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 MOTION FOR DISMISSAL WITHOUT PREJUDICE, OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME TO RESPOND TO ORDER INSTITUTING PROCEEDINGS

This "follow-on" proceeding, brought under sections 15(b) of the Securities Exchange Act and 203(f) of the Investment Advisers Act, seeks to discipline Respondent John Christopher Polit, a former registered representative of a broker-dealer, on the basis of his purported "conviction" in an Ecuadorian court for "being an accomplice to the crime of extortion." Order Instituting Administrative Proceedings (OIP), 2, ¶ 3.

Mr. Polit respectfully moves the Commission for the dismissal of this proceeding without prejudice, or for an extension of time to respond to the OIP until his appeals in Ecuador are exhausted. The principal basis is that there has been no "conviction" of Mr. Polit under the laws of Ecuador.

Mr. Polit reserves all rights to contest the merits of this proceeding on any ground available to him as a matter of law, and nothing herein should be construed as a waiver of any such right.

SUMMARY

Mr. Polit was accused by the Ecuadorian prosecutors of having been an accomplice to the crime of extortion allegedly committed by his father, a high-level Government official charged with ferreting out official corruption. The case against father and son was started by the Attorney General of Ecuador (since removed from office) within days of the father's issuance of a report finding the Attorney General to have been engaged in acts of corruption. After a trial by a three-judge panel, Respondent was found to have committed the alleged crime. His first-level appeal was unsuccessful, and he is in the process of following up with an appeal to a higher court.

The statutory authority under which this proceeding has been instituted depends on there having been a conviction in Ecuador, and whether this has occurred must be determined under Ecuadorian law. In the United States, a conviction generally occurs when the trial court enters judgment and the pendency of an appeal does not disturb the finality of the judgment. Under Ecuadorian law, however, a guilty verdict at the trial level does not ripen into a *sentencia ejecutoriada* (a final judgment with no further possibility of further appeal, which is akin to a "conviction" under U.S. law) until the exhaustion of all appeals. Since Mr. Polit's appeals have not been exhausted, he has not been "convicted" of a crime under Ecuadorian law. Therefore, this proceeding has been unlawfully commenced,

The appropriate remedy is to dismiss this proceeding, without prejudice to the Commission's reinstituting it when and if Respondent *is* convicted. If the Commission does not dismiss this proceeding, it should nevertheless order a stay pending the exhaustion of Respondent's appeals in Ecuador. The Commission's usual response to a Rule 161 motion to permit the appeal of a domestic conviction, which is to deny the motion because of the finality of the conviction under U.S. law, is not appropriate here. This is because there has yet to be a

"conviction" under Ecuadorian law. In addition, as plainly shown by the legislative history of the Securities Law Amendments of 1990, which extended the scope of a follow-on proceeding to foreign convictions, both the Commission and the Congress were well aware of the inherent difficulties in applying the disciplinary remedy to foreign convictions, even going so far as to recognize the need to "relitigate" foreign convictions on a showing of serious due process issues—which, in the case of a foreign conviction, would be a logistical nightmare. In light of those difficulties, the Commission should err on the side of caution and defer this proceeding until it is determined in Ecuador whether Mr. Polit has been convicted or not.

NOTE RE SOURCES OF PROOF

All statements in this Motion concerning Ecuadorian law[1] are supported by the attached Declaration of Maria Del Mar Gallegos Ortiz, Exhibit I hereto. She is a lawyer in Ecuador with no previous involvement in the Polit prosecution in Ecuador. As shown by Ms. Gallegos Ortiz's CV, which is attached to her Declaration, and which she has declared under penalty of perjury is true, she is eminently qualified by reason of her education, training and experience to give expert testimony on the substance of the law of Ecuador concerning the subject at issue—whether Mr. Polit has been convicted.

Certain factual assertions are supported by the attached Declaration of Adrián Bustos, a lawyer in Ecuador who serves as Mr. Polit's counsel in the trial and appeal in the criminal

[1] "While the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not govern the Commission's administrative proceedings, they often provide helpful guidance on issues not directly addressed by the Commission's Rules of Practice." *Barry C. Scutillo*, 74 S.E.C. Docket 1944, Release No. ID-183, 2001 WL 461287 at *29 (May 3, 2001). Thus, the Commission, in deciding this Motion, may look to Fed.R.Civ.P. 44.1 for guidance. *Id.* It provides: "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

proceeding. The English translation of Mr. Bustos' Declaration is Exhibit "B" to the Declaration of Ana Carolina Paola Garcia Bodan, which is Exhibit II hereto. Exhibit "A" to the Garcia Bodan Declaration is the Bustos Declaration as composed in Spanish.[2]

ARGUMENT

I.

STATUS OF MATTER IN ECUADORIAN COURTS

The Commission alleges that in 2018, Mr. Polit was convicted by an Ecuadorian court ("Sala Especializada de lo Penal, Penal Militar, Penal Policial y Transito"—the Specialized Court of Criminal, Military Criminal, Police Criminal and Transit, part of the National Court of Justice), and was sentenced to three years' imprisonment. Bustos Declaration, ¶¶ 4, 7. Mr. Polit admits that a verdict of guilty was rendered by the trial court but denies that this resulted in a "conviction."

Since the verdict was announced, Mr. Polit has appealed the verdict to the appellate court. That appeal resulted in a denial of the appeal. *Id.*, ¶ 7. Mr. Polit still has the right under Ecuadorian law to appeal to the National Court of Justice, sitting as a court of "cassation." Gallegos Ortiz Declaration, ¶ 10. A timely appeal to that court will be taken on Mr. Polit's behalf. Bustos Declaration, ¶ 8.

[2] As Mr. Busto's Declaration, ¶ 2, indicates, he does not speak, read or write English. Although Mr. Bustos' Declaration states that it would be translated by Francisco Tamayo, a Member of The Florida Bar, who is bilingual, this Motion instead relies on a translation supplied by Ana Carolina Paola Garcia Bodan, a bilingual graduate student at the University of Miami School of law.

As explained below, what occurred in the trial court did not amount to a "conviction" under Ecuadorian law. Accordingly, the Commission did not have the lawful basis to commence this proceeding on the basis of the result at the trial.

II.

UNDER ECUADORIAN LAW, MR. POLIT HAS NOT BEEN "CONVICTED" OF A CRIME

A. Whether Mr. Polit Has Been "Convicted" Of a Crime is a Question of Ecuadorian Law.

Section 15(b) of the Exchange Act and section 103(f) of the Advisers Act were amended as part of the Securities Act Amendments of 1990.[3] For the purpose of this Motion only, Mr. Polit concedes that under amended section 15(b)(6) of the Exchange Act and 103(f) of the Advisers Act, the Commission was empowered to discipline associated persons of broker dealers if they have been "convicted" of certain crimes "by a foreign court of competent jurisdiction." Thus, for the Commission to institute such a proceeding, there must have been (a) a "conviction" of an associated person under the law of the particular foreign country (b) by a court of that foreign country with the requisite jurisdiction to enter a conviction.

It is self-evident that whether these conditions have been satisfied must be determined under the laws of the foreign country, especially in the case of a country using a "civil," or Napoleonic, code of law, as opposed to a country following the common law—it being beyond cavil that legal principles and procedures vary widely between civil and common law countries, thus causing some courts to decline to presume that the laws of a civil law country are the same as those of a common law jurisdiction in the United States. *See, e.g.*, *Cuba R. Co. v. Crosby*, 222

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

U.S. 473, 479 (1912) ("In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain, and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law."); *Loebig v. Larucci*, 572 F.2d 81, 85 (2d Cir. 1978) ("New York courts have not presumed the law of a civil law country to be the same as New York law").

In sum, the Commission must look to Ecuadorian law to determine whether Mr. Polit has been "convicted" under Ecuadorian law by an Ecuadorian court with authority to enter a criminal conviction. An examination of Ecuadorian law shows that this proceeding is, at best, premature, because, under Ecuadorian law, Mr. Polit has not yet been "convicted" of a crime.

B. <u>Mr. Polit Has Not Been "Convicted" Under Ecuadorian Law.</u>

The concept of "conviction" is fundamentally different under the laws of the two countries.

"Conviction" is not defined in the Exchange Act or the Advisers Act. Another federal statute,[4] governing removal (deportation) of aliens, 8 U.S.C. § 1227(a)(2), provides that "an alien is deportable" upon a "conviction" of a number of listed types of crimes. Under Title 8, Chapter 12 ("Immigration and Nationality"), "the term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court…" 8 U.S.C. § 1101(48)(A).[5]

[4] Courts may look to the definitions of a word under different Acts to assist in interpreting words in a statute in which the word is not defined. *See United States v. Ng Lap Seng*, 934 F.3d 110, 123–24 (2d Cir. 2019), *cert. denied sub nom. Seng v. United States*, No. 19-1145, 2020 WL 3492669 (U.S. June 29, 2020) (definition of "organization").

[5] Notably, the Courts of Appeal are divided on whether, under 8 U.S.C. § 1227(a)(2), an alien is removable during the pendency of a direct appeal of her conviction. *Compare Waugh v. Holder*, 642 F.3d 1279, 1284 (10th Cir. 2011) (under 8 U.S.C. § 1101(a)(48)(A), pendency of appeal from conviction does not prevent removal) *with Orabi v. Attorney Gen. of the U.S.*, 738 F.3d 535, 542 (3d Cir. 2014) (pendency of appeal renders conviction "non-final" and prevents

This is in accord with the dictionary definition of "conviction." *See Black's Law Dictionary*, (11th ed. 2019) ("1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime."); *Webster's Third New International Dictionary*, Unabridged, s.v. "convict," accessed September 25, 2020, https://unabridged.merriam-webster.com ("convict" means "to find or declare guilty of an offense or crime by the verdict or decision of a court or other authority"). *Cf. Clay v. United States*, 537 U.S. 522, 527 (2003) ("[t]ypically, a federal judgment becomes final for appellate review and claim preclusion purposes when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment").

Ecuadorian law is materially different. As described in the Gallegos Ortiz Declaration, ¶ 10, "under the laws of Ecuador, the finding of guilt does not ripen into a final and effective judgment until all appeals have been exhausted." As Ms. Gallegos Ortiz elaborates:

> 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*. Thus, the Constitution, Art. 76(2), states: "Se presumirá la inocencia de toda persona, y será tratada como tal, mientras no se declare su responsabilidad mediante resolución firme o sentencia ejecutoriada." Although there is no authorized English translation of the laws, including the Constitution, of Ecuador, this means: "All persons shall be presumed innocent, and shall be dealt with as such, until their guilt is stated by means of a final ruling or 'sentencia ejecutoriada.'" "Sentencia ejecutoriada" means a final judgment, which does not have any other possibility for appeal.
>
> 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

removal of alien). The fact that in some circuits an alien may be deported before appeals are exhausted emphasizes the concept that, in this country, finality of a conviction is ordinarily established well before all appeals are exhausted.

> 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 Declaration, ¶ 11-13.

In sum, Mr. Polit still has the right under Ecuadorian law to appeal to the National Court of Justice, sitting as a court of "cassation," Gallegos Ortiz Declaration, ¶ 10, and a timely appeal to that court will be taken on Mr. Polit's behalf, Bustos Declaration, ¶ 8. Since, under Ecuadorian law, there can be no "sentencia ejecutoriada" (the closest analog to a "conviction" under that country's law) until all of a defendant's appellate rights are exhausted, and since Mr. Bustos has preserved, and not exhausted, all of his appellate rights, there has yet to be a "conviction" of Mr. Polit. On this ground, this proceeding must be dismissed at this juncture for lack of jurisdiction, without to its being refiled, if Mr. Polit becomes subject to a "conviction."

III.

IN THE ALTERNATIVE, THIS PROCEEDING SHOULD BE STAYED UNTIL MR. POLIT HAS EXHAUSTED HIS APPEALS IN ECUADOR

A. Introduction.

Even if the Commission declines to dismiss this proceeding, it would be wholly inappropriate, and there is no need, for the Commission to short-circuit Mr. Polit's rights of appeal in Ecuador. An extension until his appeals are exhausted would in no way prejudice the public interest. Mr. Polit is not currently associated with any broker-dealer or investment

adviser,[6] and, as long as this proceeding lasts, there is no risk that he will gain employment in the industry, even if he later seeks such employment.[7]

As Mr. Polit will show in this portion of his Motion, "good cause" exists for the requested extension. His Motion "makes a strong showing that the denial of the request or motion would substantially prejudice [his] case." Rule 161(b). Accordingly, especially in light of the Commission's announcement that, for now, "all reasonable requests for extensions of time will not be disfavored as stated in Rule 161," *In Re: Pending Admin. Proceedings*, Release No. 5467 (Mar. 18, 2020), the Commission should grant this motion for extension. This conclusion is particularly appropriate given the legislative history of the applicable provisions of the Exchange and Advisers Act, which shows that the Commission was wary of recommending to Congress the inclusion of foreign convictions in the disciplinary statutory scheme without recognition of the significant risks of injustice that can arise in overseas jurisdictions.

B. <u>The Usual Standards Under Rule 161 Do Not Apply Here.</u>

Assuming, for argument's sake, that the ordinary (non-COVID) standards applicable to Rule 161 govern, Mr. Polit readily concedes that in a follow-on case based on a *domestic* conviction, a Rule 161 motion is routinely denied when the purpose of the motion is to permit the respondent to appeal from her conviction. *See, e.g.*, *Daniel Touizer*, Admin. Proc. File No. 3-18867, 34-85321, 2019 WL 1297596 (Mar. 14, 2019), at 3. As shown in *James E. Franklin*, Rel. No. 34-56649, 91 S.E.C. Docket 2245, 2007 WL 2974200, at *4 n. 15 (Oct. 12, 2007), the

[6] See BrokerCheck report for Respondent, https://files.brokercheck.finra.org/individual/individual_5987269.pdf.

