Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws

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Thank you, Bill, for that very kind introduction. I am honored to be here.

I see that you have an ambitious agenda over the next two days discussing some of the hardest legal challenges companies are facing today. We at the SEC also have a very ambitious agenda of priorities of interest to you, including completing mandated Dodd-Frank and JOBS Act rulemakings, continuing to optimize our equity and fixed income markets, enhancing our monitoring and oversight of the asset management industry, making further progress on our disclosure effectiveness review, continuing to strengthen our critical exam program, which addresses the areas posing the greatest risk in our regulated entities, and, of course, continuing to bring significant and impactful enforcement cases, which punish misconduct and send strong messages of deterrence.

Today, I will talk about a subject that is very important to us at the SEC and to you as lawyers representing companies that may find themselves in the crosshairs of certain kinds of enforcement actions – disqualifications, exemptions and waivers under the federal securities laws.

These are important provisions that enable the Commission to safeguard investors and our capital markets from those whom we do not think should be able to fully function in them because of their past misconduct. The provisions have, in some cases, been part of the federal securities laws for many decades and apply to natural persons as well as entities. The sweep of the disqualifications is intentionally broad, both in terms of what conduct may trigger them and the range of activities covered by their prohibitions.

The Commission has corollary authority to grant waivers or exemptions in order to calibrate the otherwise overly broad effect of disqualifications that prohibit an entity or individual from engaging in particular activities, including using certain channels for capital raising provided in SEC rules. The burden is on the affected company or individual to demonstrate "good cause" that a waiver should be granted; the Commission's ultimate objective is for the waiver decision to safeguard the public interest and protect investors.

Today, I will discuss my views on how we have and should be exercising our waiver authority. My bottom line is that as we have been doing, we must carefully scrutinize each waiver decision, faithfully apply the applicable legal standards and always keep in mind the purpose of the inquiry – to determine whether the entity or individual, going forward, can engage responsibly and lawfully in the activity at issue in the particular disqualification. If the answer

is "no" at the end of that analysis, we should deny the waiver, no matter the size of the institution or consequences. But waivers were never intended to be, and we should not use them as, an additional enforcement tool designed to address misconduct or as an unjustified mechanism for deterring misconduct.

I also will say a few words about my views on how best to bring about positive change in the corporate cultures of our major financial institutions to help deter the repetitive pattern of significant corporate wrongdoing that we have witnessed both before and after the financial crisis.

The Focus on Waivers and Exemptions

In recent months, the Commission's decisions to grant or deny exemptions or waivers from regulatory disqualifications have been part of a broader public dialogue about the sufficiency of sanctions against entities that engage in wrongdoing. The civil enforcement actions or criminal charges that trigger these disqualifications may be brought by the Commission, or other federal or state authorities. Very often, the misconduct at issue in the enforcement case involves a relatively limited number of a firm's employees or a specific business line, and is wholly unrelated to the activities that would be the subject of the disqualification – for example, violations involving a failure to supervise a registered representative have nothing to do with those in a firm who participate in raising capital under a private placement exemption.

And sometimes, the triggering event for a disqualification is not even the misconduct itself. For example, a firm's broker-dealer charged with violating our net capital rules could, as part of a settlement with us, agree to retain a compliance consultant to help shore up the companies' policies and procedures and to ensure future compliance. Absent a waiver, this particular term of the settlement agreement alone – a provision that is obviously designed to prevent the re-occurrence of the net capital violation and strengthen the broker-dealer's compliance – could disqualify the entire firm from participating in private placements under Rule 506 because agreeing to retain a compliance consultant in this context constitutes a limitation on the business of the broker, which is an event triggering disqualification under that rule.[1]

As you can see from these examples, the potential scope of disqualifications under the federal securities laws is quite wide and can have a very significant impact on market participants. When such disqualifications are triggered, irrespective of the nature of the particular triggering event or the seriousness and pervasiveness of the enforcement issue, the essential question for the Commission is the same -- whether the facts and circumstances of the particular case warrant an exemption or waiver from the triggered disqualifications. The federal securities laws and SEC regulations provide the framework and standards for answering these waiver questions. And the Commission and our staff have been following those standards and answering these questions for decades in a very careful, principled manner, applying the applicable rules rigorously and fairly.

