Overseeing Private Rulemaking: Evidence from SEC review of SRO rules

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Securities markets rely heavily on private rulemaking by self-regulatory organizations (SROs) such as FINRA and the stock exchanges, supervised by the Securities and Exchange Commission. The SRO-centric model is marred by problems with democratic accountability and inherent conflicts of interest, where insiders might prioritize private benefits over public needs. For these and related reasons, the SRO model is in a moment of transition—with increasing judicial scrutiny of SROs' roles and powers within separation-of-powers and administrative-law frameworks. Scholars, meanwhile, know little about how the SROs and SEC jointly produce rules for capital markets. Previous securities regulation scholarship has focused on specific aspects of SRO rulemaking, such as the stock exchanges' corporate governance rules, largely without addressing systemic issues in the production and SEC oversight of SRO rules. Yet SRO rulemaking practices have important consequences for the regulation of securities markets, including the role of procedural reform on regulatory effectiveness and public participation.

This article's approach uses a comprehensive new dataset drawn from every issue of the Federal Register from 2000 to 2023, providing a unique macro perspective that reveals significant inefficiencies and oversight challenges in the current system. By employing a political economy lens, this study focuses on procedural inadequacies while aligning them with policy concerns about accountability, oversight, and democratic control over regulation. This article argues that

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the SRO rulemaking system is not functioning well, producing a firehose of securities law that is at once a massive drain on agency resources, as well as an impediment to robust public participation in the rules governing capital markets. After the Dodd-Frank Act, most rule change proposals go effective immediately upon filing unless the SEC takes action to halt effectiveness and need not require preapproval. The dominance of this mode of SRO rulemaking, I suggest, alters both the incentives as well as opportunities the SEC has to engage in robust oversight. I also find evidence that the SEC's oversight responds to a judicial-review shock. I assess the Dodd-Frank reforms under a framework that recognizes the tradeoff between the costs of deciding and the costs of making wrong decisions, and connect this tradeoff to deeper debates about the role of SROs in our constitutional structure. This project contributes to our understanding of the political economy of capital markets regulation, as well as our understanding of federal oversight of SRO rulemaking.

Introduction

Compare efforts by two regulators to promote diversity on American corporate boards. Both efforts involved diversity mandates for firms within the regulator's jurisdiction.[2] In the first case, federal and state courts struck down state legislation as violating constitutional antidiscrimination rules, with litigation ongoing.[3] In the second, by contrast, a panel of the U.S. Court of Appeals for the Fifth Circuit initially upheld the rule, concluding that the regulator's actions were "not subject to constitutional scrutiny."[4] The *en banc* Fifth Circuit later vacated the rule, holding that board diversity was not related to the purposes of the statutes that had purportedly authorized the regulator to adopt it.[5]

Board-diversity efforts took two different paths, with the difference being that the second regulator was the stock exchange NASDAQ. Stock exchanges and other securities industry self-regulatory organizations (SROs) historically were not treated as government regulators.[6] For the NASDAQ case, the Fifth Circuit panel had cited a litany of decisions finding that SROs are not "state actors," even if

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2 *See* Cal. Assemb. B. 979 (Cal. 2020); Cal. Assemb. B. 826 (Cal. 2023); Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, To Adopt Listing Rules Related to Board Diversity, Release No. 34-92590 86 Fed. Reg. 44,424, 44,424-45 (Aug. 12, 2021) ("NASDAQ Board Diversity Rule").

3 *See*, *e.g.*, All. for Fair Bd. Recruitment v. Weber, No. 2:21-cv-01951-JAM-AC, 2023 WL 3481146 (E.D. Cal. May 15, 2023).

4 *See* All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226, 248 (5th Cir. 2023) ("AFBR I"), *rev'd en banc*, No. 21-60626, 2024 WL 5078034 (5th Cir. Dec. 11, 2024) ("AFBR II").

5 *See AFBR II*, 2024 WL 5078034, at *4. The *en banc* Fifth Circuit vacated the SEC's order approving the NASDAQ Board Diversity Rule, reasoning that the SEC had acted arbitrarily and capriciously in approving a rule that did not further the statutory objectives. *See id.*; *see also infra* notes 108-111. The court concluded that promoting "disclosure" did not, alone, make the board-diversity rule related to the purposes of the Exchange Act. *AFBR II*, 2024 WL 5078034, at *5-10. It also held that the SEC "did not explain how" the rule had any connection with the permissible purposes of the Exchange Act, where three identified purposes "bear no relationship to the disclosure of information about [diversity] of the directors of public companies." *Id.* at *4; *see id.* at *10-15. Finally, the court identified board diversity as a "major question" sufficient to raise "skepticism" about the SEC's and exchanges' ability to regulate on the matter. *Id.* at *15-17.

6 *See* Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 547 (2022).

they "must register [with] and have their rules approved by the SEC…."[7]

Privately ordered rules are common across many domains of economic life, and are a major focus of market-based approaches to regulation.[8] But they are pervasive in American securities law, which relies heavily on self-regulation.[9] The Securities Exchange Act of 1934 (Exchange Act) empowers SROs to create rules for their members, examine their activities to promote compliance, and in so doing theoretically safeguard market integrity.[10] Though NASDAQ's board diversity rule is a salient example, in fact SRO rulemaking extends to all corners of the capital markets.[11] The self-regulatory ethos is implemented through a statutory framework creating four categories relevant to this article: (1) the stock exchanges like NYSE and NASDAQ; (2) the sole national securities association, FINRA; (3) the clearing agencies like DTC; and (4) the Municipal Securities Rulemaking Board (MSRB).[12]

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[7] *AFBR*, 85 F.4th at 243–44; *see also*, *e.g.*, Nat'l Ass'n of Sec. Dealers v. SEC, 431 F.3d 803, 804-05, 807 (D.C. Cir. 2005) (describing FINRA as a "quasi-governmental agency").

[8] *See*, *e.g.*, Emily Aguirre, *Beyond Profit*, 54 U.C. DAVIS L. REV. 2077, 2086 (2021) (describing "private ordering" as "a fundamental aim of business law"); Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 Administrative Law Review 171 (1995); *see also*, *e.g.*, Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

[9] *See*, *e.g.*, Stavros Gadinis & Howell E. Jackson, *Markets as Regulators: A Survey*, 80 S. CAL. L. REV. 1239 (2007) (describing the self-regulatory responsibilities of exchanges across jurisdictions and cataloguing levels of government oversight); Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1452 (2008); *see also*, *e.g.*, Gregory H. Shill, *The Independent Board as Shield*, 77 WASH. & LEE L. REV. 1811, 1903 (2020) (describing "the pervasive use in corporate and securities law of self-regulation as a substitute for traditional safeguards, like judicial review").

[10] For review of the literature on this article's research question about the production of SRO rules, *see infra* Parts I.B and II.B.

[11] *See*, *e.g.*, Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. RICH. L. REV. 1069, 1101 (2004) (identifying categories of exchange rules).

[12] *See* Exchange Act § 3(a)(26), 15 U.S.C. § 78c(a)(26) (defining an SRO as "any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 78s(b), 78s(c), and 78w(b) 1 of this

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Legal scholars know relatively little as an empirical matter about SRO rule production and the SEC's oversight of this process, even though these are of central programmatic and theoretical importance to market regulation—a subfield of "securities law."[13] A long and vibrant debate in securities law scholarship has focused on the theoretical desirability of the self-regulatory approach, with many sharply critical of the conflicts that can arise when industry is empowered to regulate itself.[14] The main concern with the "self-regulation" setup is the inherent incentive for industry insiders to capture the SRO and promote the SRO members' own sectoral interests.[15] Securities law addresses this concern by empowering SROs to make their own rules—like a stock exchange rule setting out requirements for a company to "list" on the exchange—while empowering the SEC in turn to engage in oversight at different points in the process. SEC oversight is thought to reduce the risks of capture by ensuring that the rule production process accounts for broader public interests—including those of investors and

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title) the Municipal Securities Rulemaking Board established by section 780–4 of this title."); *see also infra* Part I.A.

13 Financial regulatory attorney Michael Morelli examines a subset of SEC approvals and disapprovals involving NYSE and NASDAQ rules between 2018 and 2021, with particular interest in the SEC's analysis of the rules' effects on competition. Michael Morelli, *Courts, Competence, and Competition: Brewing Tensions Between Administrative, Antitrust, and Securities Law*, 64 B.C. L. REV. 1615, 1663–73 & appendix A (2023); *see infra* notes 150–153. For other examples of what we know about SRO rulemaking, see Kwon-Yong Jin & Geeyoung Min, *Relational Enforcement of Stock Exchange Rules*, 47 BYU L. REV. 1 (2021) (undertaking empirical study of fairly strict rulemaking and fairly loose enforcement of exchange listing rules, and concluding that the rule enforcement regime is best characterized as relational); Gadinis and Jackson, *supra* note 9 (surveying exchange rulemaking and governance in comparative context); *see also*, *e.g.*, U.S. Chamber of Commerce Center for Capital Markets Competitiveness, *Examining the Efficiency and Effectiveness of the U.S. Securities and Exchange Commission*, (2009), https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/ExaminingtheSECrdcfinal.pdf; *cf.* Derek Fischer, *Dodd-Frank's Failure to Address CFTC Oversight of Self-Regulatory Organization Rulemaking*, 115 COLUM. L. REV. 69, 76 (2015).

14 *See infra* Part II.A.

15 There may be a tendency to frame regulations in ways that benefit existing market players over new entrants, potentially stifling innovation and competition. Or an SRO might under-enforce rules that are costly for its members to comply with, compromising the overarching goal of investor protection. For discussion of the problems with self-regulation, *see infra* Part II.B.

non-member entities. But there remain many open questions about the framework and processes under which the SROs and SEC jointly produce rules governing capital markets.

As we will see in Part I.B, securities law contemplates that the SEC provides a public-interest backstop through the review of SRO rule proposals. Reforms introduced in 2011 as part of Dodd-Frank created a two-track system for the review and approval of SRO rules, dividing these into "routine" and "immediately effective" rules. For routine rules, the SEC must initiate proceedings to decide whether to approve or disapprove it. For the other category, a rule will go into effect upon filing unless within two months the SEC suspends it and initiates proceedings as before.

The challenge lies in seeing the forest for the trees: understanding the full impact of the SEC's review of SRO rulemaking.[16] As Figure 1 illustrates, SRO rule production has outpaced that of the SEC for over two decades, stabilizing at a bit under 75% of the SEC's annual filings in the Federal Register.[17] By volume alone, the high programmatic importance of SRO rulemaking to securities law is palpably mismatched with its low level of visibility and legibility to legal scholars.[18] This article examines SRO rulemaking and the SEC's public-interest oversight role from the "bird's eye view," drawing on a newly collected dataset of every issue of the Federal Register between 2000 and 2023. I focus on about 42,000 SEC filings in the Federal Register, which I subset to about 24,000 individual proposed rule changes.[19] I use computational methods to examine the rise and nature of SRO rulemaking

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16 For similar perspectives on securities regulation, see Urska Velikonja, *Public Enforcement After Kokesh: Evidence from SEC Actions*, 108 GEO. L.J. 389 (2019); Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901 (2016); Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CAL. L. REV. 1081 (2015).

17 Figure 1 draws on the dataset analyzed below, calculating the proportion of SRO-related filings to the total number of SEC filings in the Federal Register. For discussion of the dataset, see Part II.B and Methodological Appendix.

18 *See infra* note 145.

19 Notices and orders involving the SEC's review of individual SRO rule proposals are published in the Federal Register. On how the SEC's review of an SRO's rule change proposal is an informal adjudication, *see infra* notes 112–115.

in the securities industry.[20]

This article's forest-for-the-trees approach builds upon the theoretical notion that the SROs face a common regulatory oversight process.[21] As a positive matter, SRO rulemaking production processes are trans-substantive. In other words, SROs share a common statutory framework for proposing rule changes and obtaining the SEC's approval when needed. For instance, with few and modest exceptions, notices of these rule change proposals must be published in the Federal Register.[22] The process is the same for FINRA, stock exchanges, clearing agencies and the MSRB. Recognizing as much lets us understand better the role of SRO rulemaking in administrative law and securities regulation, looking holistically rather than just at narrower subject-matter questions like the desirability of the New York Stock Exchange (NYSE)'s listing rules, or of FINRA sales practices rules.[23] Rather, what more do we need to know to begin to answer whether SRO rule production *overall* is functioning in the public interest?

How we answer that question may shape actively unfolding legal debates about the role of SROs in our constitutional system. We might care about the rule production and governance of stock exchanges, given their importance to financial market liquidity and price discovery in a capitalist economy.[24] Yet the self-regulatory model is also in a moment of transition, with increasing judicial scrutiny of SROs' roles and powers within the administrative law framework. Even setting aside recent administrative-law blockbuster cases like *Loper Bright v.*

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[20] *See infra* Part II.B and Methodological Appendix. On computational and natural-language processing methods in the social sciences, see JUSTIN GRIMMER, MARGARET E. ROBERTS & BRANDON M. STEWART, TEXT AS DATA: A NEW FRAMEWORK FOR MACHINE LEARNING AND THE SOCIAL SCIENCES 179-83 (2022).

[21] *See also, e.g.*, Lanny Schwartz, *Suggestions for Procedural Reform in Securities Market Regulation*, 1 BROOK. J. CORP. FIN. & COM. L. 409, 435–36 (2007) (describing then-existing problems with the SRO rulemaking system that were common to the exchanges and NASD alike).

[22] *See infra* Part I.B.

[23] *See infra* notes 146-149 and accompanying text (collecting literature on specific facets of SRO rulemaking like listing and dispute resolution). The problem of SRO rulemaking is too broad to cover in one article, and here I aim to get one view on a problem rather than to answer all research questions for all time.

[24] *E.g.*, Robert B. Thompson, *Corporate Federalism in the Administrative State: The SEC's Discretion to Move the Line between the State and Federal Realms of Corporate Governance*, 82 NOTRE DAME L. REV. 1143, 1151–53, 1168–80 (2007).

Raimondo,[25] other recent cases before the Supreme Court and the courts of appeals have been challenging the traditional deference given to SROs.[26] These developments make it an opportune time to begin to reassess SROs' dominance in securities regulation, their accountability mechanisms, and their place within the constitutional order.[27]

Seizing this moment, and drawing on empirical evidence of SRO rulemaking, I argue that the current SRO rulemaking system is not functioning well. The existing statutory framework (and the SEC's implementation of it) generates too many SRO rules. We live in a world of too much content, and SRO rulemaking is a firehose of securities law.[28] This has implications both for the SEC's process as well as for public participation. I focus in this article on the rulemaking process, and in follow-up work examine the kinds of rules it produces for exchanges, FINRA, and the like.[29]

This article focuses on the outcomes of the SEC's review process, and what this means for our assessment of the Dodd-Frank procedural reforms in SEC review of SRO rule changes. The SEC has been tasked with making findings and ministerially approving or disapproving based upon those findings. The category of rules that go effective immediately upon filing, which largely focus on the fees that exchanges are able to charge for data products and order types, has also come to dominate the SRO rule filings since Dodd-Frank, with in recent years

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[25] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (ending *Chevron* deference and placing courts at the center of the regulatory enterprise).

[26] *See* Edwards, *supra* note 6 at 547 ("Now, converging lines of judicial decisions create uncertainty about whether the Supreme Court will declare existing SRO structures unconstitutional."); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 62 (2015) (Alito, J., concurring) (arguing that "there is not even a fig leaf of constitutional justification" for private rulemaking).

[27] *See*, *e.g.*, Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J. L. BUS. & FIN. 151, 197 (2009) (criticizing the fact that SRO "freedom of action … give[s] them the ability to ignore the constitutional and other rights of persons subject to their rule-making or disciplinary actions," and arguing for greater due process protections).

[28] *See infra* note 165.

[29] Though this article focuses on procedure over substance, from the bird's-eye view I also find suggestive evidence that the rules have begun to shift in ways predicted by administrative and securities law scholars of self-regulation and stock exchange regulation. SROs have accreted more power, and, in some cases, moved into for-profit roles. *See infra* Part III.A.2.

have made up upwards of 75% of rule filing notices filed in the Federal Register.[30] The dominance of these immediately-effective rule filings raises questions about whether we have adequately struck the tradeoff between, on one hand, the efficiencies that come from streamlined adjudications procedures and, on the other hand, the costs of erroneous decisions on SRO rule change proposals (such as rules go effective even though they should have been disapproved).[31]

The analysis of these and other filings can also help us understand the political economy of stock exchange regulation.[32] The growing dominance of SRO rules that go immediately effective, and the fact that nearly half of such proposals from the exchanges have in recent years involved newly adopted fees, suggest that the SEC's review of SRO rulemaking is starting to require it to act as a utility rate maker for SRO-specific fees. This raises questions of whether it is a good use of public resources for the SEC to be mediating these fee disputes. And it raises the stakes for good mechanisms of accountability for SRO rule proposals.[33]

The rest of the paper proceeds like this. Part I introduces the cast of characters: the SROs and their relationship with the SEC, as well as the statutory and regulatory frameworks for producing and reviewing SRO rule change proposals. Part II puts these questions in scholarly context, engaging with recent scholarly literature on the production of SRO rules and the SEC's review of them. It also introduces the data and methods on which this article's empirical analysis relies and describes how the mix of rule change proposals—and of the SEC's procedural treatment of them—has shifted over time so that immediately effective rules have come to predominate. Part III considers implications of these findings, arguing that the Dodd-Frank amendments tilted the process too far in favor of administrative efficiency and that exchanges have arguably come to use this rule-production system mainly for price-setting purposes. That the SRO rule change system has been used for this purpose suggests a deep tension between securities law's ambition for market-driven governance, and the egalitarian and democratic commitments elsewhere in

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30 *See infra* Part II.B.

31 *See infra* Part III.A.1.

32 *See infra* Part III.A.2.

33 *See infra* Part III.B, C.

administrative law about accountability and the public's participation in private rulemaking.

I. Introducing Self-Regulatory Organization Rulemaking

This article's topic sits at the intersection of administrative law and securities regulation. Capital markets regulation in the United States is mainly a federal responsibility with the SEC at the forefront and a major role for industry self-regulation in day-to-day implementation. This part introduces this context, including a brief history of SRO rulemaking, as well as current doctrine and practice.

A. The SEC and SROs

Some of the SEC's regulatory activities are well known, like overseeing initial public offerings and ongoing disclosure by public companies,[34] enforcing prohibitions against insider trading,[35] and suing Elon Musk.[36] Less salient to non-specialists is how far the SEC's regulatory jurisdiction extends across a range of other activities and actors in capital markets, including oversight of the stock markets and securities exchanges, broker-dealers, investment advisers, and mutual funds.

In addition to federal and state regulators,[37] industry self-regulation plays an important role in this regulatory framework. The securities industry SROs are private organizations that operate pursuant to what is effectively a federal franchise, operating as registered and closely overseen organizations granted authority to create and enforce industry-specific regulations and standards.[38] While the SEC retains ultimate regulatory authority, SROs are responsible for regulating the

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[34] *See* Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 507-08 (2020).

[35] *See*, *e.g.*, Karen E. Woody, *The New Insider Trading*, 52 ARIZ. ST. L.J. 594 (2020); Stephen M. Bainbridge, *The law and economics of insider trading 2.0*, in ENCYCLOPEDIA OF LAW AND ECONOMICS (Gerrit De Geest, ed. 2019); Yesha Yadav, *Insider Trading and Market Structure*, 63 UCLA L. REV. 968 (2016).

[36] *See* Ann Lipton, *Every Billionaire Is a Policy Failure*, 18 VA. L. & BUS. REV. 327, 339 (2024).

[37] On state securities regulation, see Andrew Jennings, *State Securities Enforcement*, 47 B.Y.U. L. REV. 67 (2022).

[38] *See* Karmel, *supra* note 27 at 196 (noting that "[a]lthough FINRA may not be a government entity, in all or virtually all of its activities, it can be viewed as exercising powers delegated to it by the SEC").

Type of SRO rule change filing	**Count**
Stock exchanges	25,138
Clearing agencies	3,472
FINRA	2,697
MSRB	422
Small-*n* SRO categories (dropped)	148
Rule change filings (total)	31,877

Table 1: Counts of SRO rule change filings in the dataset, grouped by category of SRO.

daily conduct of their member firms and individuals.

The main categories of SROs include stock exchanges, broker-dealer regulator FINRA, the MSRB, and the clearing agencies.[39] In practice, SROs set rules across a variety of contexts: they set professional conduct rules, oversee market and trading practices, audit member firms for compliance, and discipline members for violations of the securities laws or SRO rules.

