

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3298/November 5, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16649

In the Matter of

IRONRIDGE GLOBAL PARTNERS, LLC,
IRONRIDGE GLOBAL IV, LTD.

ORDER ON MOTION FOR SUMMARY
DISPOSITION

The Securities and Exchange Commission initiated this proceeding under Sections 15(b) and 21C of the Securities Exchange Act of 1934. A hearing is scheduled to begin on December 7, 2015.

The Division of Enforcement alleges that Respondent Ironridge Global IV, Ltd. violated—indeed, continues to violate—Section 15(a)(1) of the Exchange Act by acting as an unregistered dealer. Order Instituting Proceeding (OIP) at 6. The Division alleges that the principals of Respondent Ironridge Global Partners, LLC control Global IV. *Id.* at 2. On the basis of this allegation, the Division claims Global Partners is responsible for Global IV’s violation of Section 15(a)(1). *Id.* at 6. The Division therefore alleges that Global Partners is liable for violating Exchange Act Sections 15(a)(1) and 20(b). *Id.*

Respondents move for summary disposition, principally arguing that as a matter of law, Global IV is not a dealer and that even if it is dealer, it is exempt from the requirement that it register as a dealer. Respondents’ arguments may carry the day on the merits. Because there are material facts in dispute, however, summary disposition is not appropriate. Respondents’ motion is therefore DENIED.¹

Background

Solely for purposes of this Order, I will accept as true the facts alleged in the OIP. *See* 17 C.F.R. § 201.250(a) (“The facts of the pleadings of the party against whom the motion is made shall be taken as true”). Global Partners is a domestic company. OIP at 2. Until this year, it wholly owned Global IV, which is a foreign company located in the British Virgin Islands. *Id.*

¹ A party that believes its summary disposition papers sufficiently set forth the party’s position may request that I consider those papers in lieu of a prehearing brief.

Global Partners has four principals. *Id.* Until late 2012, three of Global Partners' principals were among Global IV's five directors. *Id.* Global Partners controlled Global IV. *Id.*

One of Global IV's business models involves buying the debt of microcap issuers and then settling the acquired claims against the issuers through exchanges under Section 3(a)(10) of Securities Act. OIP at 3; *see* 15 U.S.C. § 77c(a)(10). Section 3(a)(10) exempts securities from the registration requirement in the Securities Act if the securities are issued wholly or in part in exchange for bona fide outstanding claims. 15 U.S.C. § 77c(a)(10). By its terms, this exemption only applies if the exchange occurs after a court or other authorized entity holds a hearing concerning the fairness of the terms of the exchange. *Id.*

Global Partners promotes its "finance model . . . on its website and in certain business and finance publications." OIP at 3. It identifies microcap issuer candidates and its principals contact the issuers and discuss with them "the structure and purported benefits" of an exchange under Section 3(a)(10). *Id.* at 3. The principals then negotiate terms with the issuers and help the issuers identify creditors' claims to be purchased by Global IV. *Id.* The principals then negotiate with the issuers' creditors and Global IV buys the creditors' claims, typically for the entire amount owed. *Id.* at 3-4.

After purchasing claims against an issuer, Global IV files suit in a California state court. OIP at 4. Global IV and the issuer subject to the suit then enter a settlement agreement. *Id.* Once the court approves the terms of the settlement, Global IV releases its claims and the issuer issues Global IV unrestricted stock, at a "steep[] discount[]." *Id.* at 2, 4. The settlement agreement includes a price protection formula that entitles Global IV to additional shares in the event the shares decline in price during certain time periods. *Id.* at 4.

The shares issued to Global IV are placed in its brokerage accounts, over which some of Global Partners' principals have exercised trading authority. OIP at 5. Those principals have "controlled or directed" the depositing of shares into those accounts and the sales of shares out of those accounts. *Id.* Global IV begins selling the newly acquired shares on the open market within days of those shares being cleared for trading. *Id.*

As of the time the OIP was issued, Global IV had participated in over thirty exchanges under Section 3(a)(10), involving claims of about \$35 million. OIP at 4. As a result of these exchanges, Global IV acquired and sold over five billion shares of issuers' stock, reaping a profit of about \$22 million. *Id.* at 4. In twenty-one instances, Global IV's sales represented 90% or more of the day's trading volume for the stock in question. *Id.* at 5.