Disqualifications Are Not Enforcement Remedies

Although the disqualifications and their attendant exemptions or waivers can and do arise for individuals and all kinds of businesses, the public debate has been centered on financial institutions, and the appropriateness of granting exemptions or waivers to them. One series of questions that has been raised in the dialogue is whether financial institutions that are

potentially subject to disqualifications are too big to indict or otherwise charge, too big to jail, or even too big to bar. My answer to all of these and similar questions is a resounding, "No." [2]

Rigorous enforcement against entities engaged in wrongdoing, including large financial institutions, is critical for the protection of investors and the fairness of our markets, both in fact and appearance. And, at the SEC, we have many enforcement tools at our disposal which we can and do use vigorously to address and deter conduct by financial institutions that violate the federal securities laws. [3]

Disqualifications, with their accompanying grant of authority and discretion to provide exemptions or waivers, serve a very different purpose. Disqualifications guard against future participation in certain capital market activities by entities or individuals whose misconduct suggests that they cannot be relied upon to conduct those activities in compliance with the law and in a manner that will protect investors and our markets.[4] If, based on the nature and extent of the misconduct, a financial institution should not be permitted to conduct a particular line of business or avail itself of certain provisions of the securities laws, then we should and do deny the request for an exemption or waiver.

In making our decisions, we should and do treat large financial institutions exactly the same as any other firm or person when considering whether a waiver is appropriate – no better, and no worse. We apply the applicable legal standards rigorously, but recognize that the analysis differs from the questions about the appropriate sanctions for the underlying enforcement violation, which, unlike disqualifications, is the place to punish and deter.[5] Unfortunately, the public discussions about the SEC's waiver decisions sometimes do not recognize these important distinctions and can take on a political tone that can blur the analysis.

While it would not be appropriate to discuss the Commission's consideration of specific cases, I believe the current dialogue can benefit from an explanation of the Commission's approach to these matters and the interplay between enforcement actions that can result in disqualifications, the penalties that are imposed as a result of such enforcement actions, and the availability of exemptions and waivers for disqualifications in the federal securities laws.

The Distinction Between Enforcement Remedies and Disqualifications Resulting From Them

The federal securities laws distinguish between the remedies available for enforcement violations, on the one hand, and disqualifications, on the other. The Commission has broad authority to bring enforcement actions for violations of the securities laws and the Commission exercises its authority vigorously, as it should, to bring a wide range of actions against individuals, public companies, financial institutions, investment advisers, broker-dealers, and others.[6] The Commission is authorized by statute to seek a variety of enforcement sanctions and other remedies, including injunctions and cease and desist orders, temporary or permanent bars from participating in aspects of the securities industry and from serving as an officer or director of a public company, disgorgement, financial penalties, and undertakings of various types, including the retention of a compliance consultant.[7] And we aggressively seek these remedies in appropriate cases, tailoring them to the misconduct at issue.

Separately, the federal securities laws provide for disqualifications from engaging in specific, regulated activities for individuals and entities that are the subject of certain kinds of enforcement actions or prosecutions. For example, if, on account of the unlawful actions of one or more employees, an entity is subject to certain enforcement actions and remedies or convicted of certain crimes, Section 9(a) of the Investment Company Act provides for the disqualification of the entire firm from serving as an investment adviser for a registered investment company.[8] Rule 405 of the Securities Act provides that a well-known seasoned issuer (WKSI) can be disqualified from accessing the public capital markets on an accelerated and streamlined basis if it becomes an "ineligible issuer."[9] Rule 506 of Regulation D of the Securities Act, the new "bad actor" provision under the Dodd-Frank Act, provides for disqualification from relying on the rule's private placement exemption in connection with a securities offering.[10] And there are a number of similar provisions throughout the federal securities laws.[11]

