

SUBMITTED TO SECURITIES AND EXCHANGE COMMISSION

July 18, 2025

**PETITION FOR RULEMAKING
TO PROMULGATE A RULE FOR
ENFORCEMENT IN FEDERAL DISTRICT COURT
OF ACTIONS COMMENCED BY THE
FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.**

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Statement of the Petitioner

Pacific Legal Foundation (PLF) petitions the Securities and Exchange Commission (SEC) to initiate a rulemaking proceeding regarding the ability of the Financial Industry Regulatory Authority, Inc. (FINRA) to enforce Chapter 2B of Title 15 of the United States Code relating to brokers and dealers through in-house adjudications. The SEC, which regulates FINRA, is empowered to “censure or impose limitations upon the activities, functions, and operations” of FINRA. 15 U.S.C. § 78s(h)(1). The SEC should adopt a rule that will permit respondents against whom FINRA commences in-house adjudication to remove the litigation to federal district court. Adopting such a rule would authorize FINRA to better “enforce compliance by its members and persons associated with its members.” 15 U.S.C. § 78o-3(b)(2).

PLF files this petition under the Administrative Procedure Act (APA), 5 U.S.C. § 553(e).

Statement of Interest

Pacific Legal Foundation is the nation’s leading public interest organization that advocates for limited government, property rights, and the separation of powers, particularly when these causes are threatened by agencies’ abuse of power and failure to implement governing law. PLF attorneys have been counsel of record in many cases addressing the wide-ranging constitutional deficits with administrative adjudication.¹ PLF has produced substantial scholarship on this subject.² PLF also provides

¹ See, e.g., *Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc.*, No. 1:20-cv-04176 (N.D. Ill.); *Burgess v. Fed. Dep. Ins. Corp.*, No. 22-11172 (5th Cir.); *Fed. Trade Comm’n v. Credit Bureau Ctr., LLC*, No. 21-2945 (7th Cir.); *Moats v. Nat’l Credit Union Admin.*, No. 24-40259 (5th Cir.); *Black v. Sec. & Exch. Comm’n*, No. 3:23-cv-709 (W.D.N.C.).

² See, e.g., William Yeatman & Keelyn Gallagher, *The Rise of Money Sanctions in Federal Agency Adjudication*, 76 Admin. L. Rev. 857 (2024).

its expertise to policy makers through congressional testimony,³ rulemaking petitions,⁴ and policy papers.⁵

Statutory Authority for the SEC to Act on This Petition

The APA, 5 U.S.C. § 553(e), states that “an interested person [has] the right to petition for the issuance, amendment, or repeal of a rule.” PLF therefore has the right to petition the SEC, which is an “agency” of the United States within the meaning of 5 U.S.C. § 551(1), for the issuance of a rule. A “rule” “means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). The procedure for such rulemaking is set forth in 5 U.S.C. § 553: issuance of a “notice of proposed rule making ... published in the Federal Register,” *id.* § 553(b), followed by a public comment period, *id.* § 553(c), and promulgation of the final rule, *id.* § 553(d).

FINRA’s In-House Adjudication Framework

Congress has vested SEC with broad authority over the securities industry, including oversight of brokers and dealers, pursuant to the Securities Exchange Act of 1934 (Exchange Act). Brokers and dealers who want to buy and sell securities must register with the SEC and become a member of a private self-regulatory organization. 15 U.S.C. § 78o(b)(1). These self-regulatory organizations, subject to SEC review, are authorized to “enforce compliance” by their members with the Exchange Act and the

³ See, e.g., Joe Luppino-Esposito, *Congress Holds Hearing on Unconstitutional Agency—and PLF Lawyer Testifies* (Mar. 9, 2023), <https://t.ly/7XdyF>.

⁴ See, e.g., Damien Schiff, *A petition to resolve the Endangered Species Act taxonomy debate* (Nov. 13, 2017), <https://t.ly/PYs4Q>; *Petition to Repeal 50 C.F.R. § 17.31*, <https://tinyurl.com/mvne7zca>.