The volume of Global IV's sales has caused the issuers' share prices to drop. OIP at 5. As a result, Global Partners has invoked the price protection formula in Global IV's settlement agreement and "directed" the issuer to issue Global IV additional shares. *Id.* Certain of Global Partners' principals have communicated these directions or requests "directly to the issuers or [their] transfer agents." *Id.* at 6. In this way, Global Partners' "principals [have] controlled or directed the issuers' issuance of new shares." *Id.*

Global IV uses the proceeds from the sales of the issuers' stock to pay the issuers' former creditors for the claims Global IV purchased and settled through Section 3(a)(10) exchanges. OIP at 6. Global Partners' principals control the monetary transfers from Global IV's brokerage and bank accounts to the issuers' former creditors. *Id.*

The Division bases its claim that Global IV operates as a dealer on allegations that Global IV "engag[es] in serial underwriting activity, provid[es] related investment advice, and receiv[es] and sell[s] billions of shares." OIP at 1-2. Because the Division alleges that Global IV is unregistered, the Division claims Global IV has violated Section 15(a)(1) of the Exchange Act, which requires dealers to register with the Commission. *Id.* at 6; *see* 15 U.S.C. § 78o(a)(1). By extension, the Division claims that Global Partners has violated Sections 15(a)(1) and 20(b) of the Exchange Act. OIP at 6; *see* 15 U.S.C. §§ 78o(a)(1), 78t(b).

Properly framed, this case is thus about Global IV's status. If it meets the definition of a dealer, it violated Section 15(a)(1) of the Exchange Act because dealers are required to register with the Commission and it failed to do so. If it is not a dealer, or is exempt from the requirement that it register as a dealer, it is not liable under Section 15. And if Global IV is not liable, Global Partners is also not liable.

Legal Principles

1. Exchange Act Sections 15(a)(1) and 20(b)

Section 15(a)(1) of the Exchange Act requires dealers to register with the Commission.² *See* 15 U.S.C. § 78o(a)(1). A showing of scienter is not required in order to establish a violation of Section 15(a)(1). *Anthony Fields*, Securities Act Release No. 9727, 2015 SEC LEXIS 662, at *73 (Feb. 20, 2015). "The term 'dealer' means any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5)(A).

² In full, Section 15(a)(1) provides:

It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

Although the phrase “engaged in the business” is not defined in the Securities Act, the definition of the term dealer “connote[s] a certain regularity of participation in securities transactions at key points in the chain of distribution.” *Massachusetts Fin. Servs., Inc. v. Sec. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass.), *aff’d*, 545 F.2d 754 (1st Cir. 1976). The Commission has explained that to be considered a dealer, one “must be engaged in the securities business, and be buying and selling for his own account.” *Gordon Wesley Sodorff, Jr.*, Exchange Act Release No. 31134, 1992 SEC LEXIS 2190, at *14-15 (Sept. 2, 1992). And “the primary indicia . . . that a person has ‘engaged in the business’ . . . is that the level of participation in purchasing and selling securities involves more than a few isolated transactions.” *Id.* at *15; *see SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 13 (D.D.C. 1998) (“regularity of participation is the primary indicia of being ‘engaged in the business’”). Participation in buying and selling securities, however, need not “be a person’s principal business or . . . principal source of income.” *Gordon Wesley Sodorff, Jr.*, 1992 SEC LEXIS 2190 at *15.

“The phrase ‘buying and selling securities for such person’s own account’ means purchasing or selling securities as [a] principal.” Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 46745, 67 Fed. Reg. 67496, 67499 (Nov. 5, 2002) (Dealer Exemption Release).

The term dealer does not encompass a person who buys or sells securities “not as a part of a regular business.” 15 U.S.C. § 78c(a)(5)(B). This exception recognizes the distinction between a dealer and a trader. 67 Fed. Reg. at 67499. Dealers are required to register with the Commission but traders are not. *Id.* The totality of one’s activities determines which side of the dealer/trader line one falls. *Id.* “A person generally *may*” fall on the dealer side of the line:

by . . . (1) Underwriting; (2) acting as a market maker or specialist on an organized exchange or trading system; (3) acting as a de facto market maker whereby market professionals or the public look to the firm for liquidity; *or* (4) buying and selling directly to securities customers together with conducting any of an assortment of professional market activities such as providing investment advice, extending credit and lending securities in connection with transactions in securities, and carrying a securities account.

