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**Jonathan L. Marcus**

# CFTC Waivers of SEC Automatic Disqualifications

Under certain Securities and Exchange Commission ("SEC") regulations promulgated after the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, companies that violate certain Commodity Exchange Act ("CEA") provisions and Commodity Futures Trading Commission ("CFTC") regulations are automatically disqualified from relying on exemptions from SEC regulations for securities offerings.[1] The SEC explicitly conferred upon the CFTC authority to waive these disqualifications,[2] however, and the CFTC has exercised that authority in connection with a number of orders settling enforcement actions since 2013.[3] In recent years, some CFTC commissioners have questioned whether the SEC acted outside the scope of its congressional authority in empowering the CFTC to waive disqualifications, whether the CFTC has the requisite expertise to do so, and whether such waivers generally are best left to the SEC's discretion.[4] Among other concerns, CFTC commissioners have pointed to problems the agency's waiver authority has posed for the CFTC's Division of Enforcement, whose ability to settle actions with parties subject to disqualification often hinges on the granting of a waiver. In apparent response to some of the concerns that have been raised, in October 2020, SEC Chairman Jay Clayton and CFTC Chairman Heath P. Tarbert agreed by joint letter to establish a one-year pilot program, effective immediately, to formalize the agencies' practices regarding CFTC waivers of automatic disqualifications in orders settling CFTC enforcement actions.[5] While the process set out in the letter appears to ameliorate some CFTC commissioners' concerns, it does not resolve all of them, and its future is unclear.

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[1] *See* 17 C.F.R. §§ 230.262(a)(3), 230.506(d)(1)(iii).

[2] *Id.* §§ 230.262(b)(3), 230.506(d)(2)(iii).

[3] *See, e.g., In re JPMorgan Chase Bank, N.A.*, CFTC No. 14-01 (Oct. 16, 2013).

[4] *See, e.g.*, CFTC, Supporting Statement of Commissioner Dan M. Berkovitz Regarding Sunoco Enforcement Action and Opposing "Bad Actor" Waiver (Sept. 30, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement093020; CFTC, Supporting Statement of Commissioner Dan M. Berkovitz Regarding Historic Penalty against JPMorgan and Opposing "Bad Actor" Waiver (Sept. 29, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement092920; CFTC, Joint Statement of Concurrence of Commissioners Dawn D. Stump and Rostin Behnam Regarding JPMorgan Chase & Co., et al. (Sept. 29, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpbehnamjointstatement092920; CFTC, Dissenting Statement of Commissioner Dan M. Berkovitz, In re Tower Research Capital LLC: Waiver of SEC "Bad Actor" Disqualifications (Nov. 7, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement110719; CFTC, Statement of Commissioner Rostin Behnam Regarding Tower Research Capital LLC (Nov. 7, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement110719.

[5] *See* Jay Clayton & Heath P. Tarbert, Joint Letter re: Notification Protocol for CFTC Orders Implicating SEC Regulation A and D (Oct. 23, 2020), https://www.cftc.gov/media/5161/jointletter102320Reg%20A-D/download.

## Background

The federal securities laws and SEC regulations impose a number of automatic disqualifications that, based on various triggering events—including CFTC orders finding violation of statutes or regulations prohibiting fraud or price manipulation—prevent companies and individuals from relying on exemptions or engaging in conduct that would otherwise be permitted. Two of these disqualifications, arising under SEC Regulations A and D, have special relevance to the CFTC.[6] Regulation A creates an exemption from registration for certain public offerings of up to $50 million in the same 12-month period, while Regulation D provides for registration exemptions for private placements.[7] Because registered public offerings require significant disclosures, registration-exempt offerings allow companies to "obtain funding faster, at less cost, and with much less disclosure than with a public offering."[8] Regulations A and D provide that no exemption for a sale of securities shall be available if the issuer, any predecessor or affiliated issuer, or a certain person associated with the issuer[9] is, among other triggering events,[10] "subject to a final order" of the CFTC that, at the time of filing of the offering statement (with respect to Regulation A) or sale (with respect to Regulation D), bars the person from associating with an entity regulated by the CFTC or "[c]onstitutes a final order based on a