⁵ See, e.g., Keelyn Gallagher & Adi Dynar, *Re-establish Justice: Creating a Right to Remove for the Accused*, PLF Research in Brief (Aug. 2024), <https://tinyurl.com/yuwmpf4d>.

“rules and regulations thereunder.” 15 U.S.C. § 78s(g)(1). FINRA, a private, nonprofit Delaware corporation, is the only self-regulatory organization registered with the SEC. *Id.* §§ 78c(a)(26), 78o-3; *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1321 (D.C. Cir. 2024); *Turbeville v. FINRA*, 874 F.3d 1268, 1270 n.2 (11th Cir. 2017). FINRA is headed by a 22-member board of governors selected in accordance with FINRA’s internal procedures; SEC has no input or supervision over FINRA’s internal appointment process for its governing board. FINRA Board of Governors, <https://t.ly/myfAC>. FINRA’s calendar year 2024 operating revenue was \$1,684.9 million, of which \$65.4 million resulted from fines levied by FINRA through in-house disciplinary proceedings. FINRA 2024 Annual Financial Report, at 9, <https://t.ly/lQ7bw>.

To enforce compliance with the Exchange Act, FINRA proceeds exclusively through in-house enforcement actions before its own Office of Hearing Officers. FINRA Rules 9211–9213, 9268. That hearing proceeds without a jury, with FINRA’s own procedural and evidentiary rules of practice. If discipline is warranted, FINRA has three remedial tools to enforce compliance under 15 U.S.C. § 78o-3(b)(2). First, FINRA has the power to impose practice bars or expel members—either of which prohibits members from participating in the securities industry, which has often been referred to as “the securities industry equivalent of capital punishment.” *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013). This remedy becomes “effective immediately” and remains in effect throughout a respondent’s appeal. FINRA Rule 9268(f)(2). Second, FINRA has the power to impose civil monetary penalties. When it does so, FINRA keeps the money; the monies do not go into the federal government’s treasury. FINRA Rule 8320(a). Third is restitution payable to harmed investors if FINRA is able to prove such harm to specific investors. FINRA Enforcement, <https://t.ly/3vYxF>. FINRA thus deprives members of liberty (practice bars, expulsions) or property

(monetary fines), for violation of federal securities law, via its in-house adjudication machinery.

An appeal from the Office of Hearing Officers goes to another FINRA internal department, the National Adjudicatory Council. FINRA Rule 9311, 9348–9349. If FINRA’s board of governors does not review the Council’s decision, then the Council’s decision becomes final. FINRA Rule 9349(c). If the governing board reviews the Council’s decision, then the governing board’s decision is FINRA’s final decision. *Id.* An appeal from FINRA’s final decision comes to SEC. FINRA Rule 9370; 15 U.S.C. §§ 78s(d)–(h). And an appeal from SEC’s final decision goes to the appropriate circuit court. 15 U.S.C. § 78y(a)(1). During the entirety of this multi-level proceeding, no jury and no federal judge is involved in fact finding; that role is assigned by FINRA rules of practice to FINRA’s hearing officers. FINRA Rule 9268.

Reasons for the Proposed Rule

The Supreme Court has held that filing suit in federal district court when the enforcement action seeks to deprive regulated persons of private rights is “mandatory.” *SEC v. Jarkesy*, 603 U.S. 109, 112 (2024). Further, the regulated party is entitled to trial by jury before it can be deprived of liberty or property. *Id.* at 140. As noted, through in-house enforcement, FINRA seeks to deprive respondents of liberty and property. Therefore, these respondents of FINRA enforcement actions are entitled to a trial in an appropriate district court and, where appropriate, a jury. FINRA, however, conducts all of its enforcement actions through its in-house administrative process.⁶

⁶ FINRA is not required to enforce exclusively through in-house procedures: Congress has authorized FINRA to “carry out the purposes of this chapter [15 U.S.C. §§ 78a–78rr] ... to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association.” 15 U.S.C. § 78o-3(b)(2). Congress has not prohibited FINRA from

To protect the rights to an independent Article III court and a jury for respondents whose private rights are at issue, this Proposed Rule suggests a modest reform: FINRA enforcement targets should have the time-limited option to remove FINRA's enforcement action to an appropriate federal district court, where the enforcement target may demand trial by jury. The Proposed Rule does not prevent FINRA from commencing in-house actions or change the administrative adjudication apparatus in any way. Rather, it only creates a removal option for the enforcement target.

