

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2020

The Final Frontier: Are Class Action Waivers in Broker-Dealer Employment Agreements Enforceable?

Jill I. Gross

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Litigation Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Jill I. Gross, *The Final Frontier: Are Class Action Waivers in Broker-Dealer Employment Agreements Enforceable?*, 12 Penn. St. Arb. L. Rev. 96 (2020), <https://digitalcommons.pace.edu/lawfaculty/1173/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

The Final Frontier: Are Class Action Waivers in Broker-Dealer Employment Agreements Enforceable?

Jill I. Gross*

I. INTRODUCTION

Many broker-dealers (securities brokerage firms)¹ require their employees, also known as “associated persons,”² to sign employment agreements as a condition of employment. Often those employment agreements include a provision mandating arbitration of any employment disputes that may arise.³ Under the Supreme Court’s expansive interpretation of section 2 of the Federal Arbitration Act (“FAA”),⁴ there is little doubt that

* Associate Dean for Academic Affairs and Professor of Law, Elisabeth Haub School of Law at Pace University. I am grateful to comments I received at the February 12, 2020, Penn State Arbitration Law Review Symposium, “Collective Bargaining and Adhesive Arbitration.” I also am grateful for the research assistance of Diana Balaj, Haub Law, J.D. Class of 2022.

¹ The Securities Exchange Act of 1934 (“Exchange Act”) defines “broker” as “any person engaged in the business of effecting transactions in securities for the account of others.” Exchange Act, § 3(a)(4), 15 U.S.C. § 78c(a)(4) (2018). The Exchange Act defines a “dealer” as “any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise....” Exchange Act, § 3(a)(5), 15 U.S.C. § 78c(a)(5). Since most industry firms act as both brokers and dealers, they are commonly referred to as “broker-dealers.”

² The Financial Industry Regulatory Authority (“FINRA”), the primary self-regulatory organization (“SRO”) in the securities industry, designates individual brokers employed or controlled by a broker-dealer firm as “associated persons.” FINRA MANUAL, Rule 1011(b), <https://www.finra.org/rules-guidance/rulebooks/finra-rules> (last visited July 2, 2020).

³ See JAMES A. FANTO, JILL GROSS & NORMAN POSER, BROKER-DEALER LAW AND REGULATION § 21.01, at 21-3 (5th ed. 2018 & supp. 2020). Even absent an arbitration clause in an employment agreement, employment disputes between an associated person and a FINRA member firm must be arbitrated under FINRA Code of Arbitration Procedure for Industry Disputes (“Industry Code”), Rule 13200(a).

⁴ 9 U.S.C. § 2 (2018). That section provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon

those adhesive pre-dispute agreements to arbitrate are enforceable, even for claims arising under federal statutes.⁵

Some of these employment contracts also include within the pre-dispute arbitration agreement additional language known as a “class action waiver.”⁶ Pursuant to a typical class action waiver clause, parties agree not only to arbitrate all disputes arising out of the contractual relationship, but, as part of that agreement, they agree to waive their right to bring those claims on a

such grounds as exist at law or in equity for the revocation of any contract.

The Court has written that section 2 reflects “an emphatic federal policy in favor of arbitral dispute resolution” (*Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (quoting *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (internal quotation marks omitted)) and a “liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, through section 2, Congress expressed a policy preference for both the *process* of arbitration and the *contract to use the process* (the arbitration agreement).

⁵ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (reiterating that the FAA “requires courts ‘rigorously’ to ‘enforce arbitration agreements according to their terms’”); see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009) (holding that “collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that claims arising under the Age Discrimination in Employment Act are arbitrable). Additionally, in December 2019, the Equal Employment Opportunity Commission rescinded its 1997 policy statement that opposed mandatory arbitration of employment discrimination claims. See Equal Opportunity Empl. Comm., RECISSION OF MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, <https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition> (last visited June 29, 2020).

⁶ For example, as a condition of their employment with the company, Credit Suisse requires its financial advisers to agree to an arbitration agreement within a document called the Employment Dispute Resolution Program (“EDRP”). The EDRP specifies individual binding arbitration as the only procedure for resolving disputes that cannot be resolved by agreement, and states that “no dispute subject to arbitration under this section shall be consolidated with any other employee’s dispute or prosecuted as a class or collective action...An employee’s agreement to abide by the terms of the [EDRP] includes an agreement not to serve as a class representative or class member or act as a private attorney general in any dispute with Credit Suisse.” See *Laver v. Credit Suisse Sec. (USA), LLC*, No. 18-CV-00828-WHO, 2018 WL 3068109, at *7-10 (N.D. Cal. June 21, 2018), *aff’d*, 976 F.3d 841 (9th Cir. 2020). Other broker-dealers that have included class action waivers in their employment agreements include UBS Financial Services, Ameriprise Financial Services, and Citigroup Global Markets, Inc. See *Lewis v. UBS Fin. Servs. Inc.*, 818 F. Supp. 2d 1161, 1166 (N.D. Cal. 2011) (enforcing class waiver); *Dauod v. Ameriprise Fin. Servs., Inc.*, No. 8:10-CV-00302-CJC, 2011 WL 6961586, at *1 (C.D. Cal. Oct. 12, 2011); *Banus v. Citigroup Glob. Markets, Inc.*, No. 09 CIV. 7128 (LAK), 2010 WL 1643780, at *8 (S.D.N.Y. Apr. 23, 2010), *aff’d*, 422 F. App’x 53 (2d Cir. 2011).

representative basis, including as a member of a class or collective action. Instead, parties agree that any covered dispute would have to be brought individually in arbitration.⁷ The Court enforces these waivers as an agreed-upon term in the arbitration clause specifying “the rules under which that arbitration will be conducted.”⁸

To date, the Supreme Court has not seen a class action waiver it has not liked or enforced.⁹ In 2011, it held that the FAA preempted a California judge-made law that voided consumer class action waivers as unconscionable because that state law conflicted with the purposes of the FAA. Rather, the FAA mandated enforcement of the waiver.¹⁰ In 2013, the Court ruled that a class action waiver in merchants’ arbitration agreements with their charge card service provider does not deprive them of their ability to vindicate their statutory rights, even if the expense of pursuing an antitrust claim on an individual basis made it economically unfeasible to pursue.¹¹ Only if an

⁷ See, e.g., *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013) (identifying class action waiver language in the arbitration agreement at issue).