Id. (emphasis added).

Under the heading “Unlawful activity through or by means of any other person,” Section 20(b) provides that:

It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

15 U.S.C. § 78t(b).

2. Summary disposition standard

Commission Rule of Practice 250 governs motions for summary disposition. *See* 17 C.F.R. § 201.250. An administrative law judge “may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law.” 17 C.F.R. § 201.250(b). Although Rule 250 provides a mechanism for seeking summary disposition, summary disposition is disfavored in cases like this one, in which the Commission orders that an Initial Decision be issued within 300 days of service of the OIP. *See Jay T. Comeaux*, Securities Act Release No. 9633, 2014 SEC LEXIS 3001, at *16 n.30 (Aug. 21, 2014); Rules of Practice, Exchange Act Release No. 35833, 60 Fed. Reg. 32738, 32768 (June 23, 1995). The procedure contemplated under Rule 250 is thus more limited than that governed by Rule 56 of the Federal Rules of Civil Procedure. *See* 60 Fed. Reg. at 32768 (“the circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare”). Unlike under Rule 56, when a respondent moves for summary disposition in a Commission proceeding, the administrative law judge must “take[] as true” the facts alleged in the OIP, “except as modified by stipulations or admissions made by [the Division], by uncontested affidavits, or by facts officially noticed pursuant to Rule 323.” 17 C.F.R. § 201.250(a); *see* Fed. R. Civ. P. 56(c)(1), (e) (requiring a party to support an assertion with evidence and providing consequences for the failure to do so).

Although Rule 56 of the Federal Rules of Civil Procedure does not apply in this proceeding, cases applying it can be instructive. *See Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *22 n.26 (Feb. 4, 2008); *see also* Mot. at 12 n.15; Opp’n at 9 n.5. In considering Respondents’ motion, I must view the evidence in the light most favorable to the Division, “indulg[ing] all reasonable inferences in its favor.” *Mississippi Pub. Emp. Ret. Sys. v. Boston Sci. Corp.*, 649 F.3d 5, 28 (1st Cir. 2011); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Given the “drastic” nature of summary disposition, it should only be granted “with caution.” *Greenberg v. FDA*, 803 F.2d 1213, 1216 (D.C. Cir. 1986); *see Jay T. Comeaux*, 2014 SEC LEXIS 3001, at *16 n.30; 60 Fed. Reg. at 32768.

Discussion

1. Respondents’ position

Respondents argue that as a matter of law, Global IV is not a dealer. Mot. at 13-26. Relying on information posted on the Commission’s website, they argue that there are “ten established factors” that determine whether one is a dealer. *Id.* at 15-16; *see* <http://www.sec.gov/divisions/marketreg/bdguide.htm#II>. Conceding that one must consider the totality of the circumstances in order to determine whether someone is a dealer, Respondents argue that the allegations of Global IV’s activities in the OIP at most implicate one of the ten factors, being an underwriter. Mot. at 15-17.

Recognizing the connection between the terms underwriter and distribution, Respondents rely on the definition of the term distribution found in Regulation M of the Exchange Act and assert that Global IV is not an underwriter because it engages in no special selling efforts or methods. Mot. at 17-18; *see* 17 C.F.R. § 242.100(b). They also rely on the fact that the

securities Global IV acquires through Section 3(a)(10) exchanges are exempt from the registration requirement in the Securities Act. Mot. at 17-18. Respondents further argue that Global IV lacks the attributes one would normally associate with an underwriter. *Id.* at 19-21. Respondents assert that unlike underwriters, who immediately sell an issuer's stock in order to avoid risk, Global IV holds a portion of an issuer's stock for a long period. *Id.* at 19-20. Again referencing the definition of "distribution" in Regulation M, they additionally argue that Global IV's level of trading does not involve a sufficient magnitude to qualify it as an underwriter. *Id.* at 20-21. Moreover, according to Respondents, Global IV lacks other attributes of an underwriter – it does not help issuers raise capital, does not advise issuers about market conditions or marketing, is not involved with syndicates of investment banks, "or transact to provide a post-issuance secondary market." *Id.* at 21.