I. Statutory Authority for the Proposed Rule

The specific authority for the rule is 15 U.S.C. § 78s(h)(1), which states that “[t]he appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to ... censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization[s.]” SEC, thus, has specific authority to make a rule that would permit venue change to federal district court where FINRA's enforcement target exercises that option.

Specific authority for the rule is also found, as stated, in 15 U.S.C. § 78o-3(b)(2), which delegates to FINRA the governmental power “to carry out the purposes of this chapter and ... to enforce compliance[.]” This statute gives SEC the policy discretion to create the proposed rule whereby FINRA's enforcement target would have the option to remove FINRA-initiated in-house adjudications to federal district court because Congress has authorized “the Commission [to] determin[e],” 15 U.S.C. § 78o-3(b), whether and how FINRA can comply with § 78o-3(b)(2).

initiating actions in federal court. But, as a policy matter, FINRA only initiates in-house enforcement actions.

II. Applicable Constitutional Provisions and Supreme Court Precedent for the Rule

A. Article III, *Stern*, and *Jarkesy*

“Congress,” the Supreme Court said, cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (simplified). And *Jarkesy* held that suits involving private rights must be filed in federal district court, and suits involving public rights *presumptively* must be filed in federal district court. 603 at 128, 132.

It is hard, if not impossible, to square FINRA’s in-house adjudication with *Stern* and *Jarkesy*. By adjudicating in its in-house tribunals disputes involving private rights and common law claims and damages, FINRA “withdraw[s]” them “from judicial cognizance” in violation of Article III. 564 U.S. at 484. But the “responsibility for deciding” enforcement actions of the type that FINRA brings “rests with Article III judges in Article III courts.” *Id.* (simplified).

B. The Seventh Amendment and *Jarkesy*

Jarkesy held that administrative enforcement targets have the right to a trial by jury when the suits are “legal in nature.” 603 U.S. at 122. A suit is legal in nature when it involves (1) monetary penalties and (2) legal claims. *Id.* at 123.

The “remedy” factor is the “more important” and “all but dispositive.” *Id.* at 111. *Jarkesy* held that “money damages are the prototypical common law remedy.” *Id.* at 123; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987). Actions to levy and recover civil penalties under statutory provisions are “[a] type of action in debt requiring trial by jury.” *Jarkesy*, 603 U.S. at 122 (simplified).

The second factor, the legal nature of the “cause[s] of action” FINRA alleges in enforcement actions, only “confirms that” enforcement targets are “entitled to a jury”

on FINRA claims. *Id.* at 125. FINRA’s causes of action that bear a “close relationship” to “common law fraud” are legal claims. *Id.*

In this analysis, it is irrelevant that the statutory or regulatory law at issue proscribes conduct that is “narrower” or “broader” than the common law, or that it “only targets certain subject matter and certain disclosures.” *Id.* at 126. If there is a “close relationship with common law fraud,” as is the case with many FINRA enforcement actions, then the action is “legal in nature” and “could only be enforced in courts of law.” *Id.* at 125–26 (quoting 481 U.S. at 422).

Jarkesy, thus, reaffirms the black-letter principle that:

- (1) “adjudication by an Article III court is *mandatory*” if a suit “concerns private rights,” 603 U.S. at 128 (emphasis added); and
- (2) “with respect to matters that arguably fall within the scope of the ‘public rights’ doctrine, the *presumption* is in favor of Article III courts.” *Id.* at 132 (emphasis added).

