ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1416

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TIMBERVEST, LLC, WALTER WILLIAM ANTHONY BODEN, III, DONALD DAVID ZELL, JR., GORDON JONES, II, AND JOEL BARTH SHAPIRO,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For Review Of An Order
Of The Securities and Exchange Commission

BRIEF FOR *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, intervenors, and amici appearing before the Securities and Exchange Commission and in this Court appear in the Brief for Petitioners.

B. Rulings Under Review. Reference to the ruling at issue appears in the Brief for Petitioners.

C. Related Cases. This matter has not previously been before this Court. Counsel is unaware of any related cases currently pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* The Securities Industry and Financial Markets Association ("SIFMA") submits the following corporate disclosure statement:

SIFMA is a trade association that represents securities-industry members, including broker-dealers, banks, and asset managers. SIFMA has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in SIFMA.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), I, Mark Perry, hereby certify that a separate brief is necessary to provide the perspective of the securities-market participants that SIFMA represents. To my knowledge, SIFMA is the only *amicus curiae* focusing on the important questions regarding the statute of limitations in 28 U.S.C. § 2462.

Dated: April 29, 2016

/s/ Mark A. Perry
MARK A. PERRY

Counsel for Amicus Curiae Securities Industry and Financial Markets Association

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GLOSSARY

GFMA	Global Financial Markets Association
Dec.	SEC, *In re Timbervest, LLC, et al.*, Investment Advisers Act Release No. 4197 (Sept. 17, 2015) (Opinion of the Commission)
FINRA	Financial Industry Regulatory Authority
Order	SEC, *In re Timbervest, LLC, et al.*, Investment Advisers Act Release No. 4197 (Sept. 17, 2015) (Order Imposing Remedial Sanctions)
SEC	Securities and Exchange Commission
SEC Cong. Just.	SEC, *FY 2016 Congressional Budget Justification*
SEC Enf. Manual	SEC Div. of Enforcement, *Enforcement Manual*
SIFMA	The Securities Industry and Financial Markets Association

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the attached addendum.

INTEREST OF THE *AMICUS CURIAE*

SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets, and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information about SIFMA, visit http://www.sifma.org.

SIFMA files *amicus curiae* briefs in cases that raise legal issues of vital concern to securities-industry participants. SIFMA's members may be named as respondents in administrative-enforcement proceedings brought by the Securities and Exchange Commission ("SEC") seeking to impose sanctions including associational bars, cease-and-desist orders, or disgorgement, and the applicability of the statute of limitations in 28 U.S.C. § 2462 to such proceedings is of significant importance to SIFMA's members. SIFMA submits this brief to explain the proper operation of this statutory time bar in this and similar cases.

SIFMA respectfully submits that the decision and order under review in this case are inconsistent with the statute of limitations, pertinent caselaw (especially after *Gabelli v. SEC*, 133 S. Ct. 1216 (2013)), and important policies of certainty and repose on which securities-market participants and SIFMA's members rely. Accordingly, SIFMA respectfully urges this Court to grant the petition and vacate the SEC's decision and order as untimely. SIFMA does not otherwise take a position on the merits of this proceeding, and SIFMA's submission should not be construed as supporting or opposing any position other than timeliness.

All parties have consented to the filing of this brief. No person—other than SIFMA, its members, and its counsel—authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the government enforces a statute that has no specified limitations period, including many provisions of the securities laws, 28 U.S.C. § 2462 supplies a default five-year statute of limitations:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

In 2013, the Supreme Court unanimously held that Section 2462 bars the SEC from seeking civil money penalties based on a violation that occurred more than five years before the SEC brings an enforcement action. *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013). Instead of accepting that decision, the SEC now argues that Section 2462 does not apply to an identical enforcement action in which the SEC seeks sanctions other than civil money penalties—here, associational bars, a cease-and-desist order, and disgorgement—that it characterizes as "equitable." Dec. at 24. But when the government uses its enforcement power to sanction a respondent for violating the law, it makes no sense for the applicable limitations period to be contingent on the label or form of punishment the government chooses to impose.

The SEC announced that, because the sanctions imposed here would "protect the public by preventing future violations," the sanctions are "equitable, not punitive"—which, according to the SEC, means this entire action was "not within Section 2462's ambit." Dec. at 25-26. But that interpretation—which would allow the SEC to bring enforcement actions based on conduct that occurred *decades* earlier—is inconsistent with the text of the statute, this Court's decision in *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), and the Supreme Court's decision in *Gabelli*. The sanctions imposed by the SEC in the decision and order under review are, in the context of this case, punitive under Section 2462: Associational bars restrict a respondent's ability to earn a living; cease-and-desist orders label respondents wrongdoers and impose severe collateral consequences; and disgorgement seeks to deter securities-law violations by forcing wrongdoers to forfeit their illicit profits. In *Gabelli*, the Supreme Court made clear that Section 2462 prohibits the government from proceeding against a respondent for alleged violations of the securities laws more than five years after the events in question. Contrary suggestions in earlier cases do not survive the Supreme Court's pronouncement.

The SEC's interpretation of Section 2462 also makes no sense as a matter of policy, since the SEC should not be able to evade a limitations period simply by choosing different sanctions. Nor would giving the SEC that ability serve the

purposes of the securities laws: SEC enforcement is most effective (and fair) when the SEC is compelled to address misconduct promptly; the SEC has vast resources that allow it to pursue serious violations within the five-year deadline; and applying the limitations period to all SEC enforcement actions would provide securities markets with much-needed predictability. Thus, this Court should hold that Section 2462 applies whenever the SEC seeks to impose punitive sanctions—regardless of their label—for violations that occur more than five years before the SEC files an enforcement action.

ARGUMENT

I. Section 2462 Bars The SEC From Bringing Enforcement Actions More Than Five Years After An Alleged Violation.

In 2013, the Supreme Court unanimously held that Section 2462 requires the SEC to bring enforcement actions within five years of a violation when the SEC seeks to impose civil money penalties. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013). Despite that decision, the SEC continues to argue that it can wait as long as it wants, so long as it imposes "equitable" sanctions—here, associational bars, a cease-and-desist order, and disgorgement. But "equitable" does not mean "non-punitive": It is the effect of sanctions on respondents, not the label attached to the sanctions by a government enforcer, that determines whether Section 2462's time limit applies. Here, properly construed, Section 2462 encompasses each of the sanctions imposed on Petitioners by the SEC.

A. Each Of The Sanctions Here Is Time-Barred Under Section 2462.

Section 2462 is "the direct descendant of a statute of limitations enacted more than a century and a half ago." *3M Co.(Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1454 (D.C. Cir. 1994). Unless Congress provides otherwise, Section 2462 supplies a five-year limitations period whenever the government seeks to impose "any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462.

This case turns on the question whether the proceeding below imposed "penalt[ies]" or "forfeiture[s]" on Petitioners. Those words "refer to something imposed in a punitive way for an infraction of a public law," as opposed to "a liability imposed solely for the purpose of redressing a private injury[.]" *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (interpreting Section 2462's predecessor statute). Thus, where a particular sanction "goes beyond remedying the damage caused to the harmed parties by the defendant's action," Section 2462's five-year time limit applies. *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). Each of the sanctions imposed here is punitive under that standard.

The SEC concluded that Section 2462 is inapplicable because the sanctions here may be labeled "equitable." Dec. at 25. But the nature of the relief sought by the SEC, not its label, determines whether the limitations period applies. *See Johnson*, 87 F.3d at 491. "To hold otherwise would be to open the door to

Government plaintiffs' ingenuity in creating new terms for the precise forms of relief expressly covered by" Section 2462. *SEC v. Graham*, 21 F. Supp. 3d 1300, 1311 (S.D. Fla. 2014), *appeal filed*, No. 14-13562 (11th Cir. Aug. 8, 2014). This Court must therefore determine for itself whether each sanction imposed by the SEC "went 'beyond compensation of the wronged party.'" *Proffitt v. FDIC*, 200 F.3d 855, 861 (D.C. Cir. 2000) (quoting *Johnson*, 87 F.3d at 491).

The Court should be guided by the maxim that it "could scarcely be supposed" that in an administrative-enforcement proceeding "there would be no limitations period and liability might be imposed no matter how distant the violation." *3M*, 17 F.3d at 1457 (internal quotation marks omitted). Thus, if "an alternative construction is available," this Court should choose the interpretation of Section 2462 that avoids the "serious practical problems" that result from the lack of a limitations period. *United States v. McGoff*, 831 F.2d 1071, 1094 (D.C. Cir. 1987) (emphasizing that "it would be passing strange to provide for lifetime prosecutions for what the Executive obviously deemed to be something quite less than a life-or-death offense"). Ambiguities in Section 2462 should be construed in Petitioners' favor for the additional reason that "one is not to be subjected to a penalty unless the words of the statute plainly impose it." *Comm'r v. Acker*, 361 U.S. 87, 91 (1959) (internal quotation marks omitted).

1. The Associational Bars Are A Penalty.

The associational bars, which forbid Petitioners from associating with an investment adviser—*i.e.*, from working in their chosen profession—are penalties under Section 2462. According to the SEC itself, the consequences of professional sanctions "may be more devastating than a monetary fine." Commissioner Luis Aguilar, Speech at Securities Enforcement Forum, Oct. 18, 2012, *available at* https://www.sec.gov/News/Speech/Detail/Speech/1365171491510 (noting that an officer and director bar is "intended to be" punitive and that it may "requir[e] a significant change in [a respondent]'s career"). An associational bar also "clearly resemble[s] punishment in the ordinary sense of the word," because it "restrict[s] [a respondent's] ability to earn a living," and "pursue her vocation." *Johnson*, 87 F.3d at 488-89. Thus, "Congress and the courts have long considered" professional sanctions like associational bars to be penalties. *Id.* at 488 n.6 (collecting cases). And an associational bar plainly "goes beyond" compensation of a private victim; instead, it serves the public's interest in sanctioning those who violate the law. *Id.* at 487-88; *see also Meeker*, 236 U.S. at 423. The associational bars are therefore subject to Section 2462's five-year limitations period.

This Court's decisions in *Johnson* and *Proffitt* illustrate the point. In *Johnson*, the SEC imposed "a censure and a six-month disciplinary suspension" as sanctions for a supervisor's failure to supervise reasonably an employee who

committed fraud. 87 F.3d at 485-86. This Court vacated that decision because those sanctions were "not directed toward correcting or undoing the effects of [the supervisor's] faulty supervision," and hence Section 2462's five-year limitations period applied. *Id.* at 491. In *Proffitt*, the FDIC sanctioned a director by barring him from participation in the banking industry. 200 F.3d at 859. Citing *Johnson*, this Court held that Section 2462 applied there too. *Id.* at 861.

In the decision under review, the SEC "maintain[ed] that *Johnson* was incorrectly decided," though it conceded that *Johnson* "states the controlling rule" in this Circuit. Dec. at 25 n.71. Yet rather than following *Johnson*, the SEC misread that decision as allowing it to transform a "punitive" associational bar into a "remedial" associational bar that does not implicate Section 2462, simply by reciting the alleged risk that a respondent poses to the public. *See id.* at 26 & n.75. This Court, however, has recognized that "it is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet not be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant." *Proffitt*, 200 F.3d at 861 (alterations omitted) (quoting *Johnson*, 87 F.3d at 491 n.11); *see also Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977) ("One would hardly say that removal of a robber from society should be classified as only 'remedial,' because it protects ordinary citizens from his probable repetition of the crime"), *abrogated on other grounds by Steadman v.*

SEC, 450 U.S. 91 (1981). This is common sense: Most penalties are designed both to punish a wrongdoer and to protect the public, either by restraining the wrongdoer or deterring future violations. That "dual effect" does not relieve the government of its obligation to enforce the law in a timely manner. *Proffitt*, 200 F.3d at 861.[1]

To be sure, in *Johnson* this Court said that the professional suspension at issue "would less resemble punishment if the SEC had focused on [the respondent]'s current competence or the degree of risk she posed to the public." 87 F.3d at 489. But the example the Court gave was that of "a licensing agency evaluating an individual's current competence," because, in that situation, there would be no "date at which [a] claim first accrued" under Section 2462. *Id.* at 489 n.7 (internal quotation marks omitted). Thus, Section 2462 might not apply to, say, the government's decision to deny a gun dealer a license based on the agency's determination that the dealer poses a safety risk (*Gilbert v. Bangs*, 813 F. Supp. 2d 669, 676 (D. Md. 2011), *aff'd*, 481 F. App'x 52 (4th Cir. 2012)), or to the

[1] In the decision under review, the SEC also cited *Hudson v. United States*, 522 U.S. 93 (1997), for the proposition that debarment is not a penalty. Dec. at 25 n.71. But *Hudson* involved the question whether debarment is a *criminal* penalty under the Double Jeopardy Clause, and this Court in *Johnson* held that a different test applies to the question whether a sanction is punitive under Section 2462—namely, whether the sanction goes beyond remedying the harm suffered by a respondent's victims. *Johnson*, 87 F.3d at 491. The sanctions here clearly do.

revocation of a pilot's license based on the pilot's lack of necessary qualifications (*Coghlan v. Nat'l Transp. Safety Bd.*, 470 F.3d 1300, 1305 (11th Cir. 2006) (per curiam)). In contrast, Section 2462 does apply where, as here, an agency "initiate[s] . . . proceedings with an indictment-like document" alleging that the respondent violated the law, and then imposes professional bars as a direct sanction for that violation. *Johnson*, 87 F.3d at 489. This is not a licensing proceeding; it is an enforcement action and punishment is its aim.

Indeed, in *Johnson* this Court pointedly rejected the SEC's contention that it could convert a punitive sanction into a remedial one simply by asserting "that the sanctions were imposed not as punishment for past dereliction, but primarily because of [a respondent's] present danger to the public." 87 F.3d at 490. That sort of "*pro forma*" inquiry into a respondent's current competence cannot change the fact that, when the SEC brings an enforcement proceeding, any "resultant sanction" is imposed as punishment for the past violation, not an independent determination of the respondent's current fitness for her profession. *See ibid.* Moreover, in both *Johnson* and *Proffitt*, this Court noted that the very fact that the SEC had waited more than five years to bring charges suggested that the SEC sought to impose punishment for past conduct. *Proffitt*, 200 F.3d at 861; *Johnson*, 87 F.3d at 490 n.9. So, too, here.