[7] He is a full-time resident of Florida (and a dual Ecuador-United States citizen) and is engaged in business activities in Florida other than as an associated person of a broker or dealer or investment adviser.

Commission's rationale is that a criminal conviction is final when the trial court enters judgment. The Commission bases this doctrine on the fact that, in this country, criminal convictions generally become final at the trial court stage:

> [I]t is well established that a pending appeal does not affect the injunction's status as a basis for this administrative proceeding. *Blinder Robinson [& Co. v.* SEC, 837 F.2d] at 1104 n.6 [(DC. Cir. 1988)] ("[T]he fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for purposes of subsequent litigation.").

That approach is inapposite in a case based on a purported conviction from a civil law jurisdiction such as Ecuador. As clearly shown above, in that country there *is* no finality at the trial court stage, because under that country's laws an appeal stays the effectiveness of a trial verdict and it does not ripen into the Ecuadorian version of a "conviction" until all appeals are exhausted.

Moreover, even if the Commission were somehow to reject this explanation of Ecuadorian law or find it unconvincing, the underlying rationale of the Commission's approach in domestic convictions is manifestly inapposite. In the context of a domestic conviction, the standard approach is understandable and unexceptionable: the Commission can comfortably assume that regularity and the rule of law have not been put in jeopardy in a domestic conviction. As shown in the Commission's 1989 Memorandum to Congress supporting what became the Securities Act Amendments of 1990, however, such a presumption would be unwarranted in the case of foreign convictions. The political culture of a foreign country may be so vastly different

from that in this country that, in a politically "sensitive" case of this sort,[8] it is realistic to be suspicious of the form of justice that is dispensed.

In the Commission's Memorandum in H.R. Rep. No. 101-240, at 20-41 (1989),[9] one finds full support for the notion that the two sources of convictions—domestic and foreign—need be approached differently. That legislative history shows, emphatically, that it was never Congress' or the Commission's intent that proceedings of this sort should be conducted without a distinct awareness of, and the need to afford clear protection against, the abuses to which some foreign countries may subject certain criminal defendants.

The Commission proposed the enactment of these provisions in 1989. The House Report accompanying the 1990 Act, which was originally issued in relation to a predecessor to the 1990 Act, the International Securities Enforcement Act of 1989, contains a Commission memorandum advocating the passage of a package of provisions concerning the internationalization of the securities markets, including the amendments concerning foreign criminal convictions. In describing these provisions, the Commission stated: "The Commission's action against a securities professional [convicted of a foreign crime] would not be automatic." H.R. Rep. No. 101-240, at 30. The Memorandum went on to explain that "the Commission would provide the securities professional with notice and an opportunity for a hearing prior to [imposing sanctions], at which "[t]he securities professional would thus have an opportunity to present evidence on his

[8] This Motion is not the appropriate vehicle for discussing or outlining the problems with Mr. Polit's conviction, except to note that the alleged extortion was carried out by Mr. Polit's father, who was a high-level Ecuadorian official charged with ferreting out political corruption. The case against father and son was started by the Attorney General of Ecuador (since impeached) within days of the father's issuance of a report finding the Attorney General to have been engaged in acts of corruption. Bustos Declaration, ¶ 5.

[9] As a courtesy to the Commission and its Staff, a copy of H.Rep. No. 101-240 is attached as Exhibit III.

own behalf, in order to demonstrate that the imposition of sanctions would not be in the public interest."

Before concluding, the Commission took the unusual step of warning that the strong deference due a *domestic* conviction under the existing provisions of the Exchange and Advisers Acts would be inappropriate in the case of a *foreign* conviction. Thus, the Memorandum stated,

> *if the professional makes a persuasive due process or jurisdictional attack on the foreign adjudicative proceedings, the Commission may be required to permit relitigation of the underlying offense.* In such a case, as is presently the case in those situations in which the Commission may proceed against a securities professional based upon a foreign finding of misconduct, the foreign finding would provide the basis for a Commission administrative proceeding even though principles of collateral estoppel might not be available to the Commission.

Id. at 31 (emphasis added).

This shows a conscious awareness on the part of the Commission, which can also be presumed to represent the intent of the Congress,[10] that the extension of disciplinary authority to foreign criminal convictions was fraught with uncertainties not present in the case of domestic criminal convictions. For that reason alone, the Commission should be loath to require Mr. Polit to defend himself against an accusation of having been "convicted" of a crime in Ecuador without exhausting his appeals. If the Commission does not dismiss this proceeding at this stage, which it should do, at the very least it should exercise caution and not move ahead where legitimate questions about the criminal case, and its very status, plainly exist. The Commission,

[10] Senate Report No. 101-155, accompanying S. 1712 (The Securities Acts Amendments of 1989, the text of which was inserted into H.R. 1396, the Securities Act Amendments of 1990), used, without attribution to the Commission, the exact language concerning the possible need for a retrial of the foreign criminal trial, quoted above, from the Commission memorandum.

having recognized the risk and identified it to Congress, should not now ignore that risk when it actually presents itself in a pending case before it—and can be avoided.

An additional reason to impose a stay, if not a dismissal, is also based on the Commission's 1989 Memorandum. As shown above, the Commission told Congress that there might be a need in a "foreign conviction" proceeding to "relitigate" the underlying criminal case "if the professional makes a persuasive due process or jurisdictional attack on the foreign adjudicative proceedings." H.R. Rep. No. 101-240, at 31. The Commission did not explain in that Memorandum how it could actually "relitigate" a criminal trial that occurred in a foreign country under a completely different body of law. It, as well as the statute itself, left unasked—and unanswered—such fundamental questions as: What standards would be used to define "due process"? What court or panel in what country would be the forum for the "relitigation"? What government would supply the prosecutor? What would be the standard of proof? What evidence would be used? What rules of evidence would be applied? If there were no relitigation, how could the Commission rely on a criminal conviction where there has been made a "persuasive due process or jurisdictional attack on the foreign adjudicative proceedings"?

Just to pose these questions is to suggest the difficulty, if not impossibility, of making this unusual statutory construct work without jeopardizing the Respondent's right to due process in *this* proceeding in *this* country. It illustrates just how problematic is this attempt to engraft U.S. legal concepts onto a legal structure that is truly "foreign" in every way. This is a further reason for the Commission to delay this proceeding until it knows whether there even has been a true "criminal conviction" under the law of Ecuador. There is simply no need, given Mr. Polit's

not being employed in the securities industry, to open this can of worms until it is unavoidable, at least in the Commission's judgment.

WHEREFORE, for the reasons stated above, 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:_____
Richard E. Brodsky
Florida Bar No. 322520

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing to be served by email on the following this 28th day of September 2020:

Office of the Secretary: apfilings@sec.gov

Andrew Schiff, Division of Enforcement: schiffa@sec.gov

/s/ Richard E. Brodsky

Richard E. Brodsky

File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

EXHIBIT I

to

**Respondent John Christopher Polit's
Motion for Dismissal Without Prejudice,
or, in the Alternative, for Extension of Time
to Respond to Order Instituting Proceedings**

UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINSTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.
_____/

DECLARATION OF MARIA DEL MAR GALLEGOS ORTIZ
PURSUANT TO 28 U.S.C. § 1746

1. I, Maria Del Mar Gallegos Ortiz, give this Declaration in support of the Respondent's Motion for Dismissal Without Prejudice, or, on the Alternative, for Extension of Time to Respond to Order Instituting Proceedings. This declaration is made pursuant to 28 U.S.C. § 1746.

2. I reside in Quito, Ecuador. I prepared this Declaration in English, which I read, write and speak at an advanced level.

3. I am a lawyer of the Courts and Tribunals of the Republic of Ecuador. I specialize in the area of criminal law and procedure.

4. Attached hereto as Exhibit "A" is a copy of my curriculum vitae. The information therein is true and accurate.

5. I have been asked by counsel for the Respondent in this proceeding to explain in writing and under penalty of perjury under the laws of the United States of America my understanding of Ecuadorian law insofar as it relates to the question of whether, under the circumstances as I understand them, the status of the Respondent in his criminal proceeding in

Ecuador could fairly be considered to be finally determined and therefore represent a final judgment akin to a "conviction."

6. I base this Declaration on my experience in studying, teaching and practicing criminal law and procedure in Ecuador.

7. I have had no involvement in, and have no personal knowledge of, John Christopher Polit's criminal proceeding in Ecuador, which I understand forms the basis of this proceeding.

8. With respect to Mr. Polit's criminal proceeding, I understand as follows:

a. Mr. Polit has been accused of being an accomplice to the crime of extortion allegedly committed by another individual, under Article 264, subsection 2, of the Ecuadorian Penal Code. *Dr. Carlos Ramon Polit Faggioni*, case n° 00204-2017, Tribunal de Garantías Penales de la Sala Especializada de lo Penal Militar, Penal Policial y Tránsito de la Corte Nacional de Justicia.

b. The three judges who conducted the trial of that charge found him guilty.

c. A timely initial appeal was taken.

d. The result of the initial appeal was denial of the appeal.

e. A timely appeal to the National Court of Justice, sitting as a court of "cassation," has been or will be filed.

9. I understand that the provision of the United States Code under which this proceeding has been instituted assumes that the respondent in this proceeding has been "convicted" of certain crimes "by a foreign court of competent jurisdiction." I also understand that a criminal conviction in the courts of the United States becomes "final" under state or federal law, as applicable, once the trial judge enters a judgment to that effect, even if an appeal is taken from

the entry of that judgment. This contrasts with the criminal process in Ecuador, which insists that "finality" is reached only after exhaustion of all rights of appeal.

10. Under the laws of Ecuador, if an individual has been found by the trial court to be guilty of a crime, that individual has rights of appeal, including an appeal to the appellate court, and an appeal to the National Court of Justice, sitting as a court of "cassation."[1] As summarized in Paragraphs 11 and 12 below, under the laws of Ecuador, the finding of guilt does not ripen into a final and effective judgment until all appeals have been exhausted, which, as I understand it, has not yet occurred.

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*. Thus, the Constitution, Art. 76(2), states: "Se presumirá la inocencia de toda persona, y será tratada como tal, mientras no se declare su responsabilidad mediante resolución firme o sentencia ejecutoriada."[2] Although there is no authorized English translation of the laws, including the Constitution, of Ecuador, this means: "All persons shall be presumed innocent, and shall be dealt with as such, until their guilt is stated by means of a final ruling or 'sentencia ejecutoriada.'" "Sentencia ejecutoriada" means a final judgment, which does not have any other possibility for appeal.

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-

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[1] Codigo Orgánico Integral Penal (Criminal Code) (Ecuador), Arts. 653-657, https://www.asambleanacional.gob.ec/es/system/files/document.pdf.

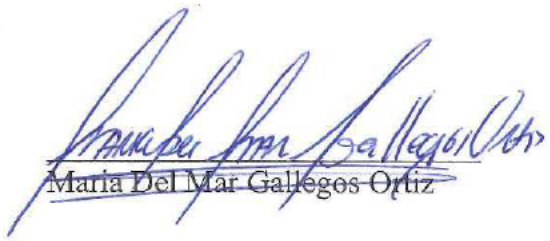
[2] Constitución de la República Del Ecuador, Art. 76-2. https://www.asambleanacional.gob.ec/sites/default/files/private/asambleanacional/filesasamblea-nacionalnameuid-29/constitucion-republica-inc-sent-cc.pdf.

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.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 25, 2020.



María Del Mar Gallegos Ortiz

MARIA DEL MAR GALLEGOS ORTIZ

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Titles:

Criminal Law Specialist **2018-2019**

Simon Bolivar Andean University

Master in Criminology

The University of Melbourne **2013- 2015**

Master's Degree in Criminal and Procedural Law

Carlos III University of Madrid **2020 (present)**

Lawyer of the Courts and Tribunals of the Republic of Ecuador

University of the Americas - UDLA **2007- 2012**

- Thesis: 'The implementation of jurors in the adversarial system of criminal proceedings in Ecuador'

Work Experience

FORSETI Lawyers

Criminal area partner

MLP Compliance Penal

Founding Partner

University of the Americas UDLA September 2016 to the present day

Teacher

Criminal Law I and Criminal Law II, Crimes in Particular

University of the Hemispheres August 2015 to the present day

Teacher- Researcher.

Concepts and fundamentals Criminal Law
Theoría and Basics of Criminal Law

Central University of Ecuador April 2016 to August 2016

Teacher- Researcher.

Criminal sciences and criminology

Philosophy of Law

Council of the Judiciary November 2015 until April 2016

Head of Initial Training

School of Judicial Function

International Detention Coalition August 2014 - August 2015

Assistant To the Advisory Coordinator- ADVOCACY INTERN

Ministry of Justice, Human Rights and Worship. April 2011- May 2013

Adviser to the Under-Secretary of Justice

National Legal Secretary of the Presidency of the Republic 2011

Legal Assistant - Intern

Perez, Bustamente & Ponce 2010

Legal Intern

Internships:

Participation in UNHCR Annual Consultations with NGOs
NGO: **International Detention Coalition 2015**
Geneva-Switzerland

Volunteering:

Non-Governmental Organization 'Forum of Children and Adolescents' 2005-2007

Academic courses:

V German School of Criminal Sciences and German Criminal Dogmatics
Center for Latin American Criminal Law and Criminal Procedure Studies
Georg-August Universitat Gottingen September 30-11 October 2019

Regulatory Compliance & U.S. Law
Economist and Jurist Innovative School
Fordham Law School March 19-23, 2018

Course on Improvement in Prevention and Suppression of Money Laundering and Criminal Responsibility of Legal Persons and Tax Fraud
Santiago de Compostela University 2017

Moralities of Everyday Life
Yale University (online) 2014

Legal English
Georgetown University 2012

Languages:

- Spanish, mother tongue.
- English, advanced level.
- Italian, intermediate level.