This article mainly focuses on the stock exchanges and FINRA, which together make up 82% of the rule filings in my dataset. (Table 1 includes a count of SRO filings from each category.) But an account of SRO rulemaking would be incomplete without mentioning two other categories of SROs also subject to the rules and processes for managing SRO rule filings—clearing agencies[40] and the MSRB.[41]

[39] *See supra* note 12.

[40] Clearing agencies such as The Depository Trust & Clearing Corporation (DTCC) facilitate post-trade activities. Some of its rules cover the procedures for the settlement of trades, including timelines and mechanisms for transaction confirmation; margin requirements; and events of member default. *See, e.g.*, Dan Awrey & Jonathan Macey, *Open Access, Interoperability, and DTCC's Unexpected Path to Monopoly*, 132 YALE L.J. 96 (2022) (assessing consolidation in the market for clearing services); Paolo Saguato, *The Unfinished Business of Regulating Clearinghouses*, 2020 COLUM. BUS. L. REV. 449 (2020).

[41] The MSRB regulates firms that issue and sell municipal securities. Some of its rules include disclosure requirements, pricing and price manipulation, and pay-to-play in underwriting of municipal securities. Michael L. Post, *The Municipal*

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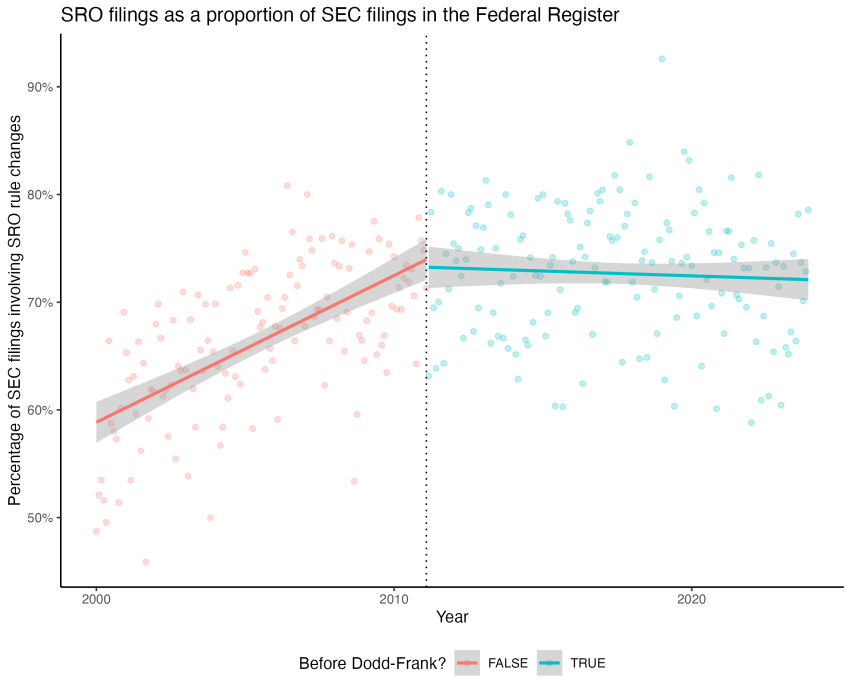

Figure 1: The proportion of the SEC's 19b-4 SRO-related filings to the total number of SEC filings in the Federal Register has gone up over time, leveling off at a bit under 75% after Dodd-Frank. The figure takes all SEC filings in the dataset and tags them, based on metadata values, as being related to an SRO rule change or not. The vertical dotted line is the date of Dodd-Frank's enactment. As in other graphs (see infra Appendix C), the data is split before (red) and after (blue) Dodd-Frank, with OLS models plotted on each data to show trends. Observations are binned by month and pool all SROs together rather than breaking them out by category.

Other federal agencies like the Commodity Futures Trading Commission oversee SROs operating in the capital markets as well.

As this menagerie of SROs reflects, securities regulation structure in the United States is predicated upon industry self-regulation. One of the founding myths is that "self-discipline is always more welcome than discipline imposed from above."[42] This structure has been described as a "historical artifact" in the context of American securities

Securities Rulemaking Board's Self-Regulatory Organisation (SRO) Model, 10 J. SEC. OPS. & CUSTODY 176 (2018).

42 Richard W. Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROBS. 663, 678 (1964).

markets—yet self-regulation also appears in comparative context, suggesting it is not all just contingent.[43]

There are also functionalist explanations for the self-regulatory structure. In addition to perceived legitimacy, the SRO model has been defended for its reliance on industry expertise,[44] more nuanced regulatory touch,[45] and purportedly superior flexibility and efficiency compared to the SEC or state regulators. This arrangement shifts some costs of rulemaking and enforcement to industry and may also reduce bureaucratic load on public agencies, allowing them to then focus on broader regulatory concerns. I return in Part II.B to the literature on self-regulation, including how the current SRO rulemaking process may reflect the conflicts that can arise when a for-profit entity oversees regulating an industry.[46]

The SEC produces its own rules governing markets and their participants. But as we will see in Part I.B, the SEC also has statutory authority to oversee the SROs in turn.[47] As part of its mission today, the SEC oversees several dozen SROs to ensure they comply with federal laws and regulations governing their operations. Each of these SROs has statutory authority to adopt rules for its members, subject to the SEC's blessing. Some of them are prolific rule filers. Others have deregistered or been consolidated during the time period this project covers.

Some illustrations may be useful.

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43 Gadinis and Jackson, *supra* note 9 at 1248. Before the enactment of the federal securities laws, the stock markets were a largely private affair. James Fallows Tierney, *Reconsidering Securities Industry Bars*, 29 STAN. J.L. BUS. & FIN. 134, 158-65 (2024); Stuart Banner, *The Origin of the New York Stock Exchange, 1791–1860*, 27 J. LEGAL STUDIES 113 (1998).

44 *See, e.g.*, Michael, *supra* note 8; Jonathan Macey & Caroline Novogrod, *Enforcing Self-Regulatory Organization's Penalties and the Nature of Self-Regulation*, 40 HOFSTRA L. REV. 963, 977-978 n.84 (2012) (noting that "the argument is somewhat limited in its applicability to today's markets, although it continues to be offered").

45 Yuliya Guseva, *Decentralized Finance, Decentralized Regulation*, Geo. Wash. L. Rev. (forthcoming 2024).

46 *See* Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CIN. L. REV. 583 (2017).

47 *See* Richard G. Wallace & Benjamin R. Dryden, *Self-Regulation: Background and Recent Developments*, *in* ALI-ABA COURSE OF STUDY SP054 ALI 3 (2009); Steven J. Cleveland, *The NYSE as State Actor?: Rational Actors, Behavioral Insights & Joint Investigations*, 55 AM. U. L. REV. 5 (2005).

1. Stock exchanges

First consider stock exchanges, which fall under the statutory category of "national securities exchanges."[48] Stock exchanges are platforms for a variety of functions in capital markets, and exchange rules relate to the various functions and businesses they conduct.[49] Exchange rules are relevant not only to members but to the broader public markets, even when they are about the structure and operation of the stock exchanges.[50] Table 2 illustrates with examples of several kinds rules drawn from the dataset in this article, including rules related to listing, fees, trading, and other market segments.

Stock exchanges generate revenue through several business segments: listing services, trading and exchange services, and the sale of market data products.[51] Stock exchanges often play a gatekeeping role of "listing" new public company securities (IPOs).[52] Generally speaking, each exchange has its own set of listing requirements, which might encompass standards for board composition, director independence, and audit committee matters.[53] These requirements typically also include minimum financial standards. In listing services, companies pay fees to have their stocks listed on an exchange, thereby gaining access to capital markets and increased visibility among investors. Some exchanges specialize in different kinds of listings; the New York Stock Exchange (NYSE), for instance, focuses on blue chip companies, while an affiliated exchange within its family, NYSE ARCA, focuses on

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48 *See* Exchange Act §§ 3, 6(a), 15 U.S.C. §§ 78c, 78f(a) (defining exchanges and providing for their registration "as a national securities exchange"); Hazen, 4 LAW. SEC. REG. § 14:26.

49 *See* Merritt B. Fox, Lawrence R. Glosten & Gabriel V. Rauterberg, *The New Stock Market: Sense and Nonsense*, 65 DUKE L.J. 191 (2015); *see also, e.g.*, Therese H. Maynard, *What is an Exchange—Proprietary Electronic Securities Trading Systems and the Statutory Definition of an Exchange*, 49 WASH. & LEE L. REV. 833 (1992).

50 *See* Sam Scott Miller, *Self-Regulation of the Securities Markets: A Critical Examination*, 42 WASH. & LEE L. REV. 853 (1985).

51 *See*, *e.g.*, Fox, Glosten, and Rauterberg, *supra* note 49 at 198–99.

52 *See*, *e.g.*, Karessa Cain, *New Efforts to Strengthen Corporate Governance: Why Use SRO Listing Standards?*, 2003 COLUM. BUS. L. REV. 619, 636-42 (2003).

53 ONNIG H. DOMBALAGIAN, CHASING THE TAPE: INFORMATION LAW AND POLICY IN CAPITAL MARKETS 5-7 (2015); Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225 (2005).

Exchange	Pub. Date	Fed. Reg. Citation	Rule description (*subject* in Fed. Reg. metadata)
NYSE	2008-09-15	73 FR 53303	Order approving proposed rule change to reduce the period within which companies must issue a press release after the exchange notifies them that they are noncompliant with exchange listing requirements
NYSE	2014-02-06	74 FR 7267	Notice of filing and immediate effectiveness of proposed rule change amending its price list to introduce fees and credits for a new order type called a midpoint passive liquidity order
Chicago Stock Exchange	2018-12-12	83 FR 63941	Notice of filing and immediate effectiveness of proposed rule change to amend CHX Article 22, Rule 6(a)
Investors Exchange	2023-10-04	88 FR 68790	Notice of filing and immediate effectiveness of proposed rule change to extend the implementation date of its new fixed midpoint peg order type

Table 2: Examples of SRO rule filings drawn from the article's dataset

listings of exchange traded products like ETFs.

Exchanges are also venues for trading. The market for stock exchange services has changed dramatically over the last 20 years, especially as it relates to trading. A "national market system" refined in 2005, in connection with other trends involving governance in stock exchanges discussed below, means that market participants can trade securities on a variety of exchanges, permitting competition among the exchanges in terms of the benefits they offer to market participants.[54] Exchanges create trading rules that structure their venues as markets. For example, as market centers, exchanges have rules governing the kinds of order types that may be submitted for execution.[55] Rules of this type include new kinds of orders, practices for market makers, circuit breaker rules, and the like. In addition, exchanges may charge fees to members and market participants to access the trading and markets

[54] Fox, Glosten, and Rauterberg, *supra* note 49 at 198–99; *see also infra* Part III.A.2.

[55] Merritt Fox & Gabriel Rauterberg, *Stock Market Futurism*, 42 J. CORP. L. 793, 804 (2017).

services they provide.[56]

A significant portion of stock exchange revenue now comes from selling market data. Products such as real-time quotes and depth-of-book data provide detailed information about trading activity and order flow.[57] Over time, exchanges have steadily increased prices for their market data products.[58] This has been a point of contention for the brokerage industry, which often views itself as a price taker in an oligopolistic market.[59] Brokers need comprehensive market data to effectively execute trades and comply with regulatory obligations, leaving them with little choice but to purchase these increasingly expensive products. The exchanges' control over essential trading data, combined with limited competition in the market data space, has heightened concerns about pricing power and fairness. The escalating fees for market data have also led to prolonged disputes with the SEC over the past decade regarding the reasonableness of these fee increases.[60] This battle over "fee filings," and the role that statutory changes have played in entrenching fee filings as a major component of the SRO rulemaking regime, is discussed below in Part III.A.2.

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[56] *See*, *e.g.*, Roger D. Blanc, *Intermarket Competition and Monopoly Power in the U.S. Stock Markets*, 1 BROOK. J. CORP. FIN. & COMM. L. 273, 288 (2006); *see also*, *e.g.*, Bats EDGA Exchange, Inc.; *Proposed Rule Change Related to Transaction Fees*, 82 FED. REG. 43,598 (Sept. 18, 2017).

[57] *See, e.g.*, Steven McNamara, *The Stock Exchange as a Multi-Sided Platform and the Future of the National Market System*, 2018 B.Y.U. L. REV. 969, 1015-21 (2018).

[58] *See, e.g.*, Jerry Markham, *Regulating the Sale of Stock Exchange Market Data to High-Frequency Traders*, 71 FLA. L. REV. 1209, 1210-11 (2019).

[59] *See*, *e.g.*, Zavier Vives & Giovanni Cespa, Regulating oligopolistic exchanges, VOX EU (July 1, 2021), https://cepr.org/voxeu/columns/regulating-oligopolistic-exchanges [https://perma.cc/ZSB3-MTAB]. Within the National Market System, brokers are required to ensure best execution for their clients, necessitating real-time access to market data across all trading venues to identify where liquidity is available. Without this data, brokers cannot accurately route orders to venues offering the best prices and liquidity.

[60] *See*, *e.g.*, Dave Michaels, *Traders Want to Know What Exchanges Earn From Market Data*, WALL ST. J. (Dec. 6, 2017), https://www.wsj.com/articles/traders-want-to-know-what-exchanges-earn-from-market-data-1512592201.

2. FINRA

FINRA is the final major SRO, all by itself in the category of "registered securities association." Broker-dealer firms, or those that effect trades for others or on their own account, today are required to be FINRA members unless they fit into narrow exemptions.[61] As a result, FINRA has jurisdiction over brokerage firms as well as the people who work for them—their principals, registered representatives, and associated persons.[62]

A second significant trend in SRO industrial organization, aside from stock exchange demutualization, has resulted in FINRA having significant enforcement powers. FINRA has taken over the role of handling enforcement on behalf of the exchanges, including enforcement of exchange rules. It is the result of the 2007 merger of NYSE Enforcement with NASD Regulation, a subsidiary of FINRA's predecessor NASD.[63] As a result of that process, the exchanges have delegated regulatory responsibilities to FINRA.

In enforcement actions, FINRA applies its regulatory rulebook. Its rules include sales practice rules, advertising and communication rules, supervisory rules, qualification and licensing requirements, and the like. Recent FINRA rules have addressed the problem of persistent

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61 *See* James Fallows Tierney & Benjamin P. Edwards, *Stockbroker Secrets*, 26 U. PA. J. BUS. L. 793, 804 (2024) ("In general, brokerage firms must be FINRA members.").

62 Edwards, *supra* note 6; Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW. 395 (2010).

63 *See* Order Approving Proposed Rule Change Relating to Consolidation of NASD and NYSE, 72 FED. REG. 42, 169, 42, 170–174 (July 26, 2007). But it was not always this way. In early American securities regulation, the federally overseen stock exchanges regulated their own members, but could not reach the conduct of nonmember firms who traded in the off-exchange over-the-counter markets. Congress quickly recognized that abuses in the off-exchange securities markets required an equivalent SRO that could govern nonmembers. *See* Maloney Act of 1938, Pub. L. No. 75-719, 52 Stat. 1070 (1938). But market structure slowly changed, brokers largely had to become NASD or FINRA members anyway, and the industry preferred specialization of functions. Meanwhile, there was the persistent concern about the conflicts inherent in exchanges enforcing the rules against their own members. Today's FINRA is the product of governance changes arising, in part, from longstanding concerns about the conflicts of interest in that arrangement. *See* NAT'L ASS'N OF SEC. DEALERS, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. 19-21 (1997), https://www.finra.org/sites/default/files/Corporate/p009762.pdf [https://perma.cc/NCG2-SP4S].

violations of FINRA rules, including raising the regulatory stakes for brokerage firms with a significant history of misconduct.[64] FINRA has other functions as well. One of its most significant services is to provide an arbitration forum for dispute resolution between brokers and their registered representatives, as well as between brokers and clients. FINRA's rulebook includes chapters dedicated to procedures in FINRA arbitration. In addition, since 2007, FINRA has also handled enforcement and examination for most of the other stock exchanges.[65]

B. SRO rulemaking in securities law

1. Statutory and regulatory history and context

The history of self-regulatory organization rulemaking begins before the federal securities laws.[66] The key feature of organized stock exchanges, like the NYSE in the 19th century, was their willingness to enforce non-legal norms of fair dealing "on pain of expulsion."[67] After the fully private-ordering era ended with the federal securities laws in the early 1930s, Congress has continued to extend the SEC's power over self-regulation in the securities markets.

Congress did so in a series of statutes, creating the exchange framework in the Exchange Act,[68] extending this to over-the-counter markets in the Maloney Act of 1938,[69] and most recently modernizing

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64 *See*, *e.g.*, Order Approving Proposed Rule Change to Amend FINRA Rule 8312 to Release Information on BrokerCheck Relating to Firm Designation as a Restricted Firm, Release No. 34-96798, 88 FED. REG. 8 (Feb. 3, 2023).

65 Edwards, *supra* note 46 at 602.

66 Macey and Novogrod, *supra* note 44 at 967–77.

67 Tierney, *supra* note 43 at 160 (citing STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS 1690-1860 263-64 (1998)).

68 Securities Exchange Act of 1934, ch. 404, § 19(b), 48 Stat. 881, 898-99 (authorizing the SEC to amend exchange rules "in respect of" 12 kinds of specified "matters," including "listing" and delisting rules).

69 Maloney Act of 1938, § 15A (providing for thirty-day SEC ex ante review of proposed rules, and a power of approval or disapproval); *see also* U.S. CHAMBER OF COMMERCE CENTER FOR CAPITAL MARKETS COMPETITIVENESS, *supra* note 13 at 43 (discussing early statutory history and amendments, including how "[t]he landmark 1963 Special Study of Securities Markets recommended eliminating the disparit[ies] in oversight between stock and exchanges and the NASD

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review in the Securities Act Amendments of 1975.[70] In these 1975 reforms, which also ushered in the beginning of the "national market system,"[71] Congress eliminated the distinction between the stock exchanges and the registered securities association (then NASD, FINRA's predecessor) for purposes of the SEC's oversight role. These statutory changes swapped a regime in which proposed rules were tested against a subject-matter-based standard, for one that looked at whether the rules met specific statutory criteria.[72]

The early 2000s, through the financial crisis, were a period of significant structural changes within the SRO landscape. Many stock exchanges demutualized and became for-profit entities. In addition, NASD's enforcement functions merged with exchange regulatory functions, resulting in FINRA. This period coincided with introspection and debate about the future of self-regulation in the securities industry, generating adjustments and proposals aimed at strengthening the oversight of SROs and enhancing their accountability. Leading up to the Dodd-Frank era, notable efforts were made to refine the oversight and operational aspects of SRO rulemaking and the SEC's

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by requiring prior SEC review and approval of all SRO rules and rule changes"); Sec. & Exch. Comm'n, *Report of Special Study of Securities Markets*, H.R. Doc. No. 95, 88th Cong., 1st Sess. Part V, pp. 198–200 (1964) (Special Study); *cf.* Bus. Roundtable v. SEC, 905 F.2d 406, 409 n.3 (D.C. Cir. 1990) (describing how the Special Study "was the 'genesis' of the 1975 legislation").

70 *See* Paul G. Mahoney, *Equity Market Structure Regulation: Time to Start Over*, 10 MICH. BUS. & ENTREPRENEURIAL L. REV. 1 (2020); Alexander I. Platt, *The Administrative Origins of Mandatory Disclosure*, 49 J. CORP. L. 1144 (2024). For legislative history and additional discussion, *see* Securities Acts Amendments of 1975, Report of the Senate Comm. on Banking, Housing and Urban Affairs to Accompany S.249, S. Rep. No. 94-75, 94th Cong., 1st Sess. 27, 131 (1975); *see also*, e.g., Senate Subcommittee on Securities, Committee on Banking, Housing and Urban Affairs, Securities Industry Study, 93 Cong., 1st Sess. 163 (Comm. Print 1973).