2. The Cease-and-Desist Order Is A Penalty.

The SEC also imposed a penalty under Section 2462 when it ordered Petitioners to "cease and desist from committing or causing any violations or future violations of" the Investment Advisers Act. Order at 1. By the order's own terms, it is concerned only with "infraction[s] of a public law," *Meeker*, 236 U.S. at 423, and, therefore, it plainly "goes beyond remedying the damage caused to the harmed parties by [Petitioner's] action." *Johnson*, 87 F.3d at 488.[2]

Moreover, the cease-and-desist order is punitive because it "label[s] [Petitioners] wrongdoers." *Gabelli*, 133 S. Ct. at 1223. That "stigmatize[s] [Petitioners] in the investment community" and would "significantly impair their ability to pursue a career." *SEC v. Jones*, 476 F. Supp. 2d 374, 385 (S.D.N.Y. 2007). A cease-and-desist order can have other collateral consequences, including:

- mandatory disclosure under Regulation S-K, *see* 17 C.F.R. § 229.401(f)(5);

[2] In *Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010), a panel of this Court held that a "cease-and-desist order is not a 'fine, penalty, or forfeiture' covered by" Section 2462. As an initial matter, that decision is not binding on this panel because it is inconsistent with this Court's earlier decisions in *Johnson* and *Proffitt*, both of which held that a sanction is punitive under Section 2462 if it goes beyond remedying the harm to a respondent's victims. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision . . . cannot prevail."). As explained below, *Riordan* is also inconsistent with the Supreme Court's later decision in *Gabelli*, and hence would not bind this panel even in the absence of *Johnson* and *Proffitt*.

- mandatory disclosure in the Financial Industry Regulatory Authority's BrokerCheck system for the respondent and any entity she is associated with, *see* FINRA Rule 8312(c);
- precluding an issuer from hiring the respondent without potentially making the issuer ineligible for the SEC's exemptions for small offerings, safe harbor for certain private placements, and streamlined procedures for Well-Known Seasoned Issuers, *see* 17 C.F.R. §§ 230.262(a)(5), 230.405, 230.505(b)(iii), 230.506(d)(1)(iv); and
- disciplinary action by state regulators, *see* Andrew M. Smith, *SEC Cease-And-Desist Orders*, 51 Admin. L. Rev. 1197, 1224-25 (1999) (collecting state statutes).

"The severity of these collateral consequences indicate[s] that" the cease-and-desist order here carries "the sting of punishment." *Jones*, 476 F. Supp. 2d at 385; *see also SEC v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012) (per curiam) (holding that an injunction and debarment were punitive under Section 2462 because those remedies "would have a stigmatizing effect and long-lasting repercussions"). Thus, like the associational bars, the cease-and-desist order is subject to Section 2462's five-year limitations period.

3. The Disgorgement Order Is Both A Forfeiture And A Penalty.

Section 2462 applies to SEC enforcement actions that impose a "forfeiture" on respondents. 28 U.S.C. § 2462. A "forfeiture" is a "divestiture of property without compensation." Black's Law Dictionary 765 (10th ed. 2014). Courts use disgorgement and forfeiture interchangeably to describe orders that require a defendant "to disgorge ill-gotten profits." *United States v. Hoover-Hankerson*, 511 F.3d 164, 171 (D.C. Cir. 2007) (describing criminal forfeiture); *see also United States v. Ursery*, 518 U.S. 267, 284 (1996) (Forfeiture is "designed primarily to confiscate property used in violation of the law, and to require *disgorgement of the fruits of illegal conduct*" (emphasis added)); *United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008) ("Forfeiture, in contrast [to restitution] is punitive; it seeks to *disgorge any profits* that the offender realized from his illegal activity" (emphasis added)). Here, the SEC ordered Petitioners to "disgorge[]" their "ill-gotten gains." Dec. at 31. Thus, the disgorgement order is a forfeiture, and Section 2462 applies. Were it otherwise, the SEC could avoid Congress's five-year limitations period through mere phraseology.[3]

[3] This Court's "precedents have not expressly considered" the question whether disgorgement is a forfeiture under Section 2462. *Riordan*, 627 F.3d at 1234 n.1. Nevertheless, in *Riordan*, a panel of this Court held that an earlier panel had "implicitly reject[ed]" that argument in *Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009) (per curiam), by holding that disgorgement is not a "penalty"

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Disgorgement is also punitive under Section 2462 where, as here, the SEC uses it to "impose a punishment for [a respondent]'s violation of a standard laid down in" the securities laws, as opposed to "attempt[ing] to restore the stolen funds to their rightful owner." *See Johnson*, 87 F.3d at 491-92. "[D]isgorgement is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011). "[W]hen a public entity seeks disgorgement it does not claim any entitlement to particular property; it seeks only to deter violations of the laws by depriving violators of their ill-gotten gains." *Id.* at 373 (internal quotation marks and alterations omitted). Thus, a disgorgement award is not "imposed solely for the purpose of redressing a private injury." *Meeker*, 236 U.S. at 423. Instead, it is a sanction "imposed in a punitive way for an infraction of a public law." *See ibid.*; *see also Tull v. United States*, 481 U.S. 412, 423-24 (1987) (describing disgorgement as "a more limited form of penalty than a civil fine"). Indeed, the SEC's own rules prohibit it from using disgorged funds to repay the victims of a securities-law violation unless the SEC's order "also assess[es] a civil money penalty." 17 C.F.R. § 201.1100. After five years, civil

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under Section 2462. *Riordan*, 627 F.3d at 1234 n.1. As explained below, both *Riordan* and *Zacharias* are inconsistent with the Supreme Court's reasoning in *Gabelli*, and thus this panel is not bound by those decisions.

money penalties are time-barred under Section 2462. *3M*, 17 F.3d at 1463. When the SEC waits more than five years to initiate an enforcement proceeding, therefore, disgorged funds will go to the United States Treasury, not "their rightful owner." *See* 17 C.F.R. § 201.1102(b); *Johnson*, 87 F.3d at 492.[4]

In sum, since the disgorgement order requires Petitioners to turn over—*i.e.*, to forfeit—money to the Treasury, as opposed to the victims of the alleged fraud, the order is a "forfeiture" under Section 2462. Likewise, since ordering Petitioners to pay funds to the Treasury "goes beyond remedying the damage caused *to the harmed parties*"—the SEC does not contend that the government was itself a victim here—the disgorgement order is a penalty under Section 2462. *See Johnson*, 87 F.3d at 488 (emphasis added).

[4] To be sure, in *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989), this Court held that "disgorgement may not be used punitively." But there the court was discussing disgorgement in a different context—namely, whether under principles of equity the SEC could measure the amount of disgorgement in a manner that exceeded a respondent's "illegally obtained profits." *Ibid.* This case presents a different question—whether disgorgement is a penalty under Section 2462. *Cf. Johnson*, 87 F.3d at 491 (distinguishing the question whether a license suspension was "punishment in various *constitutional* contexts" from the question whether a "license suspension is a *penalty for purposes of § 2462*" (emphasis in original)). Thus, *First City* and its progeny are inapposite here.

B. Congress Has Reserved Infinite Limitations Periods For Heinous Criminal Conduct, Not Civil Securities-Law Violations.

A comparison to the limitations periods for federal crimes further illustrates that Section 2462 must apply to SEC enforcement actions that impose associational bars, cease-and-desist orders, or disgorgement. "[T]he majority of federal crimes are governed by the general five year statute of limitations" in 18 U.S.C. § 3282. Charles Doyle, Cong. Research Serv., RL 31253, *Statutes of Limitation in Federal Criminal Cases: An Overview* 3 (2012). Congress has expressly provided, however, that no limitations period applies to, among other things, capital crimes, terrorism, child pornography, and genocide. *Id.* at 18-24.

To exempt technical civil violations of the securities laws from Section 2462's five-year limitations period would produce the nonsensical result of placing securities violations, however objectionable they may be, on par with abhorrent crimes like genocide or the sexual abuse of a child. *Cf. McGoff*, 831 F.2d at 1093 ("[A]lthough such conduct is certainly not to be blinked at, it is certainly far removed from what Congress appears, before now at least, to have considered so serious as to warrant the indefinite threat of prosecution"). Moreover, under the SEC's interpretation some penalties (such as civil fines) would be precluded as time-barred after five years even though less severe sanctions (such as cease-and-desist orders) could be pursued indefinitely so long as the agency labels them

"equitable." That oddity further reflects the incoherence in the SEC's efforts to escape the consequences of *Gabelli*.

C. The Supreme Court's Reasoning In *Gabelli* Forecloses The SEC's Interpretation Of Section 2462.

1. *Gabelli*'s Rationale Applies To Any Sanction The SEC Imposes In An Enforcement Proceeding.

The issue here—whether Section 2462 applies to "injunctive relief and disgorgement"—was "not before" the Supreme Court in *Gabelli*. 133 S. Ct. at 1220 n.1. But nothing in the Court's opinion suggests that its rationale is limited to civil money penalties. To the contrary, the logical ramification of the Court's ruling is that the SEC may not impose other punitive sanctions—such as associational bars, cease-and-desist orders, and disgorgement—if those sanctions are based on claims that accrued more than five years before the SEC initiated enforcement proceedings.

The SEC argued in *Gabelli* that a "discovery rule" applies to securities-fraud claims, and therefore that the five-year limitations period did not begin until the SEC knew, or had reason to know, of a particular violation. 133 S. Ct. at 1221. The Supreme Court unanimously rejected that argument. The Court did so because the SEC's interpretation would have undermined "'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Ibid.*

(quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). Because limitations periods "provide 'security and stability to human affairs,'" they are "'vital to the welfare of society.'" *Ibid.* (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). That some fraudsters might escape liability did not alter that principle, since "'even wrongdoers are entitled to assume that their sins may be forgotten.'" *Ibid.* (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). Thus, the Court reasoned that Section 2462 should be interpreted in a way that "sets a fixed date when exposure to . . . Government enforcement efforts ends[.]" *Ibid.*

Those concerns were especially paramount in "the context of [SEC] enforcement actions[.]" *Gabelli*, 133 S. Ct. at 1222. "[A] central mission of the Commission is to investigate potential violations of the federal securities laws," and the SEC "has many legal tools at hand to aid in that pursuit." *Ibid.* (internal quotation marks and citation omitted). Thus, "the SEC as enforcer is a far cry from [a] defrauded victim" who might need more time to discover securities fraud. *Ibid.* Moreover, in an enforcement action the government seeks to "go beyond compensation" and "label defendants wrongdoers." *Id.* at 1223.

All of the Supreme Court's reasoning applies with equal force here, where the SEC once again seeks to enforce the securities laws by imposing sanctions more than five years after the alleged violations occurred. A witness's memory does not improve because the SEC seeks only an associational bar. A respondent

cannot have repose when the SEC may at any time destroy his career and reputation by imposing a cease-and-desist order. And a $500,000 disgorgement order upsets settled expectations just as much as a $500,000 civil penalty.

Nothing in *Gabelli* suggests that the grave concerns with stale evidence, uncertainty, or upsetting settled expectations evaporate so long as the SEC denominates its sanctions as "equitable." Indeed, "[g]iven the reasons why we have statutes of limitation, there is no discernible rationale for applying § 2462 when" the SEC seeks a monetary penalty but not when it seeks other sanctions. *See 3M*, 17 F.3d at 1457. "From the potential defendant's point of view, lengthy delays upset settled expectations to the same extent in either case." *Ibid.* (internal quotation marks omitted).

Accepting the SEC's interpretation of Section 2462 would also create an exception that swallows the statute: Whenever the SEC wants to bring an otherwise time-barred enforcement action, it could simply denominate its sanctions as "equitable" and impose devastating financial, reputational, and career-ending harm on a respondent for conduct that occurred even *decades* earlier. That "would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223. As Chief Justice Marshall observed 200 years ago, that result "would be utterly repugnant to the genius of our laws," for "[i]n a

country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

2. *Gabelli* Trumps Earlier Cases Holding That Section 2462 Is Inapplicable To Cease-and-Desist Orders and Disgorgement.

In the decision under review, the SEC relied on cases from this Circuit and others that predate *Gabelli*. But to the extent those decisions suggest that "equitable" sanctions may escape Section 2462's five-year limitations period, those decisions are no longer good law. *See Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 665-66 (D.C. Cir. 2013) (an earlier opinion is not binding on a later panel where an intervening Supreme Court decision undermines the first panel's rationale).

As noted above, this Court in *Zacharias* and *Riordan* held that Section 2462 is inapplicable where the SEC seeks disgorgement. *Zacharias*, 569 F.3d at 471-73; *Riordan*, 627 F.3d at 1234. (*Riordan*'s analysis of this question, which consists of one paragraph, essentially amounts to a citation to *Zacharias*. *Riordan*, 627 F.3d at 1234.) As an initial matter, neither case considered whether disgorgement qualifies as a "forfeiture" under Section 2462. And neither case is reconcilable with *Johnson*'s earlier holding that a sanction is a penalty under Section 2462 if it "goes beyond remedying the damage caused to the harmed parties by the

defendant's action." 87 F.3d at 488; *see Sierra Club*, 648 F.3d at 854 (earlier panel decision controls over a later panel's conflicting decision).

In any event, *Gabelli* has now made clear that Section 2462 requires a "fixed date" at which point a potential defendant is no longer "exposed to Government enforcement action." 133 S. Ct. at 1221, 1223. In contrast, under *Riordan* and *Zacharias* a defendant's potential exposure to an SEC enforcement action would be immortal. In *Gabelli*, the Supreme Court reasoned that Section 2462 applied because in civil-enforcement actions the government "seeks a different kind of relief" where it is not seeking to "ensure that the injured receive recompense." *Id.* at 1223. In contrast, *Zacharias* held that it was "*irrelevant*" under Section 2462 whether disgorgement would "remedy the damage caused . . . by the defendant's action." 569 F.3d at 471 (emphasis added) (internal quotation marks omitted). *Gabelli* held that Section 2462 applies to sanctions that "label defendants wrongdoers." 133 S. Ct. at 1223. In contrast, *Zacharias* held that disgorgement was appropriate, Section 2462 notwithstanding, *because* the SEC had determined that the defendants were "wrongdoers." 569 F.3d at 472. In short, *Zacharias*'s reasoning is irreconcilable with that of the Supreme Court in *Gabelli*. Thus, "the Supreme Court has knocked out . . . the pillars on which [*Zacharias*] rests," and *Zacharias*'s and *Riordan*'s holdings that Section 2462 is inapplicable to disgorgement are no longer good law. *See Davis*, 716 F.3d at 666.

Riordan's holding that Section 2462 does not apply to cease-and-desist orders has likewise been abrogated by *Gabelli*. *Riordan*, 87 F.3d at 294-95. *Riordan*'s analysis on that point consisted of a citation to a half-century old case, *Drath v. FTC*, 239 F.2d 452, 453 (D.C. Cir. 1956), where this Court held that cease-and-desist orders are not penalties under an immunity provision of the Federal Trade Commission Act. *See Riordan*, 87 F.3d at 294. But, as shown above, *Gabelli* held that Section 2462 requires a fixed date at which point a potential respondent can be certain that he is no longer subject to an SEC enforcement action. *See* 133 S. Ct. at 1223. Under *Riordan*, that date could never come; a potential defendant's career and reputation would instead remain forever at the mercy of the SEC's whim. Thus, *Riordan* is irreconcilable with the Supreme Court's reasoning in *Gabelli*, and is not binding on this panel. *Riordan* is also inconsistent with this Court's earlier holdings in *Johnson* and *Proffitt* that a penalty under Section 2462 is any sanction that goes beyond remedying the harm to a respondent's victims.