⁸ *Id.* at 233, 238-39; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (enforcing class action waiver). Notably, the *Italian Colors* Court treated the class action waiver provision as a term of the arbitration agreement, not a separate agreement between the parties. Indeed, if the Court were to treat the two provisions as separate agreements, then FAA section 2 would not cover the class waiver provision at all, as it would not be an “agreement to arbitrate.”

⁹ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (enforcing class action waiver in employment agreement); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015) (preempting under the FAA a California state court’s holding that a class action waiver in an arbitration clause was not enforceable under California law); *Italian Colors*, 570 U.S. at 233-35 (enforcing pre-dispute arbitration clause containing a class action waiver in merchants’ credit card processing agreements); *AT&T Mobility*, 563 U.S. at 352 (holding that FAA preempted California law invalidating class action waivers in consumer agreements). On a related note, the Court recently held that the FAA does not allow a court to compel class arbitration when the agreement does not clearly provide for it. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (“Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to [class arbitration]”).

¹⁰ *AT&T Mobility*, 563 U.S. at 352. The Court discussed three characteristics of class arbitration that it concluded defeat the purposes of the FAA and hinder the flexible party-driven process of arbitration: (1) sacrifice of informality and speed; (2) a requisite increase in procedural formality; and (3) an increase in risks to defendants in the lack of judicial review. *Id.* at 348-51.

¹¹ *Italian Colors*, 570 U.S. at 234-35. The “effective vindication” doctrine originated from dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, (1985), where the Court “expressed a willingness to invalidate, on ‘public policy’ grounds,

arbitration agreement stripped a party of the “right” to sue, as opposed to the “ability” to sue would it be unenforceable.¹² In 2018, the Court ruled that a class and collective action waiver in an employment agreement was enforceable, and that the National Labor Relations Act’s language granting workers the right to form unions and bargain collectively was not a “contrary congressional command” that superseded the FAA’s command to enforce arbitration agreements as written and voided the waiver.¹³

What about in the securities industry? Neither FINRA’s Industry Code nor Code of Arbitration Procedure for Customer Disputes (“Customer Code”)¹⁴ permits class or collective claims to be pursued in its forum.¹⁵ This policy choice is based on a conclusion by the forum and by FINRA’s direct regulator, the Securities and Exchange Commission (“SEC”), that FINRA’s arbitration forum is not appropriate to handle and resolve class actions.¹⁶ Instead, securities regulators have made it clear that investors and associated persons should have the right to bring class actions in court.¹⁷

Indeed, in a disciplinary proceeding, FINRA’s Board of Governors reversed a hearing officer’s ruling that a broker-dealer could insert a class action waiver in its standard customer arbitration agreement, and any FINRA

arbitration agreements that ‘operat [e] ... as a prospective waiver of a party’s *right to pursue* statutory remedies.’” *Italian Colors*, 570 U.S. at 235 (citing *Mitsubishi Motors*, 473 U.S. at 637, n. 19 (emphasis added)).

¹² *Italian Colors*, 570 U.S., at 236. Though the Court wrote in *Italian Colors* that it has enforced a class action waiver before (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), as an example), in fact, no class action waiver was at issue in *Gilmer*. See Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOKLYN L. REV. 111, 134-36 (2015).

¹³ *Epic Systems*, 138 S.Ct. at 1624-26. Though the Court has not had an opportunity to address the enforceability of a class action waiver in an arbitration clause arising out of a collective bargaining agreement, it is likely that the Court would find that enforceable, too. However, a union is unlikely to agree to include a class action waiver in a collective bargaining agreement, so the issue may never be ripe for Supreme Court review. See Lise Gelertner, 2019 J. DISP. RESOL. 115, 116.

¹⁴ FINRA Dispute Resolution Services hears 99% of all securities arbitrations in the country. *Arbitration & Mediation*, FIN. INDUS. REGULATORY AUTH., <https://www.finra.org/arbitration-mediation> (last visited June 27, 2020). It offers separate Codes of Arbitration Procedure for disputes between customers and broker-dealers on the one hand, and intra-industry disputes on the other.

¹⁵ FINRA Rules 12204, 13204.

¹⁶ See *infra* notes 36-42, and accompanying text.

¹⁷ See *infra* notes 43-48, and accompanying text.

rules to the contrary are preempted by the FAA.¹⁸ Instead, FINRA held that FINRA's rules mandating that investors be able to bring class claims in court were enforceable.¹⁹ FINRA's regulatory policy, however, clashes with the FAA's mandate to enforce arbitration agreements as written, if a broker-dealer inserts a class waiver in its employment agreements with associated persons.

How would a court resolve a broker-dealer's action to enforce its class action waiver, which would require the court to disregard FINRA Rule 13204? The Supreme Court has identified one exception to the FAA's mandate: if a "contrary congressional command" displaces the FAA.²⁰ Thus far, the Court has not had occasion to examine whether a class action waiver in a broker-dealer's employment agreement with an employee is enforceable under this exception. While the Court seems very supportive of these waivers, the securities industry is different.²¹ Securities arbitration is heavily regulated, and pronouncements by the SEC—when exercising power expressly delegated to it by Congress—make it clear that class actions in court should be preserved for both investors and broker-dealer employees.

This article analyzes this issue and concludes that these class waivers are not enforceable. Part II details the regulatory framework in the securities industry relevant to this issue. Part III explains why FINRA, as a forum, does not accept class actions and why the SEC believes court-filed class actions should be preserved for employees of broker-dealers. Part IV describes the framework the Supreme Court directs courts to use when analyzing alleged conflicts between two Congressional Acts. Part V argues that FINRA's Rule 13204 barring FINRA member firms from forcing employees to waive their right to pursue class action claims in court conflicts with and supersedes the FAA's general pronouncement to enforce arbitration agreements as written. Part VI concludes.