[6] Other automatic disqualifications include (1) loss of "well-known seasoned issuer" status (17 C.F.R. § 230.405); (2) disqualification from serving as an investment adviser, depositor, or principal underwriter of registered investment companies (15 U.S.C. § 80a-9(a)); (3) loss of safe harbors under the Securities Act of 1933 and Securities Exchange Act of 1934 for forward-looking statements (15 U.S.C. §§ 77z-2(b)(1)(A) & 78u-5(b)(1)(A)); (4) loss of exemption from registration under Regulation E for securities issued by small business investment companies and business development companies (17 C.F.R. § 230.602(b)-(e)); and (5) prohibition on a registered investment adviser receiving cash fees for solicitation (17 C.F.R. § 275.206(4)-3(a)(1)(ii)(C)). There are a variety of events that trigger these automatic disqualifications, for example, where a company or its subsidiary was the subject of a judicial or administrative order that determined the entity violated the antifraud provisions of the federal securities laws. *See, e.g.*, 17 C.F.R. § 230.405. Although 15 U.S.C. § 80a-9(a)'s automatic disqualification applies to persons who have been convicted of crimes involving conduct as a person required to be registered under the CEA, triggering events for automatic disqualifications outside of those under Regulations A and D generally do not directly implicate the CEA or CFTC regulations. *See* 15 U.S.C. § 80a-9(a)(1)-(2).

[7] *See* 17 C.F.R. § 230.251, *et seq.* (Regulation A); 17 C.F.R. § 230.500, *et seq.* (Regulation D).

[8] *See* CFTC, Dissenting Statement of Commissioner Dan M. Berkovitz, In re Tower Research Capital LLC: Waiver of SEC "Bad Actor" Disqualifications (Nov. 7, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement110719.

[9] For example, any director, executive officer, or beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power. *See* 17 C.F.R. §§ 230.262(a), 230.506(d)(1).

[10] Other events that trigger automatic disqualifications under Regulations A and D include certain criminal convictions, court orders, and orders of the SEC or other federal or state agencies; suspension or expulsion from membership in, or suspension or bars 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"; serving as, or being named as, an underwriter in connection with certain registration statements or offering statements that are the subject of various SEC actions such as refusal or stop orders; and certain U.S. Postal Service false representation orders. *See* 17 C.F.R. § 230.262(a)(1)-(8); 17 C.F.R. § 230.506(d)(1)(i)-(viii).

violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct" entered within ten years before the filing of the offering statement (with respect to Regulation A) or sale (with respect to Regulation D).[11] These disqualifications thus implicate a number of CEA provisions and CFTC regulations prohibiting fraudulent or manipulative conduct.[12]

The SEC conferred broad authority on the CFTC to waive these disqualifications. Regulations A and D provide that the disqualifications will not apply if, before the filing of the relevant offering statement (with respect to Regulation A) or before the relevant sale (with respect to Regulation D), the CFTC advises in its order, or in a separate communication to the SEC, that disqualification under Regulation A or D should not arise as a consequence of the CFTC's order.[13]

In its rulemaking for the Regulation D automatic disqualification, which preceded rulemaking for the Regulation A automatic disqualification, the SEC requested comment on how the agency should handle waiver applications involving final orders of state regulators.[14] Some commenters recommended the SEC adopt automatic exceptions from disqualification if "(i) the person against whom an order is issued is licensed or regulated in the relevant state and is still permitted to conduct securities-related work in the state, or (ii) the regulator issuing the relevant order determines that disqualification is not necessary under the circumstances."[15] While the SEC declined to adopt the first of these two exceptions, the agency agreed that the second prong "allows the relevant authorities to determine the impact of their orders and conserves Commission resources (which might otherwise be devoted to consideration of waiver applications) in cases where the relevant authority determines that disqualification from Rule 506

[11] 17 C.F.R. § 230.262(a)(3)(i)(A), (ii); 17 C.F.R. § 230.506(d)(1)(iii)(A)(1), (B).

