UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINSTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.
_____/

RESPONDENT JOHN CHRISTOPHER POLIT'S REPLY TO ENFORCEMENT'S RESPONSE TO MOTION FOR DISMISSAL WITHOUT PREJUDICE, OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME TO RESPOND TO ORDER INSTITUTING PROCEEDINGS

An essential prerequisite to the validity of this proceeding is that Respondent, John Christopher Polit, has been "convicted … of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction."[1] Determining whether a conviction has occurred necessarily raises the question whether that issue is to be decided under Ecuadorian law (as Respondent John Christopher Polit argues) or under U.S. law (as Enforcement argues). It is to this issue that this Reply is directed, because it is the *only* issue Enforcement has raised in opposition to Mr. Polit's Motion. This is indeed a critical issue, because if U.S. law applies, Mr. Polit has been convicted, whereas, if Ecuadorian law applies, he has not been convicted.

[1] Exchange Act section 15(b), Advisors Act 203(f). In addition, the crime must meet the criteria of one of four categories of crimes. *Id.*

In this Reply Mr. Polit shows why Enforcement's argument is unreasonable and should not succeed, while Mr. Polit's argument is reasonable, logical and meets the test of common sense and the law. The very words of the statute directly compel that result.

In his Motion, Mr. Polit directly addresses the issue and explains that Ecuadorian law should govern this issue. Mot., 5-6. In its Response, the Division says U.S. law should govern but offers no rationale, other than the fact the term "conviction" is defined in the Advisers Act.[2] Enforcement points out that under U.S. law the pendency of an appeal does not affect the finality or effectiveness of a judgment, and therefore insists this is the end of the inquiry and "the Commission need not consider the intricasies of Ecuadorian law." Resp., 2-4. The Division maintains that whether Mr. Polit was "convicted" "is straightforward and does not require consideration of Ecuadorian law."*Id*., 2.

The problem with Enforcement's analysis is not that it is wrong that if U.S. law governs, then Mr. Polit will be deemed to have been convicted. Rather, the problem is that Enforcement provides no analysis of why U.S. law should govern this important question. As Mr. Polit shows below, his position is in accord with reason, logic and the law.

When it enacted the subject provisions as part of The Securities Acts Amendments of 1990[3], Congress did not explicitly state which nation's law would govern whether there was a conviction—the law of the U.S. or the law of the country where the prosecution occurred. This requires the exercise of determining legislative intent on the subject—"requires" it because there

[2] Mr. Polit freely admits that he mistakenly stated in his Motion that "conviction" was not defined under the Exchange or Advisers Act. Motion, 4, and sincerely regrets the error. Nevertheless, Mr. Polit pointed to a comparable definition under a different Act, and supplied a competent dictionary definition.

[3] Pub.L. No. 101–550, §§203 & 205(b), 104 Stat 2713, 2715-16, 2719-20 (1990).

must be *some* nation's law that governs this question where the respondent needs to have been "convicted [of a foreign law] by a foreign court."

One determines legislative intent from such factors as "the language of the statute itself, its legislative history [and] the underlying purpose and structure of the statutory scheme." *See Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 91 (1981) (listing factors in determining whether Congress implied a private right of contribution by employer against unions after having been found liable for violations of federal statutes expressly not providing a private right of action). Customary factors to consider include which interpretation comports with logic, reason and common sense and which would lead to an absurd result. 82 C.J.S. Statutes § 364. An additional factor that might be considered is the consequences of different answers to the underlying question. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 519 (2010) ("When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function.") (Breyer, J., dissenting).

The first level of analysis is the words of the statute themselves. The statute says that an associated person of a U.S. broker-dealer may be disciplined if that person has been "convicted … of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction." Why *need* the statute have stated that the foreign country's law govern whether the respondent has been "convicted" of a foreign crime by a foreign court? It would makes no sense to import into a foreign criminal proceeding this one element of another nation's laws. Absent an affirmative indication by Congress that it intended this result, there would be no basis to conclude that it did. Otherwise, it must be assumed that Congress intended that the issue of whether the respondent has been "convicted" of a criminal violation in Ecuador is to governed

by the laws of Ecuador. To conclude otherwise would be to create an irrational anomaly, and Congress is not assumed to have acted in that way unless the language demands such a conclusion. *See Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982) (disregarding fact that statutory violation resulted in greater than actual damages because of statutory language).