Respondents also take issue with the two other factors listed in the OIP as demonstrating that Global IV is a dealer: providing investment advice to the issuers and receiving and selling billions of shares through the Section 3(a)(10) exchanges. Mot. at 21-24. Respondents argue that these two factors are newly created by the Division and cannot be used to determine whether Global IV is a dealer. *Id.* at 22, 24. And they assert that providing investment advice to issuers, as opposed to investors, is not a factor used to identify a dealer and even if it were, Global IV does not provide investment advice. *Id.* at 22-24.

Even assuming Global IV is a dealer, Respondents argue that it is a foreign dealer and thus exempt from the registration requirement. Mot. at 25-26. Respondents assert that Global IV qualifies as a foreign dealer because it "effects transactions with persons that have not been solicited by it." *Id.* at 25-26; *see* 17 C.F.R. § 240.15a-6(a)(1). Additionally, Respondents assert that Global IV falls within the terms of the exception for a foreign dealer that effects securities transactions "with or for . . . [a] registered broker or dealer." Mot. at 25; *see* 17 C.F.R. § 240.15a-6(a)(4).

As to Global Partners, Respondents argue that the Section 20(b) charge fails because the Division cannot show that Global Partners "controlled" Global IV. Mot. at 26-29. They also argue that the Division cannot show that Global Partners caused Global IV to commit the alleged violation of Section 15(a)(1). *Id.* at 29-30. Finally, Respondents assert that Division cannot show that Global Partners "knowingly participated in Global IV's alleged § 15(a) violation." *Id.* at 30.

2. *The Division's position*

The Division argues that Global IV was acting as an unregistered dealer, because it allegedly bought securities directly from the microcap issuers, resold those securities on the open market, served as an underwriter, and "provid[ed] incidental investment advice to the issuers." Opp. at 10-11. According to the Division, the Commission has established that the determination of whether an entity is a dealer depends on a number of factors, including buying or selling securities as a principal from or to customers, carrying a dealer inventory,

underwriting, and “providing incidental investment advice.”³ *Id.* at 12 (relying on OTC Derivatives Dealers, Exchange Act Release No. 40594, 63 Fed. Reg. 59362, 59370 n.61 (Nov. 3, 1998)). The Division notes that the term “underwriter” is statutorily defined and includes “any person who has purchased from an issuer with a view to . . . the distribution of any security.” *Opp.* at 12 n.5 (relying on 15 U.S.C. §§ 78c(a)(20), 80b-2(a)(20)).

The Division argues that Respondents should not rely on the factors listed on the Commission’s website because the information contained there comes with a disclaimer.⁴ *Opp.* at 13. Moreover, the Division argues that the referenced information suggests that underwriting activity alone can support the determination that one is a dealer. *Id.* at 14, 18. The Division asserts that the determination of whether a person is an underwriter turns on whether the person “purchased from an issuer with a view to . . . the distribution of any security.”⁵ *Id.* at 19. And determining whether someone has purchased from an issuer with a view to distribution turns on the alleged underwriter’s intent at the time of the purchase. *Id.* at 19, 21.

The Division asserts that the Commission has authoritatively stated in footnote 61 of the OTC Derivatives Dealers Release that giving “incidental investment advice with respect to securities” may qualify one as a dealer. *Opp.* at 24; *see* 63 Fed. Reg. 59362, 59370 n.61. The Division also disputes Respondents’ argument that Global IV need not register because the securities it received were exempt under the Securities Act. *Opp.* at 20-21.

The Division argues that the foreign dealer exemptions do not apply. First, it relies on allegations in the OIP to the effect that Global Partners marketed its financing program and contacted issuers about participating in exchanges. *Opp.* at 25; *see* OIP at 3; 17 C.F.R. § 240.15a-6(a)(1). Second, the Division asserts that Global IV did not effect trades through a registered broker-dealer and instead acquired shares through Section 3(a)(10) exchanges. *Opp.* at 25; *see* 17 C.F.R. § 240.15a-6(a)(4)(i).