71 AFBR II, 2024 WL 5078034, at *5-10.

72 S. Rep. No. 94-75, at 5 ("Under the bill the scope of the rule-making authority and responsibility of all self-regulatory organizations would be defined in terms of purposes and standards rather than subject matters. The purposes to be served by self-regulatory rules would be expressed affirmatively and negatively (what the rules must be, and what they may not be, designed to accomplish)."); *Bus. Roundtable*, 905 F.2d at 409 ("The 1975 amendments to the Exchange Act, far from narrowing that authority, removed the enumeration [described in note 68] and replaced it with a general power under new §§ 19(b) & (c) both to review and to amend all self-regulatory organization rules.").

oversight of it, particularly through the early 2000s.[73] Many of these efforts were spearheaded by the mainstream business lobby, like the Chamber of Commerce.[74]

These efforts were tinkering—based on a neoliberal logic and designed to improve the "efficiency" of "capital formation" through SRO rulemaking, but with little other public interest virtues in mind. For instance, a report in 2002 from the Government Accountability Office identified inconsistencies between SRO rules,[75] and several other internal Office of Inspector General reports assessed the SEC's processes.[76] In 2004, the SEC released a concept release on self-regulation that—according to one observer—asked whether "market regulation, if deemed necessary," should "be vested in the stock exchanges themselves" or instead in "someone other than the market organizer."[77]

The SRO rulemaking process before Dodd-Frank was described as slow and inefficient.[78] The years leading up to Dodd-Frank were characterized by various practices in rule approval, including accelerated approvals and abrogations.[79] Before Dodd-Frank, "proceedings to

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[73] Proposed Rule Changes of Self-Regulatory Organizations, Release No. 34-43860, 66 Fed. Reg. 8912 at 6 (Feb. 5, 2001); *see also*, *e.g.*, Government Accountability Office, Report No. GAO-02-302, *SEC Operations: Increased Workload Creates Challenges* at 13 (Mar. 5, 2002), https://www.gao.gov/assets/a233928.html [https://perma.cc/D4ZA-FAQL] (discussing processing delays).

[74] *See*, *e.g.*, U.S. CHAMBER OF COMMERCE CENTER FOR CAPITAL MARKETS COMPETITIVENESS, *U.S. Sec. & Exch. Comm'n: A Roadmap for Transformational Reform*, 105–07 (2011), https://www.uschamber.com/assets/archived/images/legacy/reports/16967_SECReport_FullReport_final.pdf [https://perma.cc/PR26-C6JL]; U.S. CHAMBER OF COMMERCE CENTER FOR CAPITAL MARKETS COMPETITIVENESS, *supra* note 13 at 41–58.

[75] U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-362, Securities Markets: Competition and Multiple Regulators Heighten Concerns about Self-Regulation, at 19 (2002).

[76] *See* U.S. Sec. & Exch. Comm'n, Office of the Inspector General, *SRO Rule Filing Process*, Audit No. 438, 7 (Mar. 31, 2008), http://www.sec.gov/about/oig/audit/2008/438final.pdf; U.S. Sec. & Exch. Comm'n, Office of the Inspector General, *Commission Review of SRO Rules*, Audit No. 272, 1 (July 14, 1998), https://www.sec.gov/oig/reportspubs/aboutoigaudit272finhtm.

[77] Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 FORD. L. REV. 2541, 2548 (2006).

[78] *See infra* note 86.

[79] *See* U.S. CHAMBER OF COMMERCE CENTER FOR CAPITAL MARKETS

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determine whether to disapprove a proposed rule change were rarely begun and even more rarely concluded."[80] Informal, relational bargaining between the staff and the SROs would lead the SRO to "modif[y] or withdr[aw] a proposal" when it looked like such proceedings would be forthcoming.[81] Lanny Schwartz, formerly MSRB's chief regulatory officer, in 2007 criticized the pre-Dodd-Frank process for slow pace, complexity, and risk aversion on the part of the SEC.[82] In his view, "the SRO rule change process is the 'critical path' of much new competition and in many instances the source of developments in market structure."[83] During this period, the SEC also modestly streamlined processes for reviewing SRO rules in 2008 (and again in 2011 after Dodd-Frank).[84]

Dodd-Frank introduced reforms to the SEC's oversight of SROs and resulted in new procedures for processing SRO rule change proposals.[85] Dodd-Frank § 916's reforms had several important effects that we will turn to momentarily. Among these, it "established new statutory deadlines [for] the Commission's publication and review of proposed SRO rule changes."[86] Section 916 also "removed the concept of 'abrogation' of a filing that an SRO designated to be effective immediately upon filing," instead replacing it with a temporary suspension to give the SEC time to institute disapproval proceedings.[87]

COMPETITIVENESS, *supra* note 13.

80 *Id.*

81 *Id.*

82 Schwartz, *supra* note 21.

83 *Id.* at 411.

84 *See*, *e.g.*, Commission Guidance and Amendment to the Rules Relating to Organization and Program Management Concerning Proposed Rule Changes Filed by Self-Regulatory Organizations, Exchange Act Release No. 58092, 73 Fed. Reg. 40144, 40145 (July 11, 2008); *see also* Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n, Speech, *Statement at Open Meeting on Streamlining the Review of SRO Rulemaking* (June 25, 2008), https://www.sec.gov/news/speech/2008/spch062508cc_sros.htm.

85 Pub. L. No. 111-203, § 916 (July 21, 2010); NASDAQ Stock Mkt., LLC v. Sec. & Exch. Comm'n, 961 F.3d 421, 424-25 (D.C. Cir. 2020).

86 Final rule, Rules of Practice, 76 FED. REG. 4066, 4068 (Jan. 24, 2011).

87 *Id.*; *see also* McNamara, *supra* note 57 at 1018 (characterizing these changes as "effectively shift[ing] the burden of any decision as to the validity of an [immediately effective] SRO rule change from the SRO to the SEC").

2. Doctrine and practice under the present rules

SRO rules typically start with development by the organization's governing body, which may consist of members of the regulated industry.[88] Exchange Act § 19(b) then requires SROs to submit proposed rules and rule changes to the SEC for review. The agency is mandated to review proposed SRO rule changes to ensure they align with the public interest and investor protection. Its oversight role is aimed at ensuring that the statutory goals of the securities laws are met before the industry is allowed to enforce its own rules.

These proposed rule changes are processed by the Commission's staff, and often acted upon by the Commission itself.[89] The SEC's Division of Trading and Markets reviews the filings, typically by delegated authority.[90] Depending on the evaluation, the proposed rule can be approved, disapproved, or modified.[91]

The creation of rules is influenced by long term relational contracting between the SEC's staff and the SROs, the rare and underenforced prospect of SEC-imposed rulemaking, and demand-side dynamics from industry.[92] Relational bargaining will come into play, if at all, before the approval process; the SEC has no discretion to revise the proposal or to use disapprovals to force revisions.[93] While the SEC can

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88 *See*, *e.g.*, Christian Sabella, *An Expert's Take on Self-Regulatory Organization Rulemaking*, DTCC CONNECTION (Dec. 12, 2022), https://www.dtcc.com/dtcc-connection/articles/2022/december/12/an-experts-take-on-self-regulatory-organization-rulemaking.

89 *See* Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 952 (2023).

90 *See* Rule 30-3(a), 17 C.F.R. § 200.30-3(a) (2024).

91 For more statutory background, *see* David J. Kappos et al., *A Spot Bitcoin ETP? Understanding the SEC's Process for Reviewing an Exchange's ETP Proposal*, CRAVATH (July 18, 2023), https://www.cravath.com/a/web/gVaSYHdqDYDCR8d89bJz6H/7ZAK3Y/a-spot-bitcoin-etp-understanding-the-secs-process-for-reviewing-an-exchanges-etp-proposal.pdf [perma.cc/9QSF-WCJ9]; Wallace & Dryden, *supra* note 47.

92 *See supra* note 88, *infra* notes 94-95, and accompanying text; Ernest E. Badway & Jonathan M. Busch, *Ending Securities Industry Self-Regulation as We Know It*, 57 RUTGERS L. REV. 1351, 1354-56 (2005).

93 As the SEC recently explained in connection with the NASDAQ board diversity rule, § 19(b) "'does not give the Commission the ability to make any changes to the rule proposal as submitted, or to disapprove the rule proposal on the ground that the Commission would prefer some alternative rule on the same topic.'"

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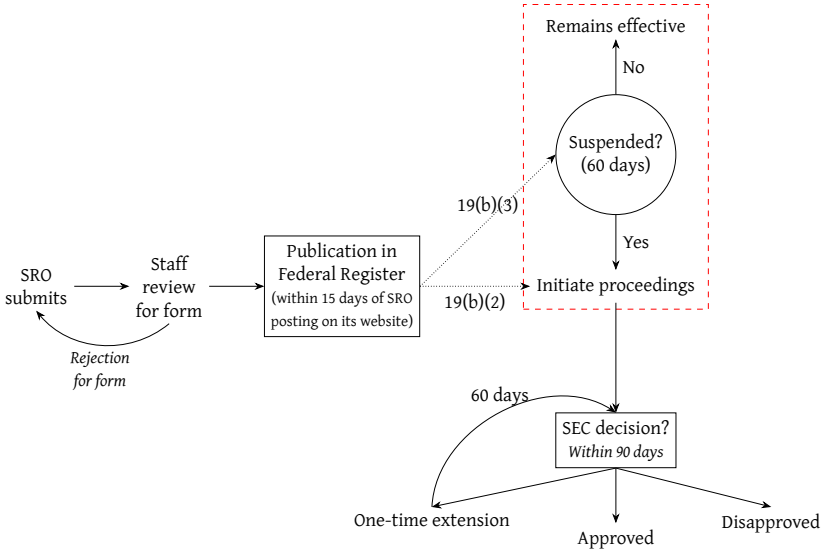

Figure 2: Flow chart of Commission review for Section 19(b)(3) immediately-effective rules (adapted from SEC OIG report). The dotted red box reflects the 19(b)(3) part of the process.

impose rules on SROs under § 19(c), that power is rarely used.[94] The proverbial "shotgun . . . behind the door," or deregistration of an SRO, is even less rarely used.[95]

Exchange Act § 19(b)(1) sets out the procedural requirements, specifying that SRO rulemaking proceeds on a timeline measured from the publication of a notice of proposed rule change in the Federal

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NASDAQ Board Diversity Rule, *supra* note 2; *see* Hazen, 6 LAW. SEC. REG. § 16:35 n.14.

94 Exchange Act § 19(c), 15 U.S.C. § 78s(c); *see* Hazen, 4 LAW. SEC. REG. § 14:26 (explaining that the § 19(c) "power is exercised only on a very infrequent basis"). For discussion of substantive limits on the SEC's § 19(c) power, *compare Bus. Roundtable*, 905 F.2d at 408-09, *with* Jeffrey Y. Wu, *Revisiting* Business Roundtable *and Section 19(c) in the Wake of the Sarbanes-Oxley Act*, 23 YALE J. ON REG. 249, 250 (2006).

95 William O. Douglas, Chairman, Sec. & Exch. Comm'n, *Address at the Dinner of the Association of Stock Exchange Firms, Commodore Hotel, New York* (May 20, 1938), reprinted in WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE 82 (1940) (describing the metaphor for SEC oversight of SROs); *see* David A. Lipton, *The SEC or the Exchanges: Who Should Do What and When? A Proposal to Allocate Regulatory Responsibilities for Securities Markets*, 16 U.C. DAVIS L. REV. 527, 528 (1983) (situating Douglas's "widely quoted" metaphor in context).

Register.[96] The rest of § 19(b) can be understood as distinguishing "routine" rules from "immediately effective" rules, and setting up processing procedures for each.[97] Figure 2 shows a schematic of how the §§ 19(b)(2) and 19(b)(3) processes work.

First, *routine rules* are filed for SEC approval and do not go into effect right away.[98] Exchange Act § 19(b)(2) sets out the process for routine rules, giving the SEC up to ninety days after publication to determine whether to "approve or disapprove the proposed rule change," or instead to "institute proceedings . . . to determine whether [it] should be disapproved."[99] Should the SEC determine to institute these proceedings, it then has to provide notice and an opportunity for a hearing.[100] It also must issue a decision within 180 days unless that time period is extended another sixty days in the SEC's discretion or by the SRO's consent.[101]

Second, unlike routine rule changes that are subject to that procedural timeline, other rules under § 19(b)(3) go *effective immediately upon filing*.[102] Dodd-Frank § 916 reformed this provision's treatment of immediately effective rules.[103] Before Dodd-Frank, SROs could only enforce certain rules—like "a change in market data fee rules"—after the Commission had solicited comment and approved it.[104] After

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96 *See also* Exchange Act § 19(b)(2)(E), 15 U.S.C. § 78s(b)(2)(E) (describing the relationship between an SRO's publication of its notice of proposed rule change on its own website, and the trigger date for "publication" in the Federal Register).

97 I use "routine" to refer to those that are not enumerated as eligible for immediate effectiveness under Exchange Act § 19(b)(3)(A), 15 U.S.C. § 78s(b)(3)(A).

98 *Compare* Exchange Act § 19(b)(2)(A)(i), with *id.* § 19(b)(3)(A).

99 Exchange Act § 19(b)(2)(A)(i), (ii), 15 U.S.C. § 78s(b)(2)(A)(i), (ii).

100 Exchange Act § 19(b)(2)(B)(i), 15 U.S.C. § 78s(b)(2)(B)(i).

101 Exchange Act § 19(b)(2)(B)(ii), 15 U.S.C. § 78s(b)(2)(B)(ii).

102 NASDAQ Stock Mkt., LLC v. Sec. & Exch. Comm'n, 961 F.3d 421, 429 (D.C. Cir. 2020) (concluding that § 19(d) doesn't permit review of proposed rule changes to set new fees under § 19(b)(3)); *see* Commission Guidance, *supra* note 84, at 40,144 (describing genesis of this practice). There is another category of rules that may be put into place summarily before filing. *See* Exchange Act § 19(b)(3)(B) (explaining the limited investor-protection grounds for doing so).

103 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 916, 124 Stat. 1376, 1833-36 (2010); *see also* S. REP. NO. 111-176, 2010 WL 1796592, at *106 (2010).

104 NetCoalition v. U.S. Sec. & Exch. Comm'n, 715 F.3d 342, 344 (D.C. Cir.

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Dodd-Frank, SROs no longer needed to wait for review: the rules could now "be enforced" immediately "upon filing" by the SRO "to the extent it is not inconsistent with" the Exchange Act, subject to suspension by the SEC within sixty days.[105] Exchange Act § 19(b)(3)(A) and Rule 19b-4(f) thus now provide for effectiveness upon filing, and no SEC preapproval, for certain categories of SRO rules.[106] If the SEC does not act to initiate proceedings or to disapprove, the rule goes into effect without agency action.[107]

As Figure 3 below shows, since the passage of Dodd-Frank, the vast majority—about two thirds—of SRO rule change proposal filings by exchanges have been related to these immediately enforceable rule proposals. The proportion is closer to one-half for FINRA's proposals. We will return to the concept of immediate effectiveness in Parts II.B and III.A below.

The SEC has relatively little discretion with respect to the approval

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2013) (*NetCoalition II*) (linking effectiveness with SEC approval of the proposal, which it could do "only if, after notice and comment, it found that the 'proposed rule change [was] consistent with the requirements' of the Exchange Act").

105 *NASDAQ*, 961 F.3d at 425 (quoting *NetCoalition II*, 715 F.3d at 344). In these cases, Section 19(b)(3)(C) sets out proceedings for the SEC's review. The SRO may enforce the rule, but for 60 days after publication, the Commission has the summary power to "temporarily suspend the change … if it appears … that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of" the Exchange Act's purposes. Temporarily suspending a rule comes with an administrative cost, as this provision requires further administrative action: the Commission must "institute proceedings under [Exchange Act § 19(b)(2)(B)] to determine whether the proposed rule should be approved or disapproved."

106 Section 19(b)(3)(A) filings "shall take effect upon filing" if they fall into one of three categories: (1) "a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization"; (2) "establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization"; or (3) "concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2)."

107 *See* Brief for the Sec. & Exch. Comm'n, *Tenn. Repub. Party v. SEC*, Nos. 16-3360, 16-3732 (6th Cir. Dec. 2016), 2016 WL 7386037, at *15-26; *see also* AT&T Corp. v. FCC, 369 F.3d 554, 556, 558-59 (D.C. Cir. 2004).

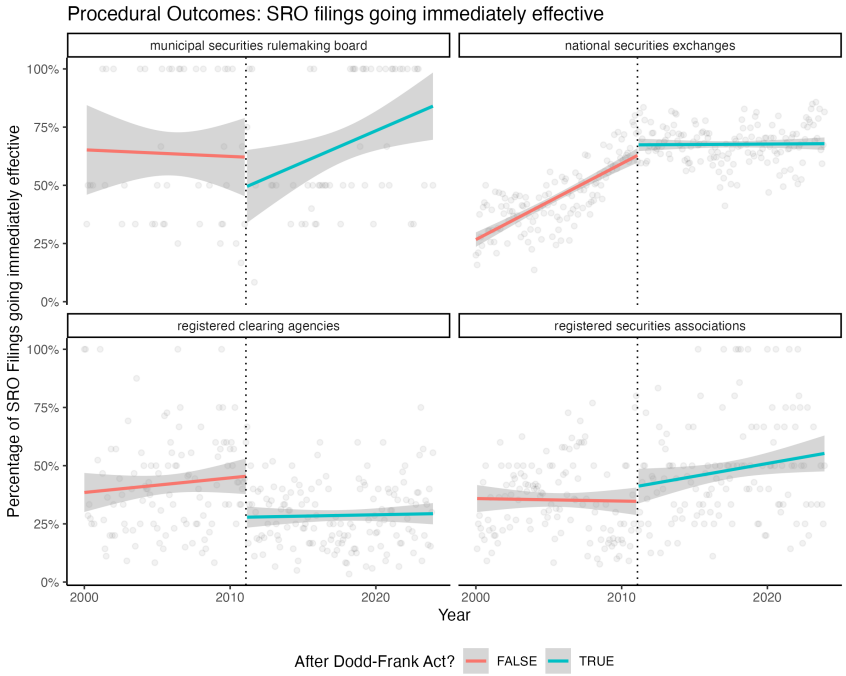

Figure 3: SRO rule proposals will often include text indications of the outcome, like going effective immediately. The proportion of rule proposals containing indications of immediate effectiveness looks different depending on the kind of SRO at issue. The vertical dotted line is the date of Dodd-Frank's enactment. As in other graphs (see Methodological Appendix A), the data is split before (red) and after (blue) Dodd-Frank, with OLS models plotted on each data to show trends. Observations are binned by month, but are robust to binning by year (code run but not shown).

or disapproval of SRO rules. Congress has directed outcomes for approval or disapproval depending on an up-or-down decision on statutory criteria: whether the SEC makes a "find[ing] that such proposed rule change is consistent with" the Exchange Act's other requirements "applicable to such organization."[108] And if the "SEC does not make that finding, it must disapprove the proposal."[109]

To illustrate, Exchange Act § 6(b) sets out the other requirements applicable to exchanges. An exchange rule involving data access fees would have to be assessed against the statutory requirements not just

[108] Exchange Act § 19(b)(2)(c)(i), 15 U.S.C. § 78s(b)(2)(c)(i). In *AFBR II*, the Fifth Circuit explained that the SEC could not approve the NASDAQ board diversity rule because it "regulates matters not related to the purposes of the Exchange Act," and thus is not "consistent with the requirements of the Exchange Act." *AFBR II*, 2024 WL 5078034, at *2.

[109] *AFBR II*, 2024 WL 5078034, at *1.

for an exchange rule, but also for a fee rule. One of those requirements is that requiring that "rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."[110]

This also underscores the hybrid nature of the SEC's review of SRO rulemaking, as well as the fact that it is not an SEC rulemaking. To begin with, unlike rulemaking by a federal agency, SRO rulemaking is *not* governed by the rulemaking provisions of the Administrative Procedure Act (APA).[111] It instead is an informal adjudication by the SEC on whether a regulated entity's proposal meets the statutory requirements for approval or disapproval.[112] SRO

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[110] Exchange Act § 6(b)(4), 15 U.S.C. § 78f(b)(4); *see also*, *e.g.*, Schwartz, *supra* note 21 at 418. This is the provision at issue in the D.C. Circuit case discussed *infra* notes 124-129.

[111] *See* U.S. CHAMBER OF COMMERCE CENTER FOR CAPITAL MARKETS COMPETITIVENESS, *supra* note 13 at 45 ("SEC review and action on SRO rules under section 19(b) is considered an administrative action, and the agency process is not subject to the APA rulemaking requirements.").

[112] *See id.*; see also Shultz v. SEC, 614 F.2d 561, 569 (7th Cir. 1980) ("The Commission, not the Exchange, is governed by the Administrative Procedure Act."); *cf.* Belenke v. SEC, 606 F.2d 193, 197-98 (7th Cir. 1979) (observing that "Section 19(b) requires only informal proceedings for SEC review of rule changes of [SROs]," and that Congress selected informal "notice" and "comment" style procedures rather than "formal hearings"). For discussion of the more modest requirements for informal adjudications, *see, e.g.*, Kent Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 530 (2019); BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., Report No. R46930, *Informal Administrative Adjudication: An Overview*, https://crsreports.congress.gov/product/pdf/R/R46930 [perma.cc/N7X4-T2PG].