Each of the disqualifications – which cover a broad range of activities critical to many market participants – is automatically triggered by a range of enforcement sanctions, including orders prohibiting future violations of the anti-fraud provisions or the registration provisions of the securities laws, orders prohibiting or limiting certain activities (including the imposition of a compliance consultant), or certain criminal convictions, to name just a few.[12] The violations that trigger sanctions may be scienter or non-scienter based and can be the result of the actions of one employee of the organization at whatever level, several executives, or the collective wrongdoing of the entity. Providing for broad disqualifications makes sense, given the need to cover any misconduct that could potentially impact the defendant's fitness to engage in various capital market activities where investors or the markets could be harmed.

To temper the potential over-breadth of the disqualification provisions, the securities laws also provide explicit grants of authority and discretion to the Commission to decide whether it is appropriate to waive a disqualification in light of the facts and circumstances in particular cases. [13] Although the language of the exemption and waiver provisions differ somewhat, generally they require the application of a "good cause" or "public interest" standard, and, in some instances, also include an explicit statutory direction to the Commission to grant an application for a waiver if the disqualification would be unduly or disproportionately severe. [14]

The Rigor of the Process Followed by the Commission and Its Staff

Some have said that the Commission and its staff routinely grant waivers without rigorous analysis. That is simply not true.

Given the breadth of the various potential disqualifications and how long they have been a part of the federal securities laws, as well as the number of enforcement actions we bring every year, the number of waivers granted, which are posted on our website, should not be at all surprising. Nor is it surprising that some financial institutions have sought a number of waivers, given the fact that corporate liability can be triggered through the act of a single employee and the breadth of the disqualification triggers. Indeed, the numbers of waivers are also a good reflection of the aggressiveness of our enforcement efforts against financial institutions and other companies. Not often discussed by the critics are the many instances where waivers are never requested or withdrawn after discussion with our staff because the

facts and circumstances would not meet the applicable standards. Generally, because of the nature of the exemptive process, these instances do not become a matter of public record, but are very much a part of a full, fair and accurate picture.

Recently, I had the staff identify the number of instances where WKSI or Rule 506 bad actor waivers were not granted. Although this information has not been recorded consistently since 2005 when the rules that included the WKSI disqualification were adopted, the staff, at my direction, has been keeping track of both formal and informal requests made for both WKSI waivers since January 2014 and Rule 506 bad actor waivers since September 2013 when the Rule 506 bad actor provisions became effective. The results of the staff review are interesting. During those periods, seven WKSI waivers were granted and at least four were denied; thirteen Rule 506 bad actor waivers were granted and at least fourteen were denied. These figures, of course, do not capture the instances where inquiries are made to the staff seeking guidance and information and a company or individual that is subject to a disqualification is not identified. It also does not capture the situations where a disqualification has occurred and no waiver is ever sought.

More importantly, these numbers and the public record do not reflect the extensive and exacting work of our staff in analyzing every exemption and waiver request. In applying the "in the public interest" and disproportionality standards of our statutes and rules to such requests, the staff considers all of the facts and circumstances related to the conduct that triggered the disqualification.

The staff, among other things, reviews the nature of the violation, the duration of the wrongdoing, the specific employees involved and their level of seniority and responsibility in the institution, and the state of mind of the participants. The staff also considers whether the conduct touched at all upon the activity at issue in the disqualification, as for example, on a request for a WKSI waiver, the staff's central focus is whether the violation in question affects the company's ability to produce reliable financial reporting disclosures going forward.[15] The staff also reviews carefully the extent of the remediation implemented by the institution in the wake of the enforcement action and what measures will be used on an ongoing basis in the future, including enhancement in controls, increased training, and personnel changes. Remediation that is bona fide and effective matters because taking positive steps to address the problems that led to the enforcement action gives us greater confidence in the company's future compliance. A repeated string of serious violations, on the other hand, can call into question whether a firm's compliance culture and "tone at the top" are so deficient that there is cause for concern even in unrelated areas of the firm. Of course, the primary focus of this part of the inquiry is not so much on the number of prior violations, but on the substance of them.