In sum, *Gabelli* applies with full force in this case: The conduct and evidence that serve as the basis for the SEC's claims are identical regardless whether it seeks to impose civil money penalties, associational bars, cease-and-desist orders, or disgorgement. So too, the limitations period should be the same.

II. Granting The SEC Unlimited Time To Pursue The Sanctions It Seeks Here Would Be Bad Policy.

Applying Section 2462 to all SEC enforcement actions would also be better policy. When the SEC brings stale claims it weakens enforcement of the securities laws. Moreover, given the SEC's vast resources and investigative tools, allowing it more than five years to bring an enforcement action is unnecessary. Finally, applying the limitations period would serve the goals of the securities laws by giving market participants much-needed certainty.

A. Allowing The SEC To Bring Decades-Old Claims Would Weaken Enforcement Of The Securities Laws.

As the Supreme Court has recognized, the objectives of the securities laws are not necessarily served by extending their reach. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). In fact, making civil remedies "more far reaching" can "disserve the goals of fair dealing and efficiency in the securities markets." *Ibid.* This case provides a compelling example of that principle.

Old claims, based on stale evidence, are harder for the government to prove (and for respondents to disprove). Limitations periods therefore "promote justice by preventing . . . the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (internal quotation marks omitted); *see also* Arthur B.

Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 Alb. L. Rev. 5, 52 (1994) ("As the SEC . . . bring[s] cases that are increasingly distant from the time of the alleged violations, faded memories and the disappearance of evidence may make it harder for the SEC to prove violations (and harder for some innocent defendants to demonstrate their blamelessness)"). This concern is especially acute in the securities industry, which experiences high employee turnover and cyclical downsizing. Thus, when the SEC waits longer than five years to bring an enforcement proceeding, the relevant employees are less likely than in other industries to be performing the same job for the same employer, which makes investigations and trials more expensive and less reliable.

Moreover, imposing a hard deadline for enforcement actions, no matter the requested relief, encourages the SEC to focus on its core mission—pursuing fresh cases that, if promptly investigated, might prevent investor losses before they occur (or, at least, provide recompense to investors within a reasonable time after losses were sustained). *See* SEC Div. of Enforcement, *Enforcement Manual* at 1 (2015), *available at* https://www.sec.gov/divisions/enforce/enforcementmanual.pdf ("*SEC Enf. Manual*"). "The public does not benefit from a framework in which the SEC can wait as long as it pleases to impose significant sanctions." Stephen R. Glaser, *Statutes of Limitations for Equitable & Remedial Relief in SEC Enforcement*

Actions, 4 Harv. Bus. L. Rev. 129, 155 (2014). Thus, "it is not unreasonable to expect the SEC to focus its efforts on bringing claims in a timely fashion against those who are guilty of serious and intentional misconduct." *Ibid.*

In contrast, "increases in the delay between" an alleged violation and an enforcement action are "generally thought to reduce the effectiveness of deterrence against other offenses, both by the offender (who sees no immediate sanction for his misconduct) and by others (who see the offender appearing to get away with his misconduct)." Laby & Callcott, *supra*, at 52; *see also Johnson*, 87 F.3d at 490 ("If the SEC really viewed [the respondent] as a clear and present danger to the public, it is inexplicable why it waited *more than five years* to begin the proceedings to suspend her."). Enforcement actions that take place so long after an alleged violation also breed distrust in the legal system, since lengthy delays and unreliable evidence can make a law's application appear arbitrary. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 481-83 (1997).

B. The SEC's Vast Resources Allow It To Bring Enforcement Actions Within Five Years Of A Violation.

Nor does the SEC need more than five years to enforce the securities laws effectively. In Fiscal Year 2015, the SEC allotted nearly $500 million for enforcement, which included more than 1,300 full-time employees in that function. SEC, *FY 2016 Congressional Budget Justification* 14, 16, *available at*

https://www.sec.gov/about/reports/secfy16congbudgjust.pdf ("*SEC Cong. Just.*"). And the SEC put those resources to good use: In 2015 it brought more enforcement actions (807), and received more in monetary sanctions ($4.2 billion), than ever before. SEC, *SEC Announces Enforcement Results for FY 2015* (2015), *available at* https://www.sec.gov/news/pressrelease/2015-245.html.

The SEC also has powerful investigative tools at its disposal. For example, the SEC can subpoena documents and witnesses it deems relevant to an investigation, *e.g.*, 15 U.S.C. § 78u(b); offer cooperation agreements to potential respondents, *SEC Enf. Manual* at 98-106; and pay monetary awards to whistleblowers, 15 U.S.C. § 78u-6.

With these resources, the SEC has a proven track record of pursuing enforcement actions within the five-year limitations period under Section 2462. In fact, the SEC brings about 60% of its enforcement actions within two years of opening an investigation, and the overall average time between the start of an investigation and the filing of an enforcement action is even less than that—about 20 months. *SEC Cong. Just.* 39-40.

And five years is already as long or longer than the statutes of limitations provided for every private cause of action under either the Securities Act or the Exchange Act. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-62 (1991). It equals, and often exceeds, the amount of time that

victims of securities fraud—who lack the SEC's investigative powers and $500 million enforcement budget—have to file private lawsuits under Section 10(b). *See Merck & Co. v. Reynolds*, 559 U.S. 633, 638 (2010) (citing 28 U.S.C. § 1658(b)). In the rare case where the SEC needs more time the SEC can, and often does, seek a tolling agreement. *SEC Enf. Manual* at 31-32. And the SEC can also use civil discovery to obtain the evidence it needs to prove a claim. *See*, *e.g.*, *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 112-13 (S.D.N.Y. 1981) (lawsuit to enjoin transfer of allegedly illegal proceeds pending discovery of the identity of alleged inside-traders).

Thus, Section 2462's five-year limitations period allows the SEC plenty of time to discover, investigate, and punish violations of the securities laws. Giving the SEC more time is therefore unnecessary to achieve Congress's objectives.

C. Allowing The Government Unlimited Time To Pursue Sanctions Harms Businesses And Investors.

Finally, accepting the SEC's interpretation of Section 2462 would create a cloud of potential liability over every participant in the financial markets. Without a "fixed date when exposure to [SEC] enforcement efforts ends," businesses, investors, and securities professionals could never enjoy the repose that statutes of limitations are designed to provide. *See Gabelli*, 133 S. Ct. at 1221. That the SEC limits its sanctions to associational bars, cease-and-desist orders, disgorgement and

the like is little solace for those whose careers, reputations, and financial security hang in the balance.

The ever-present risk of a change in SEC enforcement policy magnifies the problem. In the absence of a limitations period, market participants lack the certainty of knowing that at some point their conduct will be free from scrutiny. And the longer the SEC waits to condemn conduct deemed acceptable when it occurred, the greater the risk that its actions will be arbitrary and disrupt long-settled expectations. *See*, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (Where "an agency's announcement of its [new] interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute").

Under the SEC's interpretation of Section 2462, businesses and individuals who reasonably believe that their conduct is lawful—and the entirely innocent persons and entities that transact with them—would never be free from unknown and undiscovered SEC claims, so long as the SEC styles its sanctions as "equitable." Among other problems, such insecurity would raise the cost of business transactions, making due diligence more difficult and burdening successor corporations with a predecessor's misconduct. In contrast, interpreting Section 2462 to apply to all SEC enforcement actions would honor the need for uniformity,

predictability, and fair notice in the securities laws. *See Cent. Bank of Denver*, 511 U.S. at 188.

CONCLUSION

Section 2462, like all statutes of limitation, exists to provide certainty by allowing businesses and individuals—innocent and guilty alike—the security of knowing that, after a fixed date, their potential exposure to government enforcement has ended. Here, the SEC's interpretation of Section 2462 removes that security by allowing the government to evade the statute's five-year deadline simply by choosing different sanctions and labeling them "equitable." Section 2462's text and purpose, as elucidated by the Supreme Court in *Gabelli*, preclude that result. If the SEC believes that it needs more than five years after a fraud occurs to enforce the securities laws, then the SEC should take that argument to Congress.

* * *

For these reasons, this Court should grant the petition and vacate the decision and order under review as untimely.

Dated: April 29, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i) because this brief contains 6,905 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: April 29, 2016

/s/ Mark A. Perry
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CERTIFICATE OF SERVICE

I, Mark A. Perry, hereby certify that on this 29th day of April, 2016, a true and correct copy of the foregoing Brief for *Amicus Curiae* The Securities Industry and Financial Markets Association in Support of Petitioners was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record.

/s/ Mark A. Perry
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Addendum

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by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

(b) Limitations on liability

(1) Contemporaneous trading actions limited to profit gained or loss avoided

The total amount of damages imposed under subsection (a) of this section shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.

(2) Offsetting disgorgements against liability

The total amount of damages imposed against any person under subsection (a) of this section shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 78u(d) of this title relating to the same transaction or transactions.

(3) Controlling person liability

No person shall be liable under this section solely by reason of employing another person who is liable under this section, but the liability of a controlling person under this section shall be subject to section 78t(a) of this title.

(4) Statute of limitations

No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.

(c) Joint and several liability for communicating

Any person who violates any provision of this chapter or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) of this section with, and to the same extent as, any person or persons liable under subsection (a) of this section to whom the communication was directed.

(d) Authority not to restrict other express or implied rights of action

Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.

(e) Provisions not to affect public prosecutions

This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties.

(June 6, 1934, ch. 404, title I, § 20A, as added Pub. L. 100–704, § 5, Nov. 19, 1988, 102 Stat. 4680.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a), (c), (d), and (e), was in the original ''this title''. See References in Text note set out under section 78a of this title.

EFFECTIVE DATE

Section not applicable to actions occurring before Nov. 19, 1988, see section 9 of Pub. L. 100–704 set out as an Effective Date of 1988 Amendment note under section 78*o* of this title.

§ 78u. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commis-

sion; and (B) compliance with the request would prejudice the public interest of the United States.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) AUTHORITY OF COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) MONEY PENALTIES IN CIVIL ACTIONS.—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u–3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u–1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipula-

tion, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) PROCEDURES FOR COLLECTION.—

(i) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u–6 of this title.

(ii) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) REMEDY NOT EXCLUSIVE.—The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) JURISDICTION AND VENUE.—For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.

(D) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u–3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(4) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) DEFINITION.—For purposes of this paragraph, the term ''person participating in an offering of penny stock'' includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(e) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this chapter, the rules, regulations, and orders thereunder, and the rules of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

(f) Rules of self-regulatory organizations or Board

Notwithstanding any other provision of this chapter, the Commission shall not bring any action pursuant to subsection (d) or (e) of this section against any person for violation of, or to command compliance with, the rules of a self-regulatory organization or the Public Company Accounting Oversight Board unless it appears to the Commission that (1) such self-regulatory organization or the Public Company Accounting Oversight Board is unable or unwilling to take appropriate action against such person in the public interest and for the protection of investors, or (2) such action is otherwise necessary or appropriate in the public interest or for the protection of investors.

(g) Consolidation of actions; consent of Commission

Notwithstanding the provisions of section 1407(a) of title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws

shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

(h) Access to records

(1) The Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3405 or 3407], the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpena issued in conformity with the requirements of section 19(b)[1] of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78u(b)], section 42(b) of the Investment Company Act of 1940 [15 U.S.C. 80a–41(b)], or section 209(b) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–9(b)], and that the Commission has reason to believe that—

(A) delay in obtaining access to such financial records, or the required notice, will result in—

(i) flight from prosecution;

(ii) destruction of or tampering with evidence;

(iii) transfer of assets or records outside the territorial limits of the United States;

(iv) improper conversion of investor assets; or

(v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

(C) the acts, practices or course of conduct under investigation involve—

(i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or the failure to make disclosures required under the securities laws, which remain uncorrected; or

(ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

(i) involve significant financial speculation in securities; or

(ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4)(A) Upon a showing described in paragraph (2), the presiding judge or magistrate judge shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3409(a), (b)(1), or (b)(2)].

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpena insofar as it applies to the customer together with the following notice which shall describe with reasonable specificity the nature of the investigation for which the Commission sought the financial records:

''Records or information concerning your transactions which are held by the financial institution named in the attached subpena were supplied to the Securities and Exchange Commission on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) under section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose).''

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate judge may permit.

(6) The Commission shall compile an annual tabulation of the occasions on which the Commission used each separate subparagraph or clause of paragraph (2) of this subsection or the provisions of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] to obtain access to financial records of a customer and include it in its annual report to the Congress. Section 1121(b)[1] of the Right to Financial Privacy Act of 1978 shall not apply with respect to the Commission.

(7)(A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate judge finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount equal to the sum of—

(i) $100 without regard to the volume of records involved;

(ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and

(iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and rea-

[1] See References in Text note below.

sonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a subpena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate judge finds that the customer's claims were made in bad faith.

(9)(A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3412], except that the customer notice required under section 1112(b) or (c) of such Act [12 U.S.C. 3412(b) or (c)] may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 or the Right to Financial Privacy Act of 1978 [12 U.S.C. 3412], transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be disclosed or used only in an administrative, civil, or criminal action or investigation by the Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.], within 30 days of its determination, or complies with the requirements of section 1109 of such Act [12 U.S.C. 3409] regarding delay of notice.

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.].

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] which are common to this subsection shall have the same meaning as in such Act.

(i) Information to CFTC

The Commission shall provide the Commodity Futures Trading Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any broker or dealer registered pursuant to section 78*o*(b)(11) of this title, any exchange registered pursuant to section 78f(g) of this title, or any national securities association registered pursuant to section 78*o*–3(k) of this title.

(June 6, 1934, ch. 404, title I, § 21, 48 Stat. 899; May 27, 1936, ch. 462, § 7, 49 Stat. 1379; Pub. L. 91–452, title II, § 212, Oct. 15, 1970, 84 Stat. 929; Pub. L. 94–29, § 17, June 4, 1975, 89 Stat. 154; Pub. L. 96–433, §§ 3, 4, Oct. 10, 1980, 94 Stat. 1855, 1858; Pub. L. 98–376, § 2, Aug. 10, 1984, 98 Stat. 1264; Pub. L. 100–181, title III, § 323, Dec. 4, 1987, 101 Stat. 1259; Pub. L. 100–704, §§ 3(a)(1), 6(b), Nov. 19, 1988, 102 Stat. 4677, 4681; Pub. L. 101–429, title II, § 201, Oct. 15, 1990, 104 Stat. 935; Pub. L. 101–650, title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 104–67, title I, § 103(b)(2), Dec. 22, 1995, 109 Stat. 756; Pub. L. 106–554, § 1(a)(5) [title II, § 205(a)(5)], Dec. 21, 2000, 114 Stat. 2763, 2763A–426; Pub. L. 107–204, § 3(b)(2), title III, §§ 305(a)(1), (b), 308(d)(1), title VI, § 603(a), July 30, 2002, 116 Stat. 749, 778, 779, 785, 794; Pub. L. 111–203, title IX, §§ 923(b)(1), 929F(c), (d), (g)(2), 986(a)(3), July 21, 2010, 124 Stat. 1849, 1854, 1855, 1935.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1), (b), (d), (e), and (f), was in the original ''this title''. See References in Text note set out under section 78a of this title.