¹⁸ See *Dep't of Enforcement v. Charles Schwab & Co., Inc.*, Complaint No. 2011029760201, 2014 WL 1665738 (FINRA Apr. 24, 2014).

¹⁹ *Id.* at *14-18. Simultaneous with the issuance of the decision, Schwab entered into a Letter of Acceptance, Waiver and Consent with FINRA, settling the enforcement action by consenting to a \$500,000 penalty and agreeing not to appeal the decision further.

²⁰ *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (holding that claims arising under federal statutes are arbitrable as a matter of public policy absent a "contrary congressional command") (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal quotation marks omitted)).

²¹ See Jill Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174 (2010) (arguing that the regulatory scheme in the securities industry differentiates arbitration agreements in broker-dealer customer agreements from those in consumer contracts).

II. CONGRESS' STATUTORY DELEGATION TO THE SEC

In the wake of the stock market crash of 1929, Congress passed the Exchange Act in 1934²² to protect investors from abuses in the capital markets.²³ In addition to creating the SEC as the primary federal securities regulator, the Exchange Act also set up a system of industry self-regulation designating national securities exchanges as SROs to further protect investors and the public interest.²⁴

In 1938, Congress amended the Exchange Act to authorize the registration of national securities associations as additional SROs to regulate brokers in the over-the-counter market.²⁵ Additionally, Congress required all broker-dealers that deal with the public (with a few minor exceptions) to be a member of a registered national securities association.²⁶ Because FINRA is the only registered national securities association under section 15A of the Exchange Act, all broker-dealers are FINRA member firms.²⁷

In 1975, Congress again amended the Exchange Act, this time to give the SEC broad new powers over all SROs, including the power to review and approve all of their proposed rules and to require them to adopt, change, or repeal any rules if deemed necessary.²⁸ Through this power, the SEC exercises oversight of FINRA's activities, including operation of its arbitration forum. The Exchange Act requires FINRA to adopt rules that may be designed for a variety of purposes, ranging from preventing "fraudulent and manipulative acts and practices" to promoting "just and equitable principles of trade," and "in general, [protecting] investors and the public

²² Exchange Act, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2018)).

²³ See JAMES A. FANTO, JILL GROSS & NORMAN POSER, *BROKER-DEALER LAW AND REGULATION* § 1.01, at 1-3 (5th ed. 2018 & Supp. 2020) (explaining that the broker-dealer "industry is highly regulated because of its economic importance" and the "possibility of investor abuse").

²⁴ See *id.* § 4.01, at 4-3, 4-4.

²⁵ See *id.* § 4.01[C], at 4-9.

²⁶ See Exchange Act § 15(b)(8), 15 U.S.C. § 78o(b)(8).

²⁷ See Exchange Act § 15(b)(1), 15 U.S.C. § 78o(b)(1).

²⁸ Exchange Act § 19, 15 U.S.C. § 78s. Specifically, Congress mandated that the SEC review and release for public comment "any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization." See Exchange Act § 19(b)(1), 15 U.S.C. § 78s(b)(1); see also FANTO, GROSS & POSER, *supra* note 23, § 4.01[D] at 4-11.

interest.”²⁹ FINRA must file proposed rule changes with the SEC, and, before approving them, the SEC must publish notice and provide interested persons an opportunity to comment on the proposals.³⁰

Like it has in other industries,³¹ in the securities industry Congress created an administrative agency—the SEC—and empowered it to be the expert decision-maker regarding regulation in the securities industry. Indeed, as recently as 2010, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,³² Congress reaffirmed the long-held view that regulation of arbitration in the securities industry was best left to the SEC—the administrative agency with the most relevant expertise and a long history of regulating the process, rather than Congress itself.³³ The next section discusses how the SEC invoked its expertise and implemented the policies of the Exchange Act and purposes of Congress when regulating FINRA’s arbitration forum.

III. FINRA DISPUTE RESOLUTION AND CLASS ACTIONS

The securities industry has used arbitration to resolve intra-industry disputes since the founding of the New York Stock Exchange in the early 1800s.³⁴ FINRA and its predecessor, the National Association of Securities

²⁹ Exchange Act § 15A(b)(6), 15 U.S.C. § 78o-3(b)(6). The statute also lists certain improper purposes, including regulating “matters not related to the purposes of [the Act].” *Id.*

³⁰ *Id.* § 19(b)(1), 15 U.S.C. § 78s(b)(1). Conversely, the SEC must disapprove a proposed rule change if it does not make the requisite finding. *Id.* § 19(b)(2)(C)(ii), 15 U.S.C. § 78s(b)(2)(C)(ii). In addition, the SEC may, on its own initiative, amend FINRA’s rules as it deems “necessary or appropriate . . . in furtherance of the purposes of [the Exchange Act].” *Id.* § 19(c), 15 U.S.C. § 78s(c).

³¹ For example, in 2010 in the Dodd-Frank Act, Congress created the Consumer Financial Protection Bureau (“CFPB”) within the Federal Reserve System as an “independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020); 12 U. S. C. § 5511(a). Congress created the Environmental Protection Agency in 1970 “to consolidate the major environmental responsibilities of the federal government.” *The Environmental Protection Agency*, 5 West’s Fed. Admin. Prac. § 5223.

³² Pub. L. No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank”).

³³ *See* Dodd-Frank § 921(a) (empowering the SEC to prohibit mandatory pre-dispute arbitration clauses in customer agreements).

³⁴ *See* Jill I. Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 175-76 (describing history of development of the

Dealers (“NASD”) has been running a dispute resolution forum for arbitration and mediation of both customer and intra-industry disputes since 1968.³⁵

A. *FINRA Rule 13204*

Since 1992, FINRA, as a policy matter, has banned class action arbitration proceedings in its forum. Both Rule 12204(a) of the Customer Code and Rule 13204(a) of the Industry Code state: “(1) Class action claims may not be arbitrated under [FINRA Rules].”³⁶ Additionally, subsection (a)(4) of the rules provide:

A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.³⁷

SRO arbitration forum for the securities industry).