Recognitions

Scholarship 'Academic Excellence' awarded by the Ecuadorian Government **2013**

'Minigrant for project development of scholarship alumni' granted by the United States Department of Education and Cultural Affairs **2010**

'Study of the United States Institutions for Student Leaders' Exchange Program, University of Tennessee awarded by the United States Department of Education and Cultural Affairs **2009**

Seminars Presented

CIP LEX- PENALISTS ECUADOR
Theme: Compliance Penal, facebook Live.

Student Movement Verum, II LEGAL-ACADEMIC FORUM
Topic: Organized Crime

AESUDLA
Theme: Seminary Monitoring, Punishing or Rehabilitating?

AED Catholic and World Compliance Association
Theme: Importance of Compliance in Criminal Process: F.C Barcelona Case

R&B with the endorsement of UIDE I International Bar Forum Topic: Organized Crime and Criminological Implications.

Corruption and Crisis in Pandemic Time
Theme: Measures to Prevent Corruption from Criminal Law

Center for Procedural Law Studies - Colombia CEDEP, **July 9, 2020**
Topic: Suitability and Value of evidence obtained on social networks and electronic platforms

National Assembly of Ecuador, **7 August 2020**
Topic: COSE Book II Bill

UniAndes, Learning Law and Centralia, **August 1, 2020**
Topic: Criminal Policy Trends in Latin America

Law School Association, date: **August 12, 2020**
Topic: Witness Preparation

UDLA, "Criminal Policy Trends in South America. CoIP Reforms", **19 and 21 August 2020**
Theme: "Are there reforms on criminal liability in Ecuador?"

Institute of High National Studies (IAEN) . General State Contraloy
Theme: Compliance Programs in Ecuador
Quito - Ecuador 2017

Escola Galega de Administración Pública
Topic: Brief Analysis of Money Laundering in Ecuador
Santiago de Compostela- Spain 2017

Cenescap
Theme: Theoretical location of white collar crimes in Ecuador
Quito-Ecuador 2017

Cenescap
Theme:Criminological Thoughts of Criminal Law
Quito-Ecuador 2016

Remin University
Theme: The Paradox of Regulation. Case Study: Chevron-Texaco v. Ecuador

Beijing- China 2015

William Thompson Seminar
Theme: Chevron-Texaco v. Ecuador. Does Justice Exist for Ecuador?
Melbourne- Australia 2015

Latin American Social Forum.
Theme: The importance of the case Chevron-Texaco in the Region.
Sydney-Australia 2015

Ecuadorean Ideas that Matter.
Theme: Chevron-Texaco v. Ecuador: Changing Paradigms in the International Criminal Law.
Melbourne- Australia 2014

References

Lawyer Diego Guarderas Donoso, Undersecretary of Law of the Legal Secretariat
Phone number: (593) 998038496
Fgddiego@yahoo.es

Lawyer Hugo Arias, Senior Lawyer and Partner of Corporación Legal CL, Ecuador.
E-mail: hugolas5@hotmail.com
Phone number: (593) 997003159

File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

EXHIBIT II

to

Respondent John Christopher Polit's Motion for Dismissal Without Prejudice, or, in the Alternative, for Extension of Time to Respond to Order Instituting Proceedings

UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINSTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.
_____/

DECLARATION OF ANA CAROLINA PAOLA GARCIA BODAN
PURSUANT TO 28 U.S.C. § 1746

1. I, Ana Carolina Paola Garcia Bodan, give this Declaration in support of the Respondent's Motion for Dismissal Without Prejudice, or, on the Alternative, for Extension of Time to Respond to Order Instituting Proceedings (Motion). This declaration is made pursuant to 28 U.S.C. § 1746.

2. I reside in Coral Gables, Florida. I am in the United States to study law at the University of Miami School of Law. I am a Law graduate from Nicaragua. I prepared this Declaration in English, which I read, write and speak at an advanced level. I am a native speaker, reader and writer of Spanish.

3. I have reviewed the Declaration of Adrián Bustos in support of the Motion, which is attached hereto as Exhibit "A," and is written in Spanish.

4. I have been asked by counsel for the Respondent in this proceeding to prepare a faithful English translation of the Bustos Declaration. I fully understand the Bustos Declaration and have prepared a faithful English translation thereof, which is attached hereto as Exhibit "B."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 2020.

Ana Carolina Paola Garcia Bodan

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINSTRATIVE PROCEEDING

File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

_____/

DECLARACIÓN DE ADRIÁN BUSTOS

DE ACUERDO CON 28 U.S.C. 1746

1. Yo, Adrián Bustos, doy esta Declaración en apoyo de la moción del demandado, en la cual se solicita una extensión de tiempo para responder al orden de procedimientos. Esta declaración se hace de conformidad con el artículo 28 de la U.S.C. no. 1746.

2. Vivo en Quito, Ecuador. Preparé esta Declaración en español. No hablo inglés. El Sr. Fernando Tamayo, un abogado bilingue en Miami, Florida, con quien he tenido tratos frecuentes y en quien pongo plena confianza, lo ha traducido al inglés. No me considero capaz de hablar, leer o escribir inglés.

3. Soy un abogado de los Juzgados y Tribunales de la República del Ecuador. Me especializo en el área de derecho penal.

4. Desde el año 2018 he estado representando a John Christopher Polit (Sr. Polit) en un proceso penal en Ecuador. Se le acusa de ser cómplice del delito de concusión presuntamente cometido por otra persona, en virtud del artículo 264, subsección 2, del Código Penal

ecuatoriano. *Dr. Carlos Ramón Polit Faggioni*, caso no 00204-2017, Tribunal de Garantías Penales de la Sala Especializada de lo Penal Militar, Penal Policial y Tránsito de la Corte Nacional de Justicia.

5. La presunta extorsión fue llevada a cabo por el padre del Sr. Polit, que era un funcionario ecuatoriano de alto nivel encargado de luchar contra la corrupción pública. El caso contra padre e hijo fue iniciado por el entonces Fiscal General del Ecuador (quien en la actualidad ya no ejerce la calidad de Fiscal ya que fue procesado y removido de su cargo) a los pocos días que el padre de John Polit en calidad de Contralor General, emitiría un informe con indicios de responsabilidad penal en contra del Fiscal General, por haber participado en actos de presunta corrupción.

6. Se llevó a cabo un juicio en Quito, Ecuador, y, en junio de 2018, los tres jueces consideraron al Sr. Polit culpable del crimen alegado.

7. En su nombre se presentó una apelación de conformidad con la legislación ecuatoriana. En septiembre de 2020 se celebró una audiencia sobre dicha apelación. La apelación fue denegada.

8. En la actualidad una vez que ha sido notificada la sentencia de apelación, hemos procedido a interponer el recurso de ampliación y aclaración a la misma, para que una vez contestada esta, presentar el recurso de casación, para lo cual en un acto judicial posterior se realizara el sorteo pertinente para conformar el Tribunal que conozca este recurso de casación. Por lo tanto, para preservar el derecho de apelación del Sr. Polit, se presentará un recurso en tiempo y forma ante la Corte Nacional de Justicia, que actúa como tribunal de casación.

Declaro bajo pena de perjurio bajo las leyes de los Estados Unidos de América que lo anterior es verdadero y correcto.

Ejecutado en septiembre 24 de 2020.

Adrián Bustos

UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINSTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.
_____/

STATEMENT BY ADRIAN BUSTOS
ACCORDING TO 28 U.S.C. 1746

1. I, Adrián Bustos, give this Statement in support of the defendant's motion, in which an extension of time is requested to respond to the order of proceedings. This statement is made pursuant to Section 28 of the U.S.C. not. 1746.

2. I live in Quito, Ecuador. I prepared this Statement in Spanish. I do not speak English. Fernando Tamayo, a bilingual attorney in Miami, Florida, with whom I have had frequent dealings and in whom I put full trust, has translated it into English. I do not consider myself capable of speaking, reading or writing in English.

3. I am a lawyer of the Courts and Tribunals of the Republic of Ecuador. I specialize in the area of criminal law.

4. I have been representing John Christopher Polit (Mr. Polit) since 2018 in criminal proceedings in Ecuador. He is accused of being an accomplice to the crime of extortion allegedly committed by another person, under article 264, subsection 2, of the Ecuadorian Penal Code. *Dr. Carlos Ramon Polit Faggioni*, case no. 00204-2017, Court of Criminal Guarantees of the Specialized Chamber of Military Criminal, Police Criminal and Traffic of the National Court of Justice.

5. The alleged extortion was carried out by Mr. Pólit's father, who was a high-level Ecuadorian official in charge of fighting against political corruption. The case against father and son was initiated by the then Chief Prosecutor of Ecuador (who no longer exercises the capacity of Prosecutor since he was processed and removed from his position) a few days after John Polit's father as Contralor General, issued a report with indications of criminal responsibility against the Chief Prosecutor, for having participated in acts of alleged corruption.

6. A trial was held in Quito, Ecuador, and, in June 2018, the three judges found Mr. Polit guilty of the alleged crime.

EXHIBIT “B”

7. An appeal was filed on his behalf in accordance with Ecuadorian law. In September 2020, a hearing was held on this appeal. The appeal was denied.

8. At present, once we are notified that the appellate ruling has been finalized, we will proceed to file a writ for clarification of the appellate ruling, so that once it has been confirmed, we will present the appeal for cassation, for which in a subsequent judicial act there will be a random selection of the Court tribunal that hears this appeal. Therefore, in order to preserve Mr. Polit's right of appeal, a timely appeal will be filed with the National Court of Justice, which sits as a court of cassation.

Executed on September 24, 2020

Adrian Bustos

File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

EXHIBIT III

to

Respondent John Christopher Polit's Motion for Dismissal Without Prejudice, or, in the Alternative, for Extension of Time to Respond to Order Instituting Proceedings

GAO: 3

101ST CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
101-240

INTERNATIONAL SECURITIES ENFORCEMENT COOPERATION ACT OF 1989

SEPTEMBER 12, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DINGELL, from the Committee on Energy and Commerce, submitted the following

REPORT

[To accompany H.R. 1396]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 1396) to amend the Federal securities laws in order to facilitate cooperation between the United States and foreign countries in securities law enforcement, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

29-006

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

PURPOSE AND SUMMARY

The legislation would strengthen international cooperation in the enforcement of securities laws and thereby enhance the ability of the Securities and Exchange Commission (Commission) to prevent and detect violations of U.S. securities laws that are committed at least in part abroad and whose investigation may require the Commission to obtain substantial foreign-based evidence. The bill would amend the federal securities laws to:

Exempt confidential documents received from foreign authorities from disclosure requirements under the Freedom of Information Act or other laws under certain conditions;

Make explicit the Commission's rulemaking authority to provide nonpublic documents and other information to domestic and foreign law enforcement officials;

Grant the Commission and the self-regulatory organizations explicit authority to bar, suspend, or place limitations on securities professionals based upon the findings of a foreign court or foreign securities authority that such persons committed specified types of violations;

Authorize self-regulatory organizations, after an opportunity for a hearing, to prohibit any person who has been convicted of a felony from becoming a member or associating with a member, or to place conditions upon membership or association; and

Authorize the Commission to accept reimbursement for expenses incurred in providing assistance to foreign government authorities in their investigations.

BACKGROUND AND NEED FOR THE LEGISLATION

GROWING IMPORTANCE OF INTERNATIONAL COOPERATION

The internationalization of the world's securities markets is a trend that is likely to continue at a rapid pace. The major forces driving this trend appear to be: rapid technological advances in communications and computer technology; the growing economic interdependence between the U.S. and its major trading partners; the increasing tendency of major investors, particularly mutual funds and pension funds, to diversify their investments on a global basis; and the growing inclination of U.S. and foreign-based firms to rely on foreign debt and equity markets to raise capital.

An abundance of statistics confirms the internationalization trend. For example, the sum of U.S. assets abroad has increased from $165 billion in 1970 to over $1.1 trillion by 1986, while foreign assets located in the United States rose from $106 billion to $1.3 trilliion over the same period of time. Furthermore, the dollar volume of U.S. equity securities purchased or sold from abroad increased from $25.6 billion in 1977 to $481.5 billion in 1987. And the holdings of U.S. pension funds in foreign securities, which stood at $19 billion in 1982, are expected to reach between $120 billion and

$140 billion by 1990. Clearly, the participation of U.S. market professionals in foreign markets, and participation by foreigners in our own markets, has risen exponentially in recent years.

The potential gains from globalization are enormous. The expanded opportunities for market participation mean a larger pool of investors, thus increased liquidity in the capital markets and expanding the ability of businesses to raise the necessary capital to be competitive in global markets.

While internationalization carries obvious benefits, it also carries clear risks and challenges.[1] Although the linkage of markets has proceeded rapidly, the harmonization of regulation, surveillance, and enforcement is progressing at a much slower pace. There is today no global regulatory structure to oversee the markets and coordinate harmonization of laws and regulations to ensure efficiency and honesty. Therefore, securities regulators in each nation must work with their foreign counterparts to seek coordinated international solutions to assure fairer as well as more efficient market operations across borders.

RECENT CASES OF INTERNATIONAL SECURITIES FRAUD

The General Accounting Office (GAO), which concluded a study concerning insider trading, found that suspicious foreign originated trades were present in a substantial number of the total cases reported to the Commission by self-regulatory organizations. The GAO study cites as an example a case in which 30 foreign traders in at least 10 different countries traded 265,900 shares of a company's stock during the 6 days before a tender offer was made for that company.[2] The problems associated with international securities enforcement, and thus the need for this legislation, are illuminated by several recent important cases.

