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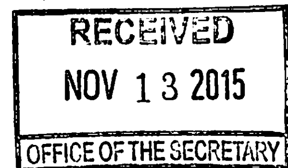
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16386

In the Matter of TRACI J. ANDERSON, CPA TIMOTHY W. CARNAHAN AND CYIOS CORPORATION, Respondents.	DIVISION OF ENFORCEMENT'S SUPPLEMENTAL BRIEFING AND RESPONSE TO OCTOBER 30, 2015 SHOW CAUSE ORDER

I. Summary

In its October 30, 2015 Order, the Court asked the Division to brief whether the issuer associational bar against Respondent Traci Anderson ("Anderson") was impermissibly retroactive, since the conduct that gave rise to the bar occurred before the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2002 ("Dodd-Frank") was enacted.[1] The Court based its concern on the D.C. Court of Appeals' decision in *Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015). In that case, the court held that the SEC could not bar Donald Koch from associating with municipal advisors or rating organizations—new associational bars created as part of Dodd-Frank—because those bars were impermissibly retroactive. The *Koch* court upheld, however, other industry bars that were in existence before Dodd-Frank was enacted. *Id.* at 157, n. 3

[1] Dodd-Frank Section 982(f) amended the Sarbanes-Oxley Act of 2002 ("SOX") as follows:

ASSOCIATION WITH AN ISSUER, BROKER OR DEALER.—It shall be unlawful for any person that is suspended or barred from being associated with ~~an issuer under this subsection~~ a registered public accounting firm under this subsection willfully to become or remain associated with ~~any issuer~~ any issuer, broker, or dealer in an accountancy or a financial management capacity, and for ~~any issuer~~ any issuer, broker, or dealer that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

Under *Koch* and other relevant case law discussed below, the issuer association bar against Anderson is not impermissibly retroactive for two reasons. First, the amendment at issue was merely clarifying. It is clear from the text of the original SOX provision—Section 105(c)(7)(B)—that Congress *always* intended for a PCAOB associational bar to also prohibit association with issuers in an accountancy or financial management capacity; any other interpretation would render this entire subsection superfluous, and would be contrary to traditional statutory construction rules. And because it was merely clarifying, the amendment applies retroactively. Second, the Dodd-Frank amendment did not attach new consequences to Anderson's actions. The issuer associational bar has been available since SOX was passed in 2002, and any changes to how that bar is imposed are merely procedural. Thus, it is equivalent to the industry bars upheld in *Koch*, not those held to be impermissibly retroactive.

II. Because the Dodd-Frank revisions to SOX Section 105(c)(7)(B) were merely clarifying, there is no retroactivity problem.

When Congress originally drafted SOX Section 105(c)(7)(B), it plainly intended for PCAOB associational bars and suspensions to prohibit association with both registered public accounting firms and issuers in an accountancy or financial management capacity. Indeed, the operative subsections under the relevant SOX provision—SOX Section 105(c)(7), "Effect of Suspension"—are entitled "Association with a Public Accounting Firm" and "Association with an Issuer," respectively. The subsection about issuers originally read:

> Association with an Issuer.—It shall be unlawful for any person that is suspended or barred from being associated with an issuer under this subsection willfully to become or remain associated with any issuer in an accountancy or a financial management capacity, and for any issuer that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

SOX § 105(c)(7)(B). Read in a vacuum, this provision is clear: if the PCAOB barred a person from associating with an issuer, it became unlawful by operation of law for that person to willfully remain or become associated with an issuer in an accountancy or financial management capacity.

However, this plain language was rendered unclear by the accompanying sanctions provision. Specifically, the originally-drafted language of "for any person that is suspended or barred from being associated with an issuer" language conflicted with the language in SOX § 105(c)(4)—where Congress enumerated the sanctions that the PCAOB could impose. (emphasis added) Under SOX Section 105(c)(4), "Sanctions," the PCAOB could only (and can only, since Dodd-Frank made no substantive changes): (1) suspend or revoke registration; (2) suspend or bar a person from further association with any registered public accounting firm; (3) limit the activities, functions, or operations of firms or people; (4) impose civil money penalties; (5) censure; or (6) require additional professional education or training. *Id.* at § 105(c)(4)(D). This "Sanction" language does not empower the PCAOB to bar a person "from being associated with an issuer"—the language originally used in § 105 (c)(7)(B). This conflicting language created an ambiguity: the issuer associational bar became operative when the PCAOB "suspended or barred [a person] from being associated with an issuer under this subjection," but Congress failed to enumerate such a suspension or bar among the sanctions the PCAOB could issue.[2]