As part of their scrutiny, the staff also looks to see whether the employees involved in the wrongdoing, even if not charged for one reason or another, have been severed from the institution or have been removed from the roles they held when the wrongdoing occurred. In certain circumstances, the staff will require an employee to be removed from that role or terminated as a condition of granting or recommending a waiver. The staff also considers the proportionality of the impact of the disqualification on the institution in light of the nature of the misconduct, as well as any negative effects it could have for the markets, the institution's clients, and the investing public.

That is the process. And we have not in the past, and will not in the future, hesitate to reject a waiver request where disqualification is needed to respond to risks posed by allowing an entity, including a financial institution, to participate in certain business activities, and where the facts and circumstances do not support a waiver.[16] It must be emphasized, however, that it would not be an appropriate exercise of our authority to deny a waiver to further punish an entity for its misconduct or history of misconduct, or in an effort to deter it or others from possible future misconduct, by letting stand an automatic disqualification where the circumstances do not warrant it.[17] Nor would it benefit our enforcement program to impose disqualifications when the applicable legal standards do not support them. Deterring entities from settling charges they would otherwise settle by the unjustified denial of waivers could, thereby delay relief to investors and lead us to expend resources on litigation that should be spent elsewhere.

Soon after my arrival at the Commission, I reviewed our waiver process in light of questions that had been raised about it. One result of that review was my request that the staff consider more broadly exercising our authority to condition a waiver in appropriate circumstances.[18] The staff also has revised the letters we issue granting waivers to clarify that any failure to comply with the representations, conditions and affirmative obligations described in the waiver request or the terms of the enforcement judgment is grounds for revocation of the waiver.[19]

To improve the transparency of our waiver process, the staff last year revised its 2011 written guidance on WKSI waivers, and undertook to develop similar guidance for other waivers. Such staff guidance is intended to provide a clear explanation of factors the staff considers in evaluating waiver requests, in part to facilitate predictability in the results of waiver requests so entities can know the consequences of our enforcement actions while negotiating settlements. And recently, the staff and the Commission have imposed special conditions on waivers where we believed additional safeguards were needed, based on the facts of those particular cases, to satisfy the "good cause" and "in the public interest" requirements before allowing the entities to participate in the activity that would have been prohibited as a result of a disqualification.[20]

Our process is, in short, a thorough, rigorous, and principled application of the law to the particular facts of each case and a process that we continue to scrutinize and enhance. It is not at all a routine or kneejerk exercise.

The Commission's Commitment to Holding Violators Fully Responsible

The Commission may not agree on every waiver decision, nor should that be expected. But the debate about waivers or a particular decision should never obscure or distract from our overall commitment to rigorous enforcement and to using every enforcement tool available to us to punish and deter unlawful conduct.

Deterrence

Let me say a bit more about deterrence, which is a critical part of the current dialogue about holding financial institutions and their executives fully accountable. We have seen repeated and disturbing violations of law by major financial institutions, both before and after the financial crisis.[21] And so the question is, what can we do to break the cycle of misconduct, to change the culture of these institutions?

While by no means a complete answer, imposing significant financial penalties and other tough terms for firms that have committed serious wrongdoing are, I believe, very important, both to sufficiently punish and to send a strong message of deterrence to other institutions. Meaningful sanctions and the public attention they garner also get the attention of boards and shareholders, who are in a position to bring about constructive corrective action, ranging from changes in management to reduction or elimination of bonuses to an overhaul of corporate culture.[22] Non-enforcement efforts, including incentive compensation reforms designed to check excessive risk taking may also better incentivize executives to bring about real change in companies with corporate cultures encouraging excessive risk-taking.[23] And there are other creative ideas about using the deferred compensation of executives to pay corporate penalties, rather than having the shareholders effectively do so.[24] The aim of all these efforts is to have those who run our financial institutions set the right "tone at the top" and imbue the institution from top to bottom with a corporate culture demanding compliance with the law and the highest ethical standards. We are not talking here about a "check the box" compliance program or nice-sounding codes of conduct. The goal is much deeper.