Switzerland/United States: the "St. Joe" and "Santa Fe" cases

The St. Joe case[3] involved substantial insider trading in the common stock and options of the St. Joe Minerals Corporation

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[1] See Report of the Staff of the U.S. Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Energy and Commerce on the Internationalization of the Securities Markets (July 27, 1987). The report is a comprehensive examination of a number of areas relating to internationalization, including transnational secondary market trading; the application of distribution, disclosure and accounting standards to international offerings; the regulation of broker-dealers, investment companies, and investment advisers who operate in more than one country; economic trends affecting internationalization; and the impact of global trading on jurisdictional issues and enforcement efforts. See also Release 33-6807, 53 Fed. Reg. 46963 (November 21, 1988) Policy Statement on Regulation of International Securities Markets. The Policy Statement identifies areas of regulatory concern presented by the continued internationalization of the securities markets. Cautioning sensitivity to "cultural differences and national sovereignty concerns," the Commission suggests that an effective regulatory structure for an international securities market system would include the following features:

1. Efficient structures for quotation, price, and volume information dissemination, order routing, order execution, clearance, settlement, and payment, as well as strong capital adequacy standards;
2. Sound disclosure systems, including accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards that provide investor protection yet balance costs and benefits for market participants; and
3. Fair and honest markets, achieved through regulation of abusive sales practices, prohibitions against fraudulent conduct, and high levels of enforcement cooperation.

[2] U.S. General Accounting Office, "Securities Regulation: Efforts to Detect, Investigate, and Deter, Insider Trading," GAO/GGD-88-116, August 5, 1988, pp. 4 and 49.

[3] *SEC.* v. *Tome*, 638 F. Supp. 596 (S.D.N.Y. 1986), aff'd, 833 F.2d 1086 (2d Cir. 1987), cert. denied, 108 S. Ct. 1751 (1988).

shortly before the announcement by Joseph E. Seagram & Co. of a proposed tender offer for St. Joe shares. On March 10, 1981, persons trading through accounts at Banca Della Svizzera Italiana (BSI) purchased 3,000 shares of St. Joe common stock and 1,055 options to purchase over 100,000 shares of the company's common stock. The next day, after Seagram announced its tender offer of $45 per share for St. Joe, representing a $15-per-share premium, the stock price soared. BSI's customers closed out the options purchased and sold 2,000 of the 3,000 shares, reaping a profit of almost $2 million.

Showing a strong probability that the U.S. insider trading laws had been violated, the Commission obtained a temporary restraining order freezing profits derived from the transactions in BSI's bank account at Irving Trust Company in New York City. The Commission did not, however, know the identities of BSI's customers, and BSI refused to disclose them on the ground that such disclosure would violate Swiss secrecy laws. The Commission then sought an order to compel discovery. A federal court ruled for the Commission, concluding that it would be a "travesty of justice" to permit a foreign company to invade American markets, violate American laws, withdraw profits, and then avoid accountability for itself by claiming anonymity under foreign law, and ordered BSI to disclose its customers' identities.[4] BSI did so, and the Commission learned that the St. Joe securities were purchased for several Panamanian corporations at the direction of Giuseppe B. Tome, an Italian national who operated a securities firm in Switzerland. The court permanently enjoined Tome and other defendants from violations of the antifraud provisions of the securities laws and ordered disgorgement of over $4 million in illegal profits, dividends earned on their stock, and prejudgment interest.

Some of the defendants appealed, claiming, among other things, that the district court lacked personal jurisdiction over them because of defects in the service of process. At the time of service, the Commission had been unaware of some of the defendants' identities. The Commission had therefore sought, and the court had issued, an order authorizing service of all defendants by publication in two European newspapers. The United States Court of Appeals for the Second Circuit held that the service of process by publication was valid and affirmed the district court's opinion in *SEC* v. *Tome*, 833 F.2d 1086 (2d Cir. 1987).

The *Santa Fe* case [5] is an example of the cases in which the Commission has been able to use the Swiss Treaty with the United States to obtain information relevant to its investigations. In the *Santa Fe* case, following the entry of a preliminary injunction in a U.S. court, the Commission attempted to learn the identities of certain holders of Swiss bank accounts who had directed purchases of Santa Fe stock and options prior to a merger announcement and gained profits of over $7.5 million. The Swiss banks refused to respond to the Commission's request on the ground that to do so

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[4] *SEC.* v. *Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

[5] SEC v. *Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of Stanta Fe International Corporation*, 81 Civ. 6553 (WCC) (S.D.N.Y. Nov. 13, 1981).

would violate Swiss bank secrecy laws. In March 1982, the Commission submitted a request for assistance under the Swiss Treaty to the government of Switzerland. In May 1984, after extensive litigation, the Swiss Federal Tribunal granted the Commission's request. The Commission thus learned the identities of the unknown purchasers, but, after the names were revealed, the purchasers appealed the ruling to prevent further disclosure of documents or testimony. Their appeal was eventually resolved in the Commission's favor, and the Commission received documents responsive to its request. On February 26, 1986, all remaining defendants agreed to settle the Commission's action and to disgorge $7.8 million in profits.

Since the *Santa Fe* case was decided, the Swiss courts have affirmed on numerous occasions the Commission's ability to use the Swiss Treaty for investigations involving insider trading and other securities fraud.

Bahamas/United States: Dennis Levine case

The Dennis Levine [6] case is another example of international securities fraud. Mr. Levine, a managing director at Drexel Burnham Lambert Inc. at the time the Commission brought its charges against him in 1986, purchased and sold securities while in possession of confidential information that he misappropriated from his investment banking clients and which he gathered from a cadre of informants scattered through a number of other prominent investment banks and law firms. He attempted to conceal this illegal insider trading by executing transactions through a secret bank account in the Bahamas. The Commission was able to persuade the Bahamian Attorney General that his country's secrecy laws should not be applied to Mr. Levine's trading and Mr. Levine was ultimately apprehended. Although the outcome of that case was successful, not all foreign authorities have been as willing to cooperate with the Commission.

Hong Kong/United States: Fred Lee/Stephen Wang case

In June 1988, the Commission filed civil charges against Stephen Sui-Kuan Wang, Jr., a junior market analyst at the investment banking firm of Morgan Stanley & Co., and Fred C. Lee, a Hong Kong-based investor who controlled trading accounts at Morgan, and other firms. The Commission alleged that Lee made over $19 million in illegal profits while in possession of material inside information provided to him by Wang. The information concerned potential takeover deals and other matters involving 25 corporate clients of Morgan Stanley and certain of the alleged illicit trades were made through accounts held at Morgan. The SEC alleged an elaborate information-funneling scheme based on a blatant disregard for the duties owed by an investment banking firm's employees to the firm, its clients and its shareholders.

Following a hearing on July 13, 1988, the U.S. District Court in Manhattan granted the Commission's motion for a preliminary injunction against further insider trading violations by Wang and

[6] *SEC* v. *Levine*, No. 86 Civ. 3726 (S.D.N.Y. July 1, 1986).

Lee and a freezing and accounting of all allegedly ill-gotten assets of the defendants.[7] In September 1988, Wang pleaded guilty to three felony offenses (securities, wire and mail fraud) arising out of his insider trading activities.[8] He also reached a settlement with the Commission in which he disgorged his profits and paid a civil fine.

The court-ordered freeze affected $12.5 million in accounts, controlled by Lee and two corporations of which he was president, at Standard Chartered Bank, a British bank with branches in the United States and Hong Kong. In the course of the litigation, Lee sought through the Hong Kong courts to force the branch of the bank holding his money to violate the freeze order and liquidate his account. In response, the Commission obtained a U.S. court order requiring the bank to pay the $12.5 million into the registry of the court in New York for safekeeping. The United Kingdom objected to this sequestration order and filed a friend of the court brief in the bank's appeal to the United States Court of Appeals for the Second Circuit, where among others the Federal Reserve Bank of New York argued that the order was beyond the authority of the court.[9]

In August 1989, the Commission reached a settlement agreement with Lee, whereby he agreed to disgorge $19 million in profits and pay a $1.5 million civil penalty as well as $4.5 million in tax liability to the Internal Revenue Service. As a result of this settlement, Standard Chartered Bank and the Commission agreed to dismiss the bank's appeal of the district court decision. The Committee will continue to monitor such cases and is concerned that the Commission receive all reasonable cooperation in similar investigations involving foreign deposits of banks doing business in the United States.

France/United States: The Triangle Industries Inc. scandal

Early in 1989, a scandal broke involving allegedly illegal trading in the shares of Triangle Industries Inc. just prior to its takeover in November 1988 by the French state-owned company Pechiney S.A. The case was the subject of numerous press reports throughout the world, because it involved major figures in the French political and financial communities.

The French investigative authority, the Commission on Operations of the Bourse (COB), concluded that there was substantial evidence of insider trading violations in Triangle stock in the several days prior to the announced takeover bid by Pechiney S.A. According to the COB's publicly released investigative report, over 228,000 Triangle shares were traded on the U.S. over-the-counter market in the three market days prior to the announcement, which compares with an average daily volume of between 5,000 and 10,000 shares. The report noted the close ties among French gov-

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[7] *SEC* v. *Wang and Lee,* No. 88 Civ. 4461 (S.D.N.Y. July 31, 1988) (order granting preliminary injunction).

[8] *United States* v. *Stephen S. Wang, Jr.,* 615 (KD) (S.D.N.Y. 1988).

[9] Standard Chartered Bank argued primarily that it was potentially subject to inconsistent judgments, since a Hong Kong court might order it to repay Lee his deposits there. In point of fact, Lee had been unable to obtain such a judgment by the time of his settlement with the Commission.

ernment officials, the state-owned Pechiney and some Triangle investors.

The Triangle-Pechiney case cuts across numerous international boundaries. The allegedly illegal trading of Triangle Industries stock took place on the National Association of Securities Dealers Automated Quotation System (NASDAQ), a U.S. network which facilitates trading of over-the-counter stocks. The trading orders were allegedly initiated in France, by various French investment companies and individuals and executed through brokers in Paris, London, and Luxembourg. The COB report on the investigation also identified "suspicious" trading in Triangle stock in an account held by a bank in the West Indies that was executed through brokerages in Geneva and London.

The case also demonstrates the growing ties among international securities regulators. The continuing investigation in France originated with a letter from the Commission to the COB in December 1988. And according to the publicly released COB report on the investigation, "numerous exchanges of information and direct contacts" between the COB and the Commission and securities authorities in the United Kingdom and Luxembourg have provided critical assistance in the progress of the investigation.

The Triangle scandal has fueled ongoing efforts to modernize French securities regulation. The COB was founded in 1967 and until recently employed only five full-time investigators. But French cabinet ministers have recently endorsed a proposal which would give the COB the power to initiate legal action in French courts and seek fines, powers it presently lacks. Under current law, the COB lacks authority to pursue remedies in court and must turn any potential securities fraud case over to a prosecutor for any criminal prosecution.

SEC ACCOMPLISHMENTS TOWARD INTERNATIONAL COOPERATION

The Commission has actively worked to improve the level of cooperation with foreign governmental authorites. Among other things, the Commission has negotiated memoranda of understanding (MOUs) and related agreements with various foreign countries. The 1982 MOU between the United States and Switzerland was the first such agreement. The Swiss MOU provided the Commission with unprecedented access to Swiss bank trading records. Of equal importance, the MOU provided a new formula for approaching evidence-gathering issues: bilateral understandings negotiated by the Commission, tailored to meet urgent enforcement problems and to address the foreign country's particular concerns.

After the Swiss MOU, the Commission negotiated increasingly complex MOUs that cover a wide range of possible cases under the federal securities laws. In 1986, the Commission entered into MOUs with the United Kingdom's Department of Trade and Industry and the Japanese Ministry of Finance. More recently, the Commission signed an MOU with the Brazilian Securities Commission and another with the British Columbia, Ontario, and Quebec Securities Commissions. Additional MOUs similar to those are under negotiation.

The provision in Public Law No. 100-704 (see discussion below), which granted the Commission authority to conduct investigations at the request of a foreign governmental authority, should assist the Commission greatly in receiving reciprocal assistance from foreign governments in the Commission's own investigations. The Committee believes that the additional statutory changes embodied in this new legislation are necessary in order for the Commission to be able to maximize cooperation with previous MOU signatories and facilitate agreements where none have yet been reached.

ACTIVITIES IN THE 100TH CONGRESS

H.R. 1396 is substantially similar to H.R. 4945, the International Securities Enforcement Cooperation Act of 1988, introduced in the last Congress and which was the subject of a hearing by the Subcommittee on Telecommunications and Finance on August 3, 1988. That bill would have granted the Commission the legal authority to invoke its investigative powers at the request of a foreign governmental authority; would have permitted the Commission to assure confidential treatment for records that would be received from foreign securities authorities under reciprocal arrangements and would have made clear the Commission's rulemaking authority to provide access to Commission records by foreign officials, as well as by domestic enforcement officials; and would have enabled the Commission and the self-regulatory organizations to institute an administrative proceeding against a securities professional based upon a finding of a foreign court or foreign securities authority that the professional engaged in illegal or improper conduct.