Read in context, this mere drafting error does not express a congressional intent to allow otherwise barred or suspended accountants to work for public issuers in an accountancy or financial management capacity. It would violate the entire tenor and purpose of SOX Section 105—which was to give the PCAOB authority to weed out bad and/or unethical accountants from public issuer accounting—

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[2] The alternative interpretation is that SOX §105(c)(7)(B) itself gave the PCAOB the power to bar persons from being associated with an issuer. If that is the case, then the Dodd-Frank amendments were merely procedural—making the issuer associational bar automatic. As discussed in the following section, procedural revisions to a statue are not impermissibly retroactive. And as the Court already knows, by the time the PCAOB bar against Anderson was issued, the Dodd-Frank amendments were already in place. Thus, the bar was automatic at that time, and the PCAOB did not (and in fact could not—as the Dodd-Frank amendments clarify) have to specifically bar Anderson "from being associated with an issuer."

to suggest that Congress intended to create a loophole to allow these accountants to directly prepare the financial statements and accounting records of publicly traded companies.

Recognizing its error, Congress made the simple clarifying amendment found in Section 982(f) of Dodd-Frank, which in its entirety reads:

> (f) INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS.—Section 105(c)(7)(B) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(c)(7)(B)) is amended—
>
> > (1) in the subparagraph heading, by inserting '', BROKER, OR DEALER'' after ''ISSUER'';
> >
> > (2) by striking ''any issuer'' each place that term appears and inserting ''any issuer, broker, or dealer''; and (3) **by striking ''an issuer under this subsection'' and inserting ''a registered public accounting firm under this subsection''.**

Dodd-Frank § 982(f) (emphasis added). By making this minor edit—changing "an issuer" to "a registered public accounting firm"—Congress clarified SOX Section 105(c)(7)(B) and gave effect to its original intent. This is further evident by the fact that Congress made no changes to the "Sanctions" subsection, § 105(c)(4)—i.e., it did not empower the PCAOB to bar a person "from association with an issuer." Thus, it is clear that Congress never intended that the PCAOB would specifically impose such a bar—but rather that it would be an automatic "effect of suspension" from being associated with a public accounting firm.

Because the amendment is merely clarifying, it does not constitute a substantive change of the law. Rather, the amendment is intended only "to clarify existing law [or] to correct a misinterpretation." *United States v. Sepulveda,* 115 F.3d 882, 885 n.5 (11th Cir. 1997). In other words, the amendment is merely "mak[ing] what was intended all along even more unmistakably clear." *United States v. Montgomery County MD,* 761 F.2d 998, 1003 (4th Cir. 1985) (quoted in *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004)). Since a clarifying amendment restates what the law has been all along, its effectiveness relates back to the time of the enactment of the original legislation. *See, e.g., Brown*, 374 F.3d at 258-59 (clarifying amendments merely clarify existing law and do not implicate constitutional

concerns about retroactivity); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) ("Normally when an amendment is deemed clarifying, rather than substantive, it is applied retroactively"); *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("concerns about retroactive application are not implicated when an amendment [. . .] is deemed to clarify relevant law rather than effect a substantive change").

Courts consider a number of factors to determine whether an amendment is merely clarifying, including whether a conflict or ambiguity existed prior to the amendment and whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history. *See, e.g., Miller v. LaSalle Bank, N.A.*, 595 F.3d 782, 789 (7th Cir. 2010); *Piamba Cortes*, 177 F.3d at1283-84 (*citing Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887 (1st Cir.1992)).[3] Here, the drafting error created an ambiguity. The amendment restored the original congressional intent of the statute. It is therefore merely clarifying and does not raise retroactivity concerns. Construing the amendment differently would render the pre-amendment Section 105(c)(7)(B) superfluous, which is at odds with basic statutory construction principals. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) ("It is a cardinal principal of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant").

When considering whether the amendment was merely clarifying, the Court should "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Hawkins v. United States*, 30 F.3d 1077, 1083 (9th Cir. 1994) (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990)). Congress included this section in the original SOX legislation for a reason, and that reason is evident from the overall context of SOX § 105 itself: to keep bad and/or unethical accountants out of both registered public accounting firms and publicly traded issuers (in an accountancy

[3] Courts may also consider express legislative statements that such amendments are clarifying rather than changes in the law, *see Miller*, 595 F.3d at 789, but that is not pertinent here because Congress was silent either way.

or financial management capacity). When Congress realized its drafting error, it rectified it with a clarifying amendment. To find otherwise would be counter-intuitive. *Brown*, 374 F.3d at 261 (amendment was clarifying where finding otherwise would result in a "counter-intuitive" result in light of the purpose of the statute). Amended Section 105(c)(7)(B) is therefore not impermissibly retroactive as applied to Anderson. Its meaning is the same as it has always been, but now it is clear.[4]

III. The Dodd-Frank revisions to SOX Section 105(c)(7)(B) were merely procedural, and thus not impermissibly retroactive.