Ultimately, to achieve lasting deterrence, we must break the "cost of doing business" mentality that tends to do little to prevent future misconduct or genuinely transform a company's compliance culture. How to achieve strong deterrence and meaningful change in corporate culture are two of the most difficult and elusive challenges both in law enforcement and corporate governance. No one should think that there are any silver bullets.

In my experience, in the enforcement arena, the most effective deterrent is strong enforcement against responsible individuals, especially senior executives. In the end, it is people, not institutions, who engage in unlawful conduct. And the greatest disincentive for wrongdoing occurs when people believe that their own liberty, reputations and livelihoods are on the line and they recognize that real, personal consequences will follow from their misconduct. "It isn't worth the price" becomes the equation, an equation that is harder to have internalized by an impersonalized institution.

As our record at the SEC shows, a critical priority of our enforcement program is to hold responsible individuals accountable.

During the financial crisis, we charged 175 individuals and entities, including 70 CEOs, CFOs and senior executives.[25] In fiscal year 2014, the Commission charged individuals in approximately 70 percent of our actions excluding delinquent filings and follow-on administrative proceedings. In fiscal year 2015 to date, we have charged individuals in more than 110 actions, or approximately 66 percent of our total actions. Not every case, of course, justifies actions against individuals and we must be fair while also being tough in making our charging decisions. But we consider individual enforcement actions in every investigation and obtain a justification from the staff for their recommendation not to charge individuals. We also do not hesitate to use remedies unique to our statutes, including "causing," "control person" and "failure to supervise" liability to hold accountable executives who were at least negligent in failing to prevent misconduct, or to seek clawbacks under Sarbanes-Oxley Section 304, even against CEOs or CFOs not involved in the wrongdoing, when there is a restatement caused by misconduct in a company.[26]

We also emphasize obtaining remedies with teeth, including disgorgement, civil penalties and, where warranted, bars from the securities industry, from serving as officers and directors of public companies and, in the case of accountants and lawyers, from practicing before the SEC. [27] Such outcomes for individuals are seldom regarded as merely inconvenient costs of doing business – they often are career-ending.

And, of course, the ultimate deterrence is jail, which is a remedy we do not have at the SEC. But we do significant work with our prosecutorial colleagues, referring cases to them, conducting parallel investigations, and bringing our expertise to bear in complex securities fraud cases.

Conclusion

The SEC's enforcement program will continue to be as tough on financial institutions and their executives, as the law, evidence, fairness, and our enforcement tools permit. The Commission and its staff will also continue to take our responsibilities on waiver and exemption requests very seriously. Deciding on waiver requests is a responsibility to be discharged rigorously, within the appropriate legal framework, and in a clear-eyed and principled manner. Denying a company a waiver under circumstances where the applicable legal standards to grant it are satisfied would be a miscarriage of our duty. Such a decision may not only be disproportionately severe in its impact on a firm that is unable to continue conducting a particular business or capital raising activity, but it could also have negative and unfair repercussions on shareholders, employees and clients. Granting a waiver where it is not justified would also, of course, be a miscarriage of our duty and risk harm to investors and the markets.

We are responsible for administering the federal securities laws with each part of our mission as our guide – investors and market participants rightfully demand that we do so. The laws that provide for disqualification, but also provide an accompanying authority for exemptions or waivers, reflect the balance that is at the core of our multi-faceted mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. That must always be our overarching guide in everything we do.

Thank you.

[1] *See* 17 C.F.R. 230.506(d)(1)(iv)(B).