On the SEC's positions in this space, *see, e.g.*, Brief for the Sec. & Exch. Comm'n at 1 n.2, *Sacks v. SEC*, No. 07-74647 (9th Cir. May 30, 2008), 2008 WL 2791810, at *1 n.2 (arguing that an approval of a § 19(b)(2) rule change proposal is an "order" rather than a "rule"). In *Sacks*, the Ninth Circuit panel initially held that "neither the APA nor a regulation of general applicability promulgated under the APA … applies" to an SRO rule change proposal because there was a separate provision for "the exclusive procedure for judicial review" of those proposals. In an amended opinion upon denial of rehearing or rehearing *en banc*, the court walked this back to the more modest holding that a more specific statute (providing for direct petitions to federal courts of appeals of SRO rulemaking) trumped a rule of general applicability (requiring exhaustion in an appellate adjudication before the agency). *Sacks v. SEC*, 635 F.3d 1121, 1125 (9th Cir. 2011), amended and superseded on denial of reh'g en banc, 648 F.3d 945 (Aug. 8, 2011).

rulemaking is not an APA rulemaking even though Exchange Act § 19(b) provides for APA-*like* procedures in connection with some categories of SRO rule filings. As with a federal agency's proposed rules, the SRO's proposals are published in the Federal Register for public input, including "notice" and "an opportunity to submit written data, views and arguments" on the proposed rule change.[113] But despite this whiff of APA-style notice-and-comment rulemaking, the SRO's proposal is not the SEC's.[114] The agency's action is in determining whether the statutory criteria are met or not with respect to the proposal—not in undertaking its own rulemaking analysis.[115]

There are also strong negative statutory incentives encouraging SROs to liberally seek SEC review of changes to their operations or rules. An SRO can't apply one of its rules—such as in a disciplinary proceeding—if not approved under Rule 19b-4 as required.[116] This means that any time an SRO wants to change material aspects of its operations or interpret its rules in new ways, it may have to seek a proposed rule change.[117] What's more, many SRO changes in operations or rules qualify as "proposed rule changes" necessitating a 19b-4 filing and SEC review, given the low threshold definition of the category.[118] Under the Exchange Act and Rule 19b-4, a "proposed rule change"

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[113] Section 19(b)(1) directs the SEC to "publish notice … together with the terms of substance of the proposed rule change," and "give interested persons an opportunity to [comment]." 15 U.S.C. § 78s(b)(1).

[114] *Compare id.*, with 5 U.S.C. § 553(b), (c).

[115] *See*, *e.g.*, Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705 (2016).

[116] *See* ABN AMRO Clearing Chicago LLC, Exchange Act Release No. 83849, 2018 WL 3869452, at 2 n.15 (SEC Aug. 15, 2018) ("Unless an exception applies, an SRO cannot invoke a procedure in a disciplinary proceeding against a member or associated person that is premised upon an unfiled and unapproved rule."); *see also*, *e.g.*, Gregory Acosta, Exchange Act Release No. 34-89121, 2020 WL 3428890 (SEC July 22, 2020).

[117] *See* Fiero v. FINRA, 666 F.3d 569 (2d Cir. 2011). The Second Circuit in 2011 did not allow FINRA to use one of its rules on the grounds that it had improperly characterized it as an immediately effective housekeeping rule under Section 19(b)(3)(A), rather than a routine rule subject to Section 19(b) (1).

[118] Exchange Act § 19(b), 15 U.S.C. § 78s(b); *see also id.* § 3(a)(27), 15 U.S.C. § 78c(a)(27) (defining the "rules of the exchange" as including "stated policies, practices, and interpretations" of the exchange that "the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors").

means any "stated policy, practice, or interpretation" of the SRO, unless a "reasonably and fairly implied" extension of an "existing rule," or rule "concerned solely with the administration of the self-regulatory organization."[119] These rules are then eligible to go immediately under Section 19(b)(3)(C). With such a sensitive trigger under Rule 19b-4, notices related to SRO rulemaking make up the bulk of the SEC's filings in the Federal Register, as reflected in Figure 1.[120]

C. Judicial perspectives on review of SRO rulemaking

There are only a handful of cases involving SRO rulemaking.[121] In many cases, a federal appellate court can review the SEC action.[122] In addition, this two-layered review has real consequences. The D.C. Circuit's determinations loom large over securities law because it is always an option for appellate review.[123] Several D.C. Circuit cases are

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[119] *See*, *e.g.*, 17 C.F.R. § 240.19b-4(a)(6) (defining a "stated policy, practice, or interpretation" to include any "material aspect of the operation of the facilities of the self-regulatory organization" and any "statement made generally available to … 'specified persons', or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to … [t]he rights, obligations, or privileges of specified persons" or "[t]he meaning, administration, or enforcement of an existing rule").

[120] In recent years, as Figure 1 illustrates, each issue of the Federal Register includes on average about two-to-three times as many SRO rule filing notices as the SEC's own non-SRO-related filings. *See also supra* note 17 (describing data source).

[121] For other case law in this space, usually involving subject-matter-specific challenges to SRO rules, *see* N.Y. Republican State Comm. v. U.S. Sec. & Exch. Comm'n, No. 18-1111 (D.C. Cir. 2019) (pay to play rule); NetCoalition v. U.S. Sec. & Exch. Comm'n, 615 F.3d 525 (D.C. Cir. 2010) (*NetCoalition I*); *NetCoalition II*, 715 F.3d 342; Bloomberg LP v. U.S. Sec. & Exch. Comm'n, No. 21-1088 (D.C. Cir. 2022) (data feed rules); NASDAQ v. U.S. Sec. & Exch. Comm'n, 21-1167, (D.C. Cir. 2022) (review of CT plan); Intercontinental Exch. v. U.S. Sec. & Exch. Comm'n, 23 F.4th 1013 (D.C. Cir. 2022); Grayscale Inv., LLC v. U.S. Sec. & Exch. Comm'n, 82 F. 4th 1239 (D.C. Cir. 2023).

There are also only a handful of cases engaging with Rule 19b-4. *See*, *e.g.*, NASDAQ OMX Grp., Inc. v. UBS Sec., LLC, 770 F.3d 1010 (2d Cir. 2014); Gen. Bond & Share Co. v. U.S. Sec. & Exch. Comm'n, 39 F.3d 1451 (10th Cir. 1994); G.K. Scott & Co., Inc. v. U.S. Sec. & Exch. Comm'n, 1995 WL 364671 (D.C. Cir. June 7, 1995) (unpublished).

[122] *See*, *e.g.*, Hammond, *supra* note 115.

[123] *See* Kyle Langvardt & James Fallows Tierney, *On "Confetti Regulation": How Not*

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worth mentioning.

This first case is perhaps more important, as the court faulted the SEC for inadequate monitoring and oversight of SRO rules.[124] In 2017, the D.C. Circuit in *Susquehanna Int'l Grp. v. SEC*[125] found that the SEC had not adequately articulated the basis for its approval of an SRO rule, and faulted the SEC's process for being too deferential to the SRO's say-so.[126] Overturning the SEC's order approving the proposed rule change, the D.C. Circuit faulted the SEC's analysis for failing to make any findings or determinations that the proposed rule met the statutory requirements.[127] According to the court, "the SEC effectively abdicated that responsibility to" the SRO by stating that a statutory factor had been considered rather than making an affirmative finding that it had been met, and by relying on the SRO's characterization of its evidence rather than making factual findings.[128] Writing in BUSINESS LAWYER's Federal Regulation of Securities annual year in review, Bill Fisher concluded from *Susquehanna* that "serious quality control efforts are in order" for SEC review of SRO rule proposals.[129]

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to Regulate Gamified Investing, 131 YALE L.J. FORUM 717, n.64 (2022) (explaining why adverse decisions from the D.C. Circuit "potentially constrain[] the agency's [nonacquiescence] choice set in ways other courts' decisions do not").

124 William O. Fisher, *Caselaw Developments 2017*, 73 BUS. LAW. 877, 887 (2018).

125 866 F.3d 442 (D.C. Cir. 2017).

126 *Id.* at 446-47.

127 The case involved a rule by a clearing agency SRO, the Options Clearing Corporation (OCC), which requires members to make capital contributions. The OCC adopted a plan for managing capital contributions and allocating them between operating expenses, capital reserves, and dividends. Remember the requirement to make findings that the proposed rule change is consistent with applicable statutory requirements. *See* Exchange Act § 19(b)(2)(c)(i), 15 U.S.C. § 78s(b)(2)(c)(i); *see also infra* note 193. Here, that included a requirement in § 17A(b)(3) that the clearing agency's rules "provide for the *equitable* allocation of reasonable dues, fees, and other charges among its participants." 15 U.S.C. § 78q-1(b)(3) (emphasis added).

128 866 F.3d at 446.

129 Fisher, *supra* note 124, at 887; *see also*, *e.g.*, Steve Quinlivan, *Court Decision May Slow SEC Approval of SRO Rules*, STINSON (Aug. 11, 2017), https://www.dodd-frank.com/2017/08/court-decision-may-slow-sec-approval-of-sro-rules/ [perma.cc/6NJ9-RZG8]; Jai Massari, Anette L. Nazareth & Gabriel D. Rosenberg, *D.C. Circuit Raises the Bar on SEC Review of SRO Rule Filings—May Further Slow Pace of Agency Actions*, DAVIS POLK CLIENT MEMORANDUM (Aug. 10, 2017).

Another set of cases set up a potential distinction between SEC and SRO rulemaking. In its own rulemaking and in reviewing SRO rulemaking alike, Exchange Act § 3(f) requires the SEC, in reviewing an SRO rule proposal, to determine whether it will promote investor protection as well as "efficiency, competition, and capital formation" (ECCF).[130] The effect of this provision appears to differ for SEC and SRO rulemakings, however. To begin with SEC rules, in a series of cases the D.C. Circuit overturned SEC rules for what it described as repeated failures "adequately to assess the economic effects of a new rule."[131] The Exchange Act does not by its terms require cost-benefit analysis.[132] Yet the D.C. Circuit has interpreted the ECCF criterion to require this kind of analysis in SEC rulemaking.[133] And while the SEC may well consider ECCF in reviewing an SRO's rule change proposals, the D.C. Circuit has not yet formally extended to SRO rulemaking the same kind of cost-benefit frameworks applicable to the SEC's own rulemaking.[134] In 2022, the D.C. Circuit declined to decide whether

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130 Exchange Act § 3(f), 15 U.S.C. §§ 78c(f) (requiring that SEC rulemaking consider "efficiency, competition, and capital formation," also known as ECCF).

131 Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011). *See* American Equity Investment Life Insurance Company v. SEC, 613 F.3d 166, 167-68 (D.C. Cir. 2010); Chamber of Commerce of U.S. v. SEC, 412 F.3d 133, 143 (D.C. Cir. 2005).

132 *See* Exchange Act § 3(f), 15 U.S.C. §§ 78c(f); David Zaring, *More on the SEC's Proxy Access Decision*, The Conglomerate (Aug. 4, 2011), https://www.theconglomerate.org/2011/08/the-dc-circuits-proxy-access-decision-keeps-getting-attention-see-here-for-a-roundup-and-here-from-elliott-spitzer-seem.html (explaining that the D.C. Circuit had interpreted the ECCF criteria to require "cost-benefit analysis," even though "there is no explicit requirement that [one] be done in the statute").

133 *See*, *e.g.*, *Chamber of Commerce*, 412 F.3d at 143; *see also* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 292, 295, 300-302 (2013) (noting that Congress has required the SEC to consider "efficiency," explaining differences between the SEC's approach and "that of agencies required to submit their CBA to OIRA," and noting that the SEC's practices "left the D.C. Circuit free to develop an ad hoc, open-ended jurisprudence of economics in SEC rulemaking that has proven increasingly unworkable").

134 Sec. & Exch. Comm'n, Off. of Insp. Gen., *Use of the Current Guidance on Economic Analysis in SEC Rulemakings*, Report No. 518, at 24-27 (June 6, 2013). Exchange Act § 3(f)'s requirement to consider investor protection and ECCF applies in review of SRO rules where the SEC "is required to consider or determine whether an action is necessary or appropriate in the public interest." 15

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Exchange Act § 3(f)'s requirement to consider ECCF imposed a cost-benefit analysis requirement in SRO rulemakings akin to that in the SEC's own rulemakings.[135] The court instead found that the "Commission's failure to respond adequately to" a commenter's "concerns about the direct and indirect costs" of the proposal rendered it arbitrary and capricious.[136]

A final case is chronologically earliest, involving the SEC's power with respect to impeding SRO rulemaking. In *Bus. Roundtable v. SEC*,[137] the court addressed a significant challenge to the SEC's authority over exchanges' rulemaking. The case arose from the SEC's attempt to regulate a particular form of shareholder voting power under Rule 19c–4, prohibiting certain kinds of "dual class" transactions.[138] The D.C. Circuit concluded that this was beyond the federal statutory authority, as listing rules were the province of the SROs and "corporate governance [was] traditionally left to the states."[139] The court noted that the government's authority is drawn from the Exchange Act's

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U.S.C. § 78c(f).

Conservative critics have long complained that SRO rulemaking is not subject to cost-benefit analysis, as other SEC rules are. *See*, *e.g.*, Hester Peirce, *Economic Analysis by Federal Financial Regulators*, 9 J. L. ECON. & POL'Y 569, 607-08, 609-10 (2013) (describing the baseline lack of economic analysis at FINRA and the MSRB); SEC Commissioner Daniel M. Gallagher, Speech, *Market 2012: Time for a Fresh Look at Equity Market Structure and Self-Regulation* (Oct. 4, 2012), https://www.sec.gov/news/speech/2012-spch100412dmghtm. The Heritage Foundation's Project 2025 agenda for a conservative presidential administration faults the SROs for secrecy and inefficiency in the rule production process. The report calls for "meaningful cost-benefit analysis as part of the rulemaking process" and public input in the form of "requir[ing] all SROs to publish rules in proposed format and seek public comment before they are submitted to the SEC . . ." David R. Burton, *Securities and Exchange Commission and Related Agencies*, *in* MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 829, 836 (2023).

135 Bloomberg LP v. SEC, 45 F.4th 462, 476 (D.C. Cir. 2022).

136 *Id.*

137 *Bus. Roundtable*, 905 F.2d at 406.

138 Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, 69 WASH. U. L. Q. 565, 566 (1991) (explaining that after "dual stock class became more common, calls went out for federal regulation," and the SEC "responded by adopting rule 19c-4"); *see*, *e.g.*, *id.* at 574-79 (describing how the case arose from challenges to Rule 19c-4).

139 *Bus. Roundtable*, 905 F.2d at 408.

regulatory mechanisms directed at exchanges, but that only the exchanges (and not the SEC) had power to reach issuers with respect to voting rules.[140]

II. SEC Oversight of SRO Rulemaking: Process and Outcomes

Rulemaking authority for SROs blurs the lines between market participant and market regulator role. This Part first puts SRO rulemaking in context, reviewing theoretical foundations in securities law for self-regulatory organization rulemaking and some critiques it faces. It then considers what empirical evidence says about the process and outcomes in SEC review of SRO rule change proposals.

A. Scholarly approaches to SROs and their rules

Scholars have long been concerned about how legal rules shape stock markets, where self-regulation sees SROs as playing both a self-interested and a regulatory role.[141] Markets are constrained by their rules, including the background legal rules and relational practices against which trade can come to exist.[142] Stock exchanges and other SROs produce rules in their capacity as regulators.[143] The history of stock market regulation, and of federally overseen self-regulation more broadly, reflects the public distrust that industry will regulate itself

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140 *Id.* at 408-10.

141 *See*, *e.g.*, Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003).

142 *See*, *e.g.*, BERNARD HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE ILLUSION OF NATURAL ORDER 15, 32-33 (2011) (arguing that the legal-realist notion that "free, voluntary, compensated exchange is in fact the product of the legal coercion that the government establishes through its role in defining property rights," applies with even greater force to stock exchange and other SRO action).

143 Paul G. Mahoney & Gabriel Rauterberg, *The Regulation of Trading Markets: A Survey and Evaluation*, *in* SECURITIES MARKET ISSUES FOR THE 21ST CENTURY 221, 224-30 (Merritt B. Fox ed., 2018); Gadinis and Jackson, *supra* note 9 at 450; Dombalagian, *supra* note 11 at 1089-1100; Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1453, 1455-56 (1997). Under consolidation of stock exchanges, we should expect a rise in the private market for securities law, given incentives for markets to both offer attractive, low-cost-of-compliance listing and trading services. Brummer, *supra* note 9 at 1437 (describing the transition from "a market for the services exchanges provide" to "a dynamic market for securities laws" they provide).

effectively.[144]

SRO *rulemaking* has received relatively little attention from legal scholars, despite its importance in regulating stock markets.[145] Particular aspects of SRO rulemaking have drawn attention, like exchange "listing rules,"[146] FINRA's dispute resolution rules,[147] or SRO rules that

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144 *See*, *e.g.*, Jonathan Chan & Ernest Lim, *How It Matters Who Makes Corporate Rules*, 25 EUR. BUS. ORG. L. REV. 655, 658-59 (2024) (explaining that stock exchanges and other self-regulatory organizations face "conflicts of interest" and "incentives to make and enforce rules in ways that benefit their members, constrained primarily by the threat of government intervention should their rulemaking stray too far from the public interest"); Edwards, *supra* note 46 at 578-82; Kristin N. Johnson, *Governing Financial Markets: Regulating Conflicts*, 88 WASH. L. REV. 185, 203, 206-07 (2013); Macey and Novogrod, *supra* note 44 at 982-86; Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOK. J. INT'L L. 665, 671-77 (2010); Onnig H. Dombalagian, *Self and Self-Regulation: Resolving the SRO Identity Crisis*, 1 BROOKLYN JOURNAL OF CORPORATE, FINANCIAL & COMMERCIAL LAW 317, 324-29 (2006); Badway & Busch, *supra* note 92, at 1363-66.

145 That SRO rulemaking is a largely unexplored area of securities regulation may be in part due to the relative obscurity of market regulation compared to other, more well-trodden areas of securities law such as disclosure. *Cf.* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1031, 1061 (2009) (noting that mandatory disclosure "was probably the most important topic in securities regulation scholarship during the 1980s and '90s").

The SEC reports that in calendar year 2021, the 43 registered SROs filed an average of 34 proposed rule changes each. *Submission for OMB Review; Comment Request; Extension: Rule 19b-4 and Form 19b-4*, 88 Fed. Reg. 5375, 5387 (Jan. 27, 2023). (My dataset shows 34 registered SROs in calendar year 2021 filing an average of 42.2 each, or a total of 1,434 in calendar year 2021; in *fiscal* year 2021, the 34 SROs filed an average of 43.1 each.) In terms of programmatic volume, this is twice as many administrative actions as the SEC brought enforcement actions during roughly the same period. For a similar time period (FY 2021), the SEC "filed 697 total enforcement actions." Press Release, SEC Release No. 2021-238, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 [perma.cc/VZ9T-4972].

146 *See*, *e.g.*, Cain, *supra* note 52 at 636-42; John C. Coffee, *Racing towards the Top: The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1821-24 (2002); Onnig H. Dombalagian, *Exchanges, Listless?: The Disintermediation of the Listing Function*, 50 WAKE FOREST L. REV. 579, 583 (2015).

147 *See*, *e.g.*, Nicole G. Iannarone, *A Model for Post-Pandemic Remote Arbitration?*, 52 STETSON L. REV. 393, 435-36 (2023); Tierney & Edwards, *supra* note 61 at 819-20.

give rise to enforcement.[148] But there are only a handful of articles acknowledging more than in passing § 19(b), Rule 19b-4, and related processes.[149]

Most recently, Michael Morelli has examined the SEC's oversight of SRO rulemaking in the context of securities-industry competition policy.[150] Citing concerns that delegating "oversight responsibility to the private sector raises accountability and legitimacy issues," Morelli reports "top-line evidence" of the degree of "regulatory scrutiny" over stock exchange rule filings.[151] He examines SEC orders disposing of NASDAQ and NYSE rule change proposals filed between 2018 and 2021 and concludes that the SEC typically does not analyze the effects of the rule change on competition; only in 11.9% (Nasdaq) and 18.4% (NYSE) of decisions does the SEC "independently analyze[]" the statutory factor of the rulemaking's effect on competition.[152] Even if there are in some cases "legitimate reasons" for this apparent underproduction of SEC monitoring of SRO rulemaking on competition, Morelli concludes that the SEC's practice likely "reflects either [its] prioritization of other policy goals or a relative lack of expertise in analyzing

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148 *See*, *e.g.*, Barbara Black, *Punishing Bad Brokers: Self-Regulation and FINRA Sanctions*, 8 BROOK. J. CORP. FIN. & COM. L. 23, 40-55 (2013).