³⁵ *Id.* at 181.

³⁶ FINRA Code of Arbitration Procedure for Customer Disputes R. 12204(a); FINRA Code of Arbitration Procedure for Industry Disputes R. 13204(a); *see also Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 272 (2d Cir. 2015) (“Rule 13204 prevents FINRA arbitrators from entertaining class and collective action claims”). However, FINRA recognizes that claimants may benefit by combining similar claims to achieve efficiencies and cost-savings. Thus, it permits joinder of claims if: (1) “the claims contain common questions of law or fact, and (2) the claims assert any right to relief jointly and severally, or the claims arise out of the same transaction or occurrence, or series of transactions or occurrences.” FINRA Code of Arbitration Procedure for Customer Disputes R. 12312(a); FINRA Code of Arbitration Procedure for Industry Disputes R. 13312(a).

³⁷ FINRA Code of Arbitration Procedure for Industry Disputes R. 13204(a)(4). Prior to 1992, there were no express protections against member firms enforcing pre-dispute agreements to compel arbitration of class or putative class claims. Specifically, the SEC’s notice of the proposed new NASD rule stated that it was being proposed by the NASD following a request by former SEC Chairman Ruder for NASD and other SROs to “consider adopting procedures

Rule 13204(b) proscribes the same limitations with respect to collective actions.³⁸ Thus, the rule explicitly bars member firms from enforcing any arbitration agreement against an associated person (i.e., an employee) with respect to any class or collective action claim unless and until one of the four conditions are satisfied. Because a class waiver is one term of an arbitration agreement, the rule bars member firms from enforcing class waivers unless and until one of the four conditions are satisfied.

The SEC's order approving the predecessor to Rule 12204, NASD Rule 10301,³⁹ emphasized that the Commission made a policy choice that class actions did not belong in SRO arbitration:

[T]he NASD believes, and the Commission agrees, that the judicial system has already developed the procedures to manage class action claims. Entertaining such claims through arbitration at the NASD would be difficult, duplicative and wasteful.... The Commission agrees with the NASD's position that, in all cases, class actions are better handled by the courts and that investors should have access to the courts to resolve class actions efficiently.⁴⁰

that would give investors access to the courts in appropriate cases, including class actions." See Proposed Rule Change by Nat'l Assoc. of Sec. Dealers, Inc. re Improvements in NASD Code of Arbitration Proc., 57 Fed. Reg. 30519-01, 30520 (July 1, 1992).

³⁸ FINRA Code of Arbitration Procedure for Industry Disputes R. 13204(b).

³⁹ In 2007, NASD Rule 10301, as it related to employees, was administratively replaced by the substantively similar FINRA Rule 13204 following the merger of NASD and NYSE Regulation, Inc. to form FINRA. FINRA Regulatory Notice 07-07, Code of Arbitration Procedure (Apr. 16, 2007). As part of that code consolidation project, FINRA added one sentence to the end of new FINRA Rule 13204: "These subparagraphs do not otherwise affect the enforceability of any rights under the Code or any other agreement." This sentence updated language in old NASD Rule 10301 that stated: "No member or associated person shall be deemed to have waived any of its rights under this Code or under any agreement to arbitrate to which it is party except to the extent stated in this paragraph." Reorganization and Revision of NASD Arbitration Rules Relating to Industry Disputes, SR-NASD-2004-011, <https://www.finra.org/rules-guidance/rule-filings/sr-nasd-2004-011>. FINRA has explained that "any other agreement" means an agreement other than the predispute arbitration agreement with a customer. *Schwab*, 2014 WL 1665738 at *22 n.11. If a class waiver clause is part of the arbitration agreement, then this sentence does not indicate that a class waiver is enforceable as "any other agreement."

⁴⁰ Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Exclusion of Class Action Claims from Arbitration, 57 Fed. Reg. 52659, 52660 (Nov. 4, 1992).

Thus, the SEC determined that courts were the preferable forum for class claims, because, unlike the SRO arbitration forums, courts already had in place procedures to manage those claims.⁴¹ In approving the rule, the SEC recognized that class actions were important for investor protection and reflected an efficient allocation of resources between two dispute resolution systems.⁴² Moreover, the rule addressed the SEC's concern that investors should have access to the courts in appropriate cases, including for class actions.⁴³

Two years later, in 1994, the SEC approved an amendment to NASD Rule 10301 to clarify that the rule was intended to cover employment-related class actions involving member firms and their employees, and not just customer class actions.⁴⁴ Notably, in approving this clarifying change, the SEC reiterated the rule's fundamental purpose of protecting member firms' customers *and* employees' rights to bring and participate in class actions: "[The SEC] believes that access to the courts for class action litigation should be preserved for associated persons and member firms as well as for investors and that the rule change approved herein provides a sound procedure for the management of class actions."⁴⁵

In 2012, the SEC approved an amendment to FINRA Rule 13204 (former

⁴¹ "The NASD believes that the proposed rule change ... will facilitate the arbitration process for all participants by preventing certain categories of actions from being brought in the NASD's arbitration forum and for which the forum does not have procedures or resources to handle." Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Exclusion of Class Action Claims from Arbitration, Release No. 33506, 1994 WL 28348, at *2 (Jan. 24, 1993).

⁴² *Id.* For a more complete history of the rule, see Barbara Black and Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 27-28 (2012).

⁴³ Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions From Arbitration Proceedings, 57 Fed. Reg. 52659-02, at 52660; see also *Dep't of Enforcement v. Charles Schwab & Co.*, No. 2011029760201, 2014 WL 1665738, *11 (FINRA Bd. of Governors Apr. 24, 2014) ("Rule 12204 of the Customer Code was intended to preserve investor access to the courts to bring or participate in judicial class actions").

⁴⁴ Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Exclusion of Class Action Claims from Arbitration, 59 Fed. Reg. 22032-01, at 22033 (explaining that the "original intent of the [1992 rule] was to exclude class action claims by associated persons, including employment-related claims, and other industry class actions from arbitration, as well as customer-related class actions.").