The Right to Financial Privacy Act of 1978, referred to in subsec. (h)(1), (6), (8), (9)(B), (11), and (13), is title XI of Pub. L. 95–630, Nov. 10, 1978, 92 Stat. 3697, which is classified generally to chapter 35 (§3401 et seq.) of Title 12, Banks and Banking. Section 1121(b) of the Act, which was classified to section 3421(b) of Title 12, was repealed by Pub. L. 104–66, title III, §3001(d), Dec. 21, 1995, 109 Stat. 734. For complete classification of this Act to the Code, see Short Title note set out under section 3401 of Title 12 and Tables.

Section 19(b) of the Securities Act of 1933, referred to in subsec. (h)(2), was redesignated section 19(c) by Pub. L. 107–204, title I, §108(a)(1), July 30, 2002, 116 Stat. 768, and is classified to section 77s(c) of this title.

Section 21(h) of the Securities Exchange Act of 1934, referred to in the paragraph within quotation marks following subsec. (h)(4)(C), is classified to subsection (h) of this section.

AMENDMENTS

2010—Subsec. (a)(1). Pub. L. 111–203, §929F(g)(2), in first sentence, substituted '', a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm'' for ''or a person associated with such a firm''.

Pub. L. 111–203, §929F(c), (d), in first sentence, inserted '', or, as to any act or practice, or omission to act, while associated with a member, formerly associated'' after ''member or a person associated'' and ''or, as to any act or practice, or omission to act, while a participant, was a participant,'' after ''in which such person is a participant,''.

Subsec. (d)(3)(C)(i). Pub. L. 111–203, §923(b)(1), inserted ''and section 78u–6 of this title'' after ''section 7246 of this title''.

Subsec. (h)(2). Pub. L. 111–203, §986(a)(3), struck out ''section 18(c) of the Public Utility Holding Company Act of 1935,'' after ''section 21(b) of the Securities Exchange Act of 1934,''.

2002—Subsec. (a)(1). Pub. L. 107–204, §3(b)(2)(A), inserted ''the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm,'' after ''is a participant,''.

Subsec. (d)(1). Pub. L. 107–204, §3(b)(2)(B), inserted ''the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm,'' after ''is a participant,''.

Subsec. (d)(2). Pub. L. 107–204, §305(a)(1), substituted ''unfitness'' for ''substantial unfitness''.

Subsec. (d)(3)(C)(i). Pub. L. 107–204, §308(d)(1), inserted '', except as otherwise provided in section 7246 of this title'' before period at end.

Subsec. (d)(5). Pub. L. 107–204, §305(b), added par. (5).

Subsec. (d)(6). Pub. L. 107–204, §603(a), added par. (6).

Subsec. (e). Pub. L. 107–204, §3(b)(2)(C), inserted ''the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm,'' after ''is a participant,''.

Subsec. (f). Pub. L. 107–204, §3(b)(2)(D), inserted ''or the Public Company Accounting Oversight Board'' after ''self-regulatory organization'' in two places.

2000—Subsec. (i). Pub. L. 106–554 added subsec. (i).

1995—Subsec. (d)(4). Pub. L. 104–67 added par. (4).

1990—Subsec. (d). Pub. L. 101–429 designated existing provision as par. (1) and added pars. (2) and (3).

1988—Subsec. (a). Pub. L. 100–704, §6(b), designated existing provisions as par. (1) and added par. (2).

Subsec. (d). Pub. L. 100–704, §3(a)(1), redesignated par. (1) as entire subsec. (d) and struck out par. (2) which provided civil penalties for purchasing or selling securities while in possession of material nonpublic information.

1987—Subsec. (d). Pub. L. 100–181, §323(1), substituted ''Whenever'' for ''Wherever''.

Subsec. (e). Pub. L. 100–181, §323(2), struck out '', the United States District Court for the District of Columbia,'' after ''the district courts of the United States''.

Subsec. (g). Pub. L. 100–181, §323(3), struck out ''The term 'securities laws' as used herein and in subsection (h) of this section includes the Securities Act of 1933 (15 U.S.C. 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79 et seq.), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).'' See 15 U.S.C. 78c(a)(47).

1984—Subsec. (d). Pub. L. 98–376 designated existing provisions as par. (1) and added par. (2).

1980—Subsec. (g). Pub. L. 96–433, §4, inserted ''and in subsection (h) of this section.''

Subsec. (h). Pub. L. 96–433, §3, added subsec. (h).

1975—Subsec. (a). Pub. L. 94–29, §17(1), expanded the Commission's power to conduct investigations to include violations of the rules of a national securities exchange, registered securities association, registered clearing agency, or the Municipal Securities Rulemaking Board.

Subsec. (d). Pub. L. 94–29, §17(2), redesignated subsec. (e) as (d) and amended it generally, substituting ''has engaged, is engaged, or is about to engage'' for ''is engaged or about to engage'', ''any provision'' for ''the provisions'', ''the rules or regulations'' for ''or of any rule or regulation'', and ''such a showing'' for ''a proper showing'', and inserting ''the rules of a national securities exchange or registered securities association of which such persons is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board,'' in first sentence and inserting ''as may constitute a violation of any provision of this chapter or the rules or regulations thereunder'' in second sentence. Former subsec. (d) was repealed by Pub. L. 91–452. See 1970 Amendment note below.

Subsec. (e). Pub. L. 94–29, §17(2), redesignated subsec. (f) as (e) and amended it generally, substituting ''mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title'' for ''mandamus commanding any person to comply with the provisions of this chapter or any order of the Commission made in pursuance thereof or with any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title'' and adding cls. (2) and (3). Former subsec. (e) redesignated (d).

Subsecs. (f), (g). Pub. L. 94–29, §17(3), added subsecs. (f) and (g). Former subsec. (f) redesignated (e).

1970—Subsec. (d). Pub. L. 91–452 struck out subsec. (d) which related to immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

1936—Subsec. (f). Act May 27, 1936, inserted ''or with any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title''.

CHANGE OF NAME

Words ''magistrate judge'' substituted for ''magistrate'' wherever appearing in subsec. (h)(4)(A), (5), (7)(A), (8) pursuant to section 321 of Pub. L. 101–650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section

4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–67 not to affect or apply to any private action arising under this chapter or title I of the Securities Act of 1933 (15 U.S.C. 77a et seq.), commenced before and pending on Dec. 22, 1995, see section 108 of Pub. L. 104–67, set out as a note under section 77*l* of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–429 effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in a note under section 77g of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by section 3(a)(1) of Pub. L. 100–704 not applicable to actions occurring before Nov. 19, 1988, see section 9 of Pub. L. 100–704 set out as a note under section 78*o* of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–376 effective Aug. 10, 1984, see section 7 of Pub. L. 98–376, set out as a note under section 78c of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Pub. L. 96–433, § 5, Oct. 10, 1980, 94 Stat. 1858, provided that:

''(a) The amendments made by section 1 of this Act [amending section 78fff–3 of this title] shall take effect on the date of enactment of this Act [Oct. 10, 1980].

''(b) The amendments made by sections 2, 3, and 4 of this Act [amending this section and section 3422 of Title 12, Banks and Banking] shall take effect on November 10, 1980. Nothing in this Act [amending this section and section 78fff–3 of this title and section 3422 of Title 12] or in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall apply to any Securities and Exchange Commission subpena issued prior to such date.''

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

SAVINGS PROVISION

Amendment by Pub. L. 91–452 not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

CONSTRUCTION OF 1995 AMENDMENT

Nothing in amendment by Pub. L. 104–67 to be deemed to create or ratify any implied right of action, or to prevent Commission, by rule or regulation, from restricting or otherwise regulating private actions under this chapter, see section 203 of Pub. L. 104–67, set out as a Construction note under section 78j–1 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

PROMOTION OF RECIPROCAL SUBPOENA ENFORCEMENT

Pub. L. 105–353, title I, § 102, Nov. 3, 1998, 112 Stat. 3233, provided that:

''(a) COMMISSION ACTION.—The Securities and Exchange Commission, in consultation with State securities commissions (or any agencies or offices performing like functions), shall seek to encourage the adoption of State laws providing for reciprocal enforcement by State securities commissions of subpoenas issued by another State securities commission seeking to compel persons to attend, testify in, or produce documents or records in connection with an action or investigation by a State securities commission of an alleged violation of State securities laws.

''(b) REPORT.—Not later than 24 months after the date of enactment of this Act [Nov. 3, 1998], the Securities and Exchange Commission (hereafter in this section referred to as the 'Commission') shall submit a report to the Congress—

''(1) identifying the States that have adopted laws described in subsection (a);

''(2) describing the actions undertaken by the Commission and State securities commissions to promote the adoption of such laws; and

''(3) identifying any further actions that the Commission recommends for such purposes.''

§ 78u–1. Civil penalties for insider trading

(a) Authority to impose civil penalties

(1) Judicial actions by Commission authorized

Whenever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security or security-based swap agreement while in possession of material, nonpublic information in, or has violated any such provision by communicating such information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options or security futures products, the Commission—

(A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and

(B) may, subject to subsection (b)(1) of this section, bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.

(2) Amount of penalty for person who committed violation

The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.

(3) Amount of penalty for controlling person

The amount of the penalty which may be imposed on any person who, at the time of the

(5) Other terms

The terms ''blank check company'', ''rollup transaction'', ''partnership'', ''limited liability company'', ''executive officer of an entity'' and ''direct participation investment program'', have the meanings given those terms by rule or regulation of the Commission.

(June 6, 1934, ch. 404, title I, §21E, as added Pub. L. 104–67, title I, §102(b), Dec. 22, 1995, 109 Stat. 753.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (c)(1), (f), and (g), was in the original ''this title''. See References in Text note set out under section 78a of this title.

EFFECTIVE DATE

This section not to affect or apply to any private action arising under this chapter or title I of the Securities Act of 1933 (15 U.S.C. 77a et seq.), commenced before and pending on Dec. 22, 1995, see section 108 of Pub. L. 104–67, set out as an Effective Date of 1995 Amendment note under section 77*l* of this title.

CONSTRUCTION

Nothing in section to be deemed to create or ratify any implied right of action, or to prevent Commission, by rule or regulation, from restricting or otherwise regulating private actions under this chapter, see section 203 of Pub. L. 104–67, set out as a note under section 78j–1 of this title.

§ 78u–6. Securities whistleblower incentives and protection

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term ''covered judicial or administrative action'' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

(2) Fund

The term ''Fund'' means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term ''original information'' means information that—

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions

The term ''monetary sanctions'', when used with respect to any judicial or administrative action, means—

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action

The term ''related action'', when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower

The term ''whistleblower'' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards

Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission—

(i) shall take into consideration—

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of

the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award

No award under subsection (b) shall be made—

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 78j–1 of this title; or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation

Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general

Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity

Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) No contract necessary

No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

(f) Appeals

Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determination made by the Commission in accordance with section 706 of title 5.

(g) Investor Protection Fund

(1) Fund established

There is established in the Treasury of the United States a fund to be known as the ''Securities and Exchange Commission Investor Protection Fund''.

(2) Use of Fund

The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

(A) paying awards to whistleblowers as provided in subsection (b); and

(B) funding the activities of the Inspector General of the Commission under section 78d(i) of this title.

(3) Deposits and credits

(A) In general

There shall be deposited into or credited to the Fund an amount equal to—

(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds $300,000,000;

(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and

(iii) all income from investments made under paragraph (4).

(B) Additional amounts

If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

(4) Investments

(A) Amounts in Fund may be invested

The Commission may request the Secretary of the Treasury to invest the portion

of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

(B) Eligible investments

Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

(5) Reports to Congress

Not later than October 30 of each fiscal year beginning after July 21, 2010, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—

(A) the whistleblower award program, established under this section, including—

(i) a description of the number of awards granted; and

(ii) the types of cases in which awards were granted during the preceding fiscal year;

(B) the balance of the Fund at the beginning of the preceding fiscal year;

(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(F) the balance of the Fund at the end of the preceding fiscal year; and

(G) a complete set of audited financial statements, including—

(i) a balance sheet;

(ii) income statement; and

(iii) cash flow analysis.

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j–1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general

An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) Confidentiality

(A) In general

Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute

For purposes of section 552 of title 5, this paragraph shall be considered a statute de-

scribed in subsection (b)(3)(B) of such section 552.

(C) Rule of construction

Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to government agencies

(i) In general

Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general

Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities

Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) Provision of false information

A whistleblower shall not be entitled to an award under this section if the whistleblower—

(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or

(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

(June 6, 1934, ch. 404, title I, § 21F, as added Pub. L. 111–203, title IX, § 922(a), July 21, 2010, 124 Stat. 1841.)

REFERENCES IN TEXT

The Sarbanes-Oxley Act of 2002, referred to in subsec. (h)(1)(A)(iii), is Pub. L. 107–204, July 30, 2002, 116 Stat. 745. For complete classification of this Act to the Code, see Short Title note set out under section 7201 of this title and Tables.

This chapter, referred to in subsec. (h)(1)(A)(iii), was in the original ''the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)''. This chapter, referred to in subsec. (h)(2)(D)(i), was in the original ''this Act''. See References in Text note set out under section 78a of this title.

EFFECTIVE DATE

Section effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as a note under section 5301 of Title 12, Banks and Banking.

§ 78u–7. Implementation and transition provisions for whistleblower protection

(a) Implementing rules

The Commission shall issue final regulations implementing the provisions of section 78u–6 of this title, as added by this subtitle, not later than 270 days after July 21, 2010.

(b) Original information

Information provided to the Commission in writing by a whistleblower shall not lose the status of original information (as defined in section 78u–6(a)(3) of this title, as added by this subtitle) solely because the whistleblower provided the information prior to the effective date of the regulations, if the information is provided by the whistleblower after July 21, 2010.

(c) Awards

A whistleblower may receive an award pursuant to section 78u–6 of this title, as added by this subtitle, regardless of whether any violation of a provision of the securities laws, or a rule or regulation thereunder, underlying the judicial or administrative action upon which the award is based, occurred prior to July 21, 2010.

(d) Administration and enforcement

The Securities and Exchange Commission shall establish a separate office within the Commission to administer and enforce the provisions of section 78u–6 of this title (as add[1] by section 922(a)).[2] Such office shall report annually to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on its activities, whistleblower complaints, and the response of the Commission to such complaints.