If the language of the statute does not answer the underlying question, then the next most logical basis on which this issue should be determined is to compare the respective interests of Ecuador and the United States in the matter. An alternative way of expressing what is a very similar standard is to determine the nation with the "most significant contacts" in the particular issue. In other words, under the facts, does it make more sense, overall, to apply Ecuadorian law or U.S. law to whether the result of a trial in Ecuador is akin to a "conviction"? Here, there is no question but that, on every aspect of this case having to do with the nature and status of the criminal proceeding in Ecuador, Ecuador has both far more significant contacts with the predicate to this case than the U.S. and a greater "interest" in the case:

- Mr. Polit's conduct was alleged to be criminal under Ecuador's law, not that of the U.S.
- The prosecution against Mr. Polit was commenced by Ecuadorian officials, not those of the U.S.
- Mr. Polit's trial was held in Ecuador, not in the U.S.
- The court that tried the case and rendered a guilty verdict was a court of Ecuador, not of the U.S.
- The substantive law that the courts were to follow in the trial was that of Ecuador, not of the U.S.
- The procedural law that the courts were to follow in the trial was that of Ecuador, not of the U.S.
- The law governing when and how the guilty verdict would ever become final was that of Ecuador, not of the U.S.

Ecuador has a far greater interest than does the United States in every aspect of this entire process, because it has its own sovereignty, its own society, its own constitution, its own court system and its own criminal laws and laws of criminal procedure—all of which underlie this criminal proceeding to one extent or another, and concerning all of which it seeks international respect. One supreme example of this multi-faceted interest lies in its constitutional rule that preserves the presumption of innocence until the defendant's guilt becomes finally established. Thus, Ms. Maria Del Mar Gallegos Ortiz, Mr. Polit's unchallenged expert on Ecuadorian law, states in her Declaration in support of Mr. Polit's Motion:

> 11. An overriding principle under the 2008 Constitution of the Republic of Ecuador is the preservation of the presumption of innocence during the pendency of a criminal proceeding, including through all appeals from a finding of guilt at the trial level. . .
>
> 12. Thus, under the laws of Ecuador, if an individual has been found to be guilty of a crime such as being an accomplice to extortion and there has been a timely appeal, only until all appeals have been exhausted or abandoned and proceeding has culminated in a final, non-appealable decision or judgment, and the proceeding is remanded to the trial court for 'execution' of the judgment, can it be said that there has been a sentencia ejecutoriada, i.e., a final judgment akin to a conviction.
>
> 13. These principles, which are generally applicable in civil law jurisdictions, such as Ecuador, derive from the Declaration of the Rights of Man and Citizen adopted by the French National Constituent Assembly in August 1789 and the development of the civil law since the days of Napoleon Bonaparte.

Gallegos Ortiz Decl., Ex. 1 to Motion, 2-4.[4]

[4] Enforcement did not controvert the argument that the criminal laws of countries with a common law tradition born out of the English common law system of laws are fundamentally different from the criminal laws of countries with a civil law tradition born out of the Napoleonic civil code system, and that this is why courts in this country routinely engage in the assumption that the laws of another common law country are the same as those of the United States, but refuse to engage in that assumption in the case of a civil law country. See Motion, 5-6 (citing cases).

By contrast, the U.S. has *no* articulable or legitimate interest as a nation or system of government in whether, in any one case, an Ecuadorian law was broken and the defendant was found guilty, and whether the guilty verdict would become final before the defendant appeals and exhausts his appeals. Its only interest in Mr. Polit is whether he can be disciplined as an associated person of a broker-dealer. Whatever significance this interest may have in the context of this case, it is dwarfed by the extensive interest of Ecuador in maintaining its sovereignty and system of laws and not permitting interference with the rights enshrined in its constitution and laws. Thus, it would be absurd if, were his status eventually to become akin to a "conviction" under Ecuadorian law, Mr. Polit would claim the right to be tried in this case under procedures applicable under Ecuadorian administrative law. It is equally unreasonable to suggest that U.S. law should govern whether Mr. Polit has been convicted of an Ecuadorian law in an Ecuadorian court.

In short, letting U.S. law govern the underlying issue of whether Mr. Polit has been "convicted" of an Ecuadorian law in an Ecuadorian trial is illogical, unreasonable, and contrary to the main thrust of the statute: in other words, absurd.

WHEREFORE, Respondent John Christopher Polit respectfully moves for an order dismissing this proceeding (without prejudice to the Commission's reinstituting the proceeding if and when he is "convicted" of a crime under Ecuadorian law). In the alternative, under SEC Rule of Practice 161, he seeks an extension of the time to respond to the OIP if and when he is

"convicted" of a requisite crime under Ecuadorian law or this proceeding becomes unavoidable.

Respectfully submitted,

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/s/ Richard E. Brodsky
By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing to be served by email on the following this 26th day of October 2020:

Office of the Secretary: apfilings@sec.gov
Alice K. Sum, Division of Enforcement, sumal@sec.gov
Andrew Schiff, Division of Enforcement: schiffa@sec.gov

/s/ Richard E. Brodsky
_____
Richard E. Brodsky