[2] While I served as the United States Attorney for the Southern District of New York, for example, Daiwa Bank, Bankers Trust and Republic Securities of New York were all criminally charged and convicted of securities and other frauds. As a result, in separate decisions by other agencies (the Federal Reserve Bank of New York and the SEC), Daiwa Bank lost its license to do business in the United States and Republic Securities of New York lost its broker-dealer license. *See* P. Truell, "Daiwa Bank Admits Guilt in Cover-Up," New York Times (Feb. 29, 1996), *available at* http://www.nytimes.com/1996/02/29/business/daiwa-bank-admits-guilt-in-cover-up.html; R. Abelson, "Bankers Trust Is Ordered To Pay Fine," New York Times (July 27, 1999), *available at* http://www.nytimes.com/1999/07/27/business/bankers-trust-is-ordered-to-pay-fine.html; K. Gilpin, "Republic New York Pleads Guilty to Securities Fraud," New York Times (Dec. 18, 2001), *available at* http://www.nytimes.com/2001/12/18/business/republic-new-york-pleads-guilty-to-securities-fraud.html.

[3] Although the SEC does not have criminal powers, it has brought significant enforcement actions against many major financial institutions, including UBS, Bank of America, Morgan Stanley, Credit Suisse, Merrill Lynch, JP Morgan, Citigroup, Royal Bank of Scotland, Goldman Sachs, and others. See, e.g., Press Release. No. 2015-7, *SEC Charges UBS Subsidiary With Disclosure Violations and Other Regulatory Failures in Operating Dark Pool* (Jan. 15, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-7.html; Press Release No. 2014-172, *Bank of America Admits Disclosure Failures to Settle SEC Charges* (Aug. 21, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542719632; Press Release No.. 2014-144, *Morgan Stanley to Pay $275 Million for Misleading Investors in Subprime RMBS Offerings* (July 24, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542355594; Press Release No. 2014-39, *Credit Suisse Agrees to Pay $196 Million and Admits Wrongdoing in Providing Unregistered Services to U.S. Clients* (Feb. 21 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540816517; Press Release No. 2013-261, *SEC Charges Merrill Lynch With Misleading Investors in CDOs* (Dec. 12, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540492377; Press Release No. 2013-239, *SEC Charges Royal Bank of Scotland Subsidiary with Misleading Investors in Subprime RMBS Offering* (Nov. 7, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540300002; Press Release No. 2013-187, *JPMorgan Chase Agrees to Pay $200 Million and Admits Wrongdoing to Settle SEC Charges* (Sept. 19, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539819965; Press Release No. 2011-214, *Citigroup to Pay $285 Million to Settle SEC Charges for Misleading Investors About CDO Tied to Housing Market* (Oct. 19, 2011), *available at* http://www.sec.gov/news/press/2011/2011-214.htm; Press Release No. 2010-123, *Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO* (July 15, 2010), *available at* http://www.sec.gov/news/press/2010/2010-123.htm;

[4] For example, the purpose underlying section 9(a) is stated in the legislative history of the 1940 Act: "What [the drafters of the 1940 Act] were trying to accomplish, in the view of some of the things that happened to various trusts [prior to adoption of the 1940 Act], was to get rid of persons with criminal records, persons who were under injunctions from courts of competent jurisdiction for improper practices in connection with securities. [The drafters] had no other motivation. … Our purpose was simply to try to get that type of person out of this business – where such persons ought to be out of it." *See* Investment Trusts and Investment Companies: Hearings on S. 3580 Before the Subcomm. on Securities and Exchange of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 874 (1940) (statement of Judge Healy).

[5] How severely to punish offenders in order to deter their future misconduct (specific deterrence), as well as the future misconduct of others who may be chilled by the punishment (general deterrence) pose some of the most difficult questions and hard-to-measure effects in law enforcement. *See generally* C. Beccaria, On Crimes and Punishment (1764), for the origins of rational choice theory which supports the argument that deterrence is a primary justification for punishment.