As to the allegation under Section 20(b), the Division argues that unlike Section 20(a), Section 20(b) does not use the word “control.” *Opp.* at 26-29. It thus says that it need not show that Global Partners controlled Global IV. *Id.* at 27. Even so, however, the Division argues that the evidence shows that Global Partners did control Global IV. *Id.* Finally, the Division asserts

³ In their reply, Respondents argue that Global IV does not do any of these things, that being an underwriter does not make one a dealer, and that Global IV is not an underwriter. Reply at 7-17. For purposes of this order, there is no need to discuss the allegation that Global IV “provid[es] related investment advice[] and receiv[es] and sell[s] billions of shares.” OIP at 1-2. Nonetheless, the factual assertions related to the claim that *Global IV* “provid[es] related investment advice,” *see* OIP at 3, pertain to Global Partners and its principals.

⁴ In their reply, Respondents say that guidance on the Commission’s website is “not mere musings the Division is free to ignore.” Reply at 7.

⁵ Respondents argue that a distribution involves special selling efforts not in evidence here. Reply at 14-15.

that because “multiple legal sources” gave Respondents notice that Global IV was required to register, Global Partners cannot claim that it did not act “knowingly.” *Id.* at 29.

3. *The Division has shown that material facts are in dispute*

The allegations against Global IV, and by extension, Global Partners, form links in a chain. The Division alleges that Global IV is a dealer because it acted as an underwriter. And, the Division says, Global IV qualifies as an underwriter because it purchased shares with a view toward distribution. Although there is a facial appeal to Respondents’ arguments that Global IV is neither an underwriter nor a dealer, the fact-specific nature of the inquiry at issue does not lend itself to resolution by summary disposition.⁶ Respondents’ motion is thus DENIED.

A. *The dealer allegations*

The definition of the term dealer casts a wide net, covering those who “engage[] in the business of buying and selling securities . . . for [their] own account.”⁷ The reach of this net is limited by the fact that buying and selling securities when not done as part of a regular business qualifies one as a trader, not as a dealer. 15 U.S.C. § 78c(a)(5)(B); *see* 67 Fed. Reg. at 67499. Determining whether one’s activity is part of a regular business is necessarily a fact-specific endeavor that requires consideration of the totality of the alleged dealer’s activities and circumstances. *See* 67 Fed. Reg. at 67499.

At least as alleged in the OIP, the facts could support the inference that Global IV’s entire business model involves acquiring and selling securities. Buying or purchasing includes “acquisition of an interest in . . . property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction.” Black’s Law Dictionary (10th ed. 2014). This broad definition encompasses the manner in which Global IV is alleged to have acquired the issuers’ shares: a voluntary exchange of shares for consideration, *i.e.*, relinquishment of claims. *See* OIP at 4-5. Depending on the totality of all relevant factors, *see* 67 Fed. Reg. at 67499, the fact that Global IV’s business model involves acquiring and selling securities is *potentially* enough to make it a dealer, *see SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 809 (11th Cir. 2015) (“While evidence of merely *some* profits from buying and selling securities

⁶ *See Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 123 (2d Cir. 2004) (“Given the fact-specific nature of the inquiry, granting summary judgment . . . is not appropriate.”); *see also White v. Baptist Mem’l Health Care Corp.*, 699 F.3d 869, 878 n.1 (6th Cir. 2012) (“a ‘fact-specific finding’ . . . is inherently inappropriate on summary judgment”).

⁷ 15 U.S.C. § 78c(a)(5)(A); *see Gordon Wesley Sodorff, Jr.*, 1992 SEC LEXIS 2190, at *14-15; Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27017, 54 Fed. Reg. 30013, 30015-16 (July 18, 1989) (“The definitions in the Exchange Act of the terms ‘broker’ and ‘dealer’ and the registration requirements of Section 15(a) of the Exchange Act were drawn broadly by Congress to encompass a wide range of activities involving investors and securities markets.”).

may alone be inconclusive proof, the defendants' *entire* business model was predicated on the purchase and sale of securities."').⁸

In the Dealer Exemption Release, the Commission provided that underwriting is one among several indicia of being a dealer. 67 Fed. Reg. at 67499. At the same time, the Commission stated that the ultimate determination of whether one is a dealer "depends upon all of the relevant facts and circumstances." *Id.* Being an underwriter thus *could* make one a dealer, when all other factors are considered.