[12] The provisions include the CFTC's traditional antifraud authority under 7 U.S.C. § 6b, commodity pool operator and commodity trading advisor antifraud authority under 7 U.S.C. § 6o, the agency's traditional prohibitions on price manipulation under 7 U.S.C. §§ 9(3) and 13(a)(2) and 17 C.F.R. § 180.2, and post-Dodd-Frank prohibitions on fraud-based price manipulation under 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1.

[13] 17 C.F.R. §§ 230.262(b)(3), 230.506(d)(2)(iii). Regulations A and D also provide that courts or other agencies whose orders may result in automatic disqualifications may grant similar waivers. *See id.* The SEC itself may waive the disqualifications if, "[u]pon a showing of good cause and without prejudice to any other action by the [SEC]," "the [SEC] determines that it is not necessary under the circumstances that an exemption be denied." 17 C.F.R. §§ 230.262(b)(2), 230.506(d)(2)(ii). Automatic disqualifications do not apply, with respect to Regulation A, to certain orders of the SEC or other agencies that occurred or were issued before June 19, 2015, and, with respect to Regulation D, any conviction, order, judgment, decree, suspension, expulsion or bar that occurred or was issued before September 23, 2013 (i.e., the effective dates of the regulations setting forth the disqualifications). 17 C.F.R. §§ 230.262(b)(1), 230.506(d)(2)(i). Additionally, automatic disqualifications under Regulations A and D do not apply if the issuer "establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed." 17 C.F.R. §§ 230.262(b)(4), 230.506(d)(2)(iv).

[14] *See* Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings, 76 Fed. Reg. 31,518, 31,529-30 (June 1, 2011).

[15] *See* Disqualifications of Felons and Other "Bad Actors" from Rule 506 Offerings, 78 Fed. Reg. 44,730, 44,748 (July 24, 2013).

offerings is not warranted."[16] The SEC adopted this form of waiver for disqualifying orders of not only state agencies, but also of courts and other federal agencies including the CFTC, with respect to Regulation D, and later with respect to Regulation A.[17]

**Differing Perspectives on Waivers**

The SEC's waiver provisions have generated controversy—both as a general matter and specifically with respect to the grant of waiver authority to the CFTC. Some SEC commissioners have argued that the agency's practice of routinely granting waivers amounts to a rubber stamp, and that some institutions are treated as "too big to bar."[18] Senator Elizabeth Warren (D-Mass.) similarly argued that the practice of granting waivers to large financial institutions that are recidivists reflects an apparent view by the SEC that those institutions "deserve[] to continue to enjoy special privileges under the securities laws despite . . . deep breaches of trust and evident mismanagement."[19]

Other SEC commissioners have defended the agency's waiver practice as appropriate, particularly where automatic disqualifications can effectively function as a "corporate death penalty" that could put firms out of business.[20] In 2015, then-SEC Chair Mary Jo White observed that in some cases, misconduct that would otherwise result in an automatic disqualification does not warrant that penalty where it involves only a "relatively limited number

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[16] *See id*.

[17] *See id.*; *see also* Amendments for the Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21,806, 21,902 (Apr. 20, 2015) (17 C.F.R. § 230.262(b)(2)).

[18] *See, e.g.*, Kara M. Stein, Dissenting Statement in the Matter of The Royal Bank of Scotland Group, plc, Regarding Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver From Being an Ineligible Issuer, SEC (Apr. 28, 2014), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541670244. For example, in dissenting from waivers granted by the SEC to banks involved in settlements related to alleged manipulation of foreign exchange rates—some of which had also been involved in settlements related to the manipulation of the London Interbank Offered Rate—Commissioner Kara M. Stein argued that the waivers would "continu[e] [a] culture that does not adequately support legal and ethical behavior," and that ignoring recidivism results in "risks to investors and the American public that are being ignored." Kara M. Stein, Dissenting Statement Regarding Certain Waivers Granted by the Commission for Certain Entities Pleading Guilty to Criminal Charges Involving Manipulation of Foreign Exchange Rates, SEC (May 21, 2015), http://www.sec.gov/news/statement/stein-waivers-granted-dissenting-statement.html; *see also* Luis A. Aguilar & Kara M. Stein, Dissenting Statement in the Matter of Oppenheimer & Co., Inc., SEC (Feb. 4, 2015), http://www.sec.gov/news/statement/dissenting-statement-oppenheimer-inc.html (arguing that the SEC should be less willing to grant waivers to entities with a "failed compliance culture").

