INSIGHTS

THE CORPORATE & SECURITIES LAW ADVISOR

Volume 29 Number 8, August 2015

DEPARTMENTS

Wolters Kluwer

SECURITIES ENFORCEMENT

Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws

Obtaining waivers from the automatic disqualification provisions of the federal securities laws is a necessity in many common regulatory settlements. Such waivers are no longer routinely granted and are now subject to heightened scrutiny from the Securities and Exchange Commission and attention from members of Congress.

By Richard A. Rosen and David S. Huntington

Collateral consequences often arise as a result of government action against a corporation or its affiliates, triggered by anything from a settled administrative proceeding with the SEC to a criminal conviction. To avoid or mitigate these collateral consequences, entities may have to seek exemptive relief from multiple regulators, including the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission, the Federal Reserve, the Department of Labor, and self-regulatory organizations such as the Financial Industry Regulatory Authority (FINRA). This article addresses only those collateral consequences arising under the federal securities laws and involving the SEC. The principal collateral consequences under the federal securities laws are: (1) loss of well-known seasoned issuer (WKSI) status for the purposes of securities offerings;[1] (2) disqualification under Section 9(a) of the Investment Company Act of 1940 (1940 Act), which bars the affected entity and its affiliates from serving as an investment adviser, depositor or principal underwriter of certain registered investment companies;[2] (3) loss of statutory safe harbors under the Securities Act of 1933 (Securities Act), and the Securities Exchange Act of 1934 (Exchange Act), for forward-looking statements, which were added by the Private Securities Litigation Reform Act of 1995 (PSLRA);[3] (4) loss of private offering exemptions provided by Regulations A and D under the Securities Act;[4] (5) loss of the exemption from registration under the Securities Act for securities issued by certain small business investment companies and business development companies provided by Regulation E;[5] and (6) the prohibition on a registered investment adviser from receiving cash fees for solicitation under Rule 206(4)-3 of the Investment Advisers Act of 1940 (Advisers Act).[6] These disqualifications frequently are unrelated to the conduct at issue in the settlement—for example, a company could be subject to loss of its WKSI status for actions with no connection to a debt or equity offering.

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The statutes and regulations that provide for disqualification also allow the SEC to waive disqualification, typically on a showing of "good cause."[7] For example, the SEC can waive the WKSI disqualification if it determines that "it is not necessary under the circumstances that an issuer be considered" ineligible.[8] Only a few clues exist in the history of these statutes and regulations that shed light on the underlying rationale for automatic disqualifications and waivers.[9]

The legislative history of the 1940 Act indicates that—at least in the opinion of Judge Robert Healy, one of the first SEC Commissioners—one purpose of allowing the SEC to waive the automatic disqualification provision of Section 9(a) is to afford a "bad actor" the opportunity to redeem himself through rehabilitation.[10] In enacting the amendments to the Securities Act and the Exchange Act collectively known as the PSLRA, the Conference Committee noted that waivers for automatic disqualifications from the right to invoke the statutory safe harbor provisions for forward looking statements should be available for "established and reputable entities," suggesting that the SEC should have the discretion to avoid the disqualification entirely for entities that, historically, issue more reliable disclosures.[11] Senator Christopher Dodd's comments on the Dodd-Frank Act, which gave rise to the "bad actor" provisions of Rule 506(d) of Regulation D, lend support to the idea that automatic disqualifications are not intended to punish a company by taking away certain privileges under the securities laws, but rather are meant to protect the public and the marketplace by "reduc[ing] the danger of fraud in private placements."[12] Similarly, the adopting release for recent amendments to Regulation A (modifications often referred to as "Regulation A+") state that reducing the potential for fraud is a possible benefit of "bad actor" provisions, which may "lower the risk premium associated with the risk of fraud."[13] Beyond these scattered statements, there is little authority illuminating the purpose of waivers.

In spite of the lack of legislative history, it is generally understood that the purpose of automatic disqualification provisions is to punish bad actors by preventing them from relying on certain accommodations provided in the securities laws or, in some contexts, such as Section 9(a) of the 1940 Act, by preventing them from engaging in certain businesses that could result in investor harm. The waiver provisions give the SEC discretion to provide relief in cases where disqualification is viewed as disproportionately harsh and/or where disqualification could actually have the effect of harming investors.

Traditionally, the SEC generally has granted waivers in connection with settlements involving reputable financial institutions and public companies. In recent years, however, in the wake of the financial crisis, the SEC has taken a harder look at the waiver process, denying waivers in some high profile cases[14] and generating dissent among the Commissioners about the proper role of waivers. Notably, in a deviation from previous practice, the SEC no longer grants waivers unless the requesting company shows that it currently relies on, or imminently will rely on, privileges that will be lost as the result of the disqualification.

The Principle Waiver

A brief overview of the six principal waivers follows.

WKSI

In 2005, the SEC adopted changes to the registration, communications and offering process

INSIGHTS
THE CORPORATE & SECURITIES LAW ADVISOR

INSIGHTS (ISSN No. 0894-3524) is published monthly for a subscription rate of $965/1 year; $1,641/2 years; $2,316/3 years: $121/Single Issue by Wolters Kluwer, 76 Ninth Avenue, New York, NY 10011. POSTMASTER: Send address changes to **INSIGHTS,** 7201 McKinney Circle, Frederick, MD 21704.
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under the Securities Act, in part by creating a new category of issuer—the well-known seasoned issuer, or WKSI.[15] The chief benefits of obtaining WKSI status include (1) greater flexibility of communication during the offering process, and (2) automatic shelf registration, which allows registration statements for shelf offerings to become automatically effective upon filing and avoids delays associated with review by the Division of Corporation Finance.[16]

Under Securities Act Rule 405, "ineligible issuers" are denied WKSI status and the concomitant benefits. "Ineligible issuers" are defined to include issuers that have been subject to certain criminal or civil enforcement proceedings, including SEC administrative proceedings relating to violations of the antifraud provisions of the federal securities laws.[17] Thus, for example, a company becomes an ineligible issuer if the SEC enters an administrative cease and desist order against it (or against one of its subsidiaries) for a violation of Section 34(b) of the 1940 Act.[18] Loss of WKSI status lasts three years from the date of disqualification.[19]

The loss of WKSI status can place an issuer at a considerable disadvantage.

The loss of WKSI status can place an issuer at a considerable disadvantage if it does not have an effective shelf registration statement. While an ineligible issuer can still file a shelf registration statement, the statement would be subject to review by the SEC staff, which could result in delay and the inability to access the capital markets when market conditions are most advantageous. The WKSI waiver is negotiated with the staff of the Division of Corporation Finance and is granted by order of the SEC. Historically, the staff was able to grant the waiver pursuant to its delegated authority, but more recently the Commission itself has acted to grant these waivers.