149 For older discussion, see Michael, *supra* note 8 at 207-11; Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws*, 62 N.C. L. REV. 475 (1984); James J. Moylan, *The Place of Self-Regulation in the Securities Industry*, 6 SEC. REG. L.J. 49 (1978); Walter Werner, *Adventure in Social Control of Finance: The National Market System for Securities*, 75 COLUM. L. REV. 1233 (1975); Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange, 80 YALE L.J. 811 (1971) (discussing practice before the 1975 amendments and the national market system).

150 *See* Morelli, *supra* note 13 at 1669-71. One quibble with Morelli's otherwise valuable contribution. He contends that the SROs "implement authority delegated to the SEC under the Exchange Act," and that all SRO "actions are considered the SEC's actions." *Id.* at 1669. The second claim is doubtful insofar as it is incomplete. The SEC's approval or disapproval of a routine rule is an "order." But what to make of an immediately-effective rule under § 19(b)(3), which may go into effect automatically and will not be suspended if the SEC omits to act? Is that agency action or Congress's delegation to a private entity that the SEC can make nonreviewable by omitting to act (such as by suspending or instituting proceedings)? *See supra* note 107 and *infra* note 189.

151 Morelli, *supra* note 13, at 1670.

152 *Id.*; Exchange Act § 6(b)(8), 15 U.S.C. § 78f(b)(8).

competition-related issues."[153]

More broadly, scholars have examined SROs, including their rulemaking functions, in terms of accountability and independence concerns that echo broader debates in administrative law.[154] These concerns can be manifested in agency cost[155] and aggrandizement approaches.[156] According to Emily Hammond, the problem with SROs is "arbitrariness" and a lack of "accountability," given "the combination of oversight agencies' deference to SROs and judicial deference to

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[153] *Id.* at 1671.

[154] *See*, *e.g.*, Joshua C. Macey et. al., *Grid Reliability in the Electric Era*, 41 YALE J. ON REG. 164, 173–79 (2024). Scholars have also examined the role of SRO and exchange rulemaking in comparative context. *See*, *e.g.*, Gadinis and Jackson, *supra* note 9; Jonathan Macey & Hideki Kanda, *Stock Exchange as a Firm: The Emergence of Close Substitutes for the New York and Tokyo Stock Exchanges*, 75 CORNELL L. REV. 1006 (1990). For recent examples focusing on the LSE, *see* Brian R. Cheffins & Bobby V. Reddy, *Will Listing Rule Reform Deliver Strong Public Markets for the UK?*, 86 MODERN L. REV. 176 (2023); Jonathan Chan, *The Relevance of Public Law to Private Ordering: The Consequences of Uncertain Judicial Review for Stock Exchange Self-Regulation*, 21 J. CORP. L. STUD. 219 (2021). Exchanges in different jurisdictions may adopt rules to capitalize on regulatory arbitrage, attracting issuers and investors seeking more favorable regulatory environments. *See*, *e.g.*, James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115 (2012); Marcel Kahan, *Some Problems with Stock Exchange-Based Securities Regulation*, 83 VA. L. REV. 1509 (1997).

[155] Agency cost theories recognize that due to their potential for private interest-led policy goals, stock exchanges and other industry self-regulators are unlikely to choose so as to optimally serve the public interest. SROs might prioritize rules that align more closely with the interests of their most influential members rather than the overall market or public good. *See*, *e.g.*, Edwards, *supra* note 46 at 574-78; Johnson, *supra* note 144 at 192–200; Onnig H. Dombalagian, *Securities and Derivatives Exchanges in the United States: Market and Ownership Structures*, FIN. MKT. INFRASTRUCTURE: L. REGUL. (Jens-Hinrich Binder & Paolo Saguato eds., forthcoming 2021); John W. Carson, *Conflicts of Interest in Self-Regulation: Can Demutualized Exchanges Successfully Manage Them?* (World Bank Pol'y Res. Working Paper No. 3183, 2003).

[156] Aggrandizement theories focus on the self-interest and power-maximizing behavior of organizations and their leaders. In this view, SROs may pursue rulemaking in a way that enhances their own prestige, influence, or control within the financial market ecosystem. *See*, *e.g.*, Tierney, *supra* note 43 at 167-68 (citing Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1297 (2015)). Driven by their desire for institutional self-preservation and expansion, SROs might prioritize rulemaking that asserts their dominance and visibility in the regulatory framework, even at the cost of efficiency or market liquidity.

oversight agencies [that] undermines both the constitutional and regulatory legitimacy of SROs."[157] William Birdthistle and M. Todd Henderson argue that "the mismatch between SROs' governmental powers and private unaccountability is leading our financial regulatory system towards an unstable and unsustainable structure at a time when it most requires strength and stability."[158] They call for "greater [SEC] control over [the] subordinate SROs."[159]

How might analysis of the rules stock exchanges produce inform or provide evidence bearing on theories of self-regulation and the public interest? Consider first the regulatory capture hypothesis, which posits regulators may be unduly influenced by the entities they regulate.[160] Under one definition, regulatory capture "denotes the misalignment of incentives of government actors who pursue narrow private interests that may conflict with the public interest they purport to serve."[161] As legal scholar Ben Edwards argues, "most observers conclude that the regulation of financial services exhibits a high degree of capture"; SROs "may be more prone to acting in the industry's interest than" the SEC and its staff.[162] This may be in part because securities regulators primarily hear from the regulated industry in the form of SROs, their members, and their respective lobbyists—and typically not from the rest of the general public. [163] SRO rulemaking presents a risk of capture that illustrates the tensions inherent in self-regulation, and raises similar problems as what's known in the regulatory literature as "corporations as private regulators."[164]

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157 Hammond, *supra* note 115 at 1771.

158 William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 6 (2013).

159 *Id.* at 42.

160 *See, e.g.*, James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845, 854-859 (2019).

161 Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 630 (2012).

162 Edwards, *supra* note 46 at 606–07. For an eye-opening example, run, don't walk, to infra note 215!

163 Steven M.H. Wallman, *Commentary on Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 825, 830 (2009).

164 This refers to corporations, rather than governmental entities, taking on roles traditionally associated with public regulation. Wentong Zheng, *Corporations as Private Regulators*, 55 U. MICH. J.L. REFORM 649 (2022). This literature raises

footnote continued on next page

Finally, there are significant monitoring costs. With the SEC's review process being resource-intensive and time-consuming, we might be concerned that the current structure does not effectively oversee the rules being produced. Wading through and processing this volume of SRO rule filings is an enormous regulatory task for the SEC's Division of Trading and Markets and the Commission itself.[165] This has been a concern of the agency and other observers for years.[166] Meanwhile, there may be reason for reciprocal concern that SEC monitoring of SROs will be costly and thus will be underproduced.[167]

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questions about the adequacy of self-regulation in protecting consumer interests, the role of government oversight, and the mechanisms for ensuring corporate accountability. *See id.*; David L. Weimer, *The Puzzle of Private Rulemaking: Expertise, Flexibility, and Blame Avoidance in U.S. Regulation*, 66 PUB. ADMIN. REV. 569 (2006).

165 In a farewell address, then-SEC Commissioner Luis Aguilar left tips for future colleagues, including about the role of SRO rulemaking. Among those tips is this banger in the key of David Byrne:

> From time to time, you might read in a newspaper about a "Commission action," and you will have no idea what it is about. So you'll ask yourself, am I having a "senior moment?" Am I suffering from amnesia?

Luis A. Aguilar, Comm'r, SEC, *Commissioner Aguilar's (Hopefully) Helpful Tips for New SEC Commissioners* (Nov. 30, 2015); *cf.* TALKING HEADS, *Once in a Lifetime*, *on* REMAIN IN LIGHT (Warner Bros. 1981) ("And you may tell yourself, 'this is not my beautiful house.' … And you may say to yourself, 'My God, what have I done?'").

Aguilar answered "probably not" amnesia; "[i]n all likelihood, the staff had taken action pursuant to the more than 376 separate rules where the Commission previously granted delegated authority to the SEC staff." Aguilar, *supra* this note ("[T]he staff acts on thousands of rule filings from SROs including, exchanges, clearing agencies, and FINRA pursuant to delegated authority."); *see also*, *e.g.*, Wallace and Dryden, *supra* note 47 ("The Commission's Division of Trading and Markets takes primary responsibility for reviewing SRO rule filings. Most rules are approved by the authority delegated to this Division."). The applicable regulation contains an escape hatch for disapprovals by the Division director under delegated authority. *See* 17 C.F.R. § 200.30-3(a)(12) (providing that if two Commissioners object the director's delegated disapproval becomes a recommendation for Commission action).

166 *See*, *e.g.*, U.S. CHAMBER OF COMMERCE CENTER FOR CAPITAL MARKETS COMPETITIVENESS, *supra* note 13 at 5 (describing the review "process [as] a major responsibility of the Division of Trading and Markets," with staff "review[ing] 1,014 filings" in 2006 and 1,143 in 2007).

167 *See* Hammond, *supra* note 115.

From the perspective of industry participants and academics, it also is a potentially significant obstacle to monitoring, understanding, commenting on, and influencing the design and adoption of SRO rules.[168] The volume of SRO rule proposals may be too great for even those with material financial incentives to monitor and comment on these rules manually. In some sense the problem is one of consumption of disclosure, for which there may be diminishing returns, a topic to which we'll return in part III.C.[169] For scholars the problem is in some sense less tractable because it would be cost-ineffective and overly burdensome to try to track and make meaning of the firehose of SRO rules with manual review.[170] This raises the stakes of using automated methods to identify and parse these filings.

B. Evidence from the SEC's review of SRO rule changes

Notices of proposed rules and actions on the proposals, are published in the Federal Register. As this source is available in machine-readable digital format, the Federal Register's textual contents are amenable to programmatic methods and analysis. By treating legal texts as data, we can quantify and model the processes that underpin the SEC's oversight of SRO rulemaking. This article's empirical strategy uses natural language processing methods to uncover trends in SEC review of SRO rulemaking.[171]

The subpart presents the primary results of the empirical study. (Readers interested in further detail about the data and methods are encouraged to review the Methodological Appendix before returning.) In short, I wrote a computer script in the R programming language to scrape and parse bulk data from the Federal Register, compiling it into

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168 Omar Al-Ubaydli & Patrick A. McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997–2012*, 11 REGUL. & GOVERNANCE 109 (2017).

169 Arthur G. Fraas & Randall Lutter, *How Effective Are Federally Mandated Information Disclosures?*, 7 J. BENEFIT-COST ANALYSIS 326 (2016); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

170 Having tried, it encouraged me to pivot to this approach.

171 While these text-as-data methods offer substantial insights, they are not without limitations. The Methodological Appendix also examines the extent and the boundaries of what these methods can reveal about the nature of rulemaking, acknowledging the aspects of legal and regulatory action that may elude purely quantitative textual analysis.

a structured dataset of almost 730,000 filings from January 2000 to December 2023 inclusive. This article focuses on a subset of this data: 45,438 filings in which the SEC is designated as the filing agency, of which 34,488 filings involve SRO rule changes. After filtering out observations with missing metadata, we are left with 31,877 filings, which in turn are grouped into 24,841 unique identifiers for a Form 19b-4 rule change proposal. Through the use of these grouping strategies and NLP methods like regular expressions (RegEx), I programmatically code the variables necessary for the study.

1. Procedural outcomes in the SEC's § 19(b) adjudications

The evidence shows a distribution of responses from the SEC that showcases the complexity of this regulatory process. Exchange Act Section 19(b) provides for different statutory pathways for the SEC to act, or not, on SRO rule proposals. These include mandatory notice-and-comment periods, immediate effectiveness with a lookback period for comments, and the institution of SEC proceedings to modify or disapprove rule filings. Remember that the Dodd-Frank Act largely eliminated the category of "abrogation," created a new category of "disapproval" filings, and altered the thresholds (and thus incentives) associated with immediately effective filings.

Figure 4 and Figure 5 reflect raw counts of new SRO rule change proposals filed with the SEC. For stock exchanges, the number of SRO rule filings have stayed high over time as a group, with about 1,000 proposals filed a year, and have stayed about steady with about 50 proposals filed a year if counted at the individual SRO level. The top-line trend is in significant contrast with that of FINRA, the sole registered securities association. FINRA made a lot of rule change proposals in the years leading up to Dodd-Frank. This was a result of the merger of NASD and NYSE Enforcement that created FINRA in 2009. By contrast, FINRA today does not make more than about 50 proposals a year on its own.

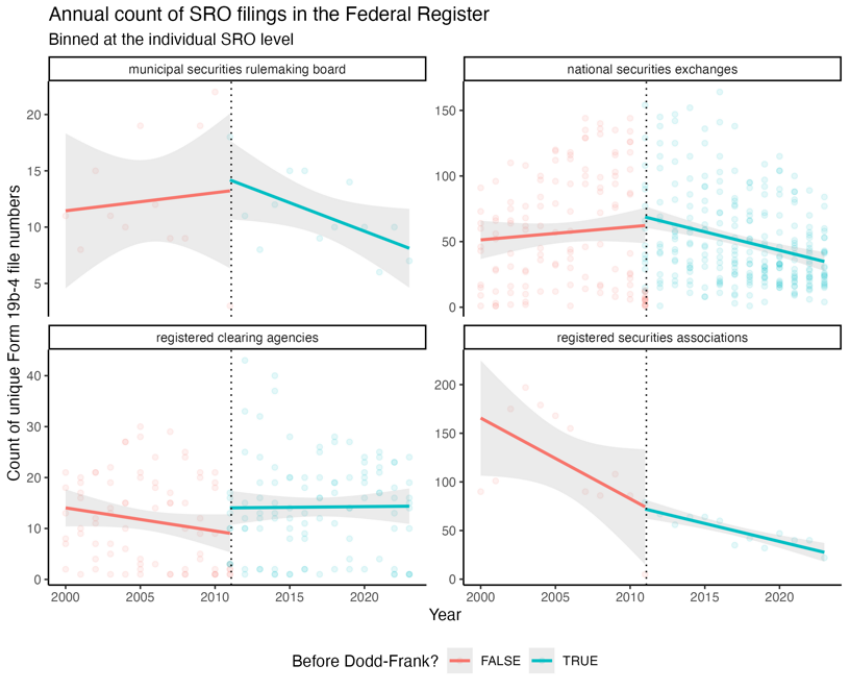

Figure 5: This figure shows the count of unique "file numbers" in the metadata, which is a proxy for the number of unique rule change proposals (as compared to the raw count of filings in the Federal Register, which may overstate the number of proposals to the extent multiple filings relate to the same one). This is a variation on the previous graph showing the counts binned at the year and individual-SRO level, showing the annual counts for each SRO rather than for the whole category. As in other graphs (see Methodological Appendix A), the data is split before (red) and after (blue) Dodd-Frank, with OLS models plotted on each data to show trends. Observations are binned at the year.

The Dodd-Frank reforms were designed, in part, to deal with the firehose of SRO filings. The data reported in Figure 8 in the appendix reflects the relative rise after Dodd-Frank of adjudications to determine whether to approve or disapprove a rule change proposal. Over time, the SEC has become more aggressive in initiating proceedings to determine what to do about the proposal. The flip side is that adjudication like this—deciding whether to approve or disapprove a rule change—is costly in agency time and resources.

The agency's ability to efficiently handle the firehose of SRO filings through adjudication depends, in part, on volume. The fact the majority of some types of SRO rule change proposals go into effect

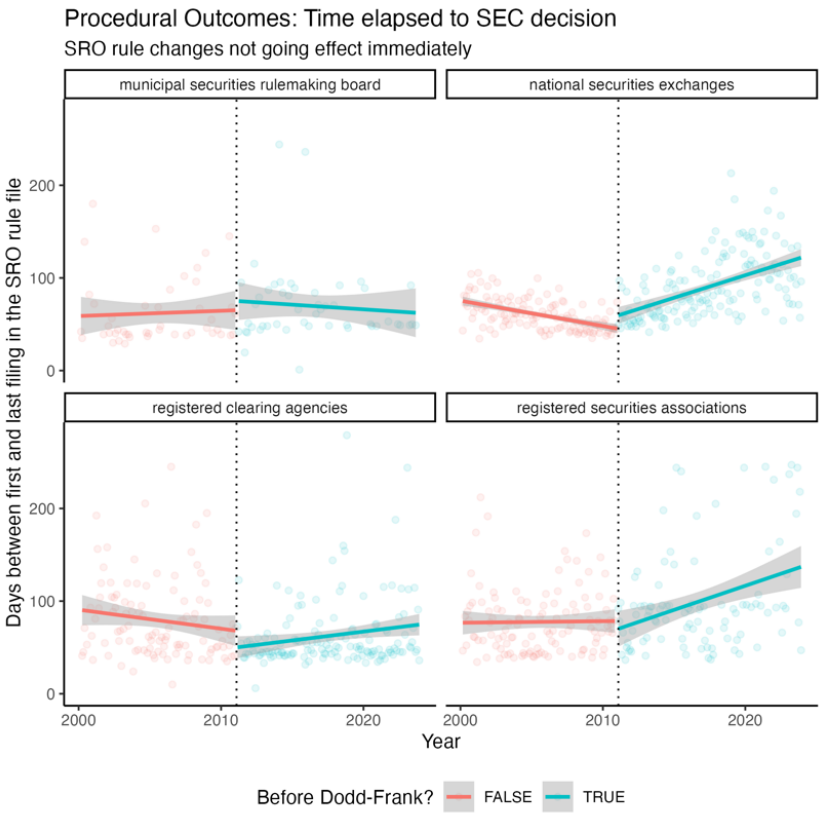

Figure 6: This figure focuses on the SRO rule change proposals that do not go effect immediately, and measures the elapsed time from first to last filing in these proposals' administrative dockets. As in other graphs (see Methodological Appendix A), the data is split before (red) and after (blue) Dodd-Frank, with OLS models plotted on each data to show trends. Observations are binned at the month level.

immediately, as we'll see in the next subsection, raises the question of what happens to the other cases that must be handled through adjudication. Figure 6 focuses on the SRO rule change proposals that do not go effect immediately, and measures the elapsed time from first to last filing in these proposals' administrative dockets. In cases where a proposal does not go effective immediately, the average length to completion (reflected in my measure) has gone up after a local minimum around Dodd-Frank. In some cases, this reflects a greater length-to-completion than before Dodd-Frank, when the process was criticized as slow and sclerotic. For these more "routine" proposals, the SEC has taken significantly longer in FINRA cases than in exchange cases to

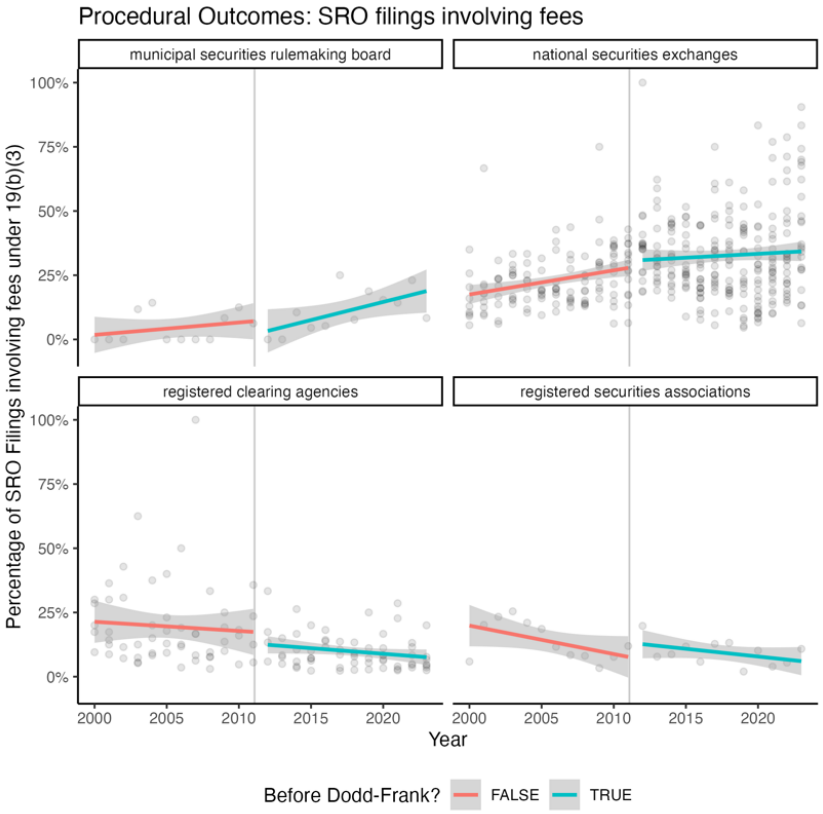

Figure 7: This figure shows the percentage of SRO filings matching a textual pattern indicating that the proposed rule relates to "fees." As in other graphs (see Methodological Appendix A), the data is split before (red) and after (blue) Dodd-Frank, with OLS models plotted on each data to show trends. Observations are binned at the year and individual SRO level.

reach the final resolution. One possibility is that the FINRA proposals are more complex and require more time; another is that the level of public participation is higher, again requiring more time to parse.