[19] Letter from Sen. Elizabeth Warren (D-Mass.) to Mary Jo White, Chair, SEC at 8 (June 2, 2015), https://www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf.

[20] Daniel M. Gallagher, Why is the SEC Wavering on Waivers? Remarks at the 37th Annual Conference on Securities Regulation and Business Law (Feb. 13, 2015), https://www.sec.gov/news/speech/021315-spc-cdmg.html. Commissioner Gallagher also criticized automatic disqualifications as "the antithesis of 'flexible' sanctions that can be 'tailored' to the 'gravity of the violation.'" *Id.* (quoting Financial Reporting Practices (Part 2): Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce, 100th Cong., 2d Sess., at 25 (May 2, 1988) (statement of SEC Chairman David S. Ruder)).

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."[21] Chair White also argued that disqualifications are fundamentally different from traditional enforcement remedies in that, unlike sanctions specifically intended to deter federal securities laws violations, disqualifications are a more blunt instrument in that they prevent "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 . . . markets."[22] In addition to these considerations, waiver authority also provides the SEC and other agencies with flexibility and leverage in settlement negotiations.

Nonetheless, some members of Congress have sought to subject the SEC's waiver practices to more stringent requirements and restrict the agency's ability to consider waiver requests in connection with orders settling enforcement actions. In 2015, Representative Maxine Waters (D-Cal.) introduced a bill called the Bad Actor Disqualification Act that would severely limit the ability of firms to obtain waivers from the SEC. Representative Waters reintroduced the bill in 2017 and 2019, but it has never become law. In its most recent iteration, the bill would, among other things, require (i) a person seeking a waiver to first petition the SEC for a temporary waiver, which the SEC could grant upon determination that the person would suffer "immediate irreparable injury" absent the waiver, (ii) Federal Register publication of the waiver request, with an opportunity for public comment, and (iii) a public hearing on the granting of a permanent waiver, which would need to be "in the public interest," "necessary for the protection of investors," and in furtherance of "market integrity."[23]

In July 2019, Chairman Clayton announced modifications to the SEC's waiver process that move in the opposite direction from the proposed legislation. Those modifications are designed to enhance the agency's ability to consider waivers in conjunction with the settlement of enforcement actions.[24] The modifications also are intended to promote "certainty," which Chairman Clayton noted is a "key driver of settlements," particularly with respect to enforcement actions that potentially entail automatic disqualifications.[25] He noted that parties seeking settlements often make contemporaneous settlement offers and waiver requests, the latter of

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[21] Mary Jo White, Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws (Mar. 12, 2015), https://www.sec.gov/news/speech/031215-spch-cmjw.html. Chair White provided, as an example, violations involving a failure to supervise that have "nothing to do with those [individuals] in a firm who participate in raising capital under a private placement exemption." *Id.* She also noted that in some cases, the event that triggers disqualification is "not even the misconduct itself," remarking that a term of a settlement agreement designed to prevent recurrence of certain violations, such as the retention of a compliance consultant, could itself disqualify the settling entity from some business activities. *See id.*

[22] *Id.*

[23] *See* Bad Actor Disqualification Act of 2019 § 3, 116th Cong. (June 2019), https://financialservices.house.gov/uploadedfiles/bills-116pih-badactor.pdf.

[24] Jay Clayton, Statement Regarding Offers of Settlement (July 3, 2019), https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement.

[25] *See id.*

which are considered by the SEC Division of Corporation Finance and/or the Division of Investment Management, or determined by the SEC staff under delegated authority.[26] He said that while the SEC has considered settlement and waiver requests "almost exclusively on a segregated basis," treating the two as "separate and unconnected events" is "inconsistent with appropriate consideration of the substance and interconnected nature of the matters at issue and undermines factors that drive appropriate settlements," and can "substantially complicate and lengthen the negotiating process."[27] Chairman Clayton said that, going forward, an offer of settlement that "includes a simultaneous waiver request negotiated with all relevant divisions" would be presented to and considered by the Commission as a "single recommendation from the staff,"[28] in effect making the Commission's approval of an enforcement settlement contingent on its accepting a waiver application.