Section 9 of the 1940 Act

Section 9(a) of the 1940 Act prohibits certain persons from serving as an investment adviser, depositor or principal underwriter of registered investment companies.[20] The triggers for this disqualification are certain convictions (including guilty pleas) before a U.S. court within the past 10 years,[21] or injunctions barring a person from serving in certain roles (for example, as an underwriter, broker, dealer or investment adviser).[22]

This disqualification extends under Section 9(a)(3) to any "affiliated person"—a term that is defined broadly to include any entity under common control.[23] Thus, the conviction of any entity in the corporate structure creates a companywide disqualification. Because control of more than 25 percent of a company's voting stock creates a presumption of control under the 1940 Act, the definition can sweep in joint ventures as well.[24]

In the absence of a waiver, an affected entity and its affiliates cannot continue in the business of advising and underwriting registered mutual funds. Clients would have to move as quickly as possible to divest themselves of their funds businesses—a potentially a cumbersome process under the 1940 Act and the Advisers Act.[25] Funds would lose their original investment advisers and would have to undergo the expense of approving new ones.

The SEC may grant relief from disqualification by issuing a waiver under Section 9(c) on a showing that applying the sanctions of Section 9(a) would be "unduly or disproportionately severe or that the conduct of such person has been such as not to make it against the public interest or protection of investors to grant such application."[26] The Section 9(c) application process can be cumbersome. A formal application must be submitted via EDGAR with signature pages from each affected entity within the corporate structure. The application is negotiated with the staff of the Division of Investment Management and relief is granted by order of the Commission.

PSLRA Safe Harbor for Forward Looking Statements

Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act, as added by the PSLRA, provide statutory safe harbors for certain forward-looking statements.[27]

The safe harbor provisions are unavailable for any forward-looking statement that is "made with respect to the business or operations of the issuer, if the issuer … during the three-year period preceding the date on which the statement was first made," has been the subject of certain criminal or civil enforcement proceedings, including SEC administrative proceedings relating to violations of the antifraud provisions of the federal securities laws.[28] The SEC staff now interprets the statute narrowly, with disqualification arising only when an issuer itself is the subject of proceedings; previously, the staff had taken the position that disqualification of a subsidiary also disqualifies the parent issuer. Without the safe harbor, an issuer faces greater exposure to private securities fraud liability in connection with its forward-looking statements.

The waiver historically was negotiated with the staff of the Division of Enforcement, but as the result of a recent change in policy, the Division of Corporation Finance now reviews these waiver requests. Waivers from this disqualification are granted by order of the Commission. In determining whether a waiver is appropriate, the SEC generally applies the same factors that it would apply in ruling on a request for a WKSI waiver.

Regulations A and D

Regulations A and D provide exemptions from registration for certain small offerings, and the exemption under Rule 506 of Regulation D is widely relied upon by private funds and other companies for raising capital. The disqualification provisions—located in Rule 262 of Regulation A, which also triggers disqualification from the exemption in Rule 505 of Regulation D, and in Rule 506(d) of Regulation D—are now virtually identical after having been harmonized by modifications to Regulation A that became effective on June 19, 2015 (Regulation A+ amendment).[29] An issuer is disqualified under these provisions if it, or a direct or indirect parent of the issuer, has (among other things) within the past five years been convicted of securities-related offenses or been subject to certain orders by a court, the Commission, or certain other federal and state regulators.[30]

When a company requires waivers under both Regulations A and D, they are often requested and granted in tandem,[31] although relief will be granted only to the extent that an issuer currently is, or imminently will be, relying on the exemptive provision. Under both Regulations A and D, a waiver is available "upon a showing of good cause, … if the Commission determines that is not necessary under the circumstances that an exemption be denied."[32] Waivers may be granted by the staff of the Division of Corporation Finance under its delegated authority.[33] It should be noted that both Regulations A and D now contain a provision that makes obtaining a waiver unnecessary if the regulator or court whose order would otherwise give rise to the disqualification advises (either in the order or in a side letter to the Commission or SEC staff) that the disqualification "should not arise."[34] As discussed below, this provision recently has sparked controversy.

Regulation E

Regulation E provides an offering exemption for certain small business investment companies and business development companies. Under Rule 602, this exemption becomes unavailable if the issuer, or an affiliate, has (among other things) within the past five years been convicted of certain crimes or subject to certain Commission or court orders.[35] It is also unavailable if a director, officer, or principal security holder of the issuer, or the investment adviser or underwriter of the securities to be offered, has been convicted of a securities-related crime within the past ten years or is subject to an ongoing injunction or SEC order.[36] Thus, in the absence of a waiver, a client will no longer be able to advise or underwrite small business investment companies or BDCs that rely on Regulation E. The SEC may grant waivers "upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied."[37] The Commission has not delegated to its staff the authority to issue Regulation E waivers, which must therefore be obtained by order of the Commission.

Advisers Act Section 206(4)-3

Rule 206(4)-3 under the Advisers Act prohibits an investment adviser from paying a cash fee, "directly or indirectly," to any solicitor that has been the subject of certain convictions or SEC orders, or "has been found by the Commission to have engaged … in any of the conduct" enumerated in Section 203(e)(1), (5) and (6) of the Advisers Act, including SEC administrative proceedings relating to violations of the antifraud provisions of the federal securities laws.[38] The staff has interpreted the phrase "directly or indirectly" to mean that disqualification of a parent will typically also disqualify a subsidiary involved in solicitation, on the theory that the parent can be considered "indirectly" involved in the subsidiary's solicitation. However, an entity involved in solicitation will typically not be disqualified due to the conduct of a more distant affiliate (such as a distant sister corporation). The staff will not recommend issuing a no-action letter if it believes the relief is unnecessary based on the current operation of an entity's business.

The SEC staff now has adopted a policy permitting companies to rely on an existing no-action letter issued in 2003 and commonly referred to as the *Dougherty* no-action letter, without having to submit a separate waiver request, in cases where disqualification arises from an administrative proceeding, as opposed to a civil action.[39] *Dougherty* allows either the company, acting as a solicitor, or any investment adviser with which it has a solicitation agreement, to take advantage of no-action relief provided it meets certain conditions, most notably if it makes certain disclosures about the disqualifying conduct to each person solicited.[40] However, the staff has indicated that it expects affected parties to seek a no-action letter when the disqualifying event is not an administrative proceeding. In these circumstances, relief in the form of a separate no-action letter must be negotiated with the staff, and as a practical matter also must receive Commission approval.