Part of H.R. 4945 was enacted by Congress as Section 6 of the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), Pub. L. No. 100-704, 102 State. 4677. Section 6 of the ITSFEA amended the Securities Exchange Act of 1934 to permit the Commission, in its discretion, to provide foreign securities authorities with assistance in investigating possible violations of laws or rules related to securities matters that the requesting authority administers or enforces. H.R. 1396 incorporates three provisions of H.R. 4945 that were not enacted as part of ITSFEA. They are an exemption of foreign nonpublic information from the Freedom of Information Act, and explicit authority for the Commission to provide access to its records and to sanction securities professionals based on the findings of a foreign court or securities authority. The bill also includes two new provisions not contained in the earlier legislation. These new provisions would permit self-regulatory organizations to exclude persons convicted of any felony from membership in the self-regulatory organizations and would authorize the Commission to accept reimbursement for expenses incurred on behalf of foreign securities authorities.

HEARINGS

The Subcommittee on Telecommunications and Finance held a hearing on H.R. 1396 on March 21, 1989. Testimony was received from John E. Pinto, Executive Vice President, National Association of Securities Dealers; David S. Ruder, Chairman, Securities and Exchange Commission; and Robert P. Wilkinson, Director of Enforce-

ment, The Securities Association, Ltd., London, England. Additional material was submitted by Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice; Mary V. Mochary, Principal Deputy Legal Advisor, Department of State; and Minoru Nagaoka, President, Tokyo Stock Exchange.

COMMITTEE CONSIDERATION

On June 20, 1989, the Committee met in open session and ordered reported the bill H.R. 1396, with amendments, by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Subcommittee held an oversight hearing and made findings and recommendations that are reflected in the legislative report.

COMMITTEE ON GOVERNMENT OPERATIONS

Pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, oversight findings have been submitted to the Committee by the Committee on Government Operations in its report entitled "Problems With The SEC's Enforcement of U.S. Securities Laws In Cases Involving Suspicious Trades Originating From Abroad," House Report No. 100-1065. Those findings are reflected in the legislative report.

COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the Committee believes that the cost incurred by the Commission in carrying out H.R. 1396 would be approximately $50,000 per year to implement the confidentiality authority granted in the bill. However, this cost is more than offset by fees collected by the Commission and contributed to the Treasury. The Committee observes that the Commission collected $248,945,000 in fee revenue in 1988, 184 percent of its appropriation. Estimated fee collections of $252 million are expected in 1989, equivalent to 177 percent of the agency's appropriation, and $263 million in 1990, equivalent to 156 percent of the agency's requested funding.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 16, 1989.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: As you requested, the Congressional Budget Office has reviewed H.R. 1396, the International Securities Enforcement Cooperation Act of 1989, as ordered reported by the House Committee on Energy and Commerce, June 20, 1989. We

expect that enactment of the bill would result in additional costs to the federal government of about $50,000 per year, assuming appropriation of the necessary sums.

H.R. 1396 contains a number of provisions aimed at facilitating cooperation between the United States and foreign countries in securities law enforcement. Specifically, the bill would allow the Securities and Exchange Commission (SEC) to exempt certain records provided by foreign securities authorities from the Freedom of Information Act, if release of such records would violate foreign privacy statutes. In addition, the bill would grant the SEC the authority to permit access to its enforcement files by domestic and foreign law enforcement officials. H.R. 1396 also would permit the SEC to impose sanctions against securities professionals based on violations of foreign securities laws. In addition, self-regulatory organizations, such as the stock exchanges, would be allowed to exclude from membership persons convicted of violating foreign laws. Finally, the bill would allow the SEC to accept reimbursement for expenses incurred for investigations performed on behalf of foreign securities authorities.

Based on information from the SEC, we expect that the agency would require a small increase in personnel to implement the confidentiality authority granted in the bill. We estimate that this additional personnel requirement would cost about $50,000 per year, assuming appropriation of the necessary sums. Authorizing the SEC to accept reimbursements from foreign securities authorities would not result in significant savings because the SEC generally would not charge for such investigations, but instead would accept reciprocal assistance as payment. Other provisions of H.R. 1396 are not expected to result in additional costs to the federal government.

No costs would be incurred by state or local government as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Douglas Criscitello, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee makes the following statement with regard to the inflationary impact of the reported bill: The Committee does not believe that an inflationary impact on the economy will result from the passage of H.R. 1396.

SECTION-BY-SECTION ANALYSIS

SECTION 2

Section 2 of the Act amends Section 24 of the Exchange Act by adding new subsections authorizing the Commission to withhold from disclosure documents furnished to the Commission by foreign securities officials upon certain conditions.

Section 2(a).—Section 2(a) is an amendment necessitated by the scheme of amended Section 24 of the Exchange Act, to which the Act adds new subsections (c), (d), and (e). It strikes from Section 24(b) the sentence, "Nothing in this subsection shall authorize the Commission to withhold information from the Congress." That sentence becomes part of a new Section 24(e) of the Exchange Act.

New Section 24(c) clarifies the Commission's authority to provide records, as defined in Section 24(a) of the Exchange Act, in its discretion and upon a showing that the information is needed, to any persons deemed appropriate by the Commission by rule. The new provision conditions this discretionary authority on the person receiving the information assuring its confidentiality as the Commission deems appropriate.

Section 2(a) of the Act also adds new Section 24(d) to the Exchange Act. New Section 24(d) authorizes the Commission to protect the confidentiality of records received from a foreign securities authority under certain conditions. The new provision will allow the Commission to gather otherwise unobtainable confidential documents from foreign countries for regulatory and enforcement purposes. An amendment at Subcommittee helped to clarify the original intent of this provision.

The Subcommittee amendment made several important changes to the legislation as introduced. Under the amended Section 24(d), the Commission's authority to provide assurances of confidentiality is linked explicitly to the "exempted" statute section of the Freedom of Information Act, 5 U.S.C. 552(b)(3)(B). Section 24(d) is identified specifically as such an "exempted" statute.

Section 24(d) as amended authorizes the Commission to withhold documents under this section only if the foreign securities authority in "good faith" makes a determination and representation to the Commission that public disclosure of such records would violate the laws applicable to that foreign securities authority. The addition of "determination" to the original "representation" requirement assures that a representation based upon foreign law will be provided by the foreign authority. The amendment also substituted the word "violate" for the original language which less clearly stated that disclosure needed to be "contrary" to a foreign law for the confidentiality assurances to be provided.

Section 24(d) also limits the authority of the Commission to provide assurances of confidentiality to those circumstances in which the Commission obtains records pursuant to a memorandum of understanding with a foreign authority or an alternative procedure which the Commission may authorize in connection with the Commission's administration or enforcement of the securities laws.

New Section 24(e) clarifies that nothing in Section 24 authorizes the Commission to withhold information from Congress or not to comply with an order of a United States court in an action initiated by the United States or the Commission. The Committee is sensitive to the desires of any person or foreign authority to have absolute confidentiality. This section is not intended to invade privacy or cause unwarranted release of information. However, it recognizes the Committee's legitimate interest in overseeing the operations of the Commission and in having access to relevant Commission records. New Section 24(e) also clarifies that this section does

not alter the Commission's responsibilities under the Right to Financial Privacy Act, 12 U.S.C. 3401 et seq., as limited by Section 21(h) of the Exchange Act, with respect to transfers of records covered by these statutes.

Section 2(b).—Section 2(b) provides conforming amendments to Section 45(a) of the Investment Company Act of 1940 and Section 210(b) of the Investment Advisers Act of 1940. These conforming amendments were added at Subcommittee markup. As originally introduced, the legislation would have granted the Commission the authority to withhold documents pursuant to Section 24(c) of the Exchange Act "notwithstanding any other provision of law," with the implicit reference to provisions of the Investment Company Act and the Investment Advisers Act. The conforming amendments now make explicit changes in the Investment Company and Advisers Acts, with references to Section 24(c) of the Exchange Act.

SECTION 3

Section 3 of the Act amends the Exchange Act to authorize the Commission to impose sanctions on brokers or dealers, their associated persons, and individuals seeking to become associated persons of brokers or dealers on the basis of misconduct in a foreign country.

Section 3(a).—Section 3(a) of the Act amends Section 15(b) of the Exchange Act, the Exchange Act's registration provision. Subsection (a)(1) provides for Commission censure of, limitations on the activities of or revocation or suspension of the registration of brokers or dealers, based upon a conviction within ten years rendered by a foreign court of competent jurisdiction of a crime which is substantially equivalent to a felony or misdemeanor as provided by Section 15(b)(4)(B). The Act thus clarifies the Commission's authority to consider offenses from foreign jurisdictions that might not classify crimes formally as felonies or misdemeanors, e.g., noncommon law jurisdictions.

Section 15(b)(4)(B)(i) lists offenses involving the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense as within the class of felonies and misdemeanors that permit the Commission to sanction brokers or dealers. Subsection (a)(2) of the Act amends this provision by including within this list any substantially equivalent activity, however denominated by the laws of a foreign government. The Act therefore clarifies the Commission's authority to consider such activities even if the foreign government does not denominate them as precisely the same offenses that they constitute within the United States.

Section 15(b)(4)(B)(ii) also allows the Commission to consider offenses arising out of the conduct of various securities-related businesses, including the business of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, or transfer agent. Subsection (a)(3)(A) of the Act amends Section 15(b)(4)(B)(ii) by including any substantially equivalent activity, however denominated by the laws of a foreign government. The Act accordingly clarifies the Commission's authority to consider

such offenses regardless of the employment terms involved, which may differ in foreign countries. Section 15(b)(4)(B)(ii) also permits the Commission to consider offenses arising out of the conduct of the business of an entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.). Subsection (a)(3)(B), therefore, also amends Section 15(b)(4)(B)(ii) by including any equivalent foreign statute or regulation. The Act thus clarifies the Commission's authority to consider foreign offenses arising out of the commodities trading business.

Section 15(b)(4)(B)(iii) includes larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, and misappropriation of funds or securities within the list of offenses that trigger Commission sanctions. Subsection (a)(4) of the Act adds any substantially equivalent activity, however denominated by the laws of a foreign government.

Section 15(b)(4)(B)(iv) of the Exchange Act includes violations of Sections 152, 1341, 1342, or 1343 or Chapter 25 or 47 of Title 18 of the U.S. Code within the list of offenses that the Commission may consider. These provisions concern concealment of assets, false oaths and claims, and bribery in connection with bankruptcy; mail fraud; wire fraud; counterfeiting and forgery; and fraud and false statements, respectively. Subsection (a)(5) amends Section 15(b)(4)(B)(iv) by including a violation of a substantially equivalent foreign statute.

Section 15(b)(4)(C) also empowers the Commission to impose sanctions on the basis of permanent or temporary injunctions against acting in the securities-related or commodities-related capacities enumerated in Section 15(b)(4)(B)(ii) and against engaging in or continuing any conduct or practice in connection with such activity or in connection with the purchase or sale of any security. Subsection (a)(6)(A) amends Section 15(b)(4)(C) by including foreign persons performing substantially equivalent functions, and subsection (a)(6)(C) includes substantially equivalent foreign entities. The Act thereby clarifies the Commission's authority on this point in the same way and for the same reasons as subsection (a)(3)(A). Subsection (a)(6)(B) amends Section 15(b)(4)(C) by including any foreign statute or regulation substantially equivalent to the Commodity Exchange Act, thus clarifying the Commission's authority with the same basis and purpose as subsection (a)(3)(B).

Subsection (a)(7) adds new Section 15(b)(4)(G) to the Exchange Act. Subparagraph (G) empowers the Commission to base sanctions of findings by a foreign securities authority of (1) false or misleading statements in registration or reporting materials filed with the foreign securities authority, (2) violations of statutory provisions concerning securities or commodities transactions, or (3) aiding, abetting, or otherwise causing another person's violation of such foreign securities or commodities provisions, or failing to supervise a person who has committed such a violation. Subparagraph (G) substantially parallels the provisions of existing Sections 15(b)(4)(A), (D), and (E) concerning such findings by the Commission or other securities and commodities regulatory authorities.

Section 3(b).—Section 3(b) of the Act amends Section 3(a)(39) of the Exchange Act, which concerns statutory disqualification from self-regulatory organization (SRO) membership. Under the present

statutory and regulatory scheme, a person subject to statutory disqualification is not excluded automatically from the securities business. However, when such a person seeks to become associated with a member of an SRO, that SRO and the Commission have the opportunity, under Section 15A(g)(2) of the Exchange Act and Rule 19h-1 thereunder, to give special review to the person's employment application or to restrict or prevent reentry into the business where appropriate for the protection of investors. This structural use of statutory disqualification does not change with the Act's amendments. Rather, the amendments expand, by incorporation, the list of findings that result in the statutory disqualification.

Section 3(b)(1) of the Act amends Section 3(a)(39)(A) of the Exchange Act, which now lists expulsion or suspension from membership or participation in, or association with a member of, an SRO, commodity contract market, or futures association as resulting in statutory disqualification, to include exclusion in the described manner from the foreign equivalent of an SRO, foreign or international securities exchange, or a foreign contract market, board of trade, or futures association.

Similarly, Section 3(b)(2) amends Section 3(a)(39)(B) of the Exchange Act by expanding it. It currently refers to orders of the Commission or another appropriate regulatory agency suspending or revoking registration as a broker, dealer, municipal securities dealer, or government securities dealer or broker. The amendments to Section 3(a)(39) apply to brokers, dealers, municipal securities dealers, government securities brokers, and government securities dealers of any nationality, because these terms are defined in Exchange Act Sections 3(a)(4), 3(a)(5), 3(a)(30), 3(a)(43), and 3(a)(44) without reference to nationality. Under the Section 3(b)(2) amendment, orders by an appropriate foreign financial regulatory authority denying, suspending, or revoking authority to engage in transactions in contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market, board of trade, or foreign equivalent also will result in statutory disqualification.