⁴⁵ *Id.* (emphasis added).

NASD Rule 10301), creating new subsection (b) to expand the Rule’s prohibition to “collective action claims by employees of FINRA members under the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), or the Equal Pay Act of 1963 (APA).”⁴⁶ In its approval order, the SEC reiterated that one of the fundamental purposes of Rule 13204 is to protect member firms’ employees’ rights to bring and participate in class and collective actions in court.⁴⁷ The SEC specifically based its approval on, *inter alia*, its findings that the amendment would: (a) “facilitate the efficient resolution of collective actions under the FLSA, ADEA, or the EPA, as courts have established procedures to manage these types of representative actions;” and (b) “preserve access to courts for these types of claims for employees of FINRA members.”⁴⁸

In summary, while there have been a few amendments to the language of Rules 12204 and 13204 over the years, the basic restrictions of the current version are materially the same as those of the original rule the SEC approved back in 1992—member firms may not enforce pre-dispute arbitration agreements with respect to class or putative class claims, subject to four listed exceptions addressing situations such as where class certification has been denied or where an absent class member has affirmatively opted out of a class pursuant to Rule 23 or similar state procedures.

B. *FINRA Rule 12204 Bars Class Action Waivers in Customer Agreements*

FINRA Rule 12204(d)—worded substantially similar to Rule 13204(a)(4)—is the counterpart to Rule 13204 in the customer context.

⁴⁶ Self-Regulatory Organizations; Financial Industry Regulatory Authority Inc.; Notice of filing Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Amending Rule 13204 of the Code of Arbitration Procedure for Industry Disputes to Preclude Collective Action Claims From Being Arbitrated, 77 Fed. Reg. 22374 (Apr. 13, 2012).

⁴⁷ *Id.* at 22375. During the comment period, Assistant Chief Counsel of FINRA Dispute Resolution, Mignon McLemore, noted in a letter to the SEC that “any language in a member firm’s employment agreement that requires employees to waive their right to file or participate in a collective action against a member firm in other fora is contrary to the provisions of the Industry Code. A member firm’s use of such language that limits employees’ rights, and contradicts Rule 13204(b), would violate IM-13000, and may also violate FINRA Rule 2010.” Letter from Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution, to Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission, Apr. 13, 2012, <https://www.sec.gov/comments/sr-finra-2011-075/finra2011075-4.pdf> (last visited July 3, 2020).

⁴⁸ SEC Order re Amending Rule 13204, 77 Fed. Reg. at 22375.

Significantly, FINRA has interpreted Rule 12204(d) to bar class action waivers in arbitration agreements between broker-dealers and their customers. In 2014, in an enforcement action against FINRA member Charles Schwab, the FINRA Board of Governors ruled that Schwab’s inclusion of a class waiver provision in its customer arbitration agreement violated FINRA Rule 12204(d).⁴⁹

IV. THE “CONTRARY CONGRESSIONAL COMMAND” EXCEPTION TO THE FAA

As stated above, under the FAA, courts must enforce arbitration agreements as written.⁵⁰ However, the Court has declared repeatedly that the FAA’s mandate is not absolute: it “may be overridden by a contrary Congressional command.”⁵¹ Indeed, in any statutory context, when inconsistent laws emanate from a single legislature, absent an express exemption clause in either, the Supreme Court reconciles them by applying the long-standing canon of statutory construction known as the implied repeal doctrine.⁵² Limited to narrow circumstances,⁵³ the doctrine applies only to the extent necessary to reconcile the conflicting laws.⁵⁴ The burden is on the party seeking the implied repeal to show congressional intent to override the former law, which can be proven through (1) the text of the law, (2) its legislative history, or (3) an inherent conflict between the edict of the former law and the underlying purpose of the latter.⁵⁵

⁴⁹ *Dep’t of Enforcement v. Charles Schwab & Co.*, No. 2011029760201, 2014 WL 1665738 (FINRA Bd. of Governors Apr. 24, 2014).

⁵⁰ *See supra* notes 4-5, and accompanying text.

⁵¹ *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987); *see also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

⁵² For a more thorough description of the implied repeal doctrine, see Black and Gross, *supra* note 42, at 32-35.

⁵³ *See, e.g., United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 734 (1975) (implied repeal limited to “particular and discrete instances” where an appeal was “necessary to make the [regulatory scheme] work”) (alteration in original) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)).

⁵⁴ *See Silver*, 373 U.S. at 357; *Branch v. Smith*, 538 U.S. 254, 273 (2003).

⁵⁵ *McMahon*, 482 U.S. at 226-27 (analyzing alleged conflict between FAA and the anti-waiver section of the Exchange Act); *see also Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 275-77 (2007) (identifying factors to consider when choosing between conflicting federal laws to assess whether they are truly incompatible).

The Supreme Court recently considered the implied repeal doctrine when analyzing an alleged conflict between the FAA and another Congressional statute.⁵⁶ In *Epic Systems*, employees alleged various labor and law violations by their employers in class actions filed in federal district court. The employers sought to compel arbitration pursuant to a pre-dispute arbitration clause and class action waiver in the applicable employment agreements. The employees argued that the National Labor Relations Act's ("NLRA") protection of "concerted activities"⁵⁷ included an employee's right to pursue labor claims as a class or collective action and thus displaced the FAA's mandate to enforce arbitration agreements as written.

The Court rejected plaintiffs' contention that section 7 of the NLRA conflicts with section 2 of the FAA:

When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both." A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. The intention must be "clear and manifest." And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute.⁵⁸

The Court held that Section 7 of the NLRA is not a "contrary" pronouncement by Congress that supplanted the FAA because it does not express approval or disapproval of arbitration or mention class procedures.⁵⁹ Rather, section 7 speaks only about workers' concerted activities such as collective bargaining, picketing and strikes. Indeed, the Court stated "that the absence of any specific statutory discussion of arbitration or class actions is

⁵⁶ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624-30 (2018) (identifying criteria for application of implied repeal doctrine).