The controversy over the waiver process conducted by the SEC extends to the CFTC. As noted above, some CFTC commissioners have questioned both the legality and wisdom of the SEC's decision to authorize the CFTC to use its discretion to waive certain automatic disqualifications. In 2019, Commissioner Dan M. Berkovitz dissented from the CFTC's waiver of automatic disqualifications under Regulation D in an order settling charges against Tower Research Capital LLC for spoofing and a manipulative and deceptive scheme.[29] Commissioner Berkovitz registered two principal objections: that the CFTC lacked both the legal authority and the requisite expertise to "determine the appropriate procedures and disqualifications for public and private securities offerings and how best to protect investors from fraud in the securities markets."[30]

With respect to legal authority, Commissioner Berkovitz contended that there is nothing in either the CEA, the federal securities laws, or any other law that authorizes the CFTC to make determinations with respect to the federal securities laws, and that "[b]ecause there has been no delegation by Congress to the CFTC to administer the registration of securities . . . the CFTC's determination [to grant a waiver] . . . has no legal effect."[31] Additionally, he argued that, as a

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[26] *See id.* Echoing Chair White's 2015 remarks, Chairman Clayton noted that the analysis informing the SEC's waiver determination can be complex because "the businesses and operations of the entity affected by the collateral disqualifications may or may not be related to the conduct at issue, and the collateral consequences can range from immaterial to extremely significant and may or may not have an impact on investor protection." *Id.*

[27] *Id.*

[28] *Id.*

[29] *See In re Tower Research Capital LLC*, CFTC No. 20-06 (Nov. 6, 2019). The settlement required Tower Research Capital LLC to pay approximately $67.4 million in monetary relief (nearly $32.6 million in restitution, $10.5 million in disgorgement, and a civil monetary penalty of $24.4 million) for charges alleging spoofing and manipulation in equity index futures products on two exchanges.

[30] CFTC, Dissenting Statement of Commissioner Dan M. Berkovitz, In re Tower Research Capital LLC: Waiver of SEC "Bad Actor" Disqualifications (Nov. 7, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement110719.

[31] *Id.* (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.")).

policy matter, it is "inappropriate for the CFTC—the federal derivatives regulator—to opine on, or determine, whether securities offerings should be exempt from registration under the securities laws," because the CFTC does not possess the expertise necessary to do so.[32]

Commissioner Berkovitz further contended that issues of authority and expertise are complicated by timing considerations in settling enforcement actions, remarking that "firms inform the CFTC that they will not resolve [the CFTC's] enforcement actions absent a waiver," which puts the agency in an "untenable position" because it must either issue a waiver "it is both unauthorized and unqualified to provide," or "indefinitely delay[] . . . enforcement actions until the SEC can render an opinion."[33] He pointed to the CFTC's history of granting waivers as exemplifying this tension, noting that while the agency began referring waiver decisions to the SEC in 2015 following SEC Commissioner Kara M. Stein's criticism of the CFTC for a previous decision to grant a waiver to a large financial institution, the agency resumed granting waivers in 2018—presumably, he said, to "avoid the potential delay and complication that could result from involving [the SEC] in . . . [CFTC] settlement negotiations."[34] Commissioner Berkovitz encouraged other commissioners to "work with the SEC to properly allocate responsibilities" across the agencies "without delaying the resolution of CFTC enforcement actions."[35] Commissioner Berkovitz has repeated these concerns in connection with other orders since the Tower Research Capital LLC order.[36]

While other CFTC commissioners have not joined Commissioner Berkovitz in questioning the agency's authority to grant waivers, they have echoed his concern that the CFTC is not suited to determine whether it is appropriate to grant waivers from automatic disqualifications arising under the federal securities laws. For example, Commissioner Rostin Behnam expressed "extreme reservations" with respect to the waiver granted to Tower Research Capital LLC, given the "gravity" of the conduct alleged, "which involved unprecedented levels