Section 3(b)(3) redesignates subparagraphs (D) and (E) of Section 3(a)(39) as subparagraphs (E) and (F), respectively. Section 3(b)(4) adds new subparagraph (D), which includes among the conditions that result in statutory disqualification findings by a foreign or international securities exchange, foreign securities authority, or other foreign authority empowered by a foreign government to administer or enforce its laws relating to financial transactions, to the effect that an individual, by his conduct, was a cause of a suspension, expulsion, or order by the foreign securities authority or other foreign financial regulatory or administrator.

Section 3(b) (5) and (6) of the Act make conforming amendments in newly redesignated subparagraphs (E) and (F) of Section 3(a)(39) of the Exchange Act, adding references to new Sections 3(a)(39)(D) and 15(b)(4)(G) of the Exchange Act, respectively. In addition, under the Act, subparagraph (F), which by cross-reference to Section 15(b)(4) of the Exchange Act makes persons convicted of specified felonies and misdemeanors subject to statutory disqualification, adds "any other felony" to the list of crimes that warrant special review. This provision permits the Commission and the SROs to

provide special scrutiny of persons who have been convicted of crimes that are not currently specified, such as taking of property, assault, murder, and drug trafficking. This amendment does not automatically exclude every person convicted of a felony from the securities business. Rather, it permits SROs, subject to Commission review, to consider the facts and circumstances surrounding a particular felony and to impose necessary safeguards to protect the markets and investors from unreasonable risks.

Section 3(c).—Section 3(c) of the Act makes conforming amendments. It amends Section 15(b)(6) of the Exchange Act, which authorizes the Commission to consure, limit the activities of, or bar or suspend from association with a broker or dealer any person who has committed or omitted any act or omission enumerated in Section 15(b)(4) (A), (D), or (E), has been convicted of any offense enumerated in subparagraph (B), or has been enjoined as specified in Section 15(b)(4)(C). By adding to Section 15(b)(6) findings by a foreign securities authority under new subparagraph (G) of Section 15(b)(4), Section 3(c) authorizes the Commission to consider such findings when imposing sanctions upon persons who are, or who seek to become, associated persons of a broker or dealer.

Section 3(c) similarly amends Sections 15B(c)(2), 15B(c)4, 15C(1)(A), 15C(c)(1)(C), 17A(c)(3)(A), and 17A(c)(3)(C) of the Exchange Act by adding new subparagraph (G) of Section 15(b)(4) as a basis for Commission action under those provisions.

Sections 15B(c) (2) and (4), which concern the Commission's disciplinary authority over municipal securities dealers and their associated persons, and which parallel Sections 15(b) (4) and (6), are amended to include a reference to new Section 15(b)(4)(G). Findings of misconduct by a foreign securities authority thus can support Commission sanctions against municipal securities dealers and their associated persons.

Section 15C(c)(1) (A) and (C), which concern the Commission's sanctioning authority over government securities brokers and dealers and their associated persons, and which also parallel Sections 15(b) (4) and (6), are amended to include a reference to new Section 15(b)(4)(G), for the same reason as above.

Sections 17A(c)(3) (A) and (C), which concern the Commission's sanctioning authority over transfer agents and their associated persons, and which further parallel Sections 15(b) (4) and (6), are amended to include a reference to new Section 15(b)(4)(G) for the same reason.

Section 15C(f)(2) of the Exchange Act currently forbids the Commission from investigating or taking any other action under the Exchange Act against a government securities broker or dealer or its associated persons for violations of Section 15C or the rules or regulations thereunder. The exception is where the Commission, rather than one of the banking regulators (Comptroller of the Currency for national banks, Board of Governors of the Federal Reserve System for state member banks, Federal Deposit Insurance Corporation for insured non-member state banks, and Federal Home Loan Bank Board for federally insured savings and loan associations), is the appropriate regulatory agency for the government securities broker or dealer. Section 15C(f)(2), by its own terms, also does not limit the Commission's authority with respect

to violations of any other provisions of the Exchange Act or of corresponding rules or regulations. Section 6(c) of the Act extends this exception by forbidding limitations on investigations pursuant to Section 21(a)(2) of the Exchange Act to assist a foreign securities authority.

SECTION 4

In order to ensure that orders of any regulatory body, foreign or domestic, with authority to suspend or revoke registration or its equivalent are available to the Commission, Section 4 of the Act adds a new definition of the term "foreign financial regulatory authority," as Section 3(a)(51) of the Exchange Act. A "foreign financial regulatory authority" is defined to include any foreign securities authority, which is defined in Section 3(a)(50) of the Exchange Act; governmental or regulatory bodies empowered to administer or enforce laws relating to enumerated financial matters; and membership organizations that regulate members' participation in financial matters. Pursuant to the Act's amendments to Section 3(a)(39) of the Exchange Act, orders of foreign financial regulatory authorities are deemed sufficient to result in "statutory disqualification," as will such an order limiting registration of the foreign equivalent of any of the enumerated entities.

SECTION 5

Section 5 of the Act makes parallel amendments to the Investment Company Act of 1940 (1940 Act) and the Investment Advisers Act of 1940 (Advisers Act) to clarify and strengthen the Commission's authority to impose sanctions, on the basis of violations of foreign law, on investment advisers or on persons associated or seeking to become associated with an investment adviser or a registered investment company.

Section 5(a).—Section 5(a) of the Act amends Section 9(b) of the 1940 Act. Section 9(a) of the 1940 Act generally prohibits a person convicted of a felony or misdemeanor involving securities or the securities business or subject to a temporary or permanent injunction restricting his ability to engage in the securities business from serving as an employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end company, unit investment trust, or face-amount certificate company. The automatic statutory disqualification in Section 9(a) is supplemented by the Commission's authority under Section 9(b). Under Section 9(b), the Commission may, after notice and opportunity for hearing, prohibit a person from serving in any of the capacities cited in Section 9(a) or as an affiliated person of a registered investment company's investment adviser, depositor, or principal underwriter if the person has willingly caused a false or misleading statement to be made in any registration statement, application, or report filed with the Commission or if the person has willfully violated or willfully aided and abetted a violation of any provision (including rules and regulations) of the federal securities laws or the Commodity Exchange Act.

In an amendment parallel to Sections 3(a)(7) and 5(b)(8) of the Act, Section 9(b) is amended to add a new paragraph (4) that will authorize the Commission to restrict the activities of any person that has been found by a foreign authority to have (1) made any false or misleading statement in an application or report filed with a foreign securities authority or in a proceeding before the foreign securities authority, or (2) violated or aided and abetted the violation of foreign securities or commodities statues. Paragraph (4) will, therefore, parallel the provisions of paragraph (1), (2), and (3) of Section 9(b), and extend the statute to equivalent foreign violations.

Section 9(b) also is amended to add two new provisions, Section 9(b)(5) and 9(b)(6), that will allow the Commission by order to prohibit a person from serving in any of the designated capacities if the person has been convicted by a foreign court of any of the offenses designated in Section 9(a)(1) or has been enjoined by a foreign court in a manner set forth in Section 9(a)(2). Section 9(a) (1) and (2) automatically disqualify anyone who within the past 10 years has been convicted of any felony or misdemeanor involving, or is subject to a permanent or temporary injunction relating to, acting as an underwriter, broker, dealer, investment adviser, municipal securities dealer, or entity or person required to be registered under the Commodity Exchange Act, or as an affiliated person, salesman, or employee of any investment company, bank, insurance company, or entity or person required to be registered under the Commodity Exchange Act, or in the connection with the purchase or sale of any security. Although a conviction or injunction under Section 9(a) (1) or (2) results in an automatic statutory disqualification, a substantially equivalent foreign conviction or injunction would not. However, a substantially equivalent foreign funding will provide a basis for a Commission order prohibiting the individual's association with a registered investment company in any of the capacities designated in the statute. The automatic disqualification provisions of Section 9(a), coupled with the Commission's exemptive authority under Section 9(c) to avoid any inequitable results, are indispensable means of safeguarding the integrity of registered investment companies. The amended Section 9(b) does not automatically bar a person solely on the basis of a foreign finding of a violation of foreign law without any prior notice or opportunity for hearing by a U.S. court or administrative agency. Instead, amended Section 9(b) provides that the Commission may impose a bar on a case-by-case basis if it determines that the foreign finding justifies such a sanction. The amendment does not create competitive disparities because, just as Section 9(a) applies equally to U.S. and foreign persons that have been convicted or enjoined in a manner specified in the statute, Section 9(b), as amended, grants the Commission authority to institute an administrative proceeding against either a U.S. or foreign person that has committed an equivalent foreign violation and has been sanctioned by a foreign authority.

Section 5(b).—Section 5(b) of the Act amends Section 203(e) of the Advisers Act. Section 203(e) authorizes the Commission to censure, place limitations on the activities of, suspend for up to twelve months, or revoke the registration of an investment adviser where the adviser or an associated person of the adviser has committed,

or has been sanctioned for, certain specified violations. Section 5(b) of the Act amends Section 203(e) to include, among the factors that the Commission may consider, violations of foreign law that are substantially equivalent to a violation currently set forth in the statute.

Subsection 203(e)(2) of the Advisers Act authorizes the Commission to bring a proceeding based upon convictions within the past ten years of certain felonies and misdemeanors. Section 5(b)(1) of the Act amends this section to include convictions by a foreign court of competent jurisdiction of crimes substantially equivalent to a felony or misdemeanor. The Act thus clarifies the Commission's authority to consider foreign criminal findings that the foreign jurisdiction may not classify as a "felony" or "misdemeanor."

Section 203(e)(2)(A) of the Advisers Act lists offenses involving the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense as within the class of felonies and misdemeanors that authorize the Commission to discipline investment advisers. Section 5(b)(2) of the Act amends Section 203(e)(2)(A) by including within this list any substantially equivalent activity, however denominated by the laws of a foreign government.

Section 203(e)(2)(B) of the Advisers Act authorizes the Commission to consider offenses arising out of the conduct of various securities-related businesses. Included is any broker, dealer, municipal securities dealer, government securities broker, investment adviser, bank, insurance company, fiduciary, transfer agent, or entity or person required to be registered under the Commodity Exchange Act. Subsection 5(b)(3) of the Act amends Sections 203(e)(2)(B) and (e)(3) to include offenses arising out of the conduct of any foreign person performing a function substantially equivalent to any of the above.

Section 203(e)(2)(C) of the Advisers Act includes larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, and misappropriation of funds or securities within the list of offenses that may trigger Commission sanctions. Section 5(b)(4) of the Act adds any substantially equivalent offense, however denominated by the laws of a foreign government.

Section 203(e)(2)(D) of the Advisers Act includes violations of Sections 152, 1341, 1342, or 1343 or Chapter 25 or 47 of Title 18 of the U.S. Code within the list of offenses that the Commission may consider. These provisions concern concealment of assets, false oaths and claims, and bribery in connection with bankruptcy; mail fraud; wire fraud; counterfeiting and forgery; and fraud and false statements, respectively. Section 5(b)(5) of the Act amends Section 203(e)(2)(D) to include a violation of a substantially equivalent foreign statute.

Section 203(e)(3) of the Advisers Act authorizes the Commission to impose sanctions where an investment adviser or associated person has been enjoined from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, or entity or person required to be registered under the Commodity Exchange Act, or as an affiliated person or employee of any invest-

ment company, bank or insurance company or entity or person required to be registered under the Commodity Exchange Act; or from engaging in any practice in connection with any of these activities or in connection with the purchase or sale of any security. Sections 5(b)(3) and 5(b)(6) of the Act amend Advisers Act Section 203(e)(3) to include injunctions issued by any foreign court of competent jurisdiction that concern substantially equivalent activities.

Section 5(b)(7) of the Act is a technical amendment to Section 203(e)(5) of the Advisers Act. Section 203(e)(5) is amended to include violations of the Commodity Exchange Act. This technical amendment conforms Section 203(e)(5) with Section 203(e)(4) of the Advisers Act and Sections 15(b)(4)(D) and 15(b)(4)(E) of the Exchange Act.

Section 5(b)(8) of the Act adds new Section 203(e)(7) to the Advisers Act. This new subsection empowers the Commission to base sanctions on findings by a foreign financial regulatory authority of (1) false or misleading statements in registration or reporting materials filed with a foreign securities authority, (2) violations of statutory provisions concerning securities or commodities transactions, or (3) aiding, abetting, or otherwise causing another person's violation of such foreign securities or commodities provisions, or failing to supervise a person who has committed such a violation. Subsection (e)(7) substantially parallels the provisions of existing Section 203(e) (1), (4), and (5) concerning such findings by the Commission or other securities and commodities regulatory authorities. This section of the Act parallels Sections 3(a)(7) and 5(a) of the Act, which add Section 15(b)(4)(7) of the Exchange Act and Section 9(b)(4) of the 1940 Act.

Section 5(c).—Section 5(c) of the Act amends Section 203(f) of the Advisers Act, which authorizes the Commission to impose sanctions upon persons associated or seeking to become associated with an investment adviser if the person has committed or omitted any act or omission set forth in Sections 203(e) (1), (4) or (5) or has been convicted or enjoined as set forth in Sections 203(e)(2) or 203(e)(3). Section 203(f) is amended to include a reference to new Section 203(e)(7), thus authorizing the Commission to consider such findings when imposing sanctions upon persons who are, or seek to become, associated with an investment adviser.

SECTION 6

Section 6 amends Section 2(a) of the 1940 Act and Section 202(a) of the Advisers Act to include definitions of "foreign securities authority" and "foreign financial regulatory authority". These definitions are identical to the definitions of foreign securities authority in Section 3(a)(50) of the Exchange Act and the definition of foreign financial regulatory authority added by Section 4 of the Act.