(Pub. L. 111–203, title IX, § 924, July 21, 2010, 124 Stat. 1850.)

REFERENCES IN TEXT

This subtitle, referred to in subsecs. (a) to (c), means subtitle B (§§ 921–929Z) of title IX of Pub. L. 111–203.

[1] So in original. Probably should be ''added''.

[2] See References in Text note below.

1988—Pub. L. 100–690, title VII, §7081(c), Nov. 18, 1988, 102 Stat. 4407, substituted ''Indictments and information dismissed after period of limitations'' for ''Reindictment where defect found after period of limitations'' in item 3288 and ''Indictments and information dismissed before period of limitations'' for ''Reindictment where defect found before period of limitations'' in item 3289.

1984—Pub. L. 98–473, title II, §1218(b), Oct. 12, 1984, 98 Stat. 2167, added item 3292.

1951—Act June 30, 1951, ch. 194, §2, 65 Stat. 107, added item 3291.

§ 3281. Capital offenses

An indictment for any offense punishable by death may be found at any time without limitation.

(June 25, 1948, ch. 645, 62 Stat. 827; Pub. L. 103–322, title XXXIII, §330004(16), Sept. 13, 1994, 108 Stat. 2142.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§581a, 581b (Aug. 4, 1939, ch. 419, §§1, 2, 53 Stat. 1198).

Sections 581a and 581b of title 18, U.S.C., 1940 ed., were consolidated into this section without change of substance.

AMENDMENTS

1994—Pub. L. 103–322 struck out before period at end ''except for offenses barred by the provisions of law existing on August 4, 1939''.

§ 3282. Offenses not capital

(a) IN GENERAL.—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

(b) DNA PROFILE INDICTMENT.—

(1) IN GENERAL.—In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) EXCEPTION.—Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—

(A) the limitations period described under subsection (a); and

(B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

(3) DEFINED TERM.—For purposes of this subsection, the term ''DNA profile'' means a set of DNA identification characteristics.

(June 25, 1948, ch. 645, 62 Stat. 828; Sept. 1, 1954, ch. 1214, §12(a), formerly §10(a), 68 Stat. 1145; renumbered Pub. L. 87–299, §1, Sept. 26, 1961, 75 Stat. 648; Pub. L. 108–21, title VI, §610(a), Apr. 30, 2003, 117 Stat. 692.)

HISTORICAL AND REVISION NOTES

Based on section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, and on title 18, U.S.C., 1940 ed., §582 (R.S. §1044; Apr. 13, 1876, ch. 56, 19 Stat. 32; Nov. 17, 1921, ch. 124, §1, 42 Stat. 220; Dec. 27, 1927, ch. 6, 45 Stat. 51; Oct. 14, 1940, ch. 876, title I, subchap. III, §346(g), 54 Stat. 1167).

Section 582 of title 18, U.S.C., 1940 ed., and section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, were consolidated. ''Except as otherwise expressly provided by law'' was inserted to avoid enumeration of exceptive provisions.

The proviso contained in the act of 1927 ''That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information,'' was omitted as no longer necessary.

In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner.

AMENDMENTS

2003—Pub. L. 108–21 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

1954—Act Sept. 1, 1954, changed the limitation period from three years to five years.

EFFECTIVE DATE OF 1954 AMENDMENT

Act Sept. 1, 1954, ch. 1214, §12(b), formerly section 10(b), 68 Stat. 1145, as renumbered by Pub. L. 87–299, §1, Sept. 26, 1961, 75 Stat. 648, provided that: ''The amendment made by subsection (a) [amending this section] shall be effective with respect to offenses (1) committed on or after September 1, 1954, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date.''

FUGITIVES FROM JUSTICE

Statutes of limitations as not extending to persons fleeing from justice, see section 3290 of this title.

OFFENSES AGAINST INTERNAL SECURITY

Limitation period in connection with offenses against internal security, see section 783 of Title 50, War and National Defense.

SECTIONS 792, 793, AND 794 OF THIS TITLE; LIMITATION PERIOD

Limitation period in connection with sections 792, 793, and 794 of this title, see note set out under section 792.

§ 3283. Offenses against children

No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.

(June 25, 1948, ch. 645, 62 Stat. 828; Pub. L. 103–322, title XXXIII, §330018(a), Sept. 13, 1994, 108 Stat. 2149; Pub. L. 108–21, title II, §202, Apr. 30, 2003, 117 Stat. 660; Pub. L. 109–162, title XI, §1182(c), Jan. 5, 2006, 119 Stat. 3126.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §584 (R.S. §1046; July 5, 1884, ch. 225, §2, 23 Stat. 122).

Words ''customs laws'' were substituted for ''revenue laws,'' since different limitations are provided for internal revenue violations by section 3748 of title 26, U.S.C., 1940 ed., Internal Revenue Code.

This section was held to apply to offenses under the customs laws. Those offenses are within the term ''revenue laws'' but not within the term ''internal revenue

this title, section 28 of Title 15, and section 3614 of Title 42, and amending provisions set out as a note under section 2304 of Title 10, Armed Forces] shall not apply to cases pending on the date of the enactment of this subtitle [Nov. 8, 1984].''

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

(Added Pub. L. 101–650, title III, § 313(a), Dec. 1, 1990, 104 Stat. 5114; amended Pub. L. 107–204, title VIII, § 804(a), July 30, 2002, 116 Stat. 801.)

REFERENCES IN TEXT

The date of the enactment of this section, referred to in subsec. (a), is the date of enactment of Pub. L. 101–650, which was approved Dec. 1, 1990.

AMENDMENTS

2002—Pub. L. 107–204 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 2002 AMENDMENT

Pub. L. 107–204, title VIII, § 804(b), July 30, 2002, 116 Stat. 801, provided that: ''The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act [July 30, 2002].''

EFFECTIVE DATE

Pub. L. 101–650, title III, § 313(c), Dec. 1, 1990, 104 Stat. 5115, provided that: ''The amendments made by this section [enacting this section] shall apply with respect to causes of action accruing on or after the date of the enactment of this Act [Dec. 1, 1990].''

NO CREATION OF ACTIONS

Pub. L. 107–204, title VIII, § 804(c), July 30, 2002, 116 Stat. 801, provided that: ''Nothing in this section [amending this section and enacting provisions set out as a note under this section] shall create a new, private right of action.''

§ 1659. Stay of certain actions pending disposition of related proceedings before the United States International Trade Commission

(a) STAY.—In a civil action involving parties that are also parties to a proceeding before the United States International Trade Commission under section 337 of the Tariff Act of 1930, at the request of a party to the civil action that is also a respondent in the proceeding before the Commission, the district court shall stay, until the determination of the Commission becomes final, proceedings in the civil action with respect to any claim that involves the same issues involved in the proceeding before the Commission, but only if such request is made within—

(1) 30 days after the party is named as a respondent in the proceeding before the Commission, or

(2) 30 days after the district court action is filed,

whichever is later.

(b) USE OF COMMISSION RECORD.—Notwithstanding section 337(n)(1) of the Tariff Act of 1930, after dissolution of a stay under subsection (a), the record of the proceeding before the United States International Trade Commission shall be transmitted to the district court and shall be admissible in the civil action, subject to such protective order as the district court determines necessary, to the extent permitted under the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

(Added Pub. L. 103–465, title III, § 321(b)(1)(A), Dec. 8, 1994, 108 Stat. 4945.)

REFERENCES IN TEXT

Section 337 of the Tariff Act of 1930, referred to in text, is classified to section 1337 of Title 19, Customs Duties.

The Federal Rules of Evidence and the Federal Rules of Civil Procedure, referred to in subsec. (b), are set out in the Appendix to this title.

EFFECTIVE DATE

Section applicable with respect to complaints filed under section 1337 of Title 19, Customs Duties, on or after the date on which the World Trade Organization Agreement enters into force with respect to the United States [Jan. 1, 1995], or in cases under section 1337 of Title 19 in which no complaint is filed, with respect to investigations initiated under such section on or after such date, see section 322 of Pub. L. 103–465, set out as an Effective Date of 1994 Amendment note under section 1337 of Title 19.

CHAPTER 113—PROCESS

AMENDMENTS

2002—Pub. L. 107–273, div. C, title I, § 11020(b)(4)(A)(ii), Nov. 2, 2002, 116 Stat. 1828, added item 1697.

1964—Pub. L. 88–619, § 4(b), Oct. 3, 1964, 78 Stat. 996, added item 1696.

§ 1691. Seal and teste of process

All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof.

(June 25, 1948, ch. 646, 62 Stat. 945.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 721 (R.S. § 911; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Provisions as to teste of process issuing from the district courts were omitted as superseded by Rule 4 (b) of the Federal Rules of Civil Procedure. Provision for teste of the Chief Justice of writs and process was omitted as unnecessary.

A provision requiring the United States to bear the expense of providing seals was omitted as unnecessary and obsolete.

''(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

''(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

''(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

''(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

''(1) allow for regular adjustment for inflation of civil monetary penalties;

''(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

''(3) improve the collection by the Federal Government of civil monetary penalties.

''DEFINITIONS

''SEC. 3. For purposes of this Act, the term—

''(1) 'agency' means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

''(2) 'civil monetary penalty' means any penalty, fine, or other sanction that—

''(A)(i) is for a specific monetary amount as provided by Federal law; or

''(ii) has a maximum amount provided for by Federal law; and

''(B) is assessed or enforced by an agency pursuant to Federal law; and

''(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

''(3) 'Consumer Price Index' means the Consumer Price Index for all-urban consumers published by the Department of Labor.

''CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

''SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

''(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and

''(2) publish each such regulation in the Federal Register.

''COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

''SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

''(1) multiple of $10 in the case of penalties less than or equal to $100;

''(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

''(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

''(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

''(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

''(6) multiple of $25,000 in the case of penalties greater than $200,000.

''(b) DEFINITION.—For purposes of subsection (a), the term 'cost-of-living adjustment' means the percentage (if any) for each civil monetary penalty by which—

''(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

''(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

''SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.''

[Pub. L. 104–134, title III, §31001(s)(2), Apr. 26, 1996, 110 Stat. 1321–373, provided that: ''The first adjustment of a civil monetary penalty made pursuant to the amendment made by paragraph (1) [amending Pub. L. 101–410, set out above] may not exceed 10 percent of such penalty.'']

[For authority of the Director of the Office of Management and Budget to consolidate reports required under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410, set out above, to be submitted between Jan. 1, 1995, and Sept. 30, 1997, or to adjust their frequency and due dates, see section 404 of Pub. L. 103–356, set out as a note under section 501 of Title 31, Money and Finance.]

§ 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §791 (R.S. §1047). Changes were made in phraseology.

§ 2463. Property taken under revenue law not repleviable

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §747 (R.S. §934). Changes were made in phraseology.

§ 2464. Security; special bond

(a) Except in cases of seizures for forfeiture under any law of the United States, whenever a warrant of arrest or other process in rem is issued in any admiralty case, the United States marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the respondent or claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the district court where the case is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the

U.S. Code citation	Civil monetary penalty description	Year penalty amount was last adjusted	Maximum penalty amount pursuant to last adjustment	Adjusted maximum penalty amount
	For any other person	2009	75,000	80,000
	For natural person/fraud	2009	75,000	80,000
	For any other person/fraud	2009	375,000	400,000
	For natural person/substantial losses or risk of losses to others.	2009	150,000	160,000
	For any other person/substantial losses or risk of losses to others.	2009	725,000	775,000
15 U.S.C. 80a–9(d)	For natural person	2009	7,500	7,500
	For any other person	2009	75,000	80,000
	For natural person/fraud	2009	75,000	80,000
	For any other person/fraud	2009	375,000	400,000
	For natural person/substantial losses to others/gains to self.	2009	150,000	160,000
	For any other person/substantial losses to others/gain to self.	2009	725,000	775,000
15 U.S.C. 80a–41(e)	For natural person	2009	7,500	7,500
	For any other person	2009	75,000	80,000
	For natural person/fraud	2009	75,000	80,000
	For any other person/fraud	2009	375,000	400,000
	For natural person/substantial losses or risk of losses to others.	2009	150,000	160,000
	For any other person/substantial losses or risk of losses to others.	2009	725,000	775,000
15 U.S.C. 80b–3(i)	For natural person	2009	7,500	7,500
	For any other person	2009	75,000	80,000
	For natural person/fraud	2009	75,000	80,000
	For any other person/fraud	2009	375,000	400,000
	For natural person/substantial losses to others/gains to self.	2009	150,000	160,000
	For any other person/substantial losses to others/gain to self.	2009	725,000	775,000
15 U.S.C. 80b–9(e)	For natural person	2009	7,500	7,500
	For any other person	2009	75,000	80,000
	For natural person/fraud	2009	75,000	80,000
	For any other person/fraud	2009	375,000	400,000
	For natural person/substantial losses or risk of losses to others.	2009	150,000	160,000
	For any other person/substantial losses or risk of losses to others.	2009	725,000	775,000
15 U.S.C. 7215(c)(4)(D)(i)	For natural person	2009	120,000	130,000
	For any other person	2009	2,375,000	2,525,000
15 U.S.C. 7215(c)(4)(D)(ii)	For natural person	2009	900,000	950,000
	For any other person	2009	17,800,000	18,925,000

[78 FR 14181, Mar. 5, 2013]

Subpart F—Fair Fund and Disgorgement Plans

AUTHORITY: 15 U.S.C. 77h–1, 77s, 77u, 78c(b), 78d–1, 78d–2, 78u–2, 78u–3, 78v, 78w, 80a–9, 80a–37, 80a–39, 80a–40, 80b–3, 80b–11, 80b–12, and 7246.

SOURCE: 69 FR 13180, Mar. 19, 2004, unless otherwise noted.

§ 201.1100 Creation of Fair Fund.

In any agency process initiated by an order instituting proceedings in which the Commission or the hearing officer issues an order requiring the payment of disgorgement by a respondent and also assessing a civil money penalty against that respondent, the Commission or the hearing officer may order that the amount of disgorgement and of the civil penalty, together with any funds received pursuant to 15 U.S.C. 7246(b), be used to create a fund for the benefit of investors who were harmed by the violation.

[70 FR 72570, Dec. 5, 2005]

§ 201.1101 Submission of plan of distribution; contents of plan.

(a) *Submission.* The Commission or the hearing officer may, at any time,

order any party to submit a plan for the administration and distribution of funds in a Fair Fund or disgorgement fund. Unless ordered otherwise, the Division of Enforcement shall submit a proposed plan no later than 60 days after the respondent has turned over the funds or other assets pursuant to the Commission's order imposing disgorgement and, if applicable, a civil money penalty and any appeals of the Commission's order have been waived or completed, or appeal is no longer available.