Overall, the Dodd-Frank reforms may have enhanced certain aspects of regulatory efficiency, but also introduced potential vulnerabilities in the SEC's oversight system. Managing those vulnerabilities is partly a matter of navigating the tradeoff between reducing error costs and managing adjudication complexity.[172] We should not be confident that the Dodd-Frank reforms strike the right balance between these demands.

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[172] *See infra* Part III.A.1.

2. Immediate effectiveness and fee filings

A second important finding of this article's empirical analysis involves the rise of the share of immediately effective rule filings, both as an absolute and relative matter. The pre-Dodd-Frank trend reflected an increase in this kind of filing, and Dodd-Frank loosened further the procedural requirements for review of these filings. Recall that while previously the SEC had to take up-or-down action on many proposed rule changes, Dodd-Frank has required the SEC to give immediate effect to certain proposed rule changes, only to review them later under Exchange Act § 19(b)(3).

Figure 3, seen above, reflects the proportion of SRO rule change proposals that would go immediately enforceable under § 19(b)(3). The data suggest that since the passage of Dodd-Frank the vast majority—about two thirds for the exchanges, and a bit over half for FINRA—of filings have been related to immediately effective proposals.

In addition, in general the proportion of these immediately effective filings involving "fees" is especially high for stock exchanges, as Figure 7 and Figure 9 (in the appendix) reflect. Figure 7 takes all the rule filings associated with a particular SRO (for instance, the stock exchange NASDAQ) in a particular year, then calculates the proportion that include a textual marker for involving a § 19(b)(3) fee change proposal. For FINRA and the clearing agencies, we see a downward trend that has flattened off. The situation is different for the stock exchanges. Reflecting changes in the underlying business models,[173] stock exchanges have moved to an approach in which fee filings are major drivers of new rulemakings. They are now upwards of half of any given stock exchange's annual set of rule filings. What is more, because there are a large number of exchanges, fee filings have come to predominate the SEC's rule change process overall.

The institutional and statutory background offers some perspective on what to make of these findings. Before Dodd-Frank, the SEC exercised a more hands-on approach in approving or disapproving SRO rule proposals. The post-Dodd-Frank statutory change, which now sees a large majority of rules going into effect immediately, ostensibly reduces the bureaucratic delay in rule implementation. The stabilization of immediately effective filings at around two-thirds for exchanges

[173] *See*, *e.g.*, Blanc, *supra* note 56 at 290-93, 297-98.

and two-fifths for FINRA suggests a new norm in regulatory practice, which prioritizes expedience over exhaustive review. This could be seen as a positive development in terms of efficiency, reducing the time and resources spent on lengthy approval processes.

Yet it also raises concerns about the depth and rigor of the initial review process and the potential for problematic rules to go into effect without adequate oversight or scrutiny. As we have seen and will return to in the next subsection, this efficiency might come at the cost of thoroughness and accuracy. The shift in Dodd-Frank implies a significant reliance on post-hoc review mechanisms under § 19(b)(3) to catch and address issues with these rules. This reactive approach to regulation introduces a risk of regulatory lapses and errors that might not only affect market stability but also erode public trust in the effectiveness of market oversight.

III. Implications for Administrative Law and Securities Regulation

This final section addresses policy implications of the Dodd-Frank reforms, challenges arising from judicial aggrandizement, new challenges to the role of SROs in the constitutional structure, and public participation in the process of comment and SEC review.

A. Evaluating the Dodd-Frank reforms

The SEC faces a firehose of SRO rule filings, raising stakes for the agency, the industry, and the public.

1. Process, oversight, and tradeoffs between error and efficiency

As we saw earlier, SRO rule change proposals are resolved in an administrative adjudication.[174] We therefore can draw upon principles of institutional design for adjudications in setting up a framework for assessing whether the current system is desirable, and whether problems of either too much complexity or too much error can be resolved in a cost effective way. An economic-minded approach thus sees institutional design for adjudications as involving a tradeoff between error costs and adjudication costs.[175] This framework is well-known, with

[174] See *supra* notes 112-115.

[175] *See*, *e.g.*, Tierney, *supra* note 43 at 173 (explaining that this analysis "weighs the *footnote continued on next page*

applications to the design of court systems,[176] intellectual property,[177] and other areas.[178] In other work, I have applied an error-cost framework for thinking about adjudications involving SEC review of SRO action.[179] This subpart suggests some error cost implications for thinking about SRO rule change proposals.

The error-cost framework recognizes a trade-off between the costs associated with more extensive adjudication processes and the potential errors from insufficient scrutiny.[180] Adjudication costs encompass the resources expended in reviewing and enforcing rules, while error costs refer to the potential harms that arise from inadequate or inappropriate regulation—such as insufficient investor protection, unaddressed market abuses, or regulatory interventions that otherwise shouldn't have been implemented. In economic terms, an "optimal" regulatory framework would seek to minimize the sum of these costs, ensuring that rules are economically rational. In balancing these factors, a social planner would have to consider the type of rule being implemented and its potential impacts. Increased investments in administrative review and stakeholder input could reduce the likelihood and thus expected impact of costly errors, thereby enhancing the overall efficacy and fairness of the regulatory system. Although reduced regulatory scrutiny by the SEC may introduce efficiencies in the ways just described, they also introduce substantial costs associated with erroneous SEC decisions. The errors can go in both directions: the SEC might disapprove a rule that ought to be approved, and vice versa.

In this context, one of the primary concerns is the diminished

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costs of making decisions against the costs of getting those decisions wrong").

176 *See*, *e.g.*, Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400–401 (1973); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (Jun. 1995).

177 *See*, *e.g.*, Joseph Scott Miller, *Error Costs & IP Law*, U. ILL. L. REV. 175 (2014); Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2124 (2004).

178 *See*, *e.g.*, Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613 (2016).

179 *See*, *e.g.*, Tierney & Edwards, *supra* note 61 at 829-45; Tierney, *supra* note 43 at 173-75, 183.

180 *See, e.g.,* William McGeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. Rev. 2267, 2280 (2010) ("In general, administrative and error costs are inversely proportional—more elaborate decisionmaking procedures require greater effort but should yield fewer mistakes, and vice versa.").

capacity for thorough regulatory oversight. With the SEC's limited discretion under this system, there is a reduced opportunity to assess and amend proposals based on a comprehensive review of their implications.[181] This can lead to the implementation of rules that may not fully consider the public interest or that could be unduly influenced by the interests of the SROs themselves. Without rigorous examination, the SEC could allow to go into effect rules that favor incumbents or suppress innovation, potentially harming competition and market integrity.[182]

Where is the tradeoff in error and adjudication costs most notable? Dodd-Frank introduced a "streamlined" rule change process in which many proposals go into effect immediately, with minimal scrutiny by the SEC. This approach has some clear benefits. Immediate-effectiveness of rule change proposals also allows for more rapid implementation of SRO rules, which can be important for adapting quickly to evolving market conditions and innovations. This can reduce bureaucratic delays, lowering costs for SROs and their members, which might ultimately benefit market participants through more efficient regulatory processes. This was the programmatic justification for Dodd-Frank § 916, as to which Congress determined that these sorts of rules typically were uncontroversial or required a lower quantum of review effort from the SEC. To that end, the Senate Report accompanying Dodd-Frank expressed the importance that SEC action on SRO rule change proposals be "efficient" and "responsive."[183]

We have seen after Dodd-Frank a shift to a system where many SRO rule change proposals go into effect immediately, with minimal scrutiny by the SEC. In high-volume administrative adjudications systems like the SEC's program for processing SRO rule change proposals, monitoring costs play a significant role in the effectiveness and efficiency of regulatory oversight. Monitoring costs refer to the expenses associated with overseeing, enforcing, and ensuring compliance with rules and regulations. These costs are significant in systems where

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181 See *supra* notes 165-169.

182 For discussion of the SEC's analysis on competition factors in SRO rule change proposals, *see supra* notes 150–153.

183 The Committee also quoted the support of the exchanges for this proposal, specifically named "concerns about current SEC processes for action on rule changes by exchanges," and expressed "expect[ation] that the changes will encourage the SEC to employ a more transparent and rapid process for consideration of rule changes." S. Rep. No. 111-176, 2010 WL 1796592, at *106.

a large volume of rules is deemed effective, unless action is taken to stop them, which is the case with about 65% of SRO rule change filings in recent years.[184]

The effect of volume on a system like this is significant. With the bulk of rules automatically becoming effective, the SEC and other stakeholders must quickly identify problematic rules that require intervention before they cause harm to markets. Monitoring costs in this scenario are high. Stakeholders and the agency alike must invest in robust surveillance and analysis capabilities to track the impact of newly effective rules and to identify negative consequences. The high volume of rules can strain resources, leading to potential oversights—or corners cut, like we saw in *Susquehanna*. Moreover, because the SEC can only react after a rule has already potentially come effective, the agency plays catch-up.

For the public, monitoring costs are less direct but equally significant. The firehose of SRO rules makes it hard for the public to participate in the rulemaking process, either as third-party commenters or through the mechanisms of federal agency accountability. If the SEC fails to catch a problematic rule, the public can suffer from poor market conditions, decreased investor confidence, and potentially financial losses. These indirect monitoring costs borne by the public can manifest as a lower overall trust in (and thus participation in) financial markets. For rules with significant, wide-ranging effects, increased investment in thorough review and stakeholder consultation could significantly reduce the likelihood of costly errors, thereby enhancing the overall efficacy and fairness of the regulatory system.

Requiring explicit approval or disapproval, the remainder represent a different kind of monitoring challenge. The institutional design of

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[184] There is a positive case for the immediate effectiveness regime. It creates a rolling window during which the SEC affected parties can review recent filings and determine whether any should be suspended pending an administrative hearing to determine whether they should be approved or disapproved. In this sense, the best that can be said for this regime is its default of allowing certain rules to go into effect immediately, with the consequence that the SEC might suspend the proposed rule and look more closely at it — preventing the SRO from enforcing it in the meantime—if staff or an affected party objects. It puts the burden on the SEC and other market participants to raise objections to stuff that "should" be controversial, with a 60 day lookback period for someone to object and the SEC to step in – such that inertia, lack of capacity, and delay, are likely to mean that the incentive is to filter out only the most outlier proposals to comment on or object to. *See supra* note 87.

such a high-volume adjudication program should carefully trade off error and adjudication costs. The costs of error should be weighed against the costs and practical limitations of conducting detailed reviews of every single rule. The design could also consider disincentives for thorough monitoring, particularly when the benefits of providing a problematic rule are diffuse (spread across the entire public) and the costs of monitoring are concentrated (borne by individual commentors or the agency). I do not purport to have solved the problem of optimizing error and adjudication costs, but the data I have drawn upon raises questions about a mismatch between the levels of scrutiny that are appropriate and that are afforded to SRO rules.

The lack of stakeholder involvement in the decision-making process would poses a significant problem, both in immediately-effective and "regular" SRO rule change proposals.[185] For immediately effective rules, the SRO can start enforcing it immediately unless the SEC takes action. While there is an opportunity for affected parties and the public to weigh in, this opportunity appears to be under-used by the public and may not be up to the task. For "routine" rule change proposals, the SEC acts to approve or disapprove by determining whether certain statutory criteria are met. And while there is an opportunity to weigh in, the narrow scope of criteria to be considered provide scant entry points for public or external expert input.[186] This can impede both the provision of valuable insights as well as its consumption and use by SEC staff, reducing the overall quality and acceptance of regulatory decisions. Stakeholder engagement is important for ensuring that a diverse range of interests and potential impacts are considered, and its absence may undermine the legitimacy and effectiveness of the regulatory framework.[187]

Yet the Dodd-Frank Act has significantly constrained the SEC's discretion. Particularly in matters akin to public utility rate setting, the SEC now has very limited ability to refuse proposals.[188] As a result, the Commission cannot simply disapprove a rule because it prefers an alternative approach; it can only disapprove if it cannot make the specific factual findings required by statute. The issue is not that the SEC has failed in its duties, but rather that it is diligently implementing the

185 *See infra* notes 218-219.

186 *See supra* notes 106-110.

187 *See infra* Part III.C.

188 *See infra* Part III.A.2.

framework established by Dodd-Frank—a trend evident in the data. Things have been made more complicated by the worsening scope of opportunities for intervention in Section 19(b)(3) proceedings.[189]

Yet we ought not fault the SEC for not exercising discretion it no

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[189] *See* Jerry W. Markham & Thomas Lee Hazen, *SEC Market Data Rate Setting Efforts*, 23A BROKER-DEALER OPERATIONS SEC. & COMM. L. § 13A:7 (updated Nov. 2023). The most recent litigation revolves around fees that the national securities exchanges charge for access to so-called "non-core" data. The SEC had initially adopted a market-based test for determining whether SRO fees were fair and reasonable, and the D.C. Circuit's first response was to conclude that there was insufficient evidence that market forces constrained exchange price-setting. *NetCoalition I*, 615 F.3d at 534. Dodd-Frank, with its § 916 amendments to the SRO rule process, altered the process for filing and approving SRO rules. Three years later, the D.C. Circuit concluded in *NetCoalition II* that it did not have jurisdiction to review an SEC decision not to suspend an immediately effective fee rule under Exchange Act § 19(b)(3)(C). NetCoalition v. SEC, 715 F.3d 342, 343 (D.C. Cir. 2013) ("*NetCoalition II*"). It also noted the possibility of challenging the fees under § 19(d) of the Exchange Act, which would open the door for judicial review. *Id.* at 353. Following *NetCoalition II*, brokerage industry trade group SIFMA challenged the reasonableness of SRO fees by filed a petition for review with the SEC under § 19(d). In a proceeding involving consolidated challenges to hundreds of fee filings, an ALJ found in bellwether proceedings in favor of the exchanges. The Commission then reversed the ALJ's decision. *See Application of Sec. Indus. & Fin. Mkts. Assn. for Review of Action Taken by NYSE Arca, Inc., and NASDAQ Stock Market LLC*, Exchange Act Release No. 84432, 2018 WL 5023228 (Oct. 16, 2018).

In 2020, the D.C. Circuit concluded that Exchange Act § 19(d) is not available as a means to challenge the reasonableness of generally applicable fee rules. *See NASDAQ*, 961 F.3d at 421. First, as a textual matter, the court concluded that § 19(d) didn't demonstrate an intent by Congress to allow challenges to generally applicable fee rules. Invoking the principle of *ejusdem generis*, meaning that general words should be read as applying only to items similar to those specifically enumerated, the court noted that the statutory text doesn't mention fees, and where it speaks of limitations it refers to actions targeted at specific individuals or entities. *See id.* at 428–29. Second, the D.C. Circuit in *Nasdaq* observed that certain notice requirements for exchanges under Section 19(d) would be impractical for generally applicable fee rules. *Id.* at 429. Third, the court described the system of generally applicable fee rules as "incompatible" with the statutory remedy under § 19(f). *Id.* at 430. Because such a scheme would be at odds with the Dodd-Frank Act's objective of streamlining procedures for fee filings, the court concluded that generally applicable fee rules are not a "'limitation' on 'access to services'" under § 19(d) of the Exchange Act and so could not be challenged under that procedure. The takeaway is that fees are not themselves reviewable under § 19(d), nor is the SEC's decision not to suspend a fee under § 19(b)(3)(C).

longer possesses. Consider the D.C. Circuit's reversal of an SEC decision not to approve an exchange traded fund (ETF) proposal that would track the spot price of Bitcoin. Among other regulatory approvals that must be obtained before a new kind of ETF comes to market, an exchange seeking to list the new kind of ETF typically must get approval as an SRO rule change. The D.C. Circuit's reversal highlights how the courts are scrutinizing the SEC's adherence to these statutory requirements.[190]

The root of this constrained discretion appears to stem from Congress's legislative choices post-financial crisis. In an effort possibly influenced by special interests, Congress enacted rules aimed at streamlining and simplifying stock exchange rulemaking. The responsibility lies with Congress, which enacted what was likely a special-interest-driven package of rules aimed at simplifying and easing stock exchange rulemaking after the financial crisis, under the belief that deregulation would be beneficial. By limiting the SEC's ability to exercise judgment, Congress may have inadvertently shifted the balance too far, reducing the effectiveness of the SEC's oversight and its ability to act in the best interest of the markets and investors.

2. The political economy angle

In regulatory environments prone to public-choice-style capture, the benefits of specific rules often accrue to powerful industry players while the costs are dispersed among the general public. This dynamic intensifies the trade-offs inherent in SRO rulemaking where influential groups can shape the design of rule change proposal reviews. Institutional designs that can mitigate these risks—such as greater transparency in the rule-making process, enhanced public participation, and stricter review of rule approval—might well balance the scale between rapid decision making by the SEC and the need to minimize error costs.

The backstory to this political economy angle begins with a pair of trends that have affected the incentives that SROs face. The first trend

[190] After the D.C. Circuit faulted the SEC for disapproving rule proposals to list bitcoin exchange-traded funds, the SEC approved a slate of proposed listing rules, suggesting sensitivity to litigation risk about SRO rulemaking. *See* Grayscale Investments, LLC v. Securities & Exchange Commission, 82 F.4th 1239, 1245 (D.C. Cir. 2023); *see also*, *e.g.*, Emily Graffeo & Katie Greifeld, *Bitcoin ETFs Take Wall Street by Storm with Historic Debut*, BLOOMBERG (Jan. 11, 2024).

is *demutualization*, or the separation of ownership from the members it governs. Traditionally, SROs like stock exchanges were mutual organizations owned and operated by their member firms—brokers and dealers who both used and had a stake in the governance of the exchange. This structure aligned the interests of the exchange with those of its members, fostering policies that promoted collective welfare. However, with demutualization, ownership shifted from the members to external shareholders, altering the incentive structure. This shift introduced new motivations centered around profitability, potentially at odds with the regulatory and oversight functions traditionally performed by SROs.

The second trend, *financialization*, complements the changes from demutualization by moving SROs toward a for-profit governance model under dispersed public ownership. As demutualized exchanges went public, their shares became widely held by investors not directly involved in the SRO's regulatory responsibilities.[191] This dispersion of ownership diluted the influence of any single stakeholder group whose incentives would be aligned—such as through reputation—with a "public interest" or "investor protection" focus for SRO rulemaking. It intensified the focus on financial performance metrics like earnings per share and return on investment. The drive for profitability led exchanges to diversify revenue streams, often by monetizing services that were once ancillary or provided at cost, such as market data and technological infrastructure.[192]

With all this in mind, SROs have increasingly leveraged regulatory structures to their advantage, particularly following Dodd-Frank. These changes constrained the SEC's oversight role over new SRO rule filings, especially those that become immediately effective. The SEC's discretion to disapprove such rules is limited to instances where

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[191] *See* Jonathan R. Macey & Maureen O'Hara, *From Markets to Venues: Securities Regulation in an Evolving World*, 58 STAN. L. REV. 563, 585 (2005) ("As exchanges convert to become profit-seeking firms...the gains of the few turn into the profits of the corporation.").

[192] *See* Lawrence R. Glosten, Economics of the Stock Exchange Business: Proprietary Market Data, (Jan. 2020) (manuscript); Onnig H. Dombalagian, *Best Execution: An Impossible Dream?*, *in* CAMBRIDGE HANDBOOK OF INVESTOR PROTECTION 227 (Arthur B. Laby ed., 2022) (noting that while exchanges "traditionally view the dissemination of market information as a commercial service," the changes brought about in the national market system reflect an attempt "to balance the commercial interests of market centers that generate price information against the public interest in having access to that information").

specific factual findings cannot be made, stripping the agency of significant veto power based on policy preferences.[193] This limitation has its most significant implications for fee filings, a category of SRO rules that can become effective immediately under § 19(b)(3). Operating as for-profit entities, stock exchanges have capitalized on the framework established by Dodd-Frank to implement a one-way ratchet of price increases enforceable by law.[194] These exchanges function akin to public utilities without traditional regulatory mechanisms to control rates. The SEC, tasked with ensuring "reasonable" fees, has historically found its ability to disapprove unjustified rate hikes severely curtailed.[195] As economists have suggested, the exchanges' profit incentives may drive prices upward without effective regulatory checks.[196]

The consequences of this upward ratchet are particularly pronounced for brokers, who are effectively price takers due to their obligations under the National Market System and duties of best execution. To fulfill these duties, brokers must access comprehensive market data, including liquidity information beyond the top of the order book.[197] This compels them to purchase extensive data services from exchanges at increasingly higher prices. Empirical evidence, albeit spotty, suggests that exchanges wield significant pricing power over these data fees, inflating operational costs for brokers and raising concerns about the equitable distribution of information rents within the market.[198] In addition, as seen in Figure 10 and Figure 11 in the

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193 *See supra* notes 108–113.