SECTION 7

Section 7 adds a new subsection (f) to Section 4 of the Exchange Act to authorize the Commission to accept reimbursement of expenses from or on behalf of foreign securities authorities for expenses incurred by the Commission in conducting investigations on their behalf or in providing other assistance. This new subsection is similar to subsection (c) of the section, which authorizes the Com-

mission to accept reimbursement from private sources for the expenses incurred by Commission members and employees in attending meetings and conferences concerning the functions or activities of the Commission.

AGENCY VIEWS

U.S. SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, March 1, 1989.

Hon. JOHN D. DINGELL,
Chairman, House Committee on Energy and Commerce, Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN DINGELL: The Securities and Exchange Commission is pleased to transmit the attached legislative proposal, the "International Securities Enforcement Cooperation Act of 1989." This proposal would amend the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. On June 3, 1988, the Commission submitted to Congress a substantially similar legislative proposal, entitled the "International Securities Enforcement Cooperation Act of 1988." Part of that proposal was enacted by Congress as Section 6 of the Insider Trading and Securities Fraud Enforcement Act of 1988, Public Law No. 100-704, 102 Stat. 4677.

This legislative proposal incorporates the three provisions of the Commission's June 1988 proposal that were not enacted. It also contains two new provisions. The first would expand the authority of securities self-regulatory organizations to exclude convicted felons from membership in, or association with members of, the organizations. The second would authorize the Commission to accept reimbursement from foreign securities authorities of expenses incurred by the Commission in providing assistance to such authorities.

The Commission believes that enactment of this legislation would strengthen international cooperation in the enforcement of securities laws.

The views expressed here and in the accompanying materials are those of the Commission and do not necessarily express the views of the President. These materials are being submitted simultaneously to the Office of Management and Budget. We will inform you of any advice received from OMB concerning the relationship of these materials to the program of the administration.

Questions concerning the proposed legislation may be directed to Nina Gross, Director of Legislative Affairs (272-2500).

Sincerely yours,

DAVID S. RUDER, *Chairman.*

Attachment:

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF THE INTERNATIONAL SECURITIES ENFORCEMENT COOPERATION ACT OF 1989

I. INTRODUCTION

On June 3, 1988, the Commission submitted to Congress a legislative proposal entitled the "International Securities Enforcement

Cooperation Act of 1988." Part of this proposal was enacted by Congress as Section 6 of the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677. Section 6 amended the Securities Exchange Act of 1934 to permit the Commission, in its discretion, to provide foreign securities authorities with assistance in investigating possible violations of laws or rules related to securities matters that the requesting authority administers or enforces. The Commission now seeks enactment of the attached legislative proposal, which includes three provisions contained in the Commission's June 1988 proposal that were not enacted. This proposal also includes two new provisions not contained in the Commission's earlier proposal.

Section 2 of the legislation would amend Section 24 of the Exchange Act to enable the Commission to maintain the confidentiality of certain foreign evidence. This amendment would promote agreements on bilateral assistance between the Commission and foreign authorities. There have been instances in which negotiations of a bilateral assistance agreement, known as a memorandum of understanding ("MOU"), have been frustrated by the Commission's inability to provide assurances that documents and testimony transmitted to the Commission by the foreign authorities will be kept confidential. The Commission cannot provide assurances of confidentiality because of its disclosure obligations under the Freedom of Information Act ("FOIA") or pursuant to a third party subpoena. In order to facilitate the cooperation of foreign authorities in providing the Commission with investigative assistance, the Commission believes that it would be appropriate to exempt documents furnished to the Commission from disclosure if the foreign authority represents that the disclosure of such documents would violate confidentiality requirements of its country's laws. Section 2(b) of the legislation would so provide.

Second, Section 2(b) of the bill would make explicit the Commission's rulemaking authority to provide documents and other information to foreign and domestic authorities. Pursuant to Rule 30-4(a)(7), 17 C.F.R. 200.30-4(a)(7), the Commission currently grants access to Commission investigative files to certain securities enforcement entities, including domestic and foreign securities authorities and self-regulatory organizations. However, Section 24(b) of the Exchange Act, as well as provisions of the Investment Advisers Act of 1940 and the Investment Company Act of 1940, arguably preclude the disclosure of certain nonpublic documents. In view of the significance of this issue to the Commission's efforts to cooperate both with foreign and domestic securities officials, the Commission believes that it would be appropriate to enact legislation making clear that the Commission, by rule, may provide for the disclosure of nonpublic documents. Section 2(b) of the accompanying legislation would accomplish this goal.

Sections 3 through 6 of the bill would amend the Exchange Act, the Investment Advisers Act, and the Investment Company Act to authorize the Commission, based upon the findings of a foreign court or foreign securities authority, to censure, revoke the registration of or impose employment restrictions upon securities professionals registered to do securities business in the United States. The Commission already has such authority as to illegal or improp-

er activity in this country pursuant to Section 15(b)(4) of the Exchange Act, Section 203(e) of the Investment Advisers Act, and Sections 9(a) and 9(b) of the Investment Company Act. Certain subsections of these provisions also have been used to support the imposition of limitations on activities of securities professionals based upon the findings of a foreign court as to illegal activity abroad. In view of the Commission's new authority to investigate on behalf of foreign securities authorities under Section 21(a)(2) of the Exchange Act, the Commission believes that it would be appropriate to make explicit and add to the Commission's exisiting authority.

The Commission believes that it should have the authority to suspend or bar securities professionals who have made false filings with foreign authorities; who have been convicted of certain crimes by foreign courts; who have been enjoined by a foreign court from committing securities law violations; who have violated foreign securities laws; or who have aided and abetted such violations. The Commission believes that this authority is a necessary and appropriate supplement to its authorities to place limitations on securities professionals based on violations of U.S. laws. Moreover, these legislative changes reflect the Commission's expectation that, at least in part as a result of the enforcement assistance that the Commission will provide to foreign authorities pursuant to newly enacted Section 21(a)(2) of the Exchange Act, securities professionals will be subject to more aggressive enforcement efforts by such foreign authorities. It would be ironic if securities professionals who are found, with the Commission's assistance, to have violated foreign securities laws substantially similar to U.S. laws were allowed unfettered operations in the U.S. securities markets, even though limitations would have been placed on them for the same violations in the United States. The provisions of Sections 3 through 6 would protect against such a result.

Section 3(b) of the legislation would amend the definition of "statutory disqualification" in Section 3(a)(39) of the Exchange Act. It would expand the grounds on which a self-regulatory organization could deny a person membership in, participation in, or association with a member of, the SRO in two ways. First, it would include certain foreign disciplinary actions. Second, it would amend subparagraph (F) of that section, which by cross reference to Section 15(b)(4) of the Exchange Act makes persons convicted of specified felonies and misdemeanors subject to a statutory disqualification. The amendment would add "any other felony" to the list of crimes that warrant special review. This provision would permit the Commission and the SROs to provide special scrutiny of persons who have been convicted of crimes that are not currently specified, such as taking of property, assault, murder, and drug trafficking. This amendment would not automatically exclude every person convicted of a felony from the securities business. Rather, it would permit SROs, subject to Commission review, to consider the facts and circumstances surrounding a particular felony and to impose appropriate safeguards to protect the markets and investors from unreasonable risks.

Finally, Section 7 of the bill would amend Section 4 of the Exchange Act to permit the Commission to accept reimbursement from a foreign securities authority or on behalf of such authority,

for travel, subsistence, and other necessary expenses incurred by Commission members and employees in carrying out investigations for that authority pursuant to Section 21(a)(2) of the Exchange Act or in providing other assistance to a foreign securities authority.

II. THE COMMISSION'S PROPOSED LEGISLATION

A. Legislation authorizing the Commission to withhold from disclosure documents furnished to the Commission by foreign securities officials

1. The need for legislation

In entering into MOUs with the Commission, authorities in foreign countries have committed themselves to obtaining and providing the Commission with documents, some of which otherwise would be kept confidential. While these authorities have determined that it is appropriate to permit public use of documents, which otherwise must be kept confidential, when the Commission prosecutes securities law violators, they have expressed concern about the disclosure of such documents when the Commission decides *not* to prosecute a particular matter.

Under the FOIA, the Commission cannot assure foreign authorities that the confidentiality of any documents furnished to the Commission will be maintained. The Commission's disclosure obligations under the FOIA are the same for records obtained from foreign securities authorities as they are for records obtained from other sources. Accordingly, the documents must be disclosed under the FOIA unless they fall within a specified FOIA exemption. Because of these FOIA obligations, foreign securities authorities have expressed concerns about providing the Commission with information relevant to ongoing investigations. They have also stated that their own domestic laws preclude them from entering into agreements with the Commission unless the Commission is able to fulfill the confidentiality requirements of the foreign country's laws.

In seeking this provision, the Commission does not intend to undermine the policies underlying the FOIA. As a practical matter, unless an appropriate FOIA exemption is created, foreign securities authorities will refuse to enter into MOUs with the Commission. If the Commission never obtains documents because there is no MOU in a given case, the documents will never be subject to a FOIA disclosure obligation in the first instance. Providing the exemption sought by the Commission therefore does not reduce the scope of the documents that are effectively subject to FOIA disclosure and does not reduce the flow of information to the public. Moreover, adoption of such an amendment will almost certainly allow the Commission to obtain for law enforcement purposes otherwise unobtainable confidential documents from foreign countries. In addition, the Commission believes that principles of comity make it appropriate to exempt from disclosure confidential documents obtained from a foreign government if those documents could not be disclosed under the laws of the foreign country. These considerations warrant enactment of the FOIA exemption.

2. The proposed legislation

The legislation proposal would amend Section 24 of the Exchange Act by adding the following new provisions:

> (d) Notwithstanding the provisions of Section 552 of title 5, United States Code, popularly referred to as the Freedom of Information Act, or of any other law, the Commission shall not be compelled to disclose records obtained from a foreign securities authoritiy if the foreign securities authority has in good faith represented to the Commission that public disclosure of such records would be contrary to the laws applicable to that foreign securities authority.
>
> (e) Nothing in this section shall—
>
> (1) alter the Commission's responsibilities under the Right to Financial Privacy Act, 12 U.S.C. 3401 et seq., as limited by Section 21(h) of the Securities Exchange Act, 15 U.S.C. 78u(h), with respect to transfers of records covered by such statutes, or
>
> (2) authorize the Commission to withhold information from the Congress or prevent the Commission from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

The proposed Section 24(d) would supersede FOIA by authorizing the Commission to withhold from disclosure documents obtained from a foreign securities authority if the foreign authority has in "good faith" represented to the Commission that public disclosure of such records would be contrary to the laws of the foreign country. The term "foreign securities authority" includes, pursuant to Section 3(a)(50) of the Exchange Act, government agencies and self-regulatory organizations which "administer" or "enforce" the securities laws. The amendment would not restrict the Commission's use of the information and documents obtained from a foreign authority in its investigations or for enforcement purposes. Nor would it limit the ability of the Congress to obtain information in the Commission's possession or preclude defendants in actions commenced by the United States or the Commission from seeking, through discovery or otherwise, such documents.[1]

The amendment would add a new Section 24(e) to clarify two points. First, the legislation would not alter the certification and notice requirements imposed by the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. 3401 et seq. Under Section 1112(a) of the RFPA, the Commission may not transfer to other federal agencies financial records that were obtained by the Commission subject to the RFPA procedures unless it certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency or department. In addition, the Commission must send the customer a copy of such certification and a notice which both describes the nature of the law enforcement inquiry and informs the custom-

[1] The amendment, by providing "notwithstanding the provision of * * * any other law," would also provide authority for the Commission to withhold documents provided by a foreign securities authority even if such documents were subject to a third-party subpoena.

er of potential legal rights under relevant privacy statutes. Under existing law, these requirements do not apply to transfers of information to non-federal agencies, foreign authorities, or self-regulatory organizations.[2]

Second, Section 24(e) would provide that the section would not prevent the Commission from complying with a request for information from the Congress or from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

By providing authority for the Commission to withhold from disclosure certain records obtained from foreign securities authorities notwithstanding the Freedom of Information Act, the amendment clearly would supersede the disclosure obligations imposed by the FOIA, and hence would not require that the Commission rely on a FOIA exemption in order to withhold from disclosure confidential documents.[3] In addition, the determination of whether foreign law prohibits the disclosure would be made by the foreign authorities, not by the Commission. That decision must, however, be made in good faith.[4]

B. Legislation granting the Commission rulemaking authority to permit access to its files by persons, both domestic and foreign, engaged in securities law enforcement and oversight

1. The need for legislation

The Commission's Rules of Practice authorize the Director of the Division of Enforcement or his delegates to provide access to nonpublic materials in the Commission's investigative files to domestic and foreign governmental authorities, self-regulatory organizations, and other specified persons.[5] In addition, Rule 2 of the Commission's Rules Relating to Investigations authorizes designated members of the Commission staff to "engage in discussions" concerning the nonpublic materials with the persons specified in Rule 30-4(a)(7).[6] These access rules have frequently facilitated the prosecu-

[2] See H.R. Rep. No. 95-1383, 95th Cong., 2d. Sess. 247 (1978).

[3] Certain statutes have been found to preempt or supersede FOIA. See, e.g., *Ricchio* v. *Kline*, 773 F.2d 1389, 1392 (D.C. Cir. 1985) (holding that FOIA was preempted by the Presidential Recordings and Materials Preservation Act, the sole purpose of which is "to preserve" and "to provide access to" a certai specific body of records).

[4] Absent a "good faith" standard, the statute might bind the Commission to follow the dictates of a foreign government. The "good faith" requirement is intended to permit the Commission to inquire into the legitimacy of the foreign government's non-disclosure request and also to provide some basis for judicial review of the Commission's decision.

