security professionals will have great difficulty in securing a judicial ruling that FINRA is a state actor subject to the due process clause. The circuits have already

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[181] *See* Singer, *supra* note 17 ("Given the split in the circuits, at some point, hopefully the Supreme Court will weigh in on this threshold issue.").

shown a perpetual hesitation to take up the SRO state actor issue. Their wavering is likely due to the fact that this general realm of law remains an impenetrable quagmire. Further, the problem is exasperated by the complex nature of SROs, as any circuit categorizing FINRA as a state actor for the sake of guaranteed constitutional process risks exposing the regulatory system of Wall Street to unintended auxiliary repercussions, the likes of which may be hard to predict, difficult to contain, and detrimental to the benefits reaped from a self-regulatory system.

Fortunately for the courts, the statutory scheme governing FINRA's disciplinary proceedings provides an easy escape from having to rule definitively on whether due process is a constitutional mandate at FINRA. As long as FINRA continues to provide fundamental procedural protections in its regulatory actions, which it must do by federal law, it will provide security professionals in disciplinary proceedings with constitutionally adequate due process. As illustrated in *Busacca*, if there is no deprivation of due process, courts do not have to wade into the muddled territory of the state actor debate and may instead dismiss the claim under a provisional due process analysis.[182] Conversely, as seen in *Gold* and *D'Alessio*, if there has been a violation of due process or the court simply does not want to consider the state actor doctrine whatsoever, the court may avoid evoking the doctrine by instead addressing the disciplinary action based on the statutory-fairness and procedural requirements of the Exchange Act.

Considering the statutory framework already guarantees securities professionals constitutionally adequate process in SRO disciplinary proceedings, there is no sense of urgency upon the courts to risk wielding the broad and uncertain sword of the state actor doctrine in settling whether that guarantee comes from the Constitution or simply federal law. Consequently, if there is to be

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[182] Note that even if a court does make such a ruling, and adequate due process has been provided, the holding arguably could be considered dicta. *See generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) (discussing a framework for distinguishing between holding and dicta, including whether propositions necessary to a certain holding should be subject to stare decisis).

a judicial ruling establishing FINRA as a state actor, it is unlikely to arise out of an appeal for due process protection.

The second implication arising from the revelation that SROs have universally been found to provide constitutional due process, and in fact are required to do so by the Exchange Act, is that even if FINRA is eventually deemed to be a government actor that must abide by the imperatives of the Constitution, this determination will have little to no material effect on the specific procedures utilized by FINRA in disciplinary actions against member broker-traders. Although obvious, this proposition is extremely important to the SRO state actor controversy, which was initiated by security professionals for the very purpose of obtaining some type of procedural protection in disciplinary actions they believed they were not already receiving. While this belief remains the crux of the industry's argument for the state actor doctrine, the circuit decisions have resolutely put this notion to rest, affirming instead that the procedural elements put in place by Congress in the 1975 Amendments to assure SROs honored constitutional due process did in fact accomplish that goal. Therefore, the state actor doctrine would only bring an additional guarantee that the procedures already employed by FINRA would continue to be offered in the future, in essence preventing Congress from removing the procedural requirements of SRO disciplinary action currently affixed in the Exchange Act.

Significant for securities broker-traders, these two implications raise concerns as to the judiciousness of the continued fight in the FINRA due process controversy. For instance, if the courts can easily avoid the state actor issue raised in appeals for due process, and are inclined to do so, it would seem legal resources are being wasted in pursuing this avenue to obtain a state actor determination for FINRA. Additionally, if FINRA's categorization as a government actor does not gain any procedural advantages for securities professionals in disciplinary hearings, it would seem any legal resources dedicated to securing a constitutional guarantee of due process are wasted. Most intriguing, however, is that even though due process is already required at FINRA, the continued state actor campaign risks unnecessarily inviting the full measure

of government intervention into the regulation of Wall Street. While securities professionals would lose what little autonomy they have left in the regulation of the trading market, it may very well be the case that trader-brokers would prefer FINRA as a slow-moving bureaucracy.

IV. CONCLUSION

Over the past four decades, the SEC's growing control over securities SROs has generated an identity crisis for the regulatory system of the U.S. secondary securities market. As the SEC has gradually siphoned away regulatory authority from private security professionals, SROs have begun to increasingly resemble government agents. With the advent of FINRA, a monopolized SRO under the comprehensive control of the SEC, there may be little doubt left that the SRO system functions as the regulatory arm of the SEC in the trading market.

However, the question whether FINRA is a private or public actor remains tied up in a complicated split among the circuit courts. As revealed in the Eleventh Circuit's opinion in *Busacca*, this split is so convoluted that for many years it has been misinterpreted. When properly understood, the law deriving from the circuit courts signals very little as to whether FINRA should be deemed a government actor. On the contrary, the circuit split cases speak volumes as to what effect a state actor determination would have on disciplinary procedures at FINRA. Combined with the statutory framework of the Exchange Act, these decisions strongly support the conclusion that constitutionally adequate process is already provided and guaranteed in FINRA's regulatory actions. In turn, this revelation suggests that a judicial ruling for constitutional due process may be difficult for securities professionals to obtain and ultimately ineffective in securing member trader-brokers additional protections in FINRA's disciplinary actions.

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