⁵⁷ 29 U. S. C. §157.

⁵⁸ *Epic Sys. Corp.*, 138 S. Ct. at 1624 (internal citations omitted).

⁵⁹ *Id.* at 1624. The Court declined to give deference to the National Labor Relations Board's interpretation of the NLRA that it voided class action waivers because the Court did not agree with the proposition that "Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer." *Id.* at 1629.

an important and telling clue that Congress has not displaced the Arbitration Act.”⁶⁰

Very few courts have examined whether FINRA Rule 13204 bars broker-dealers from enforcing class action waivers in their agreements with employees under the implied repeal doctrine.⁶¹ One circuit court decision on point is *Cohen v. UBS Financial Services, Inc.*⁶² In *Cohen*, the Second Circuit Court of Appeals enforced a class action waiver in an employment agreement between Cohen, a FINRA “associated person,” and UBS Securities (“UBS”), a broker-dealer. Cohen had filed a putative class and collective action against UBS, asserting wage-and-hour claims under the Fair Labor Standards Act and California law. UBS moved to compel individual arbitration, invoking an arbitration clause and class and collective action waiver in the parties’ employment agreement.⁶³

Cohen argued that FINRA Rule 13204 barred the enforcement of the class action waiver, because it was a “contrary congressional command” that superseded the FAA.⁶⁴ Cohen contended that Rule 13204 prohibited broker-dealers from forcing employees to waive their rights to bring a collective or class action, contrary to the FAA’s general pronouncement to enforce arbitration agreements as written.⁶⁵ The Second Circuit rejected that argument, finding no conflict between the Rule and the FAA. Rather, the Second Circuit concluded that Rule 13204 “does not preserve the right to assert a claim in class or collective form notwithstanding a contractual waiver.”⁶⁶ The Court wrote:

Cohen conflates an agreement to arbitrate with a waiver of the right to assert claims in class or collective form. Subsections (a)(4) and (b)(4) [of Rule 13204] bar the enforcement of arbitration agreements under certain circumstances; but neither subsection has anything to say about the

⁶⁰ *Id.* at 1627.

⁶¹ One court of appeals held that an arbitrator should resolve the conflict between a class waiver in an employment agreement and Rule 13204. *See Hendricks v. UBS Fin. Servs., Inc.*, 546 F. App’x 514, 519 (5th Cir. 2013) (“we leave for the FINRA arbitration panel to decide whether the class waiver requires the Plaintiffs to arbitrate on an individual basis”).

⁶² 799 F.3d 174 (2d Cir. 2015).

⁶³ *Id.* at 175.

⁶⁴ *Id.*

⁶⁵ *Id.* at 178.

⁶⁶ *Id.*

enforceability of the waivers. Although such waivers are often found in arbitration agreements (and are so incorporated in this case), the two contract terms are conceptually distinct. A class or collective action waiver is a promise to forgo certain procedural mechanisms *in court*. An agreement to arbitrate, on the other hand, is a promise to have a dispute heard in some forum *other than a court*. Rule 13204 restricts the latter, but not the former. As the FINRA Board of Governors has observed, “there are no restrictions upon firms regarding the content of predispute arbitration agreements with employees.”⁶⁷

In sum, the Second Circuit concluded that Rule 13204 is not “contrary” to the FAA because “it does not prohibit a pre-dispute waiver of class and collective action procedures, and permits FINRA arbitration of individual wage-and-hour claims.”⁶⁸ Absent any conflict, the court reasoned, both rules can co-exist, and the court need not even reach the issue of whether Rule 13204 is a “congressional command.”⁶⁹

One year after *Cohen*, FINRA publicly and forcefully indicated it did not agree with *Cohen*’s interpretation of FINRA rules. In Regulatory Notice 16-25, FINRA stated that the language from *Schwab* that the *Cohen* court cited was “dicta” as well as “superseded” by the Notice.⁷⁰

As detailed in Part V below, like FINRA, this author believes that *Cohen* and *Laver* were wrongly decided.

⁶⁷ *Id.* at 179–80 (citing *In re Dep’t of Enforcement v. Charles Schwab & Co.*, No. 2011029760201, 2014 WL 1665738, at *8 (FINRA Bd. of Governors Apr. 24, 2014)).

⁶⁸ *Cohen*, 799 F.3d at 178.

⁶⁹ *Id.* The Ninth Circuit Court of Appeals very recently agreed with the ruling in *Cohen*. See *Laver v. Credit Suisse Sec. (USA), LLC*, 976 F.3d 841, 847 (9th Cir. 2020) (holding that Rule 13204 is not contrary to Credit Suisse’s arbitration agreement because it does not ban class action waivers “with the clarity necessary” to displace the FAA and thus enforcing class action waiver in brokers’ employment contracts).

⁷⁰ FINRA Regulatory Notice 16-25, *Forum Selection Provisions Involving Customers, Associated Persons and Member Firms*, 2016 WL 4060371, at *6 n.23 (July 2016). Courts are divided as to whether Regulatory Notice 16-25 prohibits courts from enforcing waivers of the right to arbitration under FINRA Rules in broker-dealer agreements. Compare *New York Bay Capital, LLC v. Cobalt Holdings, Inc.*, No. 1:19-CV-3618-GHW, 2020 WL 1989485, at *6 (S.D.N.Y. Apr. 27, 2020) (holding that Regulatory Notice 16-25 does not change the law that a forum selection clause supersedes FINRA Rule 12200); *Binkele v. Ausloos*, No. 219CV01079APGVCF, 2019 WL 7597041, at *2 n.1 (D. Nev. July 16, 2019) (“FINRA has no authority over federal courts in this regard”) with *Reading Health Sys. v. Bear Stearns & Co.* 900 F. 3d 87 (3d Cir 2018) (citing Regulatory Notice 16-25 to support its conclusion that forum selection clause did not supersede FINRA Rule 12200).