The Dodd-Frank amendment can also be considered to be merely procedural, not substantive. Even though SOX §105(c)(7) was ambiguous as originally enacted, there can be no question that the issuer associational bar was a potential consequence of a PCAOB enforcement action, since it is directly referenced in Section 105(c)(7)(B), under the heading "Association with an Issuer." The only ambiguity was whether the issuer associational bar was automatic or required the PCAOB to specifically bar the person from "association with an issuer." Thus, to the extent that Dodd-Frank made any changes to SOX at all, they were merely procedural. They did not "impair rights [she] possessed when [she] acted, increase [her] liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Nor did they "attach[] new legal consequences to events completed before its enactment." *Id.* at 270. They merely simplified the mechanism for imposing those consequences.

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[4] Furthermore, as noted in the Division's prior briefing in this case, there is no retroactivity issue because it is the PCAOB Order itself—not Anderson's underlying misconduct—that triggered the issuer associational bar (i.e., the relevant conduct is Anderson's consent to the PCAOB order and its subsequent execution by the PCAOB). See Division's October 15 Post-hearing Reply Brief at p. 3, n. 4. There is no dispute that the PCAOB Order (entered in August 2010) went into effect after Dodd-Frank was signed into law (in July 2010). Thus, Anderson was on notice before agreeing to the PCAOB Order that the issuer associational bar would be an automatic consequence of that agreement.

As the *Koch* court noted, this is a critical distinction—and one that definitively resolves any retroactivity concerns here. The *Koch* court held that the municipal advisor and rating organization associational bars—unavailable before Dodd-Frank was passed—were impermissibly retroactive, since they were new remedies unavailable at the time of the illegal conduct. *Koch*, 793 F.3d at 158. However, the other industry bars imposed against Koch were upheld because they pre-existed Dodd-Frank—just as the issuer associational bar at issue here did. *Id.* at 157, n. 3. Dodd-Frank merely allowed the Commission to impose these bars in one proceeding—a procedural change that does not give rise to retroactivity concerns. *Id.* Likewise, here—if Congress changed anything at all—it merely simplified the process of imposing the issuer associational bar. Thus, it is the same as industry bars upheld by the *Koch* court, not the ones it struck down. And following *Koch* and *Landgraf*, it is not impermissibly retroactive.[5]

IV. Conclusion

Because the Dodd-Frank amendments at issue here were merely clarifying or procedural in nature, the issuer associational bar is not impermissibly retroactive. The Division therefore respectfully submits that the Court should not disturb its summary disposition order and should grant judgment in the Division's favor for the reasons previously argued by the Division.

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[5] The Court's October 30 order asked the Division to address two additional issues: (1) whether Congress expressly prescribed SOX §105(c)(7)(B)'s proper temporal reach; and (2) the relevance of certain language contained in recent PCAOB settlement orders. On the first issue, the Division agrees with the *Koch* court's conclusion that Congress did not expressly authorize retroactive application. *Koch*, 793 F.3d at 158. On the second issue, the fact that the PCAOB has chosen to add additional language in its materials has no bearing on the application of the statutes at issue here. It is the Division's understanding, based on conversations with staff from the PCAOB's Division of Enforcement and Investigations, that the PCAOB is including the additional language cited by the Court in order to provide an extra layer of notice to its respondents and to provide notice to the public—including future employers covered by the provision—about the effect of the sanctions. The Division also believes this to be good practice for an additional reason—that it may avoid or shortcut litigation in which respondents claim to have been unaware of the consequences of a PCAOB settlement, as the Respondents have here. But while this is a good practice, it does not change the Respondents' legal obligations and has no relevance to this case.

Dated: November 13, 2015.

Respectfully submitted,

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SERVICE LIST

Pursuant to Rule 150 of the Commission's Rules of Practice, I hereby certify that a true and correct copy of the ***Division of Enforcement's Supplemental Briefing and Response to October 30, 2015 Show Cause Order*** was served on the following on November 13, 2015 via electronic mail and/or United Parcel Service, Overnight Mail:

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