Further, *Jarkesy* cabined the public-rights exception to Article III adjudication to *six* categories of cases, and FINRA’s enforcement actions do not fall into any of those six categories:

- (1) “revenue collection by a sovereign,” in a suit where the tax official failed to deposit taxes he collected into the public treasury, 603 U.S. at 127, 131 (discussing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855));
- (2) immigration, *id.* at 129;
- (3) tariffs on imports, *id.* at 130;
- (4) “relations with Indian tribes,” *id.*;
- (5) “administration of public lands,” *id.*;
- (6) “granting of public benefits such as payments to veterans, pensions, and patent rights,” *id.* (simplified).

These categories do not include claims of the sort that FINRA brings in its enforcement actions. And because the “public rights exception is, after all, an *exception* [that] has no textual basis in the Constitution,” *id.* at 131, *Jarkesy* itself construed these categories to be narrow.

And, *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442 (1977), does not hold otherwise. *Jarkesy* rejected *Atlas Roofing’s* standardless definition of public rights: “cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes.” *Id.* at 450; *see* 603 U.S. at 139 (describing *Atlas Roofing’s* definition of public rights as “circular”). In any event, *Atlas Roofing* seldom if ever applies to the claims FINRA alleges in its enforcement actions. The claims in *Atlas Roofing*, the Supreme Court held, were “unknown to the common law.” 603 U.S. at 138–39 (quoting 430 U.S. at 461). Not so with FINRA for two reasons. First, FINRA only has the power to impose practice bars or expulsions, and monetary sanctions, FINRA Rules 9268(f)(2), 8320(a), both of which are legal remedies. Second, FINRA only has the power to enforce “this chapter,” meaning federal securities statutes, “the rules and regulations thereunder, ... and the rules of the association,” 15 U.S.C. § 78o-3(b)(2), all of which are legal claims with plain common-law analogs of fraud, misrepresentation, the law of principal and agent, and respondeat superior and vicarious liability.

C. The Fifth Amendment and *Jarkesy*

The “Due Process Clause of the Fifth Amendment” “operates together with Article III” and the Seventh Amendment to “vindicate the Constitution’s promise of a ‘fair trial in a fair tribunal.’” *Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). While Article III “promise[s] a defendant an independent judge rather than one dependent on those who hold political power,” and the Seventh Amendment “promise[s] the right to a jury trial,” the Fifth Amendment’s Due Process of Law Clause addresses the “remaining

concer[n] about the processes that would attend trials before independent judges and juries.” *Id.* at 148–149 (Gorsuch, J., concurring). That is, no person can be deprived of life, liberty, or property “without affording him the benefit of ... *judicial* process.” *Id.* at 150 (Gorsuch, J., concurring).

FINRA’s enforcement actions seek to deprive enforcement targets of liberty or property. The Fifth Amendment thus guarantees FINRA enforcement targets “the benefit of ... *judicial* process.” *Id.* Eventual and deferential appellate judicial review of FINRA’s final, appealable decision is no substitute to the “*judicial* process”—that is, jury trial in federal district court—that the Fifth Amendment requires. *See Axon Enter., Inc. v. Fed. Trade Comm’n*, 598 U.S. 175, 191 (2023) (holding that appellate review “come[s] too late to be meaningful”). There is a world of difference between the “right to a judicial forum,” which includes federal district courts and jury trials, and appellate judicial review of juryless agency decisions. *Id.* at 208 (Gorsuch, J., concurring); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (same). The former is denied if only the latter is available. 603 U.S. at 150 (Gorsuch, J., concurring).