By statute, anyone who buys a security from an issuer with the intent to distribute the security is an underwriter.⁹ This is a broad definition¹⁰ which closely associates the term underwriter with the term distribution. *Cf. Ackerberg v. Johnson*, 892 F.2d 1328, 1336 (8th Cir. 1989) (discussing the term underwriter under the similar definition in the Securities Act). Distribution in this sense means "resell[ing] to the public."¹¹ An underwriter can therefore include one who, while intending to resell the security to the public, buys a security from an issuer.¹² The Division's allegations that Global IV began selling the issuers' securities within days of acquiring them could support an inference that Global IV acquired the securities with the

⁸ Respondents argue that *Big Apple Consulting* is inapt because the court of appeals construed the definition of the term dealer found in the Securities Act, not the Exchange Act. Reply at 6; *see* 783 F.3d at 809; *see also* 15 U.S.C. § 77b(a)(12). The court of appeals, however, noted that the district court had applied the Exchange Act definition of the term dealer and opined that the definitions of dealer found in the Securities Act and the Exchange Act "are very similar." 783 F.3d at 809 n.11. Indeed, the court said that "[t]o qualify as a 'dealer,' a person must be in the 'business of' buying and selling securities." *Id.* at 809. In relevant part, this is the same inquiry that is used under the Exchange Act. *See* 15 U.S.C. § 78c(a)(5)(A); *Gordon Wesley Sodorff, Jr.*, 1992 SEC LEXIS 2190, at *14-15.

⁹ 15 U.S.C. §§ 78c(a)(20), 80b-2(a)(20)); *cf. In re Refco, Inc. Secs. Litig.*, 503 F. Supp. 2d 611, 629 (S.D.N.Y. 2007) (construing the term underwriter under the Securities Act and holding that the term includes one who "buys securities directly or indirectly from the issuer and resells . . . to the public").

¹⁰ *Reiter-Foster Oil Corp.*, Securities Act Release No. 2201, 1940 SEC LEXIS 371, at *10 (Mar. 11, 1940).

¹¹ *G. Eugene England Found. v. First Fed. Corp.*, 663 F.2d 988, 989 (10th Cir. 1973); *see In re WorldCom Secs. Litig.*, 308 F. Supp. 2d 338, 343-44 (S.D.N.Y. 2004).

¹² *See* Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 4.27, 2 Law Sec. Reg. § 4.27 (2015); *see also Big Apple Consulting*, 783 F.3d at 807 ("there is a distinction between acquiring shares from the issuer with an investment purpose and acquiring shares for the purpose of reselling them").

intent to sell to them.¹³ Inferring this fact could support a determination that Global IV acted as an underwriter.

Respondents, however, assert that as a matter of law, the definition of the term distribution found in Regulation M should apply because Regulation M is an Exchange Act regulation. Mot. at 17, 20; Reply at 14-15; *see* 17 C.F.R. § 242.100(b). As used in Regulation M, a distribution is distinguished from mere trading “by the magnitude of the offering and the presence of special selling efforts.” 17 C.F.R. § 242.100(b). Respondents have cited no precedent, however, supporting the proposition that the Commission would generally apply the Regulation M definition of the term distribution in determining whether someone is an underwriter. Rather, the definitions in Regulation M only apply “for the purposes of Regulation M.” 17 C.F.R. § 242.100(b). And as the Commission explained when discussing Regulation M’s predecessor, “[t]he term ‘distribution’ as used in [the predecessor provision] is to be interpreted in the light of the rule’s purposes as covering offerings of such a nature or magnitude as to require restrictions upon open market purchases by participants in order to prevent manipulative practices.”¹⁴

Respondents rely on no-action letters that they argue support their request for summary disposition. No-action letters have value to the extent the reasoning contained in them is persuasive. *See New York City Employees’ Ret. Sys. v. SEC*, 45 F.3d 7, 12-13 (2d Cir. 1995). No doubt, “the Bar and the public do” rely on them. Mot. at 19 (citation omitted). But they are not binding. *New York City Employees*, 45 F.3d at 14.¹⁵ It is therefore the case that while the logic supporting the conclusions reached in any given no-action letter might support a given outcome on the merits after a hearing, a no-action letter, by itself, cannot require a particular outcome sufficient to warrant summary disposition.