[5] Rule 30-4(a)(7), 17 C.F.R. 200.30-4(a)(7).

[6] 17 C.F.R. 203.2. Other relevant rules include: Rule 2.5(b) of the Commission's Rules On Informal and Other Procedures, 17, C.F.R. 202.5(b), which states that the Commission may "grant requests for access to its files made by domestic and foreign governmental authorities, self-regulatory organizations such as stock exchanges or the [NASD], and other persons or entities"; Administrative Regulation 19-1(1)(b), SECR 19-1(1)(b), which provides that "the prohibition[s] against the use of non-public information or documents" imposed by various Commission rules do "not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing Commission investigations, examinations or in the discharge of other official responsibilities"; Administrative Regulation 19-1(1)(c), SECR 19-1(1)(c), which sets forth a policy approving the use of non-public materials and the furnishing of "such assistance as may be required for the effective presentation or prosecution of a case" in circumstances where the Commission refers matters to the Justice Department or grants access to its files to any federal, state or foreign government authority; and the Commission's uncodified policies and procedures concerning the "routine uses" of systems of records in the Commission's possession that are covered by the Privacy Act. See 41 Fed. Reg. 41550 (September 22, 1976) and "SEC Systems of Records—Privacy Act of 1974" (July, 1983) (unofficial document).

tion of securities law violations by other enforcement agencies and SROs.

The Commission's access rules are long-standing. However, Section 24(b) of the Exchange Act, 15 U.S.C. 78x(b), enacted in 1975, makes it unlawful "for any member, officer, or employee of the Commission to disclose to any person other than a member, officer or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under [the FOIA], or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment of information." Section 24(b) was intended to make all requests for confidential treatment of information subject to the FOIA rules.[7] There is nothing in the legislative history suggesting that Congress intended to undermine the Commission's access program. Nevertheless, the literal language of Section 24(b) seems to do precisely that: documents that are determined under the FOIA to be confidential cannot be disclosed.

In most situations, the Commission receives an access request before the staff makes a confidential treatment determination, and Section 24(b) would not, therefore, be at issue. On occasion, however, Section 24(b) can pose an obstacle to compliance with an access request.

Additional problems with the Commission's access program may arise from other statutory provisions. Section 210(b) of the Investment Advisers Act bars the staff from making public information obtained in an examination or investigation conducted pursuant to that Act, unless the Commission expressly authorizes such disclosure (with exceptions for public hearings and disclosure to Congress). Section 45(a) of the Investment Company Act imposes a bar on the disclosure of non-public documents obtained by the Commission pursuant to that Act, except insofar as disclosure is made to federal or state government officials.

To remove these restrictions on the Commission's staff's ability to provide access to its files to domestic and foreign authorities, the Commission proposes that the Exchange Act be amended to provide explicit authority in this area.

2. The proposed legislation

The proposed legislation would amend Section 24 of the Exchange Act by adding subsection (c) as follows:

> (c) Notwithstanding any other provision of law, the Commission may, in its discretion and upon a showing that such information is needed, provide all "records" (as defined in subsection (a)) and other information in its prossession to such persons, both domestic and foreign, as

[7] Prior to the 1975 amendment, the Commission provided confidential treatment under both the FOIA rules and under Section 24(a), which at that time prescribed standards for granting confidential treatment to information filed with the Commission. The amendments were intended to end the latter procedure. See S. Rep. No. 94-75, 95th Cong., 1st Sess. 137, reprinted in 1974 U.S. Cong. & Admin. News 179, 314.

the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.

The Commission is proposing the foregoing amendment, which grants the Commission rulemaking authority, rather than an amendment which would list the specific persons to whom access may be given. As a result, the Commission will have flexibility in adjusting its access rules in the future. In addition, by specifying that the Commission may permit access by foreign persons, the Commission's authority as to this matter will be made explicit.[8] The provision as to confidentiality of records is intended to ensure that the Commission will not provide records to persons who will make the records public for purposes other than those stated in an access request.[9]

C. Legislation authorizing the Commission to impose sanctions on securities professionals for violations of foreign laws.

1. The need for legislation

a. Overview.—One likely result of efforts by foreign securities authorities to strengthen their securities law enforcement will be an increase in the number of enforcement or disciplinary proceedings brought against securities professionals, such as brokers, dealers, and investment advisers. Indeed, such actions may result at least in part from the assistance provided to foreign authorities by the Commission pursuant to recently enacted Section 21(a)(2) of the Exchange Act. The Commission, however, currently does not have explicit authority to impose administrative sanctions against professionals based upon foreign findings of their illegal or improper foreign activities (although, as discussed below, the Commission has some authority in this area). The proposed legislation provides that the Commission may, in its discretion, impose sanctions on securities professionals who have been found to have engaged in misconduct abroad when, had the order or finding of violation been made in a United State proceeding, the professional would have been subject to a Commission disciplinary proceeding. Sections 3 through 6 of the bill therefore would amend Sections 15(b)(4) and 3(a)(39) of the Exchange Act; Section 9 (b) of the Investment Company Act; and Section 203(e) of the Investment Advisers Act to provide the Commission with this express authority and to add to the Commission's existing authority.

b. Specific concerns.—U.S. broker-dealers, investment advisers, and investment companies have increased significantly their activi-

[8] By including the phrase "notwithstanding any other provision of law," the amendment will supersede the disclosure provisions of Section 45(a) of the Investment Company Act and Section 210(b) of the Investment Advisers Act.

[9] Commission policy now requires that the person making the access request state the purposes for which the requested information will be used and certify that no public use will be made of the information except for the purposes specified. It is expected that these or similar procedures would continue to be used after the legislation is enacted. In the international context, where the Commission has entered into MOUs, such MOUs delineate the public uses that can be made of information which the Commission provides pursuant to the access program.

ties in foreign markets.[10] The activities of foreign professionals in the U.S. markets also are likely to increase.[11] As a result, the Commission is likely to confront a growing number of securities professionals who have been disciplined abroad for illegal or improper activities working or seeking to work in this country.

The Commission currently has substantial authority to curtail the securities activities of certain convicted criminals and other wrongdoers for illegal or improper conduct in this country. Under Section 15 (b)(4) and (b)(6) of the Exchange Act, the Commission may censure, limit the activities, functions, or operations of, suspend for up to twelve months, or revoke the registration of any broker or dealer, or bar from association with any broker or dealer, any person: found to have violated the federal securities laws, rules, or regulations thereunder; convicted of a "felony or misdemeanor" within the preceding ten years involving specified crimes; who willfully has filed a false or misleading statement in any registration statement or report filed with the Commission; or who has willfully aided and abetted a violation of any portion of the federal securities or commodities laws. Such a person also is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act.[12] Section 203 (e) and (f) of the Investment Advisers Act provides the Commission with disciplinary authority over investment advisers and persons associated with registered investment advisers similar to that in Section 15(b) (4) and (6) of the Exchange Act.[13]

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[10] See Internationalization of the Securities Markets, Report of the U.S. Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Energy and Commerce, dated July 27, 1987, at Chapter VII. The report states that there has been a dramatic increase in the number of U.S. investment companies that emphasize foreign securities, in their portfolios and that it has become more common for investment companies registered in the United States to issue their securities in foreign markets. As of January 1988, there were 154 registered investment companies of all types that concentrate their portfolio securities in foreign securities. These funds, which are widely held by U.S. investors, use foreign broker-dealers to execute portfolio transactions, foreign custodians to hold portfolio securities, and foreign advisers to help manage their portfolios. With respect to broker-dealers, major foreign markets usually facilitate entry by granting national treatment to U.S. securities firms. France has substantially increased access to its markets by foreign firms, id. at V-3, and the Tokyo Stock Exchange recently increased the number of seats allocated to foreign firms. Affiliates of U.S. broker-dealers now engage in significant market-making activities in London. Id. at V-21.

[11] See id. at I-14-16; II-78-90. The report indicates that over 120 investment advisers from 20 countries have registered with the Commission. In 1984, the Commission transmitted a legislative proposal to Congress that would amend Section 7(d) of the Investment Company Act to give the Commission greater flexibility in permitting foreign investment companies access to the U.S. securities markets. Although this proposal never was introduced in either House of Congress, the Commission anticipates renewed interest in a legislative proposal to amend Section 7(d). In addition, the Commission is considering the possibility of reciprocal arrangements between the United States and foreign nations with respect to multinational offering of mutual fund securities. Finally, recently-adopted Rule 6c-9 will facilitate the offering of foreign bank securities in the United States. Investment Company Act Release No. 16093 (Oct. 29, 1987).

With respect to broker-dealers, about 150 foreign firms had established branches in the United States as of 1987; for their part, U.S. firms had over 250 branches in foreign countries, excluding Canada and Mexico. Id. at Chapter V, Appendix B-66 (remarks of James M. Davin, Vice-Chairman, NASD).

[12] As a result, when such a person seeks to become associated with a member of an SRO, that SRO and the commission have the opportunity to give special review to the person's employment application or to restrict or prevent reentry into the business where appropriate for the protection of investors. See Section 15A(g)(2) of the Exchange Act and Rule 19h-1 thereunder.

[13] Section 15(b)(6) of the Exchange Act and Section 203(f) of the Investment Advisers Act authorize the Commission to limit the activities of a person associated or seeking to become associated with a broker-dealer or investment adviser if the commission finds that the person has committed any of the acts or has been convicted or enjoined as designated in Section 15(b)(4) or Section 203(e). As a result, any addition to the Commission's authority under Section 15(b)(4) and Section 203(e) will, by implication, expand the Commission's authority under Section 15(b)(6) and Section 203(f).

In addition, Section 9(a) of the Investment Company Act generally prohibits a person convicted of a securities-related crime or subject to a securities-related injunction from serving as an employee, officer, director, member of an advisory board, investment adviser, or depositor of a registered investment company, or principal underwriter for any registered open-end company, unit investment trust, or face-amount certificate company. The automatic statutory disqualification in Section 9(a) is supplemented by the Commission's authority under section 9(b). Under Section 9(b), the Commission may prohibit a person from serving in any of the capacities cited in Section 9(a) or as an affiliated person of a registered investment company's investment adviser, depositor, or principal underwriter if the person willfully has caused a false or misleading statement to be made in any registration statement or report filed with the Commission or if the person has willfully violated or aided and abetted a violation of any provision of the federal securities or commodities laws.

Although the foregoing provisions do not mention the Commission's authority to impose sanctions based on foreign misconduct, certain of the provisions can be so applied. In particular, Sections 15(b)(4)(B) of the Exchange Act, 203(e)(2) of the Investment Advisers Act, and 9(a)(1) of the Investment Company Act refer to a "felony or misdemeanor" conviction for specified crimes; neither the statutes nor their legislative histories specify that the crime or conviction must take place in the United States.[14] Thus, pursuant to Section 15(b)(4)(B), the Commission revoked the U.S. registration of a Canadian broker-dealer who was convicted of crimes in Canada involving the purchase or sale of securities.[15] Likewise, under Sections 15(b)(4)(C) of the Exchange Act and 203(e)(3) of the Investment Advisers Act, the Commission may impose sanctions based upon a securities-related injunction entered by a "court of competent jurisdiction," and, under Section 9(a)(2) of the Investment Company Act, such an enjoined person's association with a registered investment company is limited. These statutes are not explicitly limited to injunctions entered by U.S. courts. See L. Loss, supra at 1305 (stating that a "court of competent jurisdiction" as set forth in seciton 15(b)(4)(C) may include a foreign court).

As to other provisions, however, such authority needs to be clarified and, in some cases, expanded. First, the Commission's authority to impose sanctions on a professional[16] and to restrict association with a registered investment company[17] for a misstatement in an application for registration or report filed with the Commission does not extend to misstatement made to foreign regulatory au-

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[14] Investment Trusts and Investment Companies: Hearings Before a Subcommittee on the Senate Committee on Banking and Curency, 76th Cong., 3d Sess. 7, 31, 559 (1940) (statement of Honorable Charles F. Adams); Investment Trusts and Investment Companies: Hearings Before a Subcommittee on the House of Representatives Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess. 13, 46, 97 (1940). As to Section 15(b)(4)(B) of the Exchange Act (originally Section 15(b)(5)(B)), see Report to Accompany H.R. 6793, H. Rep. No. 1418, 88th Cong., 2d Sess. 21 (1964).

[15] *In the Matter of R.P. Clarke & Co.*, 10 S.E.C. 1072 (1942). See also L. Loss, *Securities Regulation* 1303, n. 51 (2d ed. 1961) (citing *R.P. Clarke* decision and stating that the Commission may impose sanctions under Section 15(b)(4)(B) based upon a conviction in a foreign court).

[16] See Section 15(b)(4)(A) of the Exchange Act and Section 203(e)(1) of the Investment Advisers Act.

[17] See Section 9(b)(1) of the Investment Company Act.

thorities. Second, the Commission's authority to impose sanctions on the professional [18] or to restrict association with a registered investment company [19] for willful violation of the U.S. securities and commodites laws does not extend to violations of foreign securities laws. Finally, the Commission's authority to impose sanctions on professionals for aiding and abetting a violation or failing reasonably to supervise a person subject to the professional's control in violation of the U.S. securities laws [20] and to restrict association with a registered investment company of personnel who are found to have aided and abetted such violations [21] does not extend to activities that violates foreign securities and commodities laws. The legislation would provide the Commission with authority to act in each of these circumstances.

In addition, as to the provisons under which, as discussed above, the Commission has authority to impose sanctions, the legislation would make such authority explicit and would preclude certain challenges which might be possible under the existing statutes. In particular, Section 15(b)(4)(B) of the Exchange Act, Section 203(e)(2) of the Investment Advisers Act, and Section