194 *See*, *e.g.*, EUROPEAN FUND AND ASSET MANAGEMENT ASSOCIATION ET AL., *Global Memo on Market Data Costs*, 11 (2020), https://www.mfaalts.org/wp-content/uploads/2020/06/Global-Memo-on-Market-Data-Costs-Final.pdf [https://perma.cc/Q2BT-LHBP] (assessing evidence that "[E]xchange market data revenue began an upward ascension shortly after the introduction of a single market system.").

195 *See* Exchange Act § 11A(c)(1)(C)-(D), 15 U.S.C. § 78k-1(c)(1)(C)-(D).

196 *See* David Easley, Maureen O'Hara & Liyan Yang, *Differential Access to Price Information in Financial Markets*, 51 J. FIN. & QUANT. ANAL. 1071 (2016).

197 *See* Stanislav Dolgopolov, *Off-Exchange Market Makers and Their Best Execution Obligations: An Evolving Mixture of Market Reform, Regulatory Enforcement, and Litigation*, 17 N.Y.U. J.L. & BUS. 477, 478–79 (2021).

198 *See, e.g.*, McNamara, *supra* note 57; SECURITIES LITIGATION & CONSULTING GROUP, INC, *An Economic Study of Securities Market Data Pricing by the Exchanges* (July 10, 2008), https://www.sifma.org/wp-content/uploads/2017/05/an-economic-study-of-securities-market-data-pricing-by-the-

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appendix, available evidence suggests that market data revenue has mostly grown in absolute numbers after Dodd-Frank and has remained a steady percentage of exchanges' reported top-line revenues over the same period.

These developments underscore a broader political economy story: while Dodd-Frank aimed to streamline the rulemaking process and reduce bureaucratic sclerosis, it may have inadvertently entrenched the market power of exchanges and has apparently exacerbated disputes over information rents between exchanges and brokers. This also suggests that the exchanges have found a way to capitalize on the § 19(b) regime in a way that may offset the drag on innovation that the regime may otherwise introduce.[199]

We can illustrate these fees with an analogy to the for-profit auction website eBay.[200] Like stock exchanges, eBay establishes rules governing access to its services and systems. The companies set policies on who can use their marketplaces, the terms for accessing data systems, and fees for the privilege. Stock exchanges charge fees for access to different kinds of data and for the ability to post different kinds of bids or offers. To continue the eBay analogy, both the auction site and the stock exchange might sell data about how many people have indicated interest in a transaction at various price levels and might upcharge different features of an offer to be posted. Similarly, both might create rules that dictate how market participants access trading venues, market data, and related services. Exchanges charge fees for these services, including access to proprietary data feeds essential for real-time trading and compliance with regulatory obligations like best execution. Given

exchanges.pdf [https://perma.cc/V8W3-FFXN]. For additional countervailing evidence from the exchanges, see Marc Rysman & Rainer Schwabe, *Platform competition and the regulation of stock exchange fees*, CORNERSTONE RSCH. (Dec. 15, 2021), https://www.cornerstone.com/wp-content/uploads/2022/01/Platform-competition-and-the-regulation-of-stock-exchange-fees.pdf [https://perma.cc/4Y5H-UEDJ]; Marc Rysman, Stock Exchanges as Platforms for Data and Trading (2019), https://www.sec.gov/files/rules/sro/nysearca/2019/34-87795-ex3b.pdf [https://perma.cc/6W7J-JPGA].

199 Mahoney has voiced the similar and longstanding concern that exchanges are unlike other market participants like alternative trading systems that may make changes "without SEC approval." Mahoney, *supra* note 70 at 27. The SRO rulemaking process may introduce "regulatory constraints [that] deter exchanges from innovating on trading design." *Id.*

200 With thanks to Jack Beerman for the analogy.

their central role in the financial markets, exchanges can possess significant market power, especially when their services are indispensable for participants to operate effectively.

The stock exchange rulemaking system is as if eBay were granted a government-like monopoly over online auctions and could get federal agency approval for the rates it charges for access to its pricing and transaction data. The analogy highlights concerns about monopoly power and the regulation of essential services. In practice, it substitutes a market-based rate-setting mechanism for one resembling a public utility whose rates are subject to rubber-stamping by a regulator not set up for ratemaking. Stock exchanges setting fees for market services under regulatory oversight raises the kinds of issues about fair pricing and access at issue in the eBay hypothetical. Exchanges operate as for-profit entities but provide services that are foundational to the functioning of a market with significant network effects.

Whether the SEC is likely to be an effective rate-making regulator in this context is a matter of debate. The SEC has expertise in regulating financial markets and a mandate to protect investors and ensure fair and orderly markets. On the other hand, rate-making, especially for entities with monopolistic characteristics, traditionally falls under the purview of specialized utility regulators who possess the tools and experience to evaluate cost structures, determine reasonable rates of return, and prevent abuse of market power. By contrast, the SEC may face practical challenges in effectively regulating exchange fees for a number of reasons, including a lack of specific expertise required for detailed rate-making analysis. This political economy story has an uncertain future, with direct implications for the filing and approval of exchange data fee changes.[201]

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[201] In 2020, the SEC adopted rules providing for comprehensive reform to market data infrastructure. Market Data Infrastructure, Exchange Act Release No. 90,610, 2020 WL 7364188 (Dec. 9, 2020). Before this reform, there was a feed of core market data available from an exclusive "securities information processor," and other feeds of "non-core" or proprietary market data available from the individual SROs, the fees for which were set under the § 19(b) process. *Id.* at *86. With concerns that this created a "two-tiered data market," the reform was designed to introduce competition and level the playing field by shifting from exclusive to decentralized consolidation. *Id.* at *4. In this new model, non-SRO providers of market data—known as "competing consolidators"—would be able to bundle for resale certain mandatory data feeds, including core and consolidated data. *Id.* at *14. The overall parameters for the provision of this data in the

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The overall framework for SRO rule filings tasks the SEC with overseeing the fees charged by SROs, the Dodd-Frank statutory changes have limited the SEC's discretion in disapproving fee filings unless specific factual findings cannot be made. This constraint effectively reduces the SEC's ability to prevent potentially unjustified rate increases if the exchanges meet the minimum requirements set forth in the statute. Given that the SEC's hands are effectively tied by Congress, holding the agency accountable for these outcomes seems unreasonable. The SEC's lack of substantial discretion means it can only disapprove rules that fail to meet specific statutory criteria, not based on broader policy considerations. The D.C. Circuit's decision in *Susquehanna* highlights this limitation, faulting the SEC not for overreach but for insufficient factual findings.[202] Although statutory reform is not likely to come before the next financial crisis, meaningful reform could recalibrate the regulatory framework and restore a more balanced distribution of power and discretion.

B. Oversight, rulemaking, and mechanisms of accountability

The firehose of SRO rule filings raises the stakes for mechanisms of agency oversight and public participation. SROs' rulemaking agendas derive from industry demand, subject to (1) legislative constraints and authorizations, (2) a combination of ex-ante and ex-post review by the SEC, and (3) the prospect of judicial review. This raises questions about how we should balance the benefits of self-regulation (especially designing rules around industry expertise) with the need for public accountability and alignment with broader social welfare goals.

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decentralized consolidation market would be set by participants in one of the national market system plans. An exchange's proprietary data *could* be included in the mandatory bundle, but it would be subject to more rigorous review of the proposed NMS plan under Exchange Act § 11A(c)(1)(C)–(D) and Reg NMS Rule 603(a), which require affirmative action by the SEC in order to approve the changes (rather than immediate effectiveness). *Id.* at *86. By contrast, an exchange that was acting as a "competing consolidator" would be exempted from § 19(b) and (d), shifting to a potentially more onerous review model. *Id.* at *114. Even so, in the adopting release, the SEC repeatedly noted that the § 19(b)(3) process for individual SRO fee proposal changes would continue to apply to the fees charged for individual connectivity, proprietary data feeds, and so on. *See generally id.* The jury is still out on the effect of these changes on SRO fee filings, with the D.C. Circuit only resolving challenges to the rule near the end of the dataset. *See* Nasdaq Stock Mkt. LLC v. SEC, 34 F.4th 1105 (D.C. Cir. 2022).

[202] *Susquehanna Int'l Grp.*, 866 F.3d at 447; *see also supra* notes 124-129.

Both industry-led rulemaking, as well as SEC-led rulemaking, are legitimized through their adherence to the frameworks of accountability that govern their operation—but that, at least in theory, are not the same as the government. Since before the 1975 amendments created the Section 19(b) rulemaking process, there have been questions of how SROs fit into the administrative law framework. A Senate committee report accompanying the 1975 amendments expressed the "view [that] it would be self-defeating to saddle the [SROs] with the whol[e] panoply of Governmental administrative procedure."[203] Today, the system of self-regulation is premised on SEC oversight, structured through statutory mechanisms like Exchange Act § 19(b) that enable review of SRO rulemaking. This review process implicates the desirability for clear accountability from SROs to the political branches.[204]

Recent changes in constitutional doctrine have cast a spotlight on the role of SROs like FINRA and the stock exchanges.[205] Scholars have worried for decades about delegations of federal administrative power to quasi-private entities, which look increasingly at risk before the Roberts Court.[206] The more recent source of this scrutiny is the Supreme Court's decisions like *Lucia v. SEC*[207] and *SEC v. Jarkesy*,[208] faulting the structure of the SEC's administrative proceedings. Some aspects of these challenges are potentially applicable by extension to SROs, the culmination of a decades-long effort to have the SROs treated as state actors.[209] The Fifth Circuit's decision in *Jarkesy* had raised issues pertaining to the Seventh Amendment, nondelegation, and the removal protections of administrative officers.[210] However,

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203 S. Rep. 94-75, at 29, *as reprinted in* 1975 U.S.C.C.A.N. 179, 207.

204 *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1304 (2003).

205 *See*, *e.g.*, Edwards, *supra* note 46.

206 *See*, *e.g.*, Harold J. Krent, *The Private Performing the Public: Delimiting Delegation to Private Parties*, 65 U. MIAMI L. REV. 507 (2011).

207 Lucia v. SEC, 138 S. Ct. 2044, (2018).

208 SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (Jarkesy II).

209 *See*, *e.g.*, Richard L. Stone & Michael A. Perino, *Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law*, 1995 COLUM. BUS. L. REV. 453 (1995).

210 *See* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (Jarkesy I).

with the D.C. Circuit's July 2023 order in *Alpine Securities*, the lines are blurring.[211]

These trends could precipitate a broader reevaluation of how the rules governing securities markets are developed and implemented.[212] The possibility of challenges that could constrain SRO authority introduces significant uncertainty into the status quo governance model. This is, in part, what makes the conservative jurisprudential challenge to SROs so puzzling. There is a tension between the Roberts Court trend of consolidating power in the judiciary, and the political economy on which SRO governance is founded.[213] Instead of dispersing authority through market-oriented solutions that delegate substantial autonomy to specialized entities, there is a centripetal force centralizing decision-making in the judiciary. That project does not align with views that favor market-driven self-regulation.[214] Instead, it foretells a regulatory environment that will be more reliant on judicial interpretation and less tolerant of autonomous expertise from the rest of the world. Although it does so with overtones of accountability, it underscores the importance of developing new frameworks for how to implement representative democracy in financial markets regulation.

C. Disclosure, regulatory oversight, and public participation

Public participation promises to be an important accountability

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211 *See*, Alpine Sec. Corp. v. FINRA, No. 23-5129, 2023 U.S. App. LEXIS 16987 (D.C. Cir. July 5, 2023) (Walker, J., concurring) (identifying additional constitutional issues related to FINRA employees' protections from removal by the president).

212 *See*, *e.g.*, Karmel, *supra* note 27 at 197 (arguing that "FINRA will no longer be an SRO" if "regulated like the SEC").

213 Increased legal scrutiny on SROs can be seen as reflecting a broader judicial inclination to consolidate decision-making power. *See*, *e.g.*, Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2295 (2024) (Kagan, J., dissenting) ("In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law."); Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756 (2022).

214 See James Tierney, *How* Loper Bright *and the End to the Chevron Doctrine Impact the SEC*, ProMarket (Sept. 9, 2024), https://www.promarket.org/2024/09/09/how-loper-bright-and-the-end-to-the-chevron-doctrine-impact-the-sec/ (suggesting that "*Loper Bright* introduces new risks" to the self-regulatory model, which "hinges on a decentralized model of knowledge and authority").

mechanism in SRO rulemaking. One goal is ensuring this system operates in the public interest. SRO rule changes are important disclosures to the market, offering transparency into the workings of entities that traditionally operate behind a veil of complexity. In this sense, disclosure is about more than information. It lays the groundwork for informed public scrutiny and participation.

Rulemaking under the APA has its critics, but is at least a familiar process. To some, SRO rulemaking could look more like the APA—a more transparent, more participatory process that invites input from a wide range of stakeholders, including the public. In this model, the goal would be to promote regulations that serve the public interest rather than industry's sectoral profit motives.[215] Yet, in reality, the process looks little like this: it features short timelines, opaque processes, technical subject matter, and other obstacles that make it difficult for the public to engage meaningfully with SRO rulemaking.

The growing prevalence of immediate-effectiveness rules raises questions about the adequacy of market-disclosure and a backstop of SEC review as the mechanism of accountability. For immediately effective rules, the SRO can begin enforcement immediately unless the SEC takes action. While there is an opportunity for affected parties and the public to weigh in, it is as yet unclear whether this opportunity is adequately used by the public—say, relative to the participation rates under APA rulemaking—or whether public review of SRO rules is ultimately up to the task. Immediate effectiveness may be suitable for less critical rules, but more significant regulations that could have extensive economic or systemic impacts might not receive the scrutiny they require. This might generate regulatory gaps or oversights that might only become apparent after the fact.[216]

The SEC has ways to filter more and less important actions that

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[215] *Cf.* U.S. CHAMBER OF COMMERCE CENTER FOR CAPITAL MARKETS COMPETITIVENESS, *supra* note 74, at 120-21 (urging the SEC to hire industry insiders for the office in the Division of Trading and Markets that reviews and approves SRO rules).

[216] There is the potential for strategic behavior on the part of the SROs. Whether an SRO can get immediate effectiveness—and thus arguably less scrutiny—of a rule change proposal depends in part on its content, including whether a rule change is fairly discernible from existing SRO rules. An SRO may have an incentive to characterize a rule change as flowing from existing rules to get immediate effectiveness, even when it does not. *See*, *e.g.*, *supra* note 117.

come out of the SROs.[217] In one sense, immediate effectiveness allows for a kind of trailing period in which the SEC and the public can have some time to review and raise concerns about rules, assess their significance, and so forth.[218] The immediate-effectiveness regime also serves to reveal information about significance: if a rule goes into effect immediately and does not generate significant practical objection in its early days, that might suggest the rule's implications are of limited or minor concern.

But even this defense of the immediate effectiveness regime doesn't make room for meaningful public participation. It may be that the volume of SRO rules deters retail investor monitoring and participation.[219] It may also impede agency public-interest review. Taken together, this suggests a disconnect between the regulatory mechanisms that govern financial markets and the interests of the wider society. And it raises questions about whose interests are being served and whether the regulatory framework genuinely operates in the public interest or is skewed toward industry priorities.[220] This is so even before we account for how the technical and opaque nature of SRO rulemaking effectively sidelines the public, reinforcing a system where regulatory discourse is dominated by those with the resources and expertise to navigate it. This not only diminishes the democratic legitimacy of the regulatory process but also perpetuates a regulatory environment that is more reflective of industry priorities than public welfare.

"Accountability" in this setting implies that SROs and regulatory bodies like the SEC are not only answerable to the industry they regulate but also to the public, whose lives and financial well-being are impacted by their decisions.[221] The mechanisms through which

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217 *See, e.g.*, 17 C.F.R. § 200.30-3 (2024) (delegation to the director of the division of trading and markets of authority to assess SRO rules for their complexity or novelty and to let the SRO know of the determination).

218 *See supra* notes 87 & 184.

219 In other work in progress, Nicole Iannarone and I examine public participation in FINRA rulemaking.

220 Industry groups have significant influence over how regulatory rules are crafted and implemented. *See*, *e.g.*, KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

221 On political economy and agency over the economic conditions that affect one's

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policies can be contested and shaped should, therefore, be accessible, transparent, and responsive to public input. This may mean moving beyond shallow participatory ambitions to ensure that the voices of the public are not just heard but are influential.[222] In a world increasingly skeptical of self-regulation, the search for accountability might point toward the values and interests of the wider society, not just those who participate in the process.

Conclusion

SRO rulemaking unfolds in a firehose of volume, mired in conflicts that raise serious questions about whether for-profit private rule-makers can carry out that task in a way that aligns with the public interest. The process, warts and all, is not merely a symptom of bureaucratic inertia or ossification. It reflects deeper issues inherent within a system where for-profit entities are vested with regulatory powers. For too long, observers of securities regulation have overlooked the production of SRO rules and what may go wrong both in process and substance. The status quo, where regulatory priorities are set by the SROs with limited discretion for the SEC, is a departure from the idea that the regulatory framework should serve the public interest first and foremost.

This project is an initial step toward bringing greater scrutiny to SROs—and the mechanisms and channels by which securities and administrative law promote their accountability to the public. Taking a closer look at SRO rulemaking might, in the long run, allow us to

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life, see Renee M. Jones, *Legitimacy and Corporate Law: The Case for Regulatory Redundancy*, 86 WASH. U.L. REV. 1273 (2009); ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS (2010).

222 *Cf.* Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497 (2023). Reimagining accountability and the contestation of policy brings into sharper focus the concept of "public interest," which obscures the diverse and often conflicting interests within society. Recent work in the law and political economy of administrative law has focused on contestation over the public interest in the design of self-regulation. *See*, *e.g.*, Cristie Ford, *Regulation as Respect*, 86 LAW & CONTEMP. PROBS. 133 (2023); Daniel E. Walters, *Reclaiming Regulatory Intermediation for the Public*, 86 LAW & CONTEMP. PROBS. 157 (2023); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022); *see also*, *e.g.*, Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 2023 UTAH L. REV. 849 (2023).

think more critically about what rules should govern securities markets and who should be in charge of designing those rules. Many of these regulatory powers are not obviously better served through a self-regulatory framework. That kind of shift would be not merely administrative but perhaps more fundamental to restoring faith in an economy that is equitable and promotes a broad base of growth and social provisioning. It's time to reconsider market regulation and consider what it might look like to have a financial system that is efficient (in the sense of not wasteful) and, more importantly, aligned with society's broader goals.

METHODOLOGICAL APPENDIX

The use of "text as data" techniques has become increasingly popular in recent years, with researchers using sophisticated methods to analyze large amounts of textual information from various sources including social media posts, news articles, books, and more.[223] The literature on "law as data," understood as a form of "text as data," is varied and evolving.[224] Researchers have applied computational techniques to analyze court decisions,[225] contracts,[226] corporate governance,[227] and the like. What's more, these methods are applicable to a wide range of research questions, such as measuring and assessing approaches to statutory interpretation,[228] or uncovering patterns that may be difficult to detect through hand collection.[229] Other scholars have likewise used these methods to examine how regulated audiences respond to and

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223 *See* GRIMMER, ROBERTS, AND STEWART, *supra* note 20 at 3-4. NLP methods are commonly used when analyzing legal texts using law-as-data approaches due their ability to process large amounts of unstructured textual information. The difficulty is in reducing dimensionality of textual data, permitting further analysis of semantic content for other scholarly ends. *Id.* at 28-29. Example methods include sentiment analysis, named entity recognition, part-of-speech tagging, semantic role labeling, and topic modeling, all of which may provide valuable descriptive insights into law's textual memorializations. *See generally id.*

224 LAW AS DATA: COMPUTATION, TEXT, & THE FUTURE OF LEGAL ANALYSIS, (Michael A. Livermore & Daniel N. Rockmore eds., 2019); Nina Varsava, *Digital Humanities and the Computational Analysis of Legal Texts*, *in* COMPUTATIONAL LEGAL STUDIES: THE PROMISE AND CHALLENGE OF DATA-DRIVEN RESEARCH (Ryan Whalen ed., 2020).