* * *

These weighty constitutional deficits with FINRA’s scheme of in-house adjudication help highlight the modesty and practicality of the proposed rule. The proposal merely gives FINRA’s enforcement targets the time-limited option of removing their particular matter to federal district court; it does not require FINRA to commence all enforcement actions in federal district court. If the proposed rule is adopted, it will not affect FINRA’s ability to enforce compliance as dictated by 15 U.S.C. § 78o-3(b)(2). FINRA will commence all enforcement actions with its in-house tribunals as it currently does. The proposal only creates an option for the enforcement target to remove their matter to the appropriate district court. Many enforcement targets will choose to remain in FINRA proceedings for any number of reasons. And some enforcement targets might choose to take their chances with the federal

judiciary. Creating such an option is, as explained above, statutorily authorized and constitutionally necessary.

Text of the Proposed Rule

Section 1: Right to Remove FINRA Actions to Federal District Court

- (a) In any contested administrative proceeding initiated by the Financial Industry Regulatory Authority, Inc. at its Office of Hearing Officers against a respondent, the respondent shall have the right to remove the matter to a United States district court within the jurisdiction of which the principal office or place of business of the respondent is located.
- (b) The right to removal may be exercised:
 - (1) Within sixty days of receiving notice of the commencement of adjudication at the Office of Hearing Officers;
 - (2) By filing a notice of removal with the appropriate United States district court and serving the notice on the Financial Industry Regulatory Authority, Inc. in accordance with the Federal Rules of Civil Procedure;
 - (3) Without prejudice to any constitutional or statutory defenses that may be raised in the judicial forum.

(c) Upon the filing of a notice of removal:

- (1) The Financial Industry Regulatory Authority, Inc. shall immediately cease adjudication of the matter;
- (2) The entire record and case file of the matter that is removed shall be transferred to the United States district court to which the matter is removed;
- (3) The matter shall proceed as if originally filed in that court, subject to the Federal Rules of Civil Procedure and the Federal Rules of Evidence;
- (4) If the matter involves legal claims or penalties that would entitle any defendant to a jury trial in the United States district court, the party removing the matter to federal district court under this Rule may demand a jury trial in the federal district court to which the party removes the matter.

(d) The notice of the commencement of the Financial Industry Regulatory Authority, Inc.'s adjudication shall include in writing the allegations against the private party, and a detailed description of the party's rights, including the complete text of this Rule.

Section 2: Applicability and Exceptions

(a) This Rule applies to all adjudications commenced by the Financial Industry Regulatory Authority, Inc. with its Office of Hearing Officers after the effective date.

(b) The effective date of this Rule is [Month] [Day], [Year].

Section 3: Severability

If any provision of this Rule or its application is held to be invalid, the remainder of the Rule or the application of the provision to other persons or circumstances shall not be affected.

Benefits of the Rule

The rule would enable FINRA and SEC to implement 15 U.S.C. §§ 78s(h)(1), 78o-3(b)(2), and comply with Article III of the Constitution and the Fifth and Seventh Amendments thereto, and relevant Supreme Court precedent, as noted above.

The rule promotes liberty and the rule of law. FINRA will be more likely to bring enforcement actions only when they are truly merited. That enhances the public's confidence in FINRA's practices and SEC's supervision of FINRA.

In federal district court, FINRA, as well as the enforcement targets, will get the benefit of Federal Rules of Civil Procedure (FRCP), Federal Rules of Evidence, and all established federal district court procedures for the speedy resolution of cases.

The enforcement targets will have the option to test the strength of the enforcement action at an early stage by filing an appropriate motion under FRCP Rule 12(b).

The enforcement targets will have the option of demanding trial by jury, or alternatively, waiving it.

The enforcement targets, as well as FINRA, will have the benefit of established federal court procedures for negotiating settlements, obtaining discovery, entering out-of-court mediation or arbitration, or asking the court to grant summary judgment or conduct a bench trial for disputed facts.

FINRA, as well as enforcement targets, will benefit from expedited procedures to obtain temporary restraining orders or preliminary injunctions in appropriate cases.

Conclusion

The SEC should adopt the rule as stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2025, the foregoing document was submitted to the SEC via electronic mail as allowed by the SEC at <https://www.sec.gov/rules-regulations/petitions-rulemaking-submitted-to-sec>, which provides notice of submission to the following:

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