(b) *Contents of plan.* Unless otherwise ordered, a plan for the administration of a Fair Fund or a disgorgement fund shall include the following elements:

(1) Procedures for the receipt of additional funds, including the specification of any account where funds will be held, the instruments in which the funds may be invested; and, in the case of a Fair Fund, the receipt of any funds pursuant to 15 U.S.C. 7246(b), if applicable;

(2) Specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) Procedures for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) Procedures for making and approving claims, procedures for handling disputed claims, and a cut-off date for the making of claims;

(5) A proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed;

(6) Procedures for the administration of the fund, including selection, compensation, and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns, and, subject to the approval of the Commission, make distributions from the fund to investors who were harmed by the violation; and

(7) Such other provisions as the Commission or the hearing officer may require.

§ 201.1102 Provisions for payment.

(a) *Payment to registry of the court or court-appointed receiver.* Subject to such conditions as the Commission or the hearing officer shall deem appropriate, a plan for the administration of a Fair Fund or a disgorgement fund may provide for payment of funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

(b) *Payment to the United States Treasury under certain circumstances.* When, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the disgorgement funds and any civil penalty shall be paid directly to the general fund of the United States Treasury.

§ 201.1103 Notice of proposed plan and opportunity for comment by non-parties.

Notice of a proposed plan of disgorgement or a proposed Fair Fund plan shall be published in the *SEC Docket*, on the SEC website, and in such other publications as the Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Commission.

§ 201.1104 Order approving, modifying, or disapproving proposed plan.

At any time after 30 days following publication of notice of a proposed plan of disgorgement or of a proposed Fair Fund plan, the Commission shall, by order, approve, approve with modifications, or disapprove the proposed plan. In the discretion of the Commission, a proposed plan that is substantially modified prior to adoption may be republished for an additional comment period pursuant to § 201.1103. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for

public accounting firm's attestation report on the registrant's internal control over financial reporting in the registrant's annual report containing the disclosure required by this Item.

(c) *Changes in internal control over financial reporting.* Disclose any change in the registrant's internal control over financial reporting identified in connection with the evaluation required by paragraph (d) of §240.13a–15 or 240.15d–15 of this chapter that occurred during the registrant's last fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting.

Instructions to Item 308: 1. A registrant need not comply with paragraphs (a) and (b) of this Item until it either had been required to file an annual report pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)) for the prior fiscal year or had filed an annual report with the Commission for the prior fiscal year. A registrant that does not comply shall include a statement in the first annual report that it files in substantially the following form: ''This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies.''

2. The registrant must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the registrant's internal control over financial reporting.

[68 FR 36663, June 18, 2003, as amended at 70 FR 1594, Jan. 7, 2005; 71 FR 76595, Dec. 21, 2006; 72 FR 35321, June 27, 2007; 75 FR 57387, Sept. 21, 2010]

Subpart 229.400—Management and Certain Security Holders

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

(a) *Identification of directors.* List the names and ages of all directors of the registrant and all persons nominated or chosen to become directors; indicate all positions and offices with the registrant held by each such person; state his term of office as director and any period(s) during which he has served as such; describe briefly any arrangement or understanding between him and any other person(s) (naming such person(s)) pursuant to which he was or is to be selected as a director or nominee.

Instructions to paragraph (a) of Item 401: 1. Do not include arrangements or understandings with directors or officers of the registrant acting solely in their capacities as such.

2. No nominee or person chosen to become a director who has not consented to act as such shall be named in response to this Item. In this regard, with respect to proxy statements, see Rule 14a–4(d) under the Exchange Act (§240.14a–4(d) of this chapter).

3. If the information called for by this paragraph (a) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

4. With regard to proxy statements in connection with action to be taken concerning the election of directors, if fewer nominees are named than the number fixed by or pursuant to the governing instruments, state the reasons for this procedure and that the proxies cannot be voted for a greater number of persons than the number of nominees named.

5. With regard to proxy statements in connection with action to be taken concerning the election of directors, if the solicitation is made by persons other than management, information shall be given as to nominees of the persons making the solicitation. In all other instances, information shall be given as to directors and persons nominated for election or chosen by management to become directors.

(b) *Identification of executive officers.* List the names and ages of all executive officers of the registrant and all persons chosen to become executive officers; indicate all positions and offices with the registrant held by each such person; state his term of office as officer and the period during which he has served as such and describe briefly any arrangement or understanding between him and any other person(s) (naming such person) pursuant to which he was or is to be selected as an officer.

Instructions to paragraph (b) of Item 401: 1. Do not include arrangements or understandings with directors or officers of the registrant acting solely in their capacities as such.

2. No person chosen to become an executive officer who has not consented to act as such shall be named in response to this Item.

3. The information regarding executive officers called for by this Item need not be furnished in proxy or information statements prepared in accordance with Schedule 14A under the Exchange Act (§ 240.14a–101 of this chapter) by registrants relying on General Instruction G of Form 10–K under the Exchange Act (§ 249.310 of this chapter); *Provided*, that such information is furnished in a separate item captioned ''Executive officers of the registrant'' and included in Part I of the registrant's annual report on Form 10–K.

(c) *Identification of certain significant employees.* Where the registrant employs persons such as production managers, sales managers, or research scientists who are not executive officers but who make or are expected to make significant contributions to the business of the registrant, such persons shall be identified and their background disclosed to the same extent as in the case of executive officers. Such disclosure need not be made if the registrant was subject to section 13(a) or 15(d) of the Exchange Act or was exempt from section 13(a) by section 12(g)(2)(G) of such Act immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable.

(d) *Family relationships.* State the nature of any family relationship between any director, executive officer, or person nominated or chosen by the registrant to become a director or executive officer.

Instruction to paragraph 401(d): The term ''family relationship'' means any relationship by blood, marriage, or adoption, not more remote than first cousin.

(e) *Business experience*—(1) *Background.* Briefly describe the business experience during the past five years of each director, executive officer, person nominated or chosen to become a director or executive officer, and each person named in answer to paragraph (c) of Item 401, including: each person's principal occupations and employment during the past five years; the name and principal business of any corporation or other organization in which such occupations and employment were carried on; and whether such corporation or organization is a parent, subsidiary or other affiliate of the registrant. In addition, for each director or person nominated or chosen to become a director, briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure. If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications. When an executive officer or person named in response to paragraph (c) of Item 401 has been employed by the registrant or a subsidiary of the registrant for less than five years, a brief explanation shall be included as to the nature of the responsibility undertaken by the individual in prior positions to provide adequate disclosure of his or her prior business experience. What is required is information relating to the level of his or her professional competence, which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

(2) *Directorships.* Indicate any other directorships held, including any other directorships held during the past five years, held by each director or person nominated or chosen to become a director in any company with a class of securities registered pursuant to section 12 of the Exchange Act or subject to the requirements of section 15(d) of such Act or any company registered as an investment company under the Investment Company Act of 1940, 15 U.S.C. 80a–1, *et seq.*, as amended, naming such company.

Instruction to Paragraph (e) of Item 401: For the purposes of paragraph (e)(2), where the other directorships of each director or person nominated or chosen to become a director include directorships of two or more registered investment companies that are part of a ''fund complex'' as that term is defined in Item 22(a) of Schedule 14A under the Exchange Act (§ 240.14a–101 of this chapter), the registrant may, rather than listing each such investment company, identify the fund complex and provide the number of investment company directorships held by the director or nominee in such fund complex.

(f) *Involvement in certain legal proceedings.* Describe any of the following events that occurred during the past ten years and that are material to an evaluation of the ability or integrity of

any director, person nominated to become a director or executive officer of the registrant:

(1) A petition under the Federal bankruptcy laws or any state insolvency law was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of such person, or any partnership in which he was a general partner at or within two years before the time of such filing, or any corporation or business association of which he was an executive officer at or within two years before the time of such filing;

(2) Such person was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) Such person was the subject of any order, judgment, or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining him from, or otherwise limiting, the following activities:

(i) Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with such activity;

(ii) Engaging in any type of business practice; or

(iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of Federal or State securities laws or Federal commodities laws;

(4) Such person was the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any Federal or State authority barring, suspending or otherwise limiting for more than 60 days the right of such person to engage in any activity described in paragraph (f)(3)(i) of this section, or to be associated with persons engaged in any such activity;

(5) Such person was found by a court of competent jurisdiction in a civil action or by the Commission to have violated any Federal or State securities law, and the judgment in such civil action or finding by the Commission has not been subsequently reversed, suspended, or vacated;

(6) Such person was found by a court of competent jurisdiction in a civil action or by the Commodity Futures Trading Commission to have violated any Federal commodities law, and the judgment in such civil action or finding by the Commodity Futures Trading Commission has not been subsequently reversed, suspended or vacated;

(7) Such person was the subject of, or a party to, any Federal or State judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of:

(i) Any Federal or State securities or commodities law or regulation; or

(ii) Any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order; or

(iii) Any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity; or

(8) Such person was the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization (as defined in Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26))), any registered entity (as defined in Section 1(a)(29) of the Commodity Exchange Act (7 U.S.C. 1(a)(29))), or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member.

Instructions to paragraph (f) of Item 401: 1. For purposes of computing the ten-year period referred to in this paragraph, the date of a reportable event shall be deemed the date on which the final order, judgment or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees have lapsed. With respect

to bankruptcy petitions, the computation date shall be the date of filing for uncontested petitions or the date upon which approval of a contested petition became final.

2. If any event specified in this paragraph (f) has occurred and information in regard thereto is omitted on the grounds that it is not material, the registrant may furnish to the Commission, at time of filing (or at the time preliminary materials are filed, or ten days before definitive materials are filed in preliminary filing is not required, pursuant to Rule 14a–6 or 14c–5 under the Exchange Act (§§ 240.14a–6 and 240–14c–5 of this chapter)), as supplemental information and not as part of the registration statement, report, or proxy or information statement, materials to which the omission relates, a description of the event and a statement of the reasons for the omission of information in regard thereto.

3. The registrant is permitted to explain any mitigating circumstances associated with events reported pursuant to this paragraph.

4. If the information called for by this paragraph (f) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

5. This paragraph (f)(7) shall not apply to any settlement of a civil proceeding among private litigants.

(g) *Promoters and control persons.* (1) Registrants, which have not been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78*o*(d)) for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, and which had a promoter at any time during the past five fiscal years, shall describe with respect to any promoter, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this Item that occurred during the past five years and that are material to a voting or investment decision.

(2) Registrants, which have not been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, shall describe with respect to any control person, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this section that occurred during the past five years and that are material to a voting or investment decision.

Instructions to paragraph (g) of Item 401: 1. Instructions 1. through 3. to paragraph (f) shall apply to this paragraph (g).

2. Paragraph (g) shall not apply to any subsidiary of a registrant which has been reporting pursuant to Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report or statement.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 55665, Dec. 13, 1982; 48 FR 19874, May 3, 1983; 49 FR 32763, Aug. 16, 1984; 52 FR 48982, Dec. 29, 1987; 59 FR 52695, Oct. 19, 1994; 70 FR 1594, Jan. 7, 2005; 71 FR 53241, Sept. 8, 2006; 73 FR 958, Jan. 4, 2008; 74 FR 68362, Dec. 23, 2009]

§ 229.402 (Item 402) Executive compensation.

(a) *General*—(1) *Treatment of foreign private issuers.* A foreign private issuer will be deemed to comply with this Item if it provides the information required by Items 6.B and 6.E.2 of Form 20–F (17 CFR 249.220f), with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded.

(2) *All compensation covered.* This Item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(3) of this Item, and directors covered by paragraph (k) of this Item, by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specifically excluded from disclosure in this Item. All such compensation shall be reported pursuant to this Item, even if also called for by another requirement, including transactions between the registrant and a third party where a purpose of the transaction is to furnish compensation to any such named executive officer or director. No amount reported as compensation for one fiscal year need be reported in the same manner as compensation for a subsequent fiscal year; amounts reported as compensation for one fiscal year may be required to be reported in a different manner pursuant to this Item.

(3) *Persons covered.* Disclosure shall be provided pursuant to this Item for

§ 230.262 Disqualification provisions.

Unless, upon a showing of good cause and without prejudice to any other action by the Commission, the Commission determines that it is not necessary under the circumstances that the exemption provided by this Regulation A be denied, the exemption shall not be available for the offer or sale of securities, if:

(a) The issuer, any of its predecessors or any affiliated issuer:

(1) Has filed a registration statement which is the subject of any pending proceeding or examination under section 8 of the Act, or has been the subject of any refusal order or stop order thereunder within 5 years prior to the filing of the offering statement required by § 230.252;

(2) Is subject to any pending proceeding under § 230.258 or any similar section adopted under section 3(b) of the Securities Act, or to an order entered thereunder within 5 years prior to the filing of such offering statement;

(3) Has been convicted within 5 years prior to the filing of such offering statement of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission;

(4) Is subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, entered within 5 years prior to the filing of such offering statement, permanently restraining or enjoining, such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the Commission; or

(5) Is subject to a United States Postal Service false representation order entered under 39 U.S.C. § 3005 within 5 years prior to the filing of the offering statement, or is subject to a temporary restraining order or preliminary injunction entered under 39 U.S.C. § 3007 with respect to conduct alleged to have violated 39 U.S.C. § 3005. The entry of an order, judgment or decree against any affiliated entity before the affiliation with the issuer arose, if the affiliated entity is not in control of the issuer and if the affiliated entity and the issuer are not under the common control of a third party who was in control of the affiliated entity at the time of such entry does not come within the purview of this paragraph (a) of this section.

(b) Any director, officer or general partner of the issuer, beneficial owner of 10 percent or more of any class of its equity securities, any promoter of the issuer presently connected with it in any capacity, any underwriter of the securities to be offered, or any partner, director or officer of any such underwriter:

(1) Has been convicted within 10 years prior to the filing of the offering statement required by § 230.252 of any felony or misdemeanor in connection with the purchase or sale of any security, involving the making of a false filing with the Commission, or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser;

(2) Is subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily enjoining or restraining, or is subject to any order, judgment, or decree of any court of competent jurisdiction, entered within 5 years prior to the filing of such offering statement, permanently enjoining or restraining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, involving the making of a false filing with the Commission, or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser;

(3) Is subject to an order of the Commission entered pursuant to section 15(b), 15B(a), or 15B(c) of the Exchange Act, or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*);

(4) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a national securities exchange registered under section 6 of the Exchange Act or

a national securities association registered under section 15A of the Exchange Act for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade; or

(5) Is subject to a United States Postal Service false representation order entered under 39 U.S.C. § 3005 within 5 years prior to the filing of the offering statement required by § 230.252, or is subject to a restraining order or preliminary injunction entered under 39 U.S.C. § 3007 with respect to conduct alleged to have violated 39 U.S.C. § 3005.