Policy Debate over Waivers

Negotiating applicable waivers is a critical component in the settlement of SEC enforcement proceedings and other regulatory settlements. But waivers have engendered increasing controversy.[41] That debate has centered primarily on the WKSI waiver, although some other waivers have been implicated as well, such as those necessitated by the "bad actor" provisions under Regulation D. (There has not been public controversy over Section 9(c) waivers, perhaps because they are so essential in avoiding significant burdens on businesses and investors alike.) Nonetheless, all waiver applications are now subject to more vigorous scrutiny because of the public attention.

Until a few years ago, the SEC routinely granted waivers when they were requested, with little comment or dissent. Now, the Commissioners are increasingly outspoken and polarized on decisions about waivers. The current policy debate on the appropriateness of granting waivers turns on several core policy issues, and is divided among political party lines between the two Democratic Commissioners—Commissioners Kara Stein and Luis Aguilar—voting against waivers in several cases, and the two Republican Commissioners—Commissioners Daniel Gallagher and Michael Piwowar—voting in favor of them. Chair Mary Jo White, an independent who was appointed in early 2013, generally has sided with the

Republican Commissioners on decisions to grant waivers (even though she tends to side with the Democratic Commissioners in other enforcement policy areas such as favoring larger monetary penalties).[42]

Views of the Democratic Commissioners

The Democratic Commissioners, particularly Commissioner Stein, have argued in published dissents and in public remarks that the granting of waivers in many recent cases is a rubber stamp, and have suggested that the decision to repeatedly grant waivers arises from the thinking that some financial institutions are "too big to bar."[43]

Exemplifying Commissioner Stein's point of view are her dissenting comments in the recent settlements related to manipulation of foreign-exchange (FX) rates. On May 20, 2015, five large financial institutions agreed to plead guilty to criminal violations as part of a negotiated resolution of government investigations into FX rates.[44] These pleas would have automatically disqualified the defendants from retaining their WKSI status. But in a series of divided votes, the Commission granted each of the banks a waiver.[45]

Dissenting from that decision, Commissioner Stein argued that the institutions were recidivists, having sought multiple other WKSI waivers in the last decade. Commissioner Stein noted that some of these institutions had been involved in settlements related to the manipulation of the London Interbank Offered Rate (LIBOR), and suggested that the Commission should have revoked its earlier LIBOR-related waivers instead of granting a new set of waivers. These repeat offenses, in Commissioner Stein's view, raised the specter of a "continuing culture that does not adequately support legal and ethical behavior." Commissioner Stein argued that waivers should be used as "tools…to empower those at the top of these institutions to create meaningful cultural shifts." Conversely, ignoring repeated violations created "risks to investors and the American public that are being ignored."[46]

Commissioner Aguilar has expressed similar opinions about waivers. He recently joined Commissioner Stein in a public dissent, arguing that waivers should be less readily available to firms with a "failed compliance culture" and should be attached to more stringent conditions.[47]

Views of the Republican Commissioners

By contrast, the Republican Commissioners have issued public statements emphasizing that waivers must be considered on a case-by-case basis, and never as a means of additional punishment. For example, Commissioner Gallagher issued a public statement in April 2014 that decisions to grant waivers must "be driven by a careful analysis of the facts underlying the misconduct and whether they negatively impact the issuer's ability to produce accurate and reliable financial information."[48] He explained that waivers are necessary to ensure that companies are treated appropriately where strict application of the law would produce absurd results: "Should a criminal conviction under the Migratory Bird Treaty Act for a wind farm's killing of protected birds be weighed more heavily than a civil, non-scienter books and records violation, even though the former has nothing to do with financial reporting and the latter does?"[49] More recently, Commissioner Gallagher dismissed the idea that collateral consequences should be viewed as "enhancements" to a punishment or as sanctions, arguing that "automatic disqualifications are not, and were never intended to be, either remedial or punitive in nature."[50] Commissioner Gallagher finds support for his position in the—admittedly scant—legislative and regulatory history of automatic disqualification and waiver provisions.

Commissioner Piwowar has expressed his agreement with Commissioner Gallagher's views.

He also has claimed, without going into detail, that Commissioners are not following established staff guidelines regarding waivers. He urged the Commission to follow staff guidance on waivers, arguing that parties need clarity about waivers during settlement negotiations.[51]

Views of Chair Mary Jo White

Until this year, Chair Mary Jo White had been publicly silent about the policy of granting (or denying) waivers. But in March 2015 remarks given at Georgetown University, Chair White articulated her own views on the appropriateness of waivers. Her remarks echoed in some ways statements by the Republican Commissioners. Chair White emphasized that automatic disqualifications are not enforcement remedies and that "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."[52] Chair White also noted that waivers are often justified because the misconduct triggering a disqualification involved only a "limited number" of individuals in a business line "wholly unrelated to the activities that would be the subject of the disqualification."[53] She also pushed back on the idea—suggested by the Democratic Commissioners and some in the public sphere—that the Commission grants waivers with a rubber stamp: "Some have said that the Commission and its staff routinely grant waivers without rigorous analysis. That is simply not true."[54]

Chair White emphasized that automatic disqualifications are not enforcement remedies.

Chair White's public statement places her in line with the Republican Commissioners, and creates a 3-2 voting bloc that, at least presumptively, favors the granting of waivers. However, Chair White has a history of recusing herself from decisions involving her husband's law firm, Cravath, Swain & Moore LLP, which often appears before the SEC. The New York Times has reported that between April 2013, when she joined the Commission, and February 2015, Chair White has recused herself from at least ten investigations into clients of Cravath.[55]

Ramifications of the Policy Debate

This policy debate is becoming ever more sharply divided and entrenched, and is part of the larger political debate about the appropriate regulation of large financial institutions. Senator Elizabeth Warren recently delivered a scathing letter to Chair White, criticizing her handling of the SEC, including on the issue of waivers. Senator Warren asserted that when Chair White was appointed to lead the SEC, she promised that the Commission would be more rigorous in determining whether a waiver was appropriate, especially for companies with criminal convictions—a promise, according to Senator Warren, Chair White has not fulfilled.[56] Echoing Commissioner Stein, Senator Warren wrote with respect to the waivers granted this year to the five banks that pled guilty to FX rate manipulation: "These waivers apparently reflected the Commission's view that these banks deserved to continue to enjoy special privileges under the securities laws despite the deep breaches of trust and evident mismanagement displayed in these cases."[57]

Chair White responded by denying Senator Warren's claims, reiterating that waivers are not "enforcement remedies by rather are separate legal and regulatory provisions governed by their own applicable standards and policies, which the Commission and the staff carefully and rigorously apply."[58] Chair White also pointed out that there are many instances in which companies do not file waiver requests because they independently determine that they are unlikely to meet the requirements for a waiver. Additionally, in March 2015, Democratic Representative Maxine

Waters introduced a bill that would, among other things, require a public comment period before the Commission could issue any waiver.[59]

Politics aside, the Commissioners' public statements and dissents show that the ongoing waiver discussion at the SEC represents a fundamental disagreement about whether the denial of waivers should be used by the Commission as enforcement tools. It is unlikely that this debate will end anytime soon. But despite the Commissioners' entrenched positions, the fact that Chair White usually casts her swing vote with the Republicans means that waivers will likely continue to be granted, at least when the full Commission rules on waiver requests.