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See, e.g.*, CFTC, Supporting Statement of Commissioner Dan M. Berkovitz Regarding Sunoco Enforcement Action and Opposing "Bad Actor" Waiver (Sept. 30, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement093020 (concerning waiver granted in *In re Sunoco LP*, CFTC No. 20-75 (Sept. 30, 2020), which ordered $450,000 civil monetary penalty for alleged spoofing in crude oil, gasoline, and heating oil futures contracts on the New York Mercantile Exchange); CFTC, Supporting Statement of Commissioner Dan M. Berkovitz Regarding Historic Penalty against JPMorgan and Opposing "Bad Actor" Waiver (Sept. 29, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement092920 (concerning waiver granted in *In re JPMorgan Chase & Co.*, CFTC No. 20-69 (Sept. 29, 2020), which ordered $920 million in monetary relief for charges alleging spoofing and manipulation of precious metals and U.S. Treasury futures contracts on multiple exchanges).

of spoofing."[37] He wrote that, "[i]n instances of this magnitude, where fraud and abuse harmed market integrity and market participants, the SEC should be the sole authority regarding whether or not a waiver should result."[38] Commissioner Behnam also observed that the issue of whether to grant a waiver may not have been ripe at the time of the order, since the SEC's Regulation D waiver provisions require that waiver be provided only "before the relevant sale" (i.e., it need not be contained in the CFTC's order), and that because the respondent had not previously been required to register with either the CFTC or the SEC, there was "ample time for the SEC to consider whether the CFTC's action . . . should result in automatic disqualification."[39] Commissioner Dawn D. Stump joined Commissioner Behnam in recently raising similar concerns, explaining that the waiver authority places the CFTC in a disadvantageous position, requiring it to choose between delaying resolution of enforcement actions by referring the waiver decision to the SEC or making the decision itself despite lacking the relevant securities law expertise.[40]

**SEC-CFTC Joint Letter**

On October 23, 2020, the SEC and CFTC chairmen agreed by joint letter to establish a one-year pilot program to "set out and formalize the practice and agreement" between the chairmen relating to CFTC orders that implicate automatic disqualifications under Regulations A and D.[41] Under the terms of the letter, which is effective immediately, the chairmen agreed to "use their reasonable efforts" to implement a process whereby:

1. A designated CFTC Division of Enforcement staff member will provide notice to a designated SEC Division of Corporation Finance staff member "as soon as practicable after the CFTC becomes aware that a CFTC order may implicate" the automatic disqualifications.

2. The designated CFTC staff member will provide the designated SEC staff member with "all information relevant" to the disqualifications, including (i) the name of the proposed

[37] CFTC, Statement of Commissioner Rostin Behnam Regarding Tower Research Capital LLC (Nov. 7, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement110719.

[38] *Id*.

[39] *Id*. (citation omitted).

[40] *See* CFTC, Joint Statement of Concurrence of Commissioners Dawn D. Stump and Rostin Behnam Regarding JPMorgan Chase & Co., et al. (Sept. 29, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpbehnamjointstatement092920 ("SEC rules provide that the SEC may waive the disqualification upon a showing of good cause, but waiting for such an SEC waiver intolerably subjects the CFTC's enforcement program to the vagaries of when the SEC makes time to consider the Respondents' request. In order to efficiently perform our responsibility to enforce the CEA and the Commission's regulations . . . we decide whether to advise . . . that the Reg A/D disqualification provisions of the securities laws should not apply – a decision that is more appropriately one for securities regulators to make.") (endnote omitted).

[41] *See* Jay Clayton & Heath P. Tarbert, Joint Letter re: Notification Protocol for CFTC Orders Implicating SEC Regulation A and D at 1 (Oct. 23, 2020), https://www.cftc.gov/media/5161/jointletter102320Reg%20A-D/download.

respondent, (ii) the violations that the CFTC expects to include in its order, (iii) the CFTC staff's "best estimate" of the earliest date on which the agency's order will be issued, and (iv) whether the proposed respondent has submitted a written request for a waiver to the CFTC (and if so, a copy of the request). The SEC staff member may request "any additional information" that they "reasonably believe[] is necessary" to carry out the terms of the pilot program.