(c) Any underwriter of such securities was an underwriter or was named as an underwriter of any securities:

(1) Covered by any registration statement which is the subject of any pending proceeding or examination under section 8 of the Act, or is the subject of any refusal order or stop order entered thereunder within 5 years prior to the filing of the offering statement required by § 230.252; or

(2) Covered by any filing which is subject to any pending proceeding under § 230.258 or any similar rule adopted under section 3(b) of the Securities Act, or to an order entered thereunder within 5 years prior to the filing of such offering statement.

§ 230.263 Consent to Service of Process.

(a) If the issuer is not organized under the laws of any of the states of or the United States of America, it shall at the time of filing the offering statement required by § 230.252, furnish to the Commission a written irrevocable consent and power of attorney on Form F-X [§ 239.42 of this chapter].

(b) Any change to the name or address of the agent for service of the issuer shall be communicated promptly to the Commission through amendment of the requisite form and referencing the file number of the relevant offering statement.

§§ 230.300–230.346 [Reserved]

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S-T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S-T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

REGULATION C—REGISTRATION

AUTHORITY: Sections 230.400 to 230.499 issued under secs. 6, 8, 10, 19, 48 Stat. 78 79, 81, and 85, as amended (15 U.S.C. 77f, 77h, 77j, 77s)

Sec. 230.457 also issued under secs. 6 and 7, 15 U.S.C. 77f and 77g.

NOTE: In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

§ 230.400 Application of §§ 230.400 to 230.494, inclusive.

Sections 230.400 to 230.494 shall govern every registration of securities under the Act, except that any provision in a form, or an item of Regulation S-K (17 CFR 229.001 *et seq.*) referred to in such form, covering the same subject matter as any such rule shall be controlling unless otherwise specifically provided in §§ 230.400 to 230.494.

[47 FR 11434, Mar. 16, 1982, as amended at 76 FR 71876, Nov. 21, 2011]

GENERAL REQUIREMENTS

§ 230.401 Requirements as to proper form.

(a) The form and contents of a registration statement and prospectus shall conform to the applicable rules and forms as in effect on the initial filing date of such registration statement and prospectus.

(b) If an amendment to a registration statement and prospectus is filed for the purpose of meeting the requirements of section 10(a)(3) of the Act or pursuant to the provisions of section 24(e) or 24(f) of the Investment Company Act of 1940, the form and contents of such an amendment shall conform to the applicable rules and forms as in effect on the filing date of such amendment.

(c) An amendment to a registration statement and prospectus, other than an amendment described in paragraph (b) of this section, may be filed on any shorter Securities Act registration

numbered original shall be set forth on the first page of the document.

[47 FR 11434, Mar. 16, 1982, as amended at 47 FR 58238, Dec. 30, 1982; 67 FR 36698, May 24, 2002]

§ 230.404 Preparation of registration statement.

(a) A registration statement shall consist of the facing sheet of the applicable form; a prospectus containing the information called for by Part I of such form; the information, list of exhibits, undertakings and signatures required to be set forth in Part II of such form; financial statements and schedules; exhibits; any other information or documents filed as part of the registration statement; and all documents or information incorporated by reference in the foregoing (whether or not required to be filed).

(b) All general instructions, instructions to items of the form, and instructions as to financial statements, exhibits, or prospectuses are to be omitted from the registration statement in all cases.

(c) The prospectus shall contain the information called for by all of the items of Part I of the applicable form, except that unless otherwise specified, no reference need be made to inapplicable items, and negative answers to any item in Part I may be omitted. A copy of the prospectus may be filed as a part of the registration statement in lieu of furnishing the information in item-and-answer form. Wherever a copy of the prospectus is filed in lieu of information in item-and-answer form, the text of the items of the form is to be omitted from the registration statement, as well as from the prospectus, except to the extent provided in paragraph (d) of this rule.

(d) Where any items of a form call for information not required to be included in the prospectus, generally Part II of such form, the text of such items, including the numbers and captions thereof, together with the answers thereto shall be filed with the prospectus under cover of the facing sheet of the form as a part of the registration statement. However, the text of such items may be omitted provided the answers are so prepared as to indicate the coverage of the item without the necessity of reference to the text of the item. If any such item is inapplicable, or the answer thereto is in the negative, a statement to that effect shall be made. Any financial statements not required to be included in the prospectus shall also be filed as a part of the registration statement proper, unless incorporated by reference pursuant to Rule 411 (§ 230.411).

[47 FR 11435, Mar. 16, 1982, as amended at 62 FR 39763, July 24, 1997; 76 FR 71876, Nov. 21, 2011]

§ 230.405 Definitions of terms.

Unless the context otherwise requires, all terms used in §§ 230.400 to 230.494, inclusive, or in the forms for registration have the same meanings as in the Act and in the general rules and regulations. In addition, the following definitions apply, unless the context otherwise requires:

Affiliate. An *affiliate* of, or person *affiliated* with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

Amount. The term *amount,* when used in regard to securities, means the principal amount if relating to evidences of indebtedness, the number of shares if relating to shares, and the number of units if relating to any other kind of security.

Associate. The term *associate,* when used to indicate a relationship with any person, means (1) a corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (2) any trust or other estate in which such person has a substantial benefical interest or as to which such person serves as trustee or in a similar capacity, and (3) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the registrant or any of its parents or subsidiaries.

Automatic shelf registration statement. The term *automatic shelf registration*

the case of a well-known seasoned issuer, whether or not such registration statement is filed) and is made by means other than:

(1) A prospectus satisfying the requirements of section 10(a) of the Act, Rule 430 (§ 230.430), Rule 430A (§ 230.430A), Rule 430B (§ 230.430B), Rule 430C (§ 230.430C), Rule 430D (§ 230.430D), or Rule 431 (§ 230.431);

(2) A written communication used in reliance on Rule 167 and Rule 426 (§ 230.167 and § 230.426); or

(3) A written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of section 2(a)(10) of the Act.

Graphic communication. The term *graphic communication*, which appears in the definition of ''write, written'' in section 2(a)(9) of the Act and in the definition of written communication in this section, shall include all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation. Graphic communication shall not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.

Ineligible issuer. (1) An *ineligible issuer* is an issuer with respect to which any of the following is true as of the relevant date of determination:

(i) Any issuer that is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that has not filed all reports and other materials required to be filed during the preceding 12 months (or for such shorter period that the issuer was required to file such reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934), other than reports on Form 8–K (§ 249.308 of this chapter) required solely pursuant to an item specified in General Instruction I.A.3(b) of Form S–3 (§ 239.13 of this chapter) (or in the case of an asset-backed issuer, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor (as such terms are defined in Item 1101 of Regulation AB (§ 229.1101 of this chapter) are or were at any time during the preceding 12 calendar months required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all reports and other material required to be filed for such period (or such shorter period that each such entity was required to file such reports), other than reports on Form 8–K required solely pursuant to an item specified in General Instruction I.A.4 of Form S–3);

(ii) The issuer is, or during the past three years the issuer or any of its predecessors was:

(A) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(B) A shell company, other than a business combination related shell company, each as defined in this section;

(C) An issuer in an offering of penny stock as defined in Rule 3a51–1 of the Securities Exchange Act of 1934 (§ 240.3a51–1 of this chapter);

(iii) The issuer is a limited partnership that is offering and selling its securities other than through a firm commitment underwriting;

(iv) Within the past three years, a petition under the federal bankruptcy laws or any state insolvency law was filed by or against the issuer, or a court appointed a receiver, fiscal agent or similar officer with respect to the business or property of the issuer subject to the following:

(A) In the case of an involuntary bankruptcy in which a petition was filed against the issuer, ineligibility will occur upon the earlier to occur of:

(*1*) 90 days following the date of the filing of the involuntary petition (if the case has not been earlier dismissed); or

(*2*) The conversion of the case to a voluntary proceeding under federal

bankruptcy or state insolvency laws; and

(B) Ineligibility will terminate under this paragraph (1)(iv) if an issuer has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency, or receivership process;

(v) Within the past three years, the issuer or any entity that at the time was a subsidiary of the issuer was convicted of any felony or misdemeanor described in paragraphs (i) through (iv) of section 15(b)(4)(B) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(4)(B)(i) through (iv));

(vi) Within the past three years (but in the case of a decree or order agreed to in a settlement, not before December 1, 2005), the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a governmental action that:

(A) Prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws;

(B) Requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws; or

(C) Determines that the person violated the anti-fraud provisions of the federal securities laws;

(vii) The issuer has filed a registration statement that is the subject of any pending proceeding or examination under section 8 of the Act or has been the subject of any refusal order or stop order under section 8 of the Act within the past three years; or

(viii) The issuer is the subject of any pending proceeding under section 8A of the Act in connection with an offering.

(2) An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

(3) The date of determination of whether an issuer is an ineligible issuer is as follows:

(i) For purposes of determining whether an issuer is a well-known seasoned issuer, at the date specified for purposes of such determination in paragraph (2) of the definition of well-known seasoned issuer in this section; and

(ii) For purposes of determining whether an issuer or offering participant may use free writing prospectuses in respect of an offering in accordance with the provisions of Rules 164 and 433 (§ 230.164 and § 230.433), at the date in respect of the offering specified in paragraph (h) of Rule 164.

Majority-owned subsidiary. The term *majority-owned subsidiary* means a subsidiary more than 50 percent of whose outstanding securities representing the right, other than as affected by events of default, to vote for the election of directors, is owned by the subsidiary's parent and/or one or more of the parent's other majority-owned subsidiaries.

Material. The term *material*, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.

Officer. The term *officer* means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.

Parent. A *parent* of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries.

Predecessor. The term *predecessor* means a person the major portion of the business and assets of which another person acquired in a single succession, or in a series of related successions in each of which the acquiring person acquired the major portion of the business and assets of the acquired person.

the notice of sales on Form D regardless of why the amendment is filed.

(b) *How notice of sales on Form D must be filed and signed.* (1) A notice of sales on Form D must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S–T (17 CFR Part 232).

(2) Every notice of sales on Form D must be signed by a person duly authorized by the issuer.

[73 FR 10615, Feb. 27, 2008]

§ 230.504 Exemption for limited offerings and sales of securities not exceeding $1,000,000.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.504 by an issuer that is not:

(1) Subject to the reporting requirements of section 13 or 15(d) of the Exchange Act,;

(2) An investment company; or

(3) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person, shall be exempt from the provision of section 5 of the Act under section 3(b) of the Act.

(b) *Conditions to be met*—(1) *General conditions.* To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502 (a), (c) and (d), except that the provisions of § 230.502 (c) and (d) will not apply to offers and sales of securities under this § 230.504 that are made:

(i) Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with those state provisions;

(ii) In one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or

(iii) Exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to ''accredited investors'' as defined in § 230.501(a).

(2) The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504, in reliance on any exemption under section 3(b), or in violation of section 5(a) of the Securities Act.

NOTE 1: The calculation of the aggregate offering price is illustrated as follows:

If an issuer sold $900,000 on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

NOTE 2: If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

[57 FR 36473, Aug. 13, 1992, as amended at 61 FR 30402, June 14, 1996; 64 FR 11094, Mar. 8, 1999]

§ 230.505 Exemption for limited offers and sales of securities not exceeding $5,000,000.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this section by an issuer that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) *Conditions to be met*—(1) *General conditions.* To qualify for exemption

under this section, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502.

(2) *Specific conditions*—(i) *Limitation on aggregate offering price.* The aggregate offering price for an offering of securities under this § 230.505, as defined in § 203.501(c), shall not exceed $5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this section in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act.

NOTE: The calculation of the aggregate offering price is illustrated as follows:

Example 1: If an issuer sold $2,000,000 of its securities on June 1, 1982 under this § 230.505 and an additional $1,000,000 on September 1, 1982, the issuer would be permitted to sell only $2,000,000 more under this § 230.505 until June 1, 1983. Until that date the issuer must count both prior sales towards the $5,000,000 limit. However, if the issuer made its third sale on June 1, 1983, the issuer could then sell $4,000,000 of its securities because the June 1, 1982 sale would not be within the preceding twelve months.

Example 2: If an issuer sold $500,000 of its securities on June 1, 1982 under § 230.504 and an additional $4,500,000 on December 1, 1982 under this section, then the issuer could not sell any of its securities under this section until June 1, 1983. At that time it could sell an additional $500,000 of its securities.

(ii) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

(iii) *Disqualifications.* No exemption under this section shall be available for the securities of any issuer described in § 230.262 of Regulation A, except that for purposes of this section only:

(A) The term ''filing of the offering statement required by § 230.252'' as used in § 230.262(a), (b) and (c) shall mean the first sale of securities under this section;

(B) The term ''underwriter'' as used in § 230.262 (b) and (c) shall mean a person that has been or will be paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and

(C) Paragraph (b)(2)(iii) of this section shall not apply to any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

[47 FR 11262, Mar. 16, 1982, as amended at 54 FR 11373, Mar. 20, 1989; 57 FR 36473, Aug. 13, 1992]

§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

(a) *Exemption.* Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) or (c) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(a)(2) of the Act.

(b) *Conditions to be met in offerings subject to limitation on manner of offering*—(1) *General conditions.* To qualify for an exemption under this section, offers and sales must satisfy all the terms and conditions of §§ 230.501 and 230.502.

(2) *Specific conditions*—(i) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

NOTE TO PARAGRAPH (b)(2)(i): See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under paragraph (b) of this section.

(ii) *Nature of purchasers.* Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

(c) *Conditions to be met in offerings not subject to limitation on manner of offering*—(1) *General conditions.* To qualify for exemption under this section, sales must satisfy all the terms and conditions of §§ 230.501 and 230.502(a) and (d).

(2) *Specific conditions*—(i) *Nature of purchasers.* All purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors.

(ii) *Verification of accredited investor status.* The issuer shall take reasonable steps to verify that purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors. The issuer shall be deemed to take reasonable steps to verify if the issuer uses, at its option, one of the following non-exclusive and non-mandatory methods of verifying that a natural person who purchases securities in such offering is an accredited investor; provided, however, that the issuer does not have knowledge that such person is not an accredited investor:

(A) In regard to whether the purchaser is an accredited investor on the basis of income, reviewing any Internal Revenue Service form that reports the purchaser's income for the two most recent years (including, but not limited to, Form W–2, Form 1099, Schedule K–1 to Form 1065, and Form 1040) and obtaining a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year;

(B) In regard to whether the purchaser is an accredited investor on the basis of net worth, reviewing one or more of the following types of documentation dated within the prior three months and obtaining a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed:

(*1*) With respect to assets: Bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and appraisal reports issued by independent third parties; and

(*2*) With respect to liabilities: A consumer report from at least one of the nationwide consumer reporting agencies; or

(C) Obtaining a written confirmation from one of the following persons or entities that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor:

(*1*) A registered broker-dealer;

(*2*) An investment adviser registered with the Securities and Exchange Commission;

(*3*) A licensed attorney who is in good standing under the laws of the jurisdictions in which he or she is admitted to practice law; or

(*4*) A certified public accountant who is duly registered and in good standing under the laws of the place of his or her residence or principal office.