[6] In FY 2014, the Enforcement Division brought a record number of actions that spanned the financial sector. *See* Press Release No. 2014-230, *SEC's FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases* (October 16, 2014) *available at*

http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543184660.

[7] *See, e.g.*, 15 U.S.C. §§ 78o(b), 78u(d) (Securities Exchange Act §§ 15(b), 21(d)).

[8] 15 U.S.C. 80a-9(a). Section 9(a) of the Investment Company Act automatically disqualifies all of the following from "serv[ing] or act[ing] in the capacity of employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end company, registered unit investment trust, or registered face-amount certificate company":

> (1) any person who within 10 years has been convicted of any felony or misdemeanor inv
> the purchase or sale of any security or arising out of such person's conduct as an underw
> broker, dealer, investment adviser, municipal securities dealer, government securities brok
> government securities dealer, bank, transfer agent, credit rating agency, or entity or perso
> required to be registered under the Commodity Exchange Act, or as an affiliated person,
> salesman, or employee of any investment company, bank, insurance company, or entity o
> person required to be registered under the Commodity Exchange Act;
>
> (2) any person who, by reason of any misconduct, is permanently or temporarily enjoined
> order, judgment, or decree of any court of competent jurisdiction from acting as an under
> broker, dealer, investment adviser, municipal securities dealer, government securities brok
> government securities dealer, bank, transfer agent, credit rating agency, or entity or perso
> required to be registered under the Commodity Exchange Act, or as an affiliated person,
> salesman, or employee of any investment company, bank, insurance company, or entity o
> person required to be registered under the Commodity Exchange Act, or from engaging in
> continuing any conduct or practice in connection with any such activity or in connection w
> the purchase or sale of any security; or
>
> (3) a company any affiliated person of which is ineligible, by reason of paragraph (1) or (
> this subsection, to serve or act in the foregoing capacities.

[9] 17 C.F.R. 230.405.

[10] 17 C.F.R. 230.506(d).

[11] *See* 17 C.F.R. 230.505(b)(2)(iii), 17 C.F.R. 230.230.262 and 17 C.F.R. 230.602(e); *see also* 15 U.S.C. §§ 77z-2 and 78u-5 and 17 C.F.R. 275.206(4)-3.

[12] *See, e.g.,* Rule 506 of Regulation D of the Securities Act; Rule 405 of Securities Act; and Section 9(a) of the Investment Company Act.

[13] *See* 17 C.F.R. 230.405, 230.506(d)(2)(ii), 230.505(b)(2)(iii)(C), 230.602(e), and 230.262; and 15 U.S.C. 80a-9(a); and 15 U.S.C. §§ 77z-2 and 78u-5.

[14] Section 9(c) of the Investment Company Act provides that a person may apply for an exemption from this disqualification. Importantly, section 9(c) directs that the Commission "shall . . . grant such application" if it is established that the disqualification "as applied to such person [is] unduly or disproportionally severe or that the conduct of such person has been such as not to make it against the public interest to grant [the waiver]." 15 U.S.C. 80a-9(c). Rule 506 of Regulation D of the Securities Act states that the disqualification should not apply "upon a showing of good cause . . . if the Commission determines it is not necessary under the

circumstances that the exemption be denied." Rule 405 of the Securities Act provides that such an issuer shall not be an ineligible issuer if the Commission determines, upon showing of good cause, that is not necessary under the circumstances that the issuer be considered an ineligible issuer. The staff has issued written guidance setting forth the criteria the Commission staff will consider in making this determination under Rule 405. *See Revised Statement on Well-Known Seasoned Issuers* (April 24, 2014), *available at* http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm.

[15] *See Revised Statement on Well-Known Seasoned Issuers* (April 24, 2014), *available at* http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm.

[16] *See, e.g.,* August 18, 2014 Letter from Cleary Gottlieb Steen & Hamilton LLP to SEC Division of Corporation Finance ("In 2010, Citigroup was deemed an ineligible issuer, and thus lost its WKSI status, because of its settlement with the Commission in connection with alleged material misstatements about exposure to sub-prime mortgages."), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/2014/citigroup-081814-405.pdf.