3. The SEC Division of Corporation Finance will inform the CFTC whether it (a) does or does not object to a waiver, or (b) has comments to provide regarding the issue of waiver (including comments on any written request) or declines to provide a view "in connection with a potential waiver." The letter states that the SEC Division of Corporation Finance will "endeavor" to provide its view or comments within 45 days after receiving the information described in step 2 from the CFTC. The 45-day period may be reduced or extended by agreement of the staffs of the agencies in consultation with the chairmen. If the SEC does not provide its view or comments within the applicable 45-day period or any agreed extended period, "the CFTC's policy will be to automatically provide language advising that disqualification should not arise as a consequence of the CFTC order."[42]

The scheme set forth by the joint letter addresses some of the issues raised by commissioners with regard to the CFTC's expertise in granting waivers under the federal securities laws, and the time it takes the SEC to make a determination on a waiver request referred by the CFTC. It creates a process whereby the SEC is automatically notified of CFTC actions implicating automatic disqualifications as early as possible, and the SEC has a specific time window in which to provide comment. In doing so, the SEC is given key information relevant to the action, and has the opportunity to request additional information. By its terms, the letter appears to contemplate that the SEC will be notified of, and have the opportunity to comment on, a potential waiver by the CFTC in *any* CFTC enforcement action implicating automatic disqualifications, not only those where a potential respondent has requested a waiver from the CFTC. Perhaps most significantly, the letter makes clear that the CFTC will treat no response from the SEC staff as tantamount to no objection to a waiver. However, the joint letter does not explain what the CFTC will do in the event that the SEC *objects* to a potential waiver, meaning that the CFTC could, under the terms of the joint letter, grant a waiver despite the SEC's protests. Nor does it set forth a specific framework for resolving such interagency disagreements.

The joint letter also is not a permanent solution to the issues that commissioners Berkovitz, Behnam and Stump have raised. First, the joint letter has only a one-year term, and the only parties who are bound are the SEC and CFTC chairmen—either of whom can

[42] *See id.* at 1-3. Information shared between the agencies under the terms of the letter is subject to applicable privilege protections. *Id.* at 2. Additionally, the letter states that it does not apply to situations in which a person has submitted a waiver request to the SEC regarding a disqualification that has occurred, or may occur, as a result of a CFTC action. *Id.* at 3. In other words, if a potential respondent in a CFTC enforcement action seeks a waiver directly from the SEC under 17 C.F.R. §§ 230.262(b)(2) or 230.506(d)(2)(ii), the process set forth in the letter will not be triggered.

unilaterally terminate the letter. With Chairman Clayton's recent departure from the SEC,[43] it is unclear whether the program will last even for its one-year term. It remains to be seen whether Chairman Clayton's successor will carry the program forward with Chairman Tarbert or his successor, or whether the two agencies will take other steps to formalize the process set forth in the joint letter—for example, through a joint rulemaking. Second, while the letter agreement is designed to make the SEC more accountable for CFTC decisions on waivers and to expedite the decision-making process, it does not address the threshold question of whether the CFTC lacks the legal authority to grant waivers, a position that Commissioner Berkovitz has repeatedly advocated. Eliminating the CFTC's role in the waiver process would require rescission of the SEC's regulations providing for waivers based on the CFTC's "advi[ce]."[44] While the SEC as currently constituted has given no indication it is inclined to undertake that action, the possibility that a Commission under different leadership would be receptive to that cannot be ruled out. In the meantime, market participants facing possible disqualification should continue to make their case to the CFTC, recognizing that the SEC will likely play a significant role in the determination.

[43] *See* Paul Kiernan & Dave Michaels, *SEC Chairman Jay Clayton to Leave Agency at End of 2020*, Wall St. J. (Nov. 16, 2020), https://www.wsj.com/articles/sec-chairman-jay-clayton-to-leave-agency-at-end-of-2020-11605531600?mod=searchresults_pos1&page=1.

[44] 17 C.F.R. §§ 230.262(b)(3), 230.506(d)(2)(iii).