V. THE SECURITIES EXCHANGE ACT OF 1934, THROUGH FINRA RULE 13204, DISPLACES THE FAA

This section argues that courts cannot enforce a class waiver in an employee’s arbitration agreement with a FINRA member firm (a broker-dealer) because FINRA Rule 13204 (approved by the SEC through its Congressionally-delegated authority) is a “contrary congressional command” that displaces the FAA’s command to enforce arbitration agreements as written.

A. Rule 13204 is “Contrary” to FAA section 2

Rule 13204 bars class/collective actions from FINRA’s arbitration forum.⁷¹ Rule 13204 also bars broker-dealers from enforcing a class waiver in their employment agreements. Indeed, they would face disciplinary action if they did so.⁷²

Therefore, Rule 13204 conflicts with the FAA because a court cannot simultaneously respect the Rule’s prohibition on class action waivers in broker-dealers’ arbitration agreements with their employees and the FAA’s mandate to enforce arbitration agreements as written. Any other reading would subvert the Rule’s purpose by enforcing class waiver provisions that are within the very arbitration clauses that the Rule’s express language render unenforceable in this context. Moreover, the “legislative” history of Rule 13204(a)(4) makes clear that the Rule was designed to protect and preserve FINRA member firm employees’ access to the courts for putative class actions against their member employees.⁷³

Unlike Section 7 of the NLRA at issue in *Epic Systems*, the FINRA rule at issue—adopted in 1992—explicitly addresses arbitration for disputes between FINRA member firms and their associated persons, and it also explicitly addresses class procedures. Moreover, several of FINRA’s findings in *Schwab* are pertinent to the interpretation of Rule 13204(a)(4). In particular, the Board of Governors wrote:

⁷¹ Courts grant the SEC deference in determining the meaning of SRO rules. *Milliner v. Mut. Sec., Inc.*, 207 F. Supp. 3d 1060, 1069 (N.D. Cal. 2016).

⁷² FINRA IM 13000 (“[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member to require an associated person to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure...”).

⁷³ See *supra* notes 43-48, and accompanying text.

Rule 12204(d) of the Customer Code by its terms prevents a firm from enforcing a predispute arbitration agreement *until* a court disposes of the class action allegations or the customer opts out of the putative or certified class. Thus, none of the exceptions listed in subsection (d) apply until a customer is given the opportunity to participate in a class action. *It therefore stands to reason that Rule 12204 of the Customer Code does not contemplate a prospective waiver of a customer's right to participate in a class action.*⁷⁴

The *Schwab* reasoning that Rule 12204 prohibits class action waivers in broker-dealer/customer arbitration agreements applies with equal force to Rule 13204(a)(4) with respect to broker-dealer/employment agreements. Rules 13204 and 12204 share the same history. In both the 1992 and 1994 approval orders for the relevant rules, the SEC emphasized that these rules promote the important interest that “access to the courts for class action litigation should be preserved.”⁷⁵

In addition, the *Cohen* and *Laver* courts incorrectly ruled that there is no conflict between Rule 13204 and FAA section 2. In particular, both courts erred when they treated the agreement to arbitrate as “conceptually distinct” from the class waiver.⁷⁶ First, if the two provisions are distinct, then one is certainly not an agreement to arbitrate and thus not covered by FAA section 2. Second, and importantly, the Supreme Court in *Italian Colors* said an agreement to arbitrate and a class action waiver should be read together as part of one agreement.⁷⁷ When read together as one agreement, Rule 13204 does conflict with FAA section 2, because enforcing one necessarily requires ignoring the other. If the agreement including the class waiver is enforceable as written, a broker-dealer employee would not be able to invoke FINRA

⁷⁴ *Schwab*, 2014 WL 1665738 at *8 (first emphasis original; second emphasis added).

⁷⁵ SEC Order re Exclusion of Class Actions from Arbitration, 57 Fed. Reg. 52659-02, at 52661; SEC Order re Exclusion of Class Action Claims from Arbitration, 59 Fed. Reg. 22032-01, at 22033. As the court in *Cohen* noted, the FINRA Board of Governors in *Schwab* also mentioned three district court cases that had been cited by Schwab there, each of which had found class waivers enforceable in the context of employment claims. FINRA stated that these cases were not “controlling over disputes with customers.” However, contrary to what the Second Circuit seems to have implied in *Cohen*, FINRA did not say either way in *Schwab*, neither did it have opportunity to decide, whether those district court cases were correctly decided or consistent with FINRA Rule 13204(a)(4). *Schwab*, 2014 WL 1665738, at *7-8.

⁷⁶ *Cohen*, 799 F.3d at 179-80; *Laver*, 976 F.3d at 847.

⁷⁷ See *supra* note 8.

Rule 13204 which bars FINRA member firms from enforcing clauses in arbitration agreements that purport to waive their associated persons' rights to pursue class claims in court.

B. *Rule 13204 is a "Congressional Command"*

In addition, Rule 13204 is a "command" of Congress sufficient to displace the FAA. In *Cohen* and *Laver*, the Second and Ninth Circuits did not reach the issue of whether a FINRA rule could displace another Act of Congress. The few lower courts to consider it have divided on the question.⁷⁸

First, it is indisputable that FINRA member firms must abide by all FINRA rules, including the Code of Arbitration Procedure for Industry Disputes.⁷⁹ Furthermore, FINRA Rules "approved by the SEC are expressions of federal legislative power."⁸⁰ Therefore, Rule 13204 has the force of federal law, i.e. '34 Act, under Exchange Act §15A.⁸¹

Second, an administrative agency pronouncement can be a "command" for purposes of the implied repeal doctrine. The Supreme Court itself cited a Congressional delegation of authority to an administrative agency to regulate arbitration—precisely what we have here—as an example of a "contrary

⁷⁸ *Compare Singh v. Interactive Brokers LLC*, 2016 WL 7007791 (E.D. Va. Nov. 30, 2016) (holding that arbitration rules of FINRA are not contrary "Congressional" commands), *with Dep't of Enforcement v. Charles Schwab & Co., Inc.*, Complaint No. 2011029760201, 2014 WL 1665738 (FINRA Apr. 24, 2014) (reasoning that, because the Exchange Act delegated to the SEC, which in turn delegated to FINRA, the authority to regulate broker-dealers' arbitration agreements for the protection of investors, the Exchange Act, through FINRA Rule 12204, constituted a sufficient Congressional command to overcome the FAA's mandate).