(D) In regard to any person who purchased securities in an issuer's Rule 506(b) offering as an accredited investor prior to September 23, 2013 and continues to hold such securities, for the same issuer's Rule 506(c) offering, obtaining a certification by such person at the time of sale that he or she qualifies as an accredited investor.

Instructions to paragraph (c)(2)(ii)(A) through (D) of this section:

1. The issuer is not required to use any of these methods in verifying the accredited investor status of natural persons who are purchasers. These methods are examples of the types of non-exclusive and non-mandatory methods that satisfy the verification requirement in § 230.506(c)(2)(ii).

2. In the case of a person who qualifies as an accredited investor based on joint income with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(A) by reviewing copies of Internal Revenue Service forms that report income for the two most recent years in regard to, and obtaining written representations from, both the person and the spouse.

3. In the case of a person who qualifies as an accredited investor based on joint net worth with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(B) by reviewing such documentation in regard to, and obtaining written representations from, both the person and the spouse.

(d) ''*Bad Actor*'' *disqualification.* (1) No exemption under this section shall be available for a sale of securities if the issuer; any predecessor of the issuer;

any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of such sale; any investment manager of an issuer that is a pooled investment fund; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such investment manager or solicitor; or any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor:

(i) Has been convicted, within ten years before such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(ii) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before such sale, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(iii) Is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(A) At the time of such sale, bars the person from:

(*1*) Association with an entity regulated by such commission, authority, agency, or officer;

(*2*) Engaging in the business of securities, insurance or banking; or

(*3*) Engaging in savings association or credit union activities; or

(B) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale;

(iv) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(b) or 78*o*–4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e) or (f)) that, at the time of such sale:

(A) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(B) Places limitations on the activities, functions or operations of such person; or

(C) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(v) Is subject to any order of the Commission entered within five years before such sale that, at the time of such sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(A) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b–5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)), or any other rule or regulation thereunder; or

(B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(vi) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(vii) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the Commission that, within five years before such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(viii) Is subject to a United States Postal Service false representation order entered within five years before such sale, or is, at the time of such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(2) Paragraph (d)(1) of this section shall not apply:

(i) With respect to any conviction, order, judgment, decree, suspension, expulsion or bar that occurred or was issued before September 23, 2013;

(ii) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;

(iii) If, before the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (d)(1) of this section should not arise as a consequence of such order, judgment or decree; or

(iv) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (d)(1) of this section.

Instruction to paragraph (d)(2)(iv). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(3) For purposes of paragraph (d)(1) of this section, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(i) In control of the issuer; or

(ii) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(e) *Disclosure of prior ''bad actor'' events.* The issuer shall furnish to each purchaser, a reasonable time prior to sale, a description in writing of any matters that would have triggered disqualification under paragraph (d)(1) of this section but occurred before September 23, 2013. The failure to furnish such information timely shall not prevent an issuer from relying on this section if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

Instruction to paragraph (e). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

[47 FR 11262, Mar. 6, 1982, as amended at 54 FR 11373, Mar. 20, 1989; 78 FR 44770, 44804, July 24, 2013]

Print

8312. FINRA BrokerCheck Disclosure

(a) In response to a written inquiry, electronic inquiry, or telephonic inquiry via a toll-free telephone listing, FINRA shall release through FINRA BrokerCheck information regarding:

(1) a current or former FINRA member or a current or former member of a registered national securities exchange that uses the Central Registration Depository ("CRD") for registration purposes ("CRD Exchange") (collectively, "BrokerCheck Firms"); or

(2) a current or former associated person of a BrokerCheck Firm.

(b)

(1) Except as otherwise provided in paragraph (d) below, FINRA shall release the information specified in subparagraph (2) below for inquiries regarding a current or former BrokerCheck Firm, a person currently associated with a BrokerCheck Firm, or a person who was associated with a BrokerCheck Firm within the preceding ten years.

(2) The following information shall be released pursuant to this paragraph (b):

(A) any information reported on the most recently filed Form U4, Form U5, Form U6, Form BD, and Form BDW (collectively "Registration Forms");

(B) currently approved registrations;

(C) summary information about certain arbitration awards against a BrokerCheck Firm involving a securities or commodities dispute with a public customer;

(D) the most recently submitted comment, if any, provided to FINRA by the person who is covered by BrokerCheck, in the form and in accordance with the procedures established by FINRA, for inclusion with the information provided through BrokerCheck. Only comments that relate to the information provided through BrokerCheck will be included;

(E) information as to qualifications examinations passed by the person and date passed. FINRA will not release information regarding examination scores or failed examinations;

(F) in response to telephonic inquiries via the BrokerCheck toll-free telephone listing, whether a particular member is subject to the provisions of Rule 3170 ("Taping Rule");

(G) Historic Complaints (i.e., the information last reported on Registration Forms relating to customer complaints that are more than two (2) years old and that have not been settled or adjudicated, and customer complaints, arbitrations or litigations that have been settled for an amount less than $10,000 prior to May 18, 2009 or an amount less than $15,000 on or after May 18, 2009 and are no longer reported on a Registration Form), provided that any such matter became a Historic Complaint on or after August 16, 1999; and

(H) the name and succession history for current or former BrokerCheck Firms.

(c)

(1) Except as otherwise provided in paragraph (d) below, FINRA shall release the information specified in subparagraph (2) below for inquiries regarding a person who was formerly associated with a BrokerCheck Firm, but who has not been associated with a BrokerCheck Firm within the preceding ten years, and:

(A) was ever the subject of a final regulatory action as defined in Form U4 that has been reported to the CRD system on a Registration Form; or

(B) was registered with FINRA or a CRD Exchange on or after August 16, 1999, and any of the following applies, as reported to the CRD system on a Registration Form:

(i) was convicted of or pled guilty or nolo contendere to a crime;

(ii) was the subject of a civil injunction in connection with investment-related activity, a civil court finding of involvement in a violation of any investment-related statute or regulation, or an investment-related civil action brought by a state or foreign financial regulatory authority that was dismissed pursuant to a settlement agreement; or

(iii) was named as a respondent or defendant in an investment-related, consumer-initiated arbitration or civil litigation which alleged that the person was involved in a sales practice violation and which resulted in an arbitration award or civil judgment against the person.

(2) The following information shall be released pursuant to this paragraph (c):

(A) information regarding the event(s) enumerated in paragraph (c)(1)(A) or (B) as reported on a Registration Form;

(B) administrative information, including employment history and registration history derived from information reported on a Registration Form;

(C) the most recently submitted comment, if any, provided to FINRA by the person who is covered by BrokerCheck, in the form and in accordance with the procedures established by FINRA, for inclusion with the information provided through BrokerCheck. Only comments that relate to the information provided through BrokerCheck will be included; and

(D) information as to qualifications examinations passed by the person and date passed. FINRA will not release information regarding examination scores or failed examinations.

For purposes of this paragraph (c), a final regulatory action as defined in Form U4 may include any final action, including any action that is on appeal, by the SEC, the Commodity Futures Trading Commission, a federal banking agency, the National Credit Union Administration, another federal regulatory agency, a state regulatory agency, a foreign financial regulatory authority, or a self-regulatory organization (as those terms are used in Form U4).

(d) FINRA shall not release:

(1) information reported as a Social Security number, residential history, or physical description, information that FINRA is otherwise prohibited from releasing under Federal law, or information that is provided solely for use by regulators. FINRA reserves the right to exclude, on a case-by-case basis, information that contains confidential customer information, offensive or potentially defamatory language or information that raises significant identity theft, personal safety or privacy concerns that are not outweighed by investor protection concerns;

(2) information reported on Registration Forms relating to regulatory investigations or proceedings if the reported regulatory investigation or proceeding was vacated or withdrawn by the instituting authority;

(3) "Internal Review Disclosure" information reported on Section 7 of the Form U5;

(4) "Reason for Termination" information reported on Section 3 of the Form U5;

(5) events reported on Section 7 of the Form U5 (other than an "Internal Review Disclosure" event) for three business days after FINRA's processing of the filing. However, if an event is reported on Form U5 and the same event is thereafter reported on Form U4 prior to the expiration of the three-business-day period, FINRA will release the Forms U4 and U5 information simultaneously upon processing. Under such circumstances, the three-business-day period may be curtailed;

(6) the most recent information reported on a Registration Form, if:

(A) FINRA has determined that the information was reported in error by a BrokerCheck Firm, regulator or other appropriate authority;

(B) the information has been determined by regulators, through amendments to the uniform Registration Forms, to be no longer relevant to securities registration or licensure, regardless of the disposition of the event or the date the event occurred;

(7) information provided on Schedule E of Form BD.

(e) Eligible parties may dispute the accuracy of certain information disclosed through FINRA BrokerCheck pursuant to the administrative process described below:

(1) Initiation of a Dispute

(A) The following persons (each an "eligible party") may initiate a dispute regarding the accuracy of information disclosed in that eligible party's BrokerCheck report:

(i) any current BrokerCheck Firm;

(ii) any former BrokerCheck Firm, provided that the dispute is submitted by a natural person who served as the former BrokerCheck Firm's Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Chief Legal Officer or Chief Compliance Officer, or individual with similar status or function, as identified on Schedule A of Form BD at the time the former BrokerCheck Firm ceased being registered with FINRA or a CRD Exchange; or

(iii) any associated person of a BrokerCheck Firm or person formerly associated with a BrokerCheck Firm for whom a BrokerCheck report is available.

(B) To initiate a dispute, an eligible party must submit a written notice to FINRA, in such manner and format that FINRA may require, identifying the alleged inaccurate factual information and explaining the reason that such information is allegedly inaccurate. The eligible party must submit with the written notice all available supporting documentation.

(2) Determination of Disputes Eligible for Investigation

(A) FINRA will presume that a dispute of factual information is eligible for investigation unless FINRA reasonably determines that the facts and circumstances involving the dispute suggest otherwise.

(B) If FINRA determines that a dispute is eligible for investigation, FINRA will, except in circumstances involving court-ordered expungement, add a general notation to the eligible party's BrokerCheck report stating that the eligible party has disputed certain information included in the report. The notation will be removed from the eligible party's BrokerCheck report upon resolution of the dispute by FINRA. In disputes involving a court order to expunge information from BrokerCheck, FINRA will prevent the disputed information from being displayed via BrokerCheck while FINRA evaluates the matter.

(C) If FINRA determines that a dispute is not eligible for investigation, it will notify the eligible party of this determination in writing, including a brief description of the reason for the determination. A determination by FINRA that a dispute is not eligible for investigation is not subject to appeal.

(3) Investigation and Resolution of Disputes

(A) If FINRA determines that the written notice and supporting documentation submitted by the eligible party is sufficient to update, modify or remove the information that is the subject of the request, FINRA will make the appropriate change. If the written notice and supporting documentation do not include sufficient information upon which FINRA can make a determination, FINRA, under most circumstances, will contact the entity that reported the disputed information (the "reporting entity") to the CRD system and request that the reporting entity verify that the information, as disclosed through BrokerCheck, is accurate in content and presentation. If a reporting entity other than FINRA is involved, FINRA will defer to the reporting entity about whether the information received is accurate. If the reporting entity acknowledges that the information is not accurate, FINRA will update, modify or remove the information, as appropriate, based on the information provided by the reporting entity. If the reporting entity confirms that the information is accurate in content and presentation or the reporting entity no longer exists or is otherwise unable to verify the accuracy of the information, FINRA will not change the information.

(B) FINRA will notify the eligible party in writing that the investigation has resulted in a determination that:

(i) the information is inaccurate or not accurately presented and has been updated, modified or deleted;

(ii) the information is accurate in content and presentation and no changes have been made; or

(iii) the accuracy of the information or its presentation could not be verified and no changes have been made.

(C) A determination by FINRA, including a determination to leave unchanged or to modify or delete disputed information, is not subject to appeal.

(f) Upon written request, FINRA may provide a compilation of information about FINRA members, subject to terms and conditions established by FINRA and after execution of a licensing agreement prepared by FINRA. FINRA may charge commercial users of such information reasonable fees as determined by FINRA. Such compilations shall consist solely of information selected by FINRA from Forms BD and BDW and shall be limited to information that is otherwise publicly available from the SEC.

• • • Supplementary Material: ----------

.01 Availability and Format of Information Regarding Persons Associated with a Member Prior to 1999. Certain types of information about some persons formerly associated with a member, but who have not been associated with a member since January 1, 1999, may not be available through BrokerCheck. Types of information that may be unavailable for these persons may include the following: administrative information (e.g., employment and registration history) and information as to qualifications examinations. In addition, FINRA may release a composite report that includes information from multiple Registration Forms for such persons.

.02 Disputes Not Eligible for Investigation. For purposes of paragraph (e) of this Rule, examples of situations in which FINRA will determine that a dispute is not eligible for investigation include, but are not limited to:

(a) a dispute that involves information that was previously disputed under this process and that does not contain any new or additional evidence;

(b) a dispute that is brought by an individual or entity that is not an eligible party;

(c) a dispute that does not challenge the accuracy of information contained in a BrokerCheck report but only provides an explanation of such information;

(d) a dispute that constitutes a collateral attack on or otherwise challenges the allegations underlying a previously reported matter such as a regulatory action, customer complaint, arbitration, civil litigation, or termination;

(e) a dispute that consists of a general statement contesting information in a BrokerCheck report with no accompanying explanation; and

(f) a dispute that involves information contained in the CRD system that is not disclosed through BrokerCheck.

.03 Availability of Information Regarding Firms and Associated Persons Registered Exclusively With a CRD Exchange. Information about firms and associated persons that have been registered exclusively with a CRD Exchange is available through BrokerCheck only if the firm or associated person has been registered with a CRD Exchange on or after August 16, 1999.

Amended by SR-FINRA-2015-032 eff. Dec. 12, 2015.
Amended by SR-FINRA-2014-045 eff. Dec. 1, 2014.
Amended by SR-FINRA-2013-047 and SR-FINRA-2013-048 eff. June 23, 2014.
Amended by SR-FINRA-2010-012 eff. Nov. 6, 2010.
Amended by SR-FINRA-2010-012 eff. Aug. 23, 2010.
Amended by SR-FINRA-2009-050 eff. Nov. 30, 2009.
Amended by SR-FINRA-2009-008 eff. May 18, 2009.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2003-168 eff. March 19, 2007.
Amended by SR-NASD-2002-04 eff. Oct 14, 2002.
Amended by SR-NASD-2002-05 eff. March 11, 2002.
Amended by SR-NASD-99-45 eff. March 1, 2000.
Amended by SR-NASD-97-78 eff. Feb. 17, 1998.
Amended eff. May 4, 1988; Sept. 19, 1989; July 1, 1991; Apr. 30, 1992; July 1, 1993.

Selected Notices: 00-16, 02-20, 04-36, 07-10, 08-57, 09-23, 09-66, 10-34, 14-08, 15-49.