Respondents assert that if the Division’s position is accepted, the term dealer would encompass a host of entities that no one thinks are dealers. Reply at 4-5. Perhaps this is so. But there is no dispute that the statutory definition is broad. At this point, Respondents’ argument is insufficient to warrant summary disposition.

¹³ *Jacob Wonsover*, Exchange Act Release No. 41123, 1999 SEC LEXIS 430, at *25 n.25 (Mar. 1, 1999) (“A distribution within a relatively short period after acquisition is evidence of an original intent to distribute.”), *pet. denied*, 205 F.3d 408 (D.C. Cir. 2000); *cf. Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 213 (3d Cir. 2006) (noting the presumption that “a two-year holding period is sufficient to negate the inference that the security holder did not take the securities with a ‘view to distribute’”).

¹⁴ *Bruns, Nordeman & Co.*, Exchange Act Release No. 6540, 1961 SEC LEXIS 332, at *19-20 (Apr. 26, 1961); *see* Anti-manipulation Rules Concerning Securities Offerings, 62 Fed. Reg. 520, 522, 526 (Jan. 3, 1997) (explaining that Regulation M applies to same sorts of distributions as its predecessor).

¹⁵ *See also George Salloum*, Exchange Act Release No. 35563, 1995 SEC LEXIS 807, at *23 n.40 (Apr. 5, 1995); *see Lowell H. Listrom*, Exchange Act Release No. 30497, 1992 SEC LEXIS 674, at *8 n.3 (Mar. 19, 1992).

Similarly, Respondents' due process-based notice claims are premature. In deciding whether Global IV is a dealer, I will rely on precedent and authoritative guidance from the Commission. If Global IV falls within the ambit of applicable precedent and guidance, I will find that it is a dealer and Respondents' notice arguments will therefore fail. If Global IV does not fall within the ambit of applicable precedent and guidance, I will find that it is not a dealer and Respondents' notice arguments will be moot. Additionally, the Commission has the discretion to proceed through either adjudication or rulemaking when applying a general rule to a specific context, even if proceeding through adjudication involves announcing new principles. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *77 n.94 (Jan. 19, 2001), *pet. denied*, 289 F.2d 109 (D.C. Cir. 2002).

Finally, the securities Global IV allegedly obtained are exempt from the registration requirement of the *Securities Act*. *See* 15 U.S.C. 77c(a)(10). By the terms of Section 15(a)(1) of the *Exchange Act*, "effect[ing] . . . transactions in . . . exempted securities" does not implicate the dealer registration requirement. *See* 15 U.S.C. § 78o(a)(1). The definition in the Securities Act of the term exempted securities, however, does not apply to the Exchange Act because the Exchange Act has its own definition of that term. *Compare* 15 U.S.C. § 77c(a), *with* 15 U.S.C. § 78c(a)(12); *see Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 361 (5th Cir. 1968) ("One . . . securities exemption is from the registration provisions of the Securities Act of 1933, something not here involved. We are concerned with the Securities Exchange Act of 1934."). To the extent Respondents argue that Global IV is exempt from the dealer registration requirements in the Exchange Act solely by virtue of having acquired shares through Section 3(a)(10) exchanges, they are mistaken.

B. The foreign dealer exemption

Exchange Act Rule 15a-6 exempts certain foreign dealers from the registration requirement in Section 15(a) of the Exchange Act. 17 C.F.R. § 240.15a-6. Respondents argue that as a matter of law, Global IV is exempt because it (1) "[e]ffects transactions in securities with or for persons that have not been solicited by the foreign broker or dealer"; and (2) "[e]ffects transactions in securities with or for, or induces or attempts to induce the purchase or sale of any security by . . . [a] registered broker or dealer." Mot. at 25; 17 C.F.R. § 240.15a-6(a)(1), (4)(i).

The Division alleges that Global Partners promoted its finance model and directly contacted issuers to determine whether the issuers would agree to participate in Section 3(a)(10) exchanges. OIP at 3. These allegations are sufficient solely for purposes of this order to show that the first exemption does not apply. *See* 54 Fed. Reg. at 30017-18 (discussing the Commission's broad interpretation of the term solicit, as used in the Rule 15a-6 exemption). Additionally, the determination of whether Global IV or Global Partners solicited transactions with the issuers and the determination of whether Global Partners' alleged solicitation activity could be imputed to Global IV are fact-specific inquiries. *See id.* at 30021 (noting the "expansive, fact-specific, and variable nature of th[e] concept" of solicitation). These questions are therefore not amenable to resolution by summary disposition.