Practical Issues in Obtaining Waivers

The policy and political debates discussed above have had, and will continue to have, consequences for practice in the area of SEC waivers. The discussion below gives an overview of some of the practical issues in obtaining waivers, highlighting the impact on the waiver process of increased scrutiny connected to the policy controversy.

Deciding Which Waivers Are Needed

As an initial matter, counsel must determine which disqualifications a client faces as the result of the proposed resolution. As noted above, the SEC generally will not grant a waiver that is not necessary in the context of the company's current business. Each disqualification has a different "trigger," and each requires a different showing as to the necessity and appropriateness of the waiver. This article is not intended to provide exhaustive detail as to each waiver; however, the following considerations generally inform whether a waiver is needed:

Type of resolution. A given disqualification may be triggered by convictions, injunctions, judicial orders, regulatory orders, or some combination of the above. It may also matter whether the order is foreign or domestic—for example, Section 9(a) of the 1940 Act is triggered only by domestic court orders.[60]

Nature of conduct or violation. Whether a waiver is necessary also may turn on the nature of the specific violation or underlying conduct. A disqualification may arise from conviction under a specific statute, such as the federal wire fraud statute, or a conviction arising from certain types of activity, such as conduct as a broker, dealer, bank and so forth.[61] A disqualification may arise from a finding of "fraudulent, manipulative, or deceptive conduct,"[62] or violations of "antifraud provisions of the securities laws."[63]

Scope of disqualification. It is important to determine how the disqualification will affect the subsidiaries, parents, and affiliates of the disqualified entity. For example, the PSLRA safe-harbor disqualification, as currently interpreted by the staff, is relatively narrow: an issuer is precluded from taking advantage of the forward-looking statement safe harbor only if the issuer itself is the subject of a relevant conviction or order.[64] Other disqualifications are broader in scope: as discussed above, Section 9(a) potentially bars every entity in the corporate structure from advising registered mutual funds if any other affiliated entity is subject to the disqualification.

Involvement of the Commission

Some waivers, such as the Section 9(c) and forward-looking statement waivers, can be approved only by Commission vote.[65] Other waivers can, by regulation, be granted by the SEC staff pursuant to delegated authority—this is true of the WKSI waiver, which can be granted by the staff of the Division of Corporation Finance.[66] While historically the staff informed the Commission of its intent to grant waivers in connection with the Commission's approval of a settlement, in the current environment the staff will not grant any waiver without Commission approval. Of the last fourteen permanent WKSI waivers granted, only three were decided by a letter from the staff pursuant to its delegated authority—all others were granted by formal Commission order.[67] Counsel should take careful note of this trend: as discussed above, Commission involvement can make the waiver process more perilous, raising both the possibility of a public dissent and the possibility that a waiver will not issue because of Chair White's recusal.

Timing

In any settlement that triggers collateral consequences, the client has a strong interest in obtaining at least some level of comfort regarding the waiver by the time that a negotiated resolution is reached. Thus, counsel should alert the client to the potential need for a waiver as soon as possible and incorporate it into the plan for settlement discussions.

In the context of an SEC settlement, the waiver should be discussed with staff of the Division of Enforcement early in the process, and the SEC should be made aware that the settling company views the waiver as critical to the settlement negotiations. The staff and the Commission are firmly of the view that waivers are granted under an independent process based on "rigorous analysis"—not horse trading.[68] Nonetheless, it is clear—even to the staff—that waivers play an important role in any resolution, as parties will be reluctant to enter into a settlement when there is uncertainty about how it will affect their business.

A more complicated situation arises when the SEC is not involved in the underlying enforcement action, but rather is ruling on one or more waiver applications necessitated by the actions of other regulators. In such a case, it is crucial that the SEC be kept informed of the settlement discussions and that all parties are aware of the importance of waivers to the settlement process.

A waiver will never be formally issued until it becomes necessary—very often that is on the day of the settlement, although it may be later (for example, if a guilty plea triggering the disqualification will be entered only after the settlement papers are signed). However, the Commission may vote to approve the waiver in advance of the date when the settlement and waiver are made public. In that case, the SEC staff may communicate the Commission's vote privately in advance of the settlement date. Under no circumstances will the SEC staff state how the Commission will act until it has voted. Sometimes, such as when there is a significant delay between signing of the settlement papers and event triggering the disqualification, the highest level of comfort that can be achieved is an assurance from the staff that they will recommend that the Commission approve the waiver. Clients should be kept informed about the possibility of these various scenarios, along with a realistic appraisal of what can be achieved.

In general, a draft waiver application should be circulated to the SEC staff in the relevant division about two weeks ahead of the settlement, to give the staff time to review. The staff may propose revisions, resulting in multiple drafts being exchanged before the application is finalized for review by the Commission. Often, the SEC staff may initiate this process; in any event, counsel should be prepared to begin the process at this time. The discussions with the SEC staff may be a source of information about the likelihood of success. Conversations with the staff can give a sense of which way the Commission is likely to act, although, as noted, the staff will take care not to commit the Commission to a given course of action.

The ideal outcome of the waiver process is a permanent waiver granted at the time of settlement. In one recent case, the SEC granted a temporary, two-week WKSI waiver,[69] although that was an unusual occurrence. Section 9(c) waivers usually involve a temporary waiver granted on the date of the guilty plea or court order; a permanent waiver will then usually issue thirty days later.[70]

Content and Form of Waiver Application

While many waiver applications were at one time short, pro forma affairs, they now require making a lengthy substantive case for the waiver.[71] This change reflects, at least in part, the increased scrutiny attached to waivers: the Commissioners and staff expect a more robust and detailed justification for why the applicant needs and deserves the requested relief.

In light of the Commission's concerns, it may be appropriate for waiver-related considerations to inform other parts of the settlement process. Regulatory settlements often involve factual findings or, increasingly, admissions of misconduct. As a practical matter, those findings are often subject to some degree of negotiation. If there is any sense that the waiver might be a "hard sell" (due to difficult facts or political controversy), such negotiations should take into account the possible effect that any proposed findings might have on waiver applications.

