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Client Alert: FINRA's Enforcement Arm Under Fire

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Recent case developments in *Alpine Sec. Corp. v. FINRA* [1] before the D.C. Circuit cast further uncertainty on the future of the Financial Industry Regulatory Authority (FINRA)'s enforcement arm.

Background

In March of 2022, FINRA found that a broker dealer, Alpine Securities Corporation, violated FINRA rules, and FINRA subsequently expelled Alpine from FINRA membership. Alpine appealed to FINRA's internal appellate body, the National Adjudicatory Council, which automatically stayed the expulsion order. In an attempt to challenge the constitutionality of FINRA's ability to expel members, Alpine sued FINRA in the U.S. District Court for the Middle District of Florida on the grounds that FINRA violated the private nondelegation doctrine and the Appointments Clause. The case was later transferred to the U.S. District Court for the District of Columbia.

Meanwhile, FINRA's enforcement arm initiated expedited proceedings against Alpine seeking to expel Alpine from FINRA membership as soon as possible. As a result, Alpine moved the District Court to enjoin FINRA's expedited proceeding, which the District Court denied. In July of 2023, the D.C. Circuit Appellate Court then granted Alpine's request for an emergency injunction pending its appeal.

In a narrow holding on November 22, 2024, the D.C. Circuit reversed the District Court's denial of a preliminary injunction only with respect to Alpine's expulsion from FINRA without Securities and Exchange Commission (SEC) review. The D.C. Circuit granted Alpine's request for a preliminary injunction, finding that it demonstrated a likelihood of success on the merits of its private nondelegation claim on the grounds that FINRA's unilateral expulsion of a member ultimately bars the expelled entity from engaging in doing business, all without governmental superintendence or control.

Analysis of the Narrow Holding

With limited exceptions, federal law prohibits entities from trading securities unless they are a member of a registered securities association,[2] but FINRA is the only such association in the United States. Accordingly, FINRA's expulsion of Alpine effectively amounts to expulsion from the securities industry altogether. For this reason, the D.C. Circuit posited that the absence of SEC review prior to an expulsion likely violates the private nondelegation doctrine, which requires that a private entity statutorily delegated a regulatory role (FINRA) be supervised by a government actor (the SEC).

The Court suggested that because a FINRA expulsion order issued pursuant to expedited proceedings would take effect immediately, the SEC has no opportunity to review the situation. In essence, this limited holding calls into question only FINRA's ability to expel a member via expedited proceedings; it is also critical to remember that because this issue arose on a motion for injunctive relief, the Court's opinion did not resolve Alpine's claims on their merits. The narrowness of the Court's holding has already been identified by other courts. Only three weeks after this Court's holding, the District Court in and for Vermont distinguished the *Alpine* case from the case before it—in which FINRA is a defendant—stating that "[t]his case involves no similar expulsion."[3]

Analysis of the Dissent and Implications for the Future of FINRA's Enforcement Arm

Concurring and dissenting in part, Judge Walker of the D.C. Circuit agreed that FINRA should be enjoined from unilaterally expelling Alpine, but he dissented from the majority's decision not to enjoin the entirety of the ongoing FINRA enforcement proceedings. He stated that "FINRA wields significant executive authority when it investigates, prosecutes, and initially adjudicates allegations against a company required by law to put itself at FINRA's mercy. That type of executive power can be exercised only by the President (accountable to the nation) and his executive officers (accountable to him)."[4] Judge Walker's reasoning, along with commentary over the past year, indicates that many view FINRA's enforcement arm as unconstitutional.

Expanding on this point, Judge Walker also theorized that FINRA's exercise of executive authority, as a private actor, subverts the constitution. Though not binding, Judge Walker's dissent casts further doubt upon the future of FINRA's enforcement arm.

That doubt is amplified by the shift to the new Trump-Vance administration and the nomination of Paul Atkins to succeed Gary Gensler as SEC Chair. Regarding the Trump-Vance administration, there is at least one notable harbinger: Bill Barr, the former Attorney General under the prior Trump administration, appeared in the *Alpine* case and submitted an *amicus curiae* brief advocating for significant changes to FINRA's role and authority and positioning himself against the stance of the Biden administration, which supported FINRA's current structure.

Further, in prior comments, Atkins has hinted that the SEC has shown too much deference to FINRA and has registered concerns regarding FINRA's lack of transparency to the SEC, its members, and the public, suggesting that it has a virtual monopoly over its jurisdictions.[5] It could be true that, even absent a Trump-Vance policy on point, Atkins steers the SEC to exercise more significant oversight of FINRA and its enforcement arm.

Developments

Alpine is already being cited in court opinions and appellate and trial court submissions alike—and there will be more to come. Importantly, on January 13, Alpine moved the D.C. Circuit Court to stay the issuance of its mandate pending the filing of a petition for a writ of certiorari in an attempt to get its case in front of the Supreme Court. Not only will this be opposed by FINRA, but the United States of America has also appeared to intervene and oppose Alpine's motion to stay.

The ongoing *Alpine* saga emphasizes how nuanced and challenging it can be for a FINRA Member Firm to contest enforcement actions. More importantly, it underscores and foreshadows the near-future uncertainty surrounding FINRA's enforcement arm.

FINRA Members and Associated Persons need to strategically position themselves early on to preserve legal

arguments and manage business risk. The experienced attorneys at Shumaker will continue monitoring the *Alpine* case and its impact and can assist in navigating this dense regulatory domain and its potentially changing framework.

Please do not hesitate to reach out to the author of this article or a member of our team for more information.

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[1] 121 F.4th 1314, 1324 (D.C. Cir. 2024).

[2] 15 U.S.C. § 78o(b)(1).

[3] *Traudt v. Rubenstein*, No. 2:24-CV-782, 2024 WL 5120050, at *7 (D. Vt. Dec. 16, 2024)

[4] *Alpine*, dissent at 1.

[5] Statement before the US House of Representatives Committee on Financial Services On Fixing the Watchdog: Legislative Proposals to Improve and Enhance the SEC (September 15, 2011).

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