⁷⁹ See *Credit Suisse Sec. (USA) LLC v. Tracy*, 812 F.3d 249, 253 (2d Cir. 2016) ("Nor is there any dispute that, as a member of FINRA, Credit Suisse is bound to follow FINRA's arbitration rules. Arbitration rules, as we have previously concluded, bind FINRA members. . ."); *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 93 (3d Cir. 2018) (same).

⁸⁰ *Charles Schwab & Co. Inc. v. Fin. Indus. Regulatory Auth. Inc.*, 861 F. Supp. 2d 1063, 1065 (N.D. Cal. 2012) (citations omitted) ("Because of the SEC's oversight, FINRA Rules approved by the SEC are expressions of federal legislative power and have the force and effect of a federal regulation.").

⁸¹ See *McDaniel v. Wells Fargo Invs., LLC*, 717 F.3d 668, 673 (9th Cir. 2013) ("Congress has vested [FINRA] and the New York Stock Exchange (NYSE) with the power to promulgate rules that, once adopted by the SEC, have the force of law"); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1132 (9th Cir. 2005) (finding SRO arbitration rules approved by the SEC are "laws of the United States" and stating that they preempt conflicting state law).

congressional command” for purposes of supplanting the FAA.⁸² In *CompuCredit*, when rejecting the plaintiffs’ argument that the Credit Repair Organizations Act (CROA)—which made no mention of arbitration—superseded the FAA, the Court stated:

Had Congress meant to prohibit these very common provisions [pre-dispute arbitration clauses] in the CROA, it would have done so in a manner less obtuse than what respondents suggest. When it has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA.⁸³

The Court then cited examples of statutes where Congress did speak with the requisite clarity. Included in those examples (with a *cf.* signal) was 12 U.S.C. § 5518(b), the very statute that grants authority to the Consumer Financial Protection Bureau (“CFPB”) to regulate predispute arbitration agreements in contracts for consumer financial products or services.⁸⁴ Notably, that statute does not directly prohibit arbitration agreements or class waivers, it just empowers another governmental body to apply its own expertise to regulate arbitration as it sees fit. Thus, the Supreme Court pointed to a general Congressional delegation of authority to an administrative agency (there, the CFPB) to regulate arbitration in an industry (there, consumer financial services) in which the agency has special expertise, as a type of “congressional command” that could displace the FAA.⁸⁵

Congress has delegated to the SEC the authority to approve, amend or abrogate any rule of any securities self-regulatory organization (“SRO”), including FINRA.⁸⁶ In addition, the delegation of authority explicitly covers activities of associated persons, not just activities of investors or customers.⁸⁷

⁸² See *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012).

⁸³ *Id.* at 103.

⁸⁴ *Id.* at 104.

⁸⁵ This does not mean that courts must accord formal deference to the SEC’s interpretation of FINRA’s rules, but courts should take into account that interpretation.

⁸⁶ See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987) (discussing Congress’ broad delegation to the SEC of “expansive power to ensure the adequacy of the arbitration procedures employed by the SROs”).

⁸⁷ See *Credit Suisse Sec. (USA) LLC v. Tracy*, 812 F.3d 249, 253 (2d Cir. 2016) (“FINRA is an independent organization authorized by Congress to regulate the U.S. securities markets and professionals who sell securities in the United States”); see also 15 U.S.C. § 78o(b)(8)

The Supreme Court has long recognized that the 1975 amendments to the Exchange Act have multiple policy purposes, as they “authorize [FINRA] to promulgate rules designed to prevent fraudulent and manipulative practices; to promote equitable principles of trade; to safeguard against unreasonable profits and charges; and generally to protect investors and the public interest.”⁸⁸ Providing and regulating a forum for arbitration of industry disputes is just one way to achieve these broad Congressional goals.

When approving FINRA Rule 13204, the SEC was implementing its Congressionally-delegated authority. And unlike in *Epic Systems* where the NLRA does not use term “class action,” Rule 13204 explicitly addresses class actions. Thus, Rule 13204 is a Congressional command within the meaning of *CompuCredit* that supplants the FAA’s general command to enforce arbitration agreements as written.

VI. CONCLUSION

The Supreme Court no doubt enforces arbitration agreements under the FAA. In the last decade, the Court has extended that enforcement to class action waivers that are coupled with arbitration agreements. And, the Supreme Court has not met a class action waiver it has not liked.

Whether the Court will like a class action waiver in a broker-dealer’s agreement with its employees remains to be seen. Congress has delegated regulation of the securities industry to the SEC, which as a matter of policy has decided that class actions belong in court, not in arbitration. And, the SEC approved arbitration rules to ensure that investors and employees of broker-dealers retain the ability to pursue their class claims in court.

A class action waiver, in essence, nullifies Rule 13204 entirely. To ignore Rule 13204’s prohibition of class action waivers would be to nullify the very regulation that the SEC approved. A FINRA member firm can evade the prohibition in Rule 13204(a)(4) by simply inserting a class action waiver in its standard arbitration agreement with employees. Just as Schwab’s effort to insert a class action waiver in customer agreements was shut down by FINRA in 2014, broker-dealers’ insertion of class action waivers in employment agreements should similiary be shut down.

(reflecting Congressional creation of a national securities association and regulations of persons associated with such association); 15 U.S.C. § 78s(g) (specifying the laws empowering the SEC to approve SRO rules includes rules governing persons associated with a member firm).

⁸⁸ *United States v. Nat’l Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694, 700 n. 6 (1975) (internal citations omitted).

Permitting broker-dealers to evade the SEC's regulations could lead to broader noncompliance in other areas of the securities laws. Congress created the SEC to be the expert regulator in the securities industry, and that agency has done so effectively for almost one hundred years. To eviscerate its powers now would cause disruption in the securities markets, hurt securities industry employees, and ultimately harm investors.