225 *See*, *e.g.*, P.C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468 (2008); Michael A. Livermore, Allen B. Riddell & Daniel N. Rockmore, *The Supreme Court and the Judicial Genre*, 59 ARIZ. L. REV. 837 (2017); Felix B. Chang, Erin McCabe & James Lee, *Modeling the Caselaw Access Project: Lessons for Market Power and the Antitrust-Regulation Balance*, 22 NEV. L.J. 685 (2022); Nina Varsava, *Opinion Authorship and Precedential Status*, 101 WASH. U. L. REV. 1593 (2023)

226 *See*, *e.g.*, Yonathan Arbel & David A. Hoffman, *Generative Interpretation*, 99 N.Y.U. L. REV. 451 (2024).

227 *See, e.g.*, Jens Frankenreiter et al., *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1 (2021).

228 *See, e.g.*, Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363 (2020).

229 *See, e.g.*, Jens Frankenreiter & Michael A. Livermore, *Computational Methods in Legal Analysis*, 16 ANN. REV. L. SOC. SCI. 39 (2020).

shape law, such as through earnings calls,[230] central bank speeches,[231] constitutional discourse,[232] and comment letters on agency rulemaking.[233]

Scholars in law, accounting, and finance have already applied NLP methods in the context of SEC filings. Studies in this tradition typically examine public company disclosures on SEC's Electronic Data Gathering Analysis, and Retrieval system (EDGAR), which permit comparison with other widely available financial metrics for public companies.[234] In their governance function, SROs also must submit filings with the SEC, but just of a less familiar sort.[235]

These sorts of methods can be used to study the production of stock market and SRO rules, as well as the SEC's own rules, from Federal Register filings. NLP may allow for a more comprehensive analysis of the content and structure of these documents than is possible with traditional manual methods.[236] By applying NLP techniques

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230 *See*, *e.g.*, Kai Li & Tingyu Yu, A MACHINE LEARNING BASED ANATOMY OF FIRM-LEVEL CLIMATE RISK EXPOSURE, (2021).

231 *See*, *e.g.*, Federico Maria Ferrara, *The Battle of Ideas on the Euro Crisis: Evidence from ECB Inter-Meeting Speeches*, 27 J. EUR. PUB. POL'Y 1463 (2020).

232 *See*, *e.g.*, David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1 (2019).

233 *See*, *e.g.*, Vladimir Eidelman, Onyi Lam & Michael A. Livermore, POLITICAL SHIFTS AND PUBLIC RESPONSES TO AGENCY ACTION: A TEXT ANALYTIC APPROACH, (2021).

234 *See*, *e.g.*, Tim Loughran & Bill McDonald, *Textual Analysis in Accounting and Finance: A Survey*, 54 J. ACCOUNT. RES. 1187 (2016); Tim Loughran & Bill McDonald, *Textual Analysis in Finance*, 12 ANN. REV. FIN. ECON. 357 (2020); Liangliang Jiang, Jeffrey A. Pittman & Walid Saffar, *Policy Uncertainty and Textual Disclosure*, 36 ACCT. HORIZONS 113 (2022); Alejandro Lopez-Lira, RISK FACTORS THAT MATTER: TEXTUAL ANALYSIS OF RISK DISCLOSURES FOR THE CROSS-SECTION OF RETURNS, (2020).

235 17 CFR § 249.819; Form 19b-4, http://sec.gov/files/form19b-4.pdf. Form 19b-4 requires SROs to describe the rule or rule change they wish to enforce, as well as to submit their justifications for public review and comment in most circumstances. Like other kinds of regulated-company filings with the SEC, these are ultimately disclosures to the market about the SRO's regulatory plans.

236 A reciprocal trouble is that generative approaches to NLP can also create "bullshit," in the philosophical sense of an indifference to truth. *See* HARRY FRANKFURT, ON BULLSHIT (2005). This indifference comes to mind in the case of a blog post that is a top search engine result for Rule 19b-4. Faster Capital, *Rule 19b-4: Understanding the Backbone of SEC Regulation*,

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to large datasets of rule filings, we can better understand how different types of securities laws are created and enforced.[237] And by leveraging large datasets with historical SRO rule filings over many years, we can track changes in regulatory attention and approach, as well.[238]

A. Data and methods

The *Federal Register* is the official publication of the rulemaking agenda of the United States federal government.[239] It is published most days and agencies typically must publish their proposed rules in the *Federal Register* to notify the public and, in most cases, invite comment.[240] Agency filers include the SEC, as well as the industry SROs that are required to engage in rulemaking. The United States Government Printing Office provides access to bulk data files containing the full text and metadata of the *Federal Register* beginning in 2000.[241]

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https://fastercapital.com/content/Rule-19b-4--Understanding-the-Backbone-of-SEC-Regulation.html (reading like it was written by ChatGPT and incorrectly describing the form, who must file it, and the approval process).

[237] Along these lines, scholars have examined linguistic differences in other documents as well. *See*, *e.g.*, Sergio Davalos & Ehsan H. Feroz, *A Textual Analysis of the US Securities and Exchange Commission's Accounting and Auditing Enforcement Releases Relating to the Sarbanes-Oxley Act*, 29 INTEL. SYS. ACCT. FIN. MGMT. 19 (2022) (SEC accounting enforcement releases before and after the enactment of the Sarbanes-Oxley Act of 2002); Charlotte Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695 (2021) (decisions of FINRA arbitrators).

[238] *See*, *e.g.*, Gary E. Hollibaugh, *The Use of Text as Data Methods in Public Administration: A Review and an Application to Agency Priorities*, 29 J. PUB. ADMIN. RSCH. THEORY 474 (2019).

[239] *See* Office of the Federal Register, National Archives, *About the Federal Register*, https://www.archives.gov/federal-register/the-federal-register/about.html.

[240] *See* James T. O'Reilly, *Assembling the proposed rule*, ADMINISTRATIVE RULEMAKING § 5:1 (2023 ed.); 5 U.S.C. § 553 (providing for notice and comment); Charlie Penrod & Christopher L. Atkinson, *Discretion Gone Too Far? The Role of Public Commenting in Regulatory Rulemaking*, 18 CHARLESTON L. REV. 538, 568-69 (2024).

[241] *See* GovInfo, *Bulk Data*, https://www.govinfo.gov/bulkdata/FR. The availability of this data has led to an emerging literature that examines administrative rulemaking with textual methods. *See*, *e.g.*, Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of Mayo and Chevron*, 38 YALE J. ON REG. 818 (2021) (studying the effect of a court decision on how the Treasury Department justifies its administrative rules in the Federal Register);

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These bulk data files are in the Extensible Markup Language (XML), and so require parsing and cleaning before they can be used.[242]

As part of this project, I collected every bulk data file for every issue of the *Federal Register* during this 23-year time period. In other work, I offer a public, open-source, cleaned data set of these texts with metadata, enabling other scholars to do similar kinds of analysis (and to validate the results of this empirical study).[243]

Using the *R* statistical programming language, I bulk extract and clean the bulk data for the period from January 2000 to December 2023 inclusive.[244] This bulk data constitutes 729,754 observations comprising rules, proposed rules, and notices in the *Federal Register*. This article focuses on only a subset of the broader *Federal Register* dataset: 45,438 filings in which the SEC is designated as the filing

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Joseph Kalmenovitz, Michelle Lowry & Ekaterina Volkova, *Regulatory Fragmentation* (2022) (regulatory fragmentation); Daniel Martin Katz & M. J. Bommarito, *Measuring the Complexity of the Law: The United States Code*, 22 ARTIFICIAL INTELLIGENCE AND LAW 337 (2014) (complexity of law published in federal register).

242 *See also* Program Management Office, U.S. Government Printing Office, FEDERAL DIGITAL SYSTEM: USER GUIDE DOCUMENT—FEDERAL REGISTER XML RENDITION (Sept. 21, 2009). XML is a format used for structuring data in a way that is both human- and machine-readable. It organizes data through tree-like hierarchies of "nodes," "tags," and "attributes." Data is surrounded by pairs of tags, like <AGENCY>, which may themselves be defined or have "children" tags and nodes. *See generally* FRANK P. COYLE, XML, WEB SERVICES, AND THE DATA REVOLUTION (2002). XML must be parsed into other structured formats for effective data analysis, which involves reading the tags in their nested tree structure, and outputting the relationships into a format and workflow in another language, like R. *See* Deborah Nolan and Duncan Temple Lang, eds., XML AND WEB TECHNOLOGIES FOR DATA SCIENCES WITH R (2014).

243 *See* James Fallows Tierney, REGULATORY FILINGS IN THE FEDERAL REGISTER (2000–2023) (dataset and accompanying manuscript with usage notes).

244 The XML is hard to parse and there are data entry errors; the SEC's agency name sometimes appears misspelled or with other characters in the field, and these and other fields must be standardized so all like cases are treated alike, etc. According to one user on a coding message board, the Federal Register "XML is a mess." Chris S., *Convert (Possibly Malformed) XML into Data Frame in R*, Stack Overflow (Dec. 16, 2013), https://stackoverflow.com/a/20573966. If you have not cleaned data before, you should not underestimate how much time it takes relative to writing up the paper for a project like this. *Cf.* Frankenreiter et al., *supra* note 226 (group of authors and RAs took years to put together dataset).

agency.

I winnow down this dataset further by identifying SEC filings involving notices of proposed SRO rule change filings. The first few words of the XML <SUBJECT> tag identify an SRO filing with the phrase "Self-Regulatory Organizations," followed by the name of the SRO that made the filing. I use regex matching to tag SRO rules as such and to extract the first-identified SRO as the filer.[245] As the SROs are reported with slight differences in misspellings in the data, I use a combination of scripts and hand-coded concordance spreadsheets to clean the data. I drop several categories of SEC filings, including those not filed by SROs, issuer notices of delisting under the Exchange Act, and those in which metadata is unavailable. For this article's main analysis, I drop several categories of smaller filers, including exempt exchanges, securities futures associations, notice-registered securities futures product exchanges, and joint industry plans.

The data and code for producing the analysis of the figures in this article will be made available online in connection with the publication of the article.[246] On the figures, one global comment, as the figures have a couple of common features. First, there's typically a vertical line that shows the date of the enactment of the Dodd-Frank Act, February 10, 2011. In addition, for each graph, the data is split into two categories, before and after Dodd-Frank, labeled not just by the date on the x axis,

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[245] "Regular expressions are specially encoded text strings used as patterns for matching sets of strings." Michael Fitzgerald, *Introducing Regular Expressions*, https://www.oreilly.com/library/view/introducing-regular-expressions/9781449338879/ch01.html [https://perma.cc/X2KQ-ECDW]. For instance, the following regex matches for most but not all of the Form 19b-4 file numbers in the metadata:

\b(?:([a-z]+)[-—\s])([0-9a-z]+)[-—\s](([0-9a-z]+|\d+))(?:[-—\s](\d+))\b

I follow standard practice in using regex matches to code dummy variables of interest. *See*, *e.g.*, Jonah B. Gelbach, *Beyond Transsubstantivity*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 909, 966 (2024) (using regular expressions to match "79 million-plus unique docket entries and 3 million-plus case-level metadata records" to create dummy variables "that indicate whether one or more conditions is satisfied by the text of each entry"); Grimmer, Roberts & Stewart, *supra* note 20 at 178-83 (describing dictionary matching methods generally).

[246] *See* James Tierney, *Replication Data for: Overseeing Private Rulemaking* (draft version), Harvard Dataverse (updated Dec. 12, 2024), https://doi.org/10.7910/DVN/HPBO4K; James Tierney, *Replication-Overseeing*, GitHub (updated Dec. 12, 2024), https://github.com/jamesftierney/Replication-Overseeing.

but also by color (or grayscale when printed). There's a red color to denote before Dodd-Frank and a blue color to denote after. I plot individual points and fit an ordinary least squares model on the observations on either side of the line to show trends.[247]

B. Limits to what text-as-data methods can tell us about rulemaking

While these methods can process vast quantities of data and provide a high-level overview, they inherently lack the capacity to fully grasp the substantive content and nuances that characterize regulatory texts. Legal reasoning, policy considerations, and strategic behavior by SROs or the SEC will often require qualitative understanding or context from experts in administrative law and securities regulation. This kind of contextual, subject-matter knowledge will necessarily go beyond what statistical patterns can convey.

The problem becomes a bit more apparent once we start thinking about the subtleties of legal language and the complex (and often shrouded) motivations behind SRO demand for rules, or behind the SEC's administrative action on those proposals. Rule change proposals, like other legal texts, are replete with jargon and terms of art, embedded with normative judgments, and part of a web of meaning that NLP methods cannot adequately capture.

What's more, public comments, stakeholder engagements, and off-the-record negotiations play an important role in shaping final rules, yet these may not show up in the textual record. While data-driven methods can significantly augment our understanding of rulemaking as such, in my view they are most useful when they complement an approach that is deeply rooted in context and meaning behind the written word of regulatory law.

Finally, because the empirical strategy only examines rule proposals that have been published in the *Federal Register*, it excludes a fraction of proposals that are withdrawn before publication—or are floated by the SRO to the SEC and never filed after being shot down. As a result,

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[247] Although I am not purporting to do causal inference here, the idea of fitting a regression on either side of a treatment date is similar to kinked regression discontinuity methods. *See*, *e.g.*, Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 69 n.168 (2018) (explaining that a "regression-kink model … tests for a discontinuous change in slope, rather than an upward shift in the regression curve").

this paper does not address what happens to rules during the relational negotiations between the SEC and the SRO before publication (including occasionally decisions by the SRO to withdraw a filed rule rather than have it be disapproved).[248]

[248] The empirical strategy of focusing on published SRO rule filings may miss any proposed rules that are not published for whatever reason. This raises questions about the character of the SRO rule filings on the demand side; what rules get rejected? According to an OIG report, staff views on this point are logged in a system. *See* Sec. & Exch. Comm'n, Office of Inspector General, *Audit of the SEC's Process for Reviewing Self-Regulatory Organizations' Proposed Rule Changes*, Report No. 537, 3, 6-9 (2016). Though outside the scope of this project, these may be amenable to a FOIA search to determine rule filings that are withdrawn before publication in the Federal Register.

APPENDIX – FIGURES

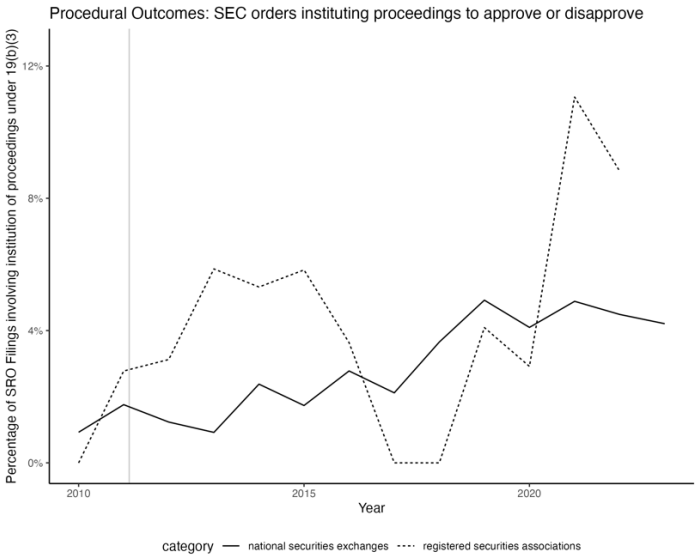

Figure 8: SRO rule proposals will often include text indications of the outcome, like an order instituting proceedings to determine whether to approve or disapprove the filing. This figure shows the percentage of SRO filings, binned by category (FINRA vs. stock exchange) and year, matching a textual pattern indicating that the SEC is instituting proceedings to determine whether to approve or disapprove the proposed rule change. The vertical line is the date of Dodd-Frank's enactment.

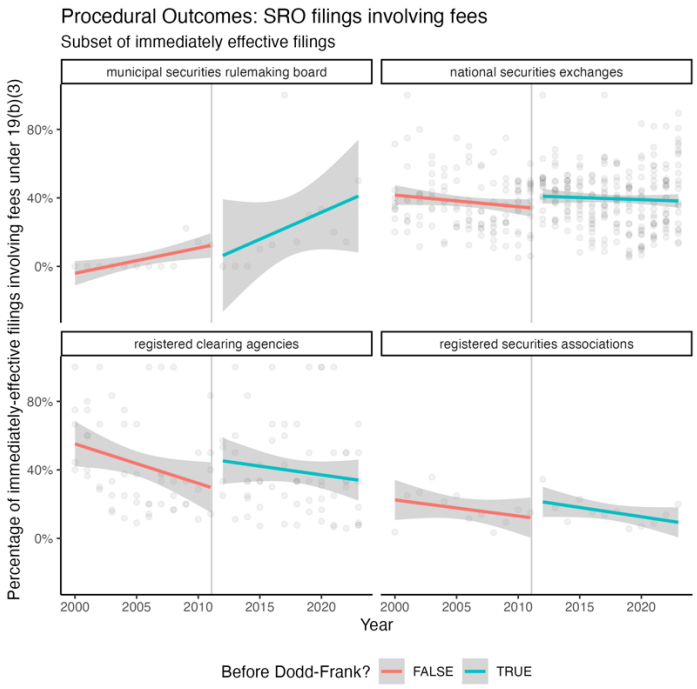

Figure 9: This figure shows the percentage *of immediately-effective SRO filings* matching a textual pattern indicating that the proposed rule relates to "fees." As in other graphs (see Methodological Appendix A), the data is split before (red) and after (blue) Dodd-Frank, with OLS models plotted on each data to show trends. Observations are binned at the year and individual SRO level.

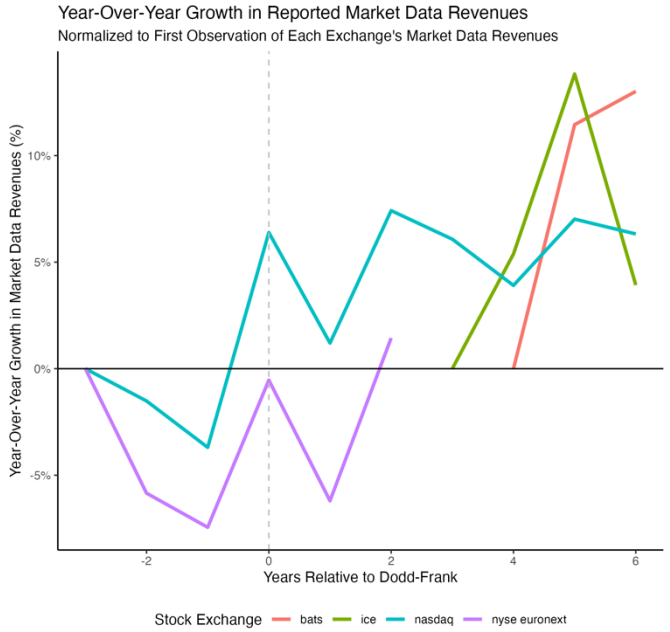

Figure 10: This figure shows the year-over-year growth in reported market data revenues for four families of stock exchanges: BATS, ICE, NASDAQ, and NYSE Euronext, from approximately 2007 to 2017.

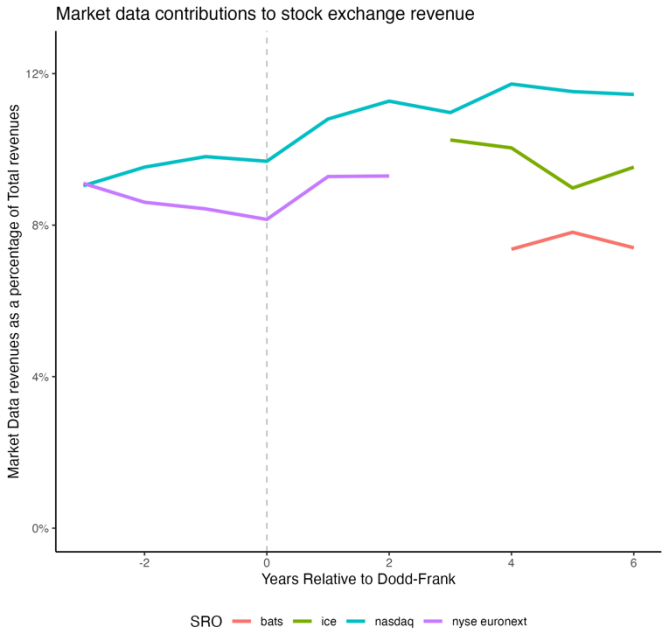

Figure 11: This figure shows the percentage of market data revenue to top-line revenue as reported for four families of stock exchanges: BATS, ICE, NASDAQ, and NYSE Euronext, from approximately 2007 to 2017.