In all instances the application should explicitly provide why the requested waiver is necessary.

In applying for a waiver, it is important to keep in mind the showing that must be made, which varies by the type of waivers that are needed. There are two principal sources of information regarding the content of specific waivers: the SEC's published guidance[72] and examples of recent, successful waiver applications, which reflect the comments of the SEC staff. Both are available on the SEC's website and should be consulted at the outset of any potential waiver applications.

Pursuant to the guidance, in all instances the application should explicitly provide why the requested waiver is necessary for the applicant's business. In some older waiver applications, the applicant succeeded in obtaining relief despite making no showing that it actually needed the relief or relied on it.[73] Today, the SEC insists on an explanation of how the applicant's business will be affected in the absence of a waiver.[74] Also, a case should be made that the conduct is unrelated to the relief being sought, and identify any remedial measures undertaken and whether employees responsible for the misconduct have been terminated.[75] Waiver applications usually list prior waivers obtained by the applicants.[76] SEC guidance indicates that prior instances of the same misconduct "raise questions" about the basis for waivers.[77] Accordingly, applicants typically take pains to distinguish the conduct underlying prior waivers, arguing that it is not like the instant misconduct and does "not form a pattern of allegedly violative conduct … in a particular area."[78]

Recent, successful applications also should be reviewed while preparing a new waiver application. For example, the Commission has granted WKSI waivers where the applications: (1) make clear that the misconduct triggering ineligible issuer status does not relate to the company's disclosures as an issuer of securities, and that the misconduct did not involve directors or senior executives of the issuer; (2) detail the specific remedial steps taken to ensure the misconduct does not reoccur; and (3) explain how the company historically has relied, and plans to rely, on the benefits afforded by WKSI.[79] Successful applications for waivers from the Regulation D "bad actor" provision have made essentially the same showings, noting instead that the conduct did not involve offerings made under Rule 506.[80]

Successful applications under Section 9(c) of the 1940 Act similarly focus on the fact that the conduct had no relation to the applicants' investment advisory business.[81] They also emphasize that the Section 9(a) bar, when applied to applicants with sizeable funds businesses, would work significant hardship not only on the applicants themselves, but on fund investors, which might face disruption of existing investment strategies and the costs of finding and approving new investment managers.[82] Section 9(c) applications also typically include representations to the effect that all employees identified as responsible for the misconduct were terminated and will have no future involvement in the applicants' activities servicing registered investment companies.[83]

Finally, counsel should be aware that the form of the application also varies. Many waiver applications, such as the WKSI, involve submitting a letter from counsel to the SEC staff. Some "waivers" are actually requested as no-action letters, such as the previously discussed no-action relief available for the ban on cash solicitation under Rule 206-4(3).[84] By contrast, Section 9(c) waivers must be submitted to the Division of Investment Management in a signed application filed on EDGAR, with a detailed appendix of the affected funds. For that reason, in cases involving a Section 9(c) waiver, the time necessary to prepare and file the application should be taken into account in the settlement process.

Conditions Attached to Waivers

The SEC increasingly has insisted on conditions attached to waivers. Chair White has noted and taken credit for this trend.[85] A typical condition is that the applicants will abide by the conditions of the regulatory settlements that triggered the waiver process.[86] Thus, violations of the underlying settlement terms may also jeopardize the waivers. In addition, Chair White has indicated that the SEC staff may insist on the termination of particular employees as a condition of granting a waiver.[87]

The SEC has shown a willingness to act creatively with regard to waivers. As Chair White noted, "recently, the staff and the Commission have imposed special conditions on waivers where [they] believed additional safeguards were needed."[88] The most notable are the burdensome conditions imposed on Bank of America in August 2014 as part of a $16.65 billion settlement related to residential mortgage-backed securities. Those conditions required (1) the appointment of an independent consultant to ensure regulatory compliance and (2) a new application following the consultant's report.[89]

In a public speech a month after this waiver was granted, Commissioner Stein lauded the conditions: "These conditions will focus and empower management to change behavior throughout the corporate culture. This approach represents a breakthrough in the Commission's method of handling waivers, and I hope to see more of this and other thoughtful approaches in the future."[90] The fact that both Commissioner Stein and Chair White have publicly endorsed this approach suggests that the Commission will continue to experiment in developing and imposing new and more burdensome conditions, including conditions that go above and beyond the undertakings required by the regulators involved in the enforcement proceedings underlying the waiver request.

A Waiver Alternative: Regulation D

Under Regulation D, clients have an alternative to the waiver process. Regulation D's "bad actor" rule provides that the disqualification will not arise if the court or regulator whose order would otherwise trigger the rule states in writing that the disqualification is unnecessary.[91] The writing can be either in the text of the order or in a side letter to the SEC staff.[92] The advantage of this provision is clear: the "waiver" can be negotiated directly with the adversary as part of settlement talks, without requiring separate negotiations with the Division of Corporation Finance.

The CFTC has provided such language in a few recent settlements.[93] However, Commissioner Stein recently sharply criticized the CFTC for doing so, arguing that granting waivers relating to the securities laws was beyond the CFTC's ken and, in any event, mistaken under the facts of that case.[94] The prospect of criticism may make regulators less willing to include such language in public orders. However, a side letter to the staff appears to offer a more discrete alternative that could be less likely to invite public criticism.

Best Practices for Waiver Applications

Based on the above, this article makes a few practical suggestions:

First, to have the greatest likelihood of success for the client, counsel should follow carefully the SEC's guidance, as well as previously successful applications for the requested waiver. Applications typically should emphasize the key points identified above—primarily, distinguishing the conduct at issue from the subject matter of the disqualification and the importance of the waiver to the company's business and to investors. As a practical matter, counsel should aim to submit draft waiver applications to the SEC two weeks in advance of the actual settlement date. Such applications require information about the nature of the settlement and the business operations of the settling corporation. Thus, draft settlement papers (especially any findings or admissions) should be in hand in time to draft the waiver application. The application also will require diligence regarding the client's business—for example, how it uses its shelf registration and how many registered funds it advises. All of this requires careful and constant coordination with the client, the SEC and any other regulators or co-counsel involved in the settlement.

Second, counsel negotiating a settlement should try to shape admissions and factual findings with the need to obtain waivers in mind. In the current environment, the risk of failing to obtain a waiver is higher than in the past. This is especially true in high-profile cases where there is reason to believe that the application will receive heavy scrutiny from the Commission. In such cases, it is to be expected that the Commission, when deciding whether a waiver is justified, will take a hard look at any factual findings or admissions made in connection with the settlement. Counsel therefore should be aware of how findings and admissions will impact the client's chances of obtaining a waiver. In addition, clients should be aware of affirmative steps they can take to strengthen a waiver application—for example, the implementation of remedial measures and the termination of relevant employees.

Third, counsel should prepare clients for possible unwanted attention in connection with waiver applications. The increasing public attention to the waiver process poses potential additional reputational harm to clients. Counsel should alert the client to the possibility of a public dissenting statement from one of the Commissioners, and the resulting bad press, and work with the client to prepare for and minimize the public relationship fallout.

Notes

1. 17 C.F.R. § 230.405 (definition of "ineligible issuer").
2. 15 U.S.C. § 80a-9(a).
3. 15 U.S.C. § 77z-2(b)(1)(A); 15 U.S.C. § 78u-5(b)(1)(A).
4. 17 C.F.R. § 230.262 (Regulation A disqualification provision); *id.* § 230.505(b)(2)(iii) (incorporating Regulation A disqualification provision into Rule 505 of Regulation D); *id.* § 230.506(d) ("bad actor" provision of Rule 506 of Regulation D).
5. 17 C.F.R. § 230.602(b)-(e).
6. 17 C.F.R. § 275.206(4)-3(a)(1)(ii)(C).
7. *E.g.*, 17 C.F.R. § 230.405 (subsection (2) under definition of "ineligible issuer"); *see also* Div. of Corp. Fin., *Revised Statement on Well-Known Seasoned Issuer Waivers*, U.S. Sec. & Exchange Commission (Apr. 24, 2014), *http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm* (elaborating on application of good cause standard).
8. 17 C.F.R. § 230.405 (subsection (2) under definition of "ineligible issuer").
9. Several of these instances have been discussed recently by Commissioner Gallagher. Daniel M. Gallagher, Comm'r, Sec. & Exchange Comm'n, Why is the SEC Wavering on Waivers? Remarks at the 37th Annual Conference on Securities Regulation and Business Law (Feb. 13, 2015), available at *http://www.sec.gov/news/speech/021315-spc-cdmg.html.*
10. *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Comm. on Banking and Currency, United States Senate*, 76th Cong. 3d Sess. at 874–75 (1940) (statement of Judge Robert Healy) (testifying with respect to the waiver provision: "we were trying to make provisions for the case of a man who within 10 years might have been guilty of a crime, who nevertheless had made a comeback and regained the respect of his fellowmen, and who should not in fairness be subject to the prohibition").

11. H.R. Rep. No. 104-369, at 46 (1995) (Conf. Rep.) ("At this time, the Conference Committee recognizes that certain types of transactions and issuers may not be suitable for inclusion in a statutory safe harbor … [but t]he SEC should consider granting exemptive orders for established and reputable entities who are excluded from the safe harbor.").

12. 156 Cong. Rec. 8314 (2010) (statement of Sen. Dodd) (explaining that the "bad actor" rule was intended to "disqualify felons and other 'bad actors' who have violated Federal and State securities laws from *continuing* to take advantage of the rule" and that "this will reduce the danger of fraud in private placements" (emphasis added)). Note that this interpretation is similar to the one espoused by Commissioner Gallagher. *See* Gallagher, *supra* note 9.

13. Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21,806, 21,885 (Apr. 20, 2015).

14. For example, one major financial institution recently withdrew a request for a WKSI waiver after the staff indicated that the waiver would not be approved. Sarah N. Lynch, *Exclusive: Credit Suisse Dropped SEC Waiver Request amid Opposition—Sources*, Reuters (May 4, 2015, 7:44 PM), *http://www.reuters.com/article/2015/05/04/us-sec-se-waiver-idUSKBN0NP26820150504.*

15. Securities Offering Reform, Securities Act Release No. 8591, 70 Fed. Reg. 44,721 (Aug. 3, 2005).

16. *Id.* at 44,729, 44,733-34; 17 C.F.R. § 230.163 (exemption from Section 5(c) for WKSIs); 17 C.F.R. § 230.163 (definition of "automatic shelf registration").

17. 17 C.F.R. § 230.405 (definition of "ineligible issuer").

18. *Id.* (subsection 1(vi) of definition of "ineligible issuer"); *see also* Letter from Mary Kosterlitz, Chief, Office of Enforcement Liaison, Div. of Corp. Fin., Sec. & Exchange Comm'n, to Deborah G. Heilizer, Sutherland Asbill & Brennan LLP (June 22, 2011), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2011/morganassetmgmt062211-3b.pd*f (granting waiver from being considered an ineligible issuer under Rule 405 that would otherwise result from a cease and desist order based on violations of, among others provisions, Section 34(b) of the 1940 Act).

19. *See* 17 C.F.R. § 230.405 (subsections (1)(ii), (iv)-(vi) of definition of "ineligible issuer").

20. 15 U.S.C. § 80a-9(a).

21. *Id.* § 80a-9(a)(1); *see also id.* § 80a-2(a)(10) (defining "convicted" to include a "plea of guilty").

22. *Id.* § 80a-9(a)(2).

23. *Id.* § 80a-2(a)(3)(C).

24. *Id.*, § 80a-2(a)(9).

25. *See* 6 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 20.9[2] , available at Westlaw 6 Law Sec. Reg. § 20.9 (last visited June 12, 2015) (discussing assignment process).

26. 15 U.S.C. § 80a-9(c).

27. *See* Richard A. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements: A Scorecard in the Courts from November 2004 Through November 2006*, 39 Sec. Reg. & L. Rep. (BNA) 54 (Jan. 15, 2007).

28. 15 U.S.C. § 77z-2(b)(1)(A); *Id.* § 78u-5(b)(1)(A).

29. *See* Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21,806, 21,809 (Apr. 20, 2015) (noting that the amendments "substantially conform" the "bad actor" provision of Regulation A to that of Regulation D). The SEC noted that "creating a uniform set of bad actor triggering events should simplify due diligence, particularly for issuers that may engage in different types of exempt offerings." *Id.* at 21,855.

30. 17 C.F.R. § 230.262(a)(1)-(6); 17 C.F.R. § 230.506(d)(1)(i)-(vi). This time period is extended to ten years for convictions of certain affiliated natural persons, such as directors, officers, and underwriters.

31. *See, e.g.*, Letter from Mauri L. Osheroff, Assoc. Dir., Div. of Corp. Fin., Sec. & Exchange Comm'n, to Paul R. Eckert, Wilmer Cutler Pickering Hale and Dorr LLP (Nov. 25, 2013), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2013/rbssecurities-section3(b)-112513.pdf.*

32. 17 C.F.R. § 230.262(b)(2); 17 C.F.R. § 230.506(d)(2)(ii).

33. 17 C.F.R. § 200.30-1(b)(1), (c).

34. 17 C.F.R. § 230.262(b)(3); 17 C.F.R. § 230.506(d)(2)(iii).

35. 17 C.F.R. § 230.602(b)(1)-(6).

36. 17 C.F.R. § 230.602(c)(1)-(3).

37. 17 C.F.R. § 230.602(e).

38. 17 C.F.R. § 230.206(4)-3(a)(ii).

39. *Dougherty & Co. LLC*, 2003 WL 22204509 (no-action letter) (S.E.C. Div. of Inv. Mgmt. Mar. 21, 2003).

40. *Id.* (requiring the company, in its capacity as a solicitor, or the investment adviser on whose behalf it solicits, for ten years from the date of the entry of the disqualifying order, to disclose the disqualification event in a written document that is delivered to each person whom the solicitor solicits (i) not less than 48 hours before the person enters into a written or oral investment advisory contract with the investment adviser or (ii) at the time the person enters into such a contract, if the person has right to terminate such contract without penalty within five business days after entering into the contract).

41. *See, e.g.*, 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*, U.S. Sec. & Exchange Commission (May 21, 2015), *http://www.sec.gov/news/statement/stein-waivers-granted-dissenting-statement.html.*

42. Chair White, "[l]ike her Democratic colleagues …, typically supports large financial penalties." Peter Eavis & Ben Protess, *She Runs S.E.C. He's a Lawyer. Recusals and Headaches Ensue*, N.Y. Times, Feb. 23, 2015, *http://www.nytimes.com/2015/02/24/business/dealbook/sec-hamstrung-by-its-leaders-legal-ties.html*

43. Kara M. Stein, *See Dissenting Statement in the Matter of Royal Bank of Scotland Group, plc, Regarding Order Under Rule 405 of the Securities Act of 1933, Granter a Waiver from Being an Ineligible Issuer*, U.S. Sec. & Exchange Commission (Apr. 28, 2014), *http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541670244* ("I fear that the Commission's action to waive our own automatic disqualification provisions arising from RBS's criminal misconduct may have enshrined a new policy—that some firms are just too big to bar.").

44. Press Release, Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), available at *http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.*

45. *In re Barclays PLC*, Securities Act Release No. 9778 (May 20, 2015), available at *https://www.sec.gov/rules/other/2015/33-9778.pdf*; *In re Citigroup Inc.*, Securities Act Release No. 9779 (May 20, 2015), available at *https://www.sec.gov/rules/other/2015/33-9779.pdf*; *In re JPMorgan Chase & Co.*, Securities Act Release No. 9780 (May 20, 2015), available at *https://www.sec.gov/rules/other/2015/33-9780.pdf*; *In re Royal Bank of Scotland Grp. PLC*, Securities Act Release No. 9781 (May 20, 2015), available at *https://www.sec.gov/rules/other/2015/33-9781.pdf*; *In re UBS AG*, Securities Act Release No. 9782 (May 20, 2015), available at *https://www.sec.gov/rules/other/2015/33-9782.pdf.*

46. Stein, *supra* note 41.

47. *See* Luis A. Aguilar and Kara M. Stein, *Dissenting Statement in the Matter of Oppenheimer & Co., Inc.*, U.S. Sec. & Exchange Commission (Feb. 4, 2015), available at *http://www.sec.gov/news/statement/dissenting-statement-oppenheimer-inc.html.*

48. Daniel M. Gallagher, *Statement on WKSI Waivers*, U.S. Securities and Exchange Commission (April 29, 2014), *http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541680627.*

49. Gallagher, *supra* note 48.

50. Gallagher, *supra* note 9.

51. Michael S. Piwowar, Commissioner, Sec. & Exchange Comm'n, Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly, and Efficient SEC (Feb. 20, 2015), available at *http://www.sec.gov/news/speech/022015-spchcmsp.html* ("Having established guidelines is particularly important in the context of settlement negotiations to allow a party that is considering a settlement offer to determine whether if it settles it will be able to obtain the necessary waivers to continue to engage in certain business activities.... I note that my fellow Commissioner Dan Gallagher gave a thoughtful speech on a potential path forward last week.").

52. Mary Jo White, Chair, Sec. & Exchange Comm'n, Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws, Remarks at the Corporate Counsel Institute, Georgetown University in Washington, D.C. (March 12, 2015), available at *http://www.sec.gov/news/speech/031215-spch-cmjw.html.*

53. *Id.*

54. *Id.*

55. Eavis & Protess, *supra* note 42. In recent letter, Chair White stated that she had recused herself for reasons related to her spouse's firm's practice approximately twelve times between April 2013 and July 2015. Letter from Mary Jo White, Chair, Sec. & Exchange Comm'n, to Elizabeth Warren, U.S. Senator, at 3 n.6 (July 10, 2015).

56. Letter from Elizabeth Warren, U.S. Senator, to Mary Jo White, Chair, Sec. & Exchange Comm'n (June 2, 2015), available at *http://www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf.*

57. *Id.* at 8.

58. Letter from Mary Jo White, *supra* note 55.

59. Peter Schroeder, *Waters Looks to Tighten Up SEC Waivers*, The Hill (Mar. 24, 2015, 10:06 AM), *http://thehill.com/policy/finance/236725-waters-look-to-tighten-up-sec-waivers.*

60. *See* No-Action Letter, *AGF Inv. Advisors, Inc.*, Ref. No. 91-280-CC, 1991 WL 176786 (S.E.C. Div. of Inv. Mgmt. June 12, 1991).

61. The list of crimes in Section 15(b)(4)(B) of the Exchange Act, 15 U.S.C. § 78o(b)(4)(B), exemplifies both approaches.

62. 17 C.F.R. § 230.506(d)(iii)(B).

63. 15 U.S.C. § 77z-2(b)(1)(ii); *id.* § 78u-5(b)(1)(A)(ii).

64. 15 U.S.C. § 77z-2(b)(1); *id.* § 78u-5(b)(1). As noted above, the staff previously had taken the position that if a subsidiary is disqualified, then the parent issuer is as well.

65. The Commission has delegated authority to the Director of Investment Management to issue certain temporary waivers under Section 9(c), 17 C.F.R. § 200.30-5(a)(7), and to issue Section 9(c) waivers that arise solely because the applicant employs a disqualified person (and only when the employee no longer works in an investment advisory role). *Id.* § 200.30-5(a)(8).

66. *See id.* § 200.30-1(a)(10).

67. *See Division of Corporation Finance No-Action, Interpretive and Exemptive Letters*, U.S. Sec. & Exchange Comm'n, *http://www.sec.gov/divisions/corpfin/cf-noaction.shtml#405* (last visited July 20, 2015).

68. White, *supra* note 52.

69. Letter from Mary Kosterlitz, Chief Office of Enforcement Liaison, Div. of Corp. Fin., SEC, to David Huntington, Paul, Weiss, Rifkind, Wharton & Garrison LLP (April 23, 2015), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2015/deutsche-bank-ag-042315-405.pdf* (finding two weeks of temporary relief was warranted where the Division of Corporate Finance was unable to complete its normal review procedure because "the timing of the criminal proceeding causing disqualification ... was not within the Commission's control").

70. In principle, an interested party may request a hearing on the 9(c) application during the thirty-day comment period. A review of the Division of Investment Management website reveals no example in the past eight years in which a hearing was requested.

See Investment Company Act Notices and Orders: Category Listing, U.S. Sec. & Exchange Comm'n, *http://www.sec.gov/rules/icreleases.shtml#ineligibledisqfirm* (last visited July 20, 2015).

71. In 2007, WKSI waiver applications were often just over three pages long. *See, e.g.*, Letter from Francis P. Barton, Cravath, Swaine & Moore LLP, to Mary J. Kosterlitz, Chief, Office of Enforcement Liaison, Div. of Corp. Fin., SEC (May 23, 2006), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/citigroup-053106-405.pdf* Today, they may run to over ten pages. *See, e.g.*, Letter from George H. White, Sullivan & Cromwell LLP, to Mary J. Kosterlitz, Chief, Office of Enforcement Liaison, Div. of Corp. Fin., SEC (May 20, 2015), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2015/barclays-plc-052015-405.pdf.*

72. *See, e.g.*, Revised Statement on Well-Known Seasoned Issuers, *supra* note 7.

73. *See, e.g.*, Letter from Steven W. Hansen, Bingham McCutchen LLP, to Mary J. Kosterlitz, Esq., Div. of Corp. Fin., SEC (Jan. 17, 2006), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/metlife022106.pdf.*

74. *See* Revised Statement on Well-Known Seasoned Issuers, *supra* note 7 (requiring an explanation of "Impact If the Waiver Request Is Denied").

75. *See id.*; White, *supra* note 52.

76. *See, e.g.*, Application Pursuant to Section 9(c) of the Investment Company Act of 1940 for Temporary and Permanent Orders Exempting Applicants from the Provisions of Section 9(a) of Such Act at 14, 20, *Banc of Am. Mortgage Sec., Inc.*, File No. 812-14390 (S.E.C. Nov. 25, 2014) ("BoA 9(c) Application"), available at *http://www.sec.gov/Archives/edgar/data/728612/000110465914083283/a14-22928_140app.htm;* Letter from Jonathan S. Pressman, Wilmer Cutler Pickering Hale and Dorr LLP, to Mary J. Kosterlitz, Chief, Office of Enforcement Liaison, Div. of Corp. Fin., SEC, at 6 (August 13, 2014), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2014/barclaysplc-092314-405.pdf* (noting that the applicant had been subject only to one previous WKSI waiver).

77. Revised Statement on Well-Known Seasoned Issuers, *supra* note 7.

78. BoA 9(c) Application, *supra* note 76, at 29; *see* Letter from Jonathan S. Pressman, *supra* note 76, at 6.

79. *See, e.g.*, Letter from Jonathan S. Pressman, *supra* note 76, at 6; *In re Barclays PLC*, Securities Act Release No. 33-9650 (Sept. 23, 2014), available at *http://www.sec.gov/rules/other/2014/33-9650.pdf.*

80. *See, e.g.*, Letter from Kenneth J. Berman, Debevoise & Plimpton LLP, to Sebastian Gomez Abero, Chief, Office of Small Bus. Policy, Div. of Corp. Fin., SEC, at 5 (May 20, 2015), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2015/ubs-ag-052015-506d.pdf; In re UBS AG*, Securities Act Release No. 33-9787 (May 20, 2015), available at *http://www.sec.gov/rules/other/2015/33-9787.pdf.*

81. *See, e.g.*, BoA 9(c) Application, *supra* note 76, at 15, 20.

82. *See id.* at 16-20. Analogous concerns have been expressed in at least one Regulation D application, which noted that the applicant's investment advisory subsidiary owned large interests in private funds that relied on the Rule 506 offering exemption, and that a disqualification might disrupt this business and force investors to find alternative offerings. *See* Letter from Kenneth J. Berman, *supra* note 80.

83. *See* BoA 9(c) Application, *supra* note 76, at 20-21.

84. *See supra* notes 39-40 and accompanying text.

85. *See* White, *supra* note 52; Ackerman, *supra* note 58.

86. *See, e.g.*, Application Pursuant to Section 9(c) of the Investment Company Act of 1940 for Temporary and Permanent Orders Exempting Applicants from the Provisions of Section 9(a) of Such Act at 14, *Credit Suisse Asset Mgmt., LLC*, File No. 812-14313 (S.E.C. May 20, 2014), available at *http://www.sec.gov/Archives/edgar/data/824468/000089914014000491/c11985577b.htm.*

87. *See* White, *supra* note 52.

88. *Id.*

89. *See* Order Under Rule 506(d) of the Securities Act of 1933 Granting a Waiver of Disqualification of the Rule 506(d)(1)(iii) Disqualification Provision, *Bank of Am., N.A.*, Securities Act Release No. 9682 (S.E.C. Nov. 25, 2014), available at *http://www.sec.gov/rules/other/2014/33-9682.pdf.*

90. Kara M. Stein, Commissioner, Sec. & Exchange Comm'n, Remarks Before the Consumer Federation of America's 27th Annual Financial Services Conference (Dec. 4, 2014), *http://www.sec.gov/News/Speech/Detail/Speech/1370543593434.*

91. 17 C.F.R. § 230.506(d)(2)(iii).

92. *Id.*

93. *See* Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions at 44, *Deutsche Bank AG*, No. 15-20 (C.F.T.C. Apr. 23, 2015), available at *http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfdeutscheorder042315.pdf;* Order Instituting Proceedings Pursuant to Sections 6(c)(4)(A) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions at 15-16, *The Royal Bank of Scotland plc*, No. 15-05 (C.F.T.C. Nov. 11, 2014), available at *http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfroyalbankorder111114.pdf.*

94. *See* Kara M. Stein, *Dissenting Statement in the Matter of Deutsche Bank AG, Regarding WKSI*, U.S. Sec. & Exchange Commission (May 4, 2015), *http://www.sec.gov/news/statement/dissenting-statement-deutsche-bank-ag-wksi.html.*