Respondents assert that the second exemption applies because the shares Global IV acquires through exchanges are deposited in its brokerage account with registered broker-dealers who execute all sales of Global IV's shares. Mot. at 25. But “[a] person effects transactions if he or she participates in securities transactions ‘at key points in the chain of distribution.’” *Erik W. Chan*, Securities Act Release No. 8078, 2002 SEC LEXIS 1059, at *28 n.42 (Apr. 4, 2002). The Division alleges that Global IV sued the issuers in order to exchange its claims for the issuers’ shares and then obtained the issuers’ shares after courts approved the exchanges. OIP at 3-4. All of these events are alleged to have occurred before the shares were deposited with Global IV’s broker-dealers. At this stage of the proceeding, these alleged facts are sufficient to show participation in a securities transaction and if true would put Global IV outside the terms of the second exemption.

C. *Global Partners and the Section 20(b) charge*

Perhaps owing to Section 20’s title, “Liability of controlling persons and persons who aid and abet violations,” courts have interpreted Section 20(b) as having a control element. *See SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1170 (D.C. Cir. 1978); *SEC v. Coffey*, 493 F.2d 1304, 1318 (6th Cir. 1974). The Sixth Circuit has reasoned that “[w]ithout such a restriction, every link in a chain of command would be personally criminally and civilly liable for the violations of inferior corporate agents.” *Coffey*, 493 F.2d at 1318. On the other hand, there is persuasive force to another view: Section 20(b) does not contain the word “control” or a variant of it and Section 20(b)’s neighbor, Section 20(a), does. *See* 15 U.S.C. § 78t(a), (b). Ordinary rules of statutory construction dictate that the inclusion of “control” in subsection (a) and its omission in subsection (b) means that control is not an element of a Section 20(b) claim.¹⁶ Section 20’s title is not necessarily dispositive.¹⁷

Nonetheless, even if control is an element of a claim under subsection (b), the Division has alleged that Global Partners controls Global IV and that Global Partners was the sole shareholder of Global IV. For purposes of summary disposition, these allegations resolve the matter. *See In re Fid./Micron Sec. Litig.*, 964 F. Supp. 539, 549 (D. Mass. 1997) (concerning a Section 20(a) claim against a controlling shareholder). Moreover, the fact-intensive nature of the question of control makes it ill-suited for resolution by summary disposition. *See In re Cabletron Sys., Inc.*, 311 F.3d 11, 41 (1st Cir. 2002) (“Control is a question of fact that ‘will not ordinarily be resolved summarily at the pleading stage.’” (quoting 2 T.L. Hazen, *Treatise on the Law of Securities Regulation* § 12.24(1) (4th ed. 2002))).

¹⁶ *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (“[W]hen ‘Congress includes particular language in one section of a statute but omits it in another’—let alone in the very next provision—this Court ‘presume[s]’ that Congress intended a difference in meaning.” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

¹⁷ *See Carter v. United States*, 530 U.S. 255, 267 (2000) (“the title of a statute ‘[is] of use only when [it] shed[s] light on some ambiguous word or phrase’ in the statute itself” (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998))).

Assuming “knowing use” of a controlled person is an element of a 20(b) violation, *see Coffey*, 493 F.2d at 1318, the OIP’s allegations of control by Global Partners and the involvement of its principals in Global IV’s operations are sufficient to show “knowing use” of Global IV. Because scienter is not an element of the underlying allegation that Global IV violated Section 15(a)(1), the Division need only show that Global Partners intended for Global IV to operate in the fashion that it did, assuming operating in that fashion constitutes a violation of section 15(a)(1). *See SEC v. Randy*, 38 F. Supp. 2d 657, 667 (N.D. Ill. 1999) (“The SEC need only establish that Johnston acted as a broker-dealer . . . and that he failed to register with the SEC”). The allegations, which I assume for purposes of this order to be true, support an inference that Global Partners so intended.

Conclusion

For the foregoing reasons, the Division has shown that material facts are in dispute. As a result, I DENY Respondents’ motion for summary disposition.

James E. Grimes
Administrative Law Judge