

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2020/November 14, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15992

In the Matter of

MARC SHERMAN

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:

ORDER

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on July 30, 2014, pursuant to Section 21C of the Securities Exchange Act of 1934 (Exchange Act). The hearing is scheduled to begin on March 2, 2015, in Washington, D.C.

The OIP was authorized against Respondent Marc Sherman (Sherman) in his capacity of officer and director of a public company for alleged conduct in 2008 and 2009. Sherman is not alleged to be, or have been, a registrant or associated with a registrant. The sanctions authorized in the OIP are a cease-and-desist order, an officer and director bar, and civil penalties. Under consideration is Sherman's Motion to Preclude Civil Monetary Penalties, filed September 17, 2014, and responsive pleadings.¹ Sherman argues, and the undersigned has concluded, that to impose such penalties would be an impermissible *ex post facto* application of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).

It is undisputed that Sherman's alleged conduct occurred before the July 22, 2010, effective date of the Dodd-Frank Act, which added the provision contained in Exchange Act Section 21B(a)(2), that authorizes the Commission to impose a civil penalty "[i]n any proceeding instituted under section 21C against *any person*." (emphasis added). It is also undisputed that the Dodd-Frank Act did not expressly make retroactive this new authority to impose civil penalties in administrative cease-and-desist proceedings against persons who were not registrants or associated with registrants. There is a general presumption against retroactive application of legislation absent clear Congressional intent favoring such a result. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 280 (1994). Retroactive effect includes "increas[ing] a party's liability for past conduct." *Id.*

Landgraf recognizes the well-established principle that intervening statutes conferring or ousting jurisdiction can be applied retroactively. *Id.* at 274 (citing *Hallowell v. Commons*, 239 U.S. 506, 508-09 (1916) (authorizing retroactive application of statute transferring jurisdiction of American Indian probate disputes from Article III courts to Department of the Interior)). The

¹ Sherman's motion was filed as ordered at the September 10, 2014, prehearing conference. *Marc Sherman*, Admin. Proc. Rulings Release No. 1793, 2014 SEC LEXIS 3291 (A.L.J. Sept. 10, 2014).

Division of Enforcement (Division) argues that the Dodd-Frank Act penalty authorization contained in Exchange Act Section 21B(a)(2) is such a jurisdictional change. However, the precedent that the Division cites in support of this argument involved situations in which jurisdiction of disputes was *removed* from Article III courts and transferred to an administrative agency.² By contrast, Exchange Act Section 21B, as amended by the Dodd-Frank Act, does not remove jurisdiction from any court but rather creates a new authority for the Commission to impose civil penalties.³

Prior to the effective date of the Dodd-Frank Act, the Commission was authorized to seek civil penalties in U.S. District Courts by Sections 20(d) of the Securities Act of 1933 and 21(d)(3) of the Exchange Act against “any person” who violated the securities laws. Thus, the Division argues, the penalty provision added by the Dodd-Frank Act did not increase Sherman’s liability for past conduct in that he could have been sued for civil penalties in U.S. District Court by the Commission. However, the Commission did not do so, either before or after the effective date of the Dodd-Frank Act.

The Division also argues that the issue is not ripe for decision in that Sherman’s alleged violations, if proven, could result in the sanctions other than civil penalties, such that the scope of the hearing would be unchanged whether or not civil penalties are precluded in advance. However, as Sherman states, preclusion of civil penalties will make settlement negotiations more efficient and will also eliminate any need to consider evidence of Sherman’s ability to pay penalties. In short, deciding the penalty issue now will shorten the hearing and contribute to a more efficient resolution of the proceeding. Accordingly, civil penalties will be precluded in this proceeding in the event that the undersigned concludes that Sherman committed any violation alleged in the OIP.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

² *Hallowell v. Commons; Kolster v. INS*, 101 F.3d 785, 788 (1st Cir. 1996) (authorizing retroactive application of statute stripping Article III courts of jurisdiction over certain Board of Immigration Appeals proceedings).

³ The penalty provisions are even different. *Compare* Securities Act Section 20(d)(2) and Exchange Act Section 21(d)(3)(B) *with* Exchange Act Section 21B(b) (providing different maximum amounts for court-ordered penalties as compared with Commission-imposed penalties). Also, a defendant in a court proceeding has a right to a jury trial, which a respondent in a Commission proceeding does not have.