[17] *See*, Disqualification of Felons and Other ''Bad Actors'' from Rule 506 Offerings, 78 FR 44730 at 44759, 44760, and 44762 (July 24, 2013) http://www.gpo.gov/fdsys/pkg/FR-2013-07-24/pdf/2013-16983.pdf.

[18] *See* SEC Release No. 9589 (May 19, 2014) *available at* http://www.sec.gov/rules/other/2014/33-9589.pdf; SEC Release No. 9682 (Nov. 25, 2014) *available at* http://www.sec.gov/rules/other/2014/33-9682.pdf; SEC Release No. 9712 (Jan. 27, 2015) *available at* http://www.sec.gov/rules/other/2015/33-9712.pdf.

[19] Historically, our staff guidance and letters granting waiver requests have stated that waivers may be granted on a conditional basis and that a failure to comply with an enforcement judgment or with undertakings or affirmative obligations contained in the waiver request can result in a subsequent reconsideration of the decision to grant the waiver.

[20] *See* SEC Release No. 9682 (Nov. 25, 2014) *available at* http://www.sec.gov/rules/other/2014/33-9682.pdf; SEC Release No. 9712 (Jan. 27, 2015) *available at* http://www.sec.gov/rules/other/2015/33-9712.pdf

[21] *See supra* Note 3 and *see also e.g.,* Department of Justice Press Release, *RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates* (February 6, 2013), *available at* http://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor; Department of Justice Press Release, *UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates* (December 19, 2012) , *available at* http://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor; and Commodity Futures Trading Commission Press Release, *CFTC Orders Five Banks to Pay over $1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates*(November 12, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7056-14

[22] For more detail on my thoughts in this area, generally see my remarks from last year at Stanford University's Directors College. A Few Things Directors Should Know About the SEC (June 23, 2014), *available at*

http://www.sec.gov/News/Speech/Detail/Speech/1370542148863.
http://www.sec.gov/News/Speech/Detail/Speech/1370542148863.

[23] *See* Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[24] *See* William C. Dudley, "Enhancing Financial Stability by Improving the Culture in the Financial Services Industry," (October 20, 2014), *available* at http://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html.

[25] Our record on financial crisis cases may be found at http://www.sec.gov/spotlight/enf-actions-fc.shtml.

[26] *See,* e.g. Press Release No. 2014-67, *SEC Charges Owner of N.J.-Based Brokerage Firm With Manipulative Trading* (April 4, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541406190 (charging an owner of a brokerage firm with aiding and abetting Exchange Act violations by co-owners of firm); Press Release No. 2014-263, *Wedbush Securities and Two Officials Agree to Settle SEC Case* (Nov. 20, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543504806 (charging two former executives of a broker-dealer with causing the entity's violations of the market access rule); Press Release No. 2014-249, *SEC Charges Allen Park, Mich. and Two Former City Leaders in Fraudulent Muni Bond Offering for Movie Studio Project* (Nov. 6, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543373355 (charging a former mayor as a control person in a case where the city's bond offerings falsely described the scope and viability of the project being funded); Press Release No. 2015-46, *SEC Charges Texas-Based Brokerage Firm With Violating Supervisory and Customer Protection Rules* (March 4, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-46.html (charging firm with failing to supervise registered representatives' transfer of customer funds to outside business activities); Press Release No. 2015-28, *SEC Announces Half-Million Dollar Clawback from CFOs of Silicon Valley Company That Committed Accounting Fraud* (February 10, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-28.html (obtaining clawbacks of nearly half a million dollars from two former CFOs of a software company during time periods the company presented materially false and misleading financial statements).

[27] An unofficial count indicates that, for example, for calendar years 2000 through 2014, the Commission imposed approximately 2,500 investment adviser bars. Approximately 960 of these bars were imposed in calendar years 2010 through 2014.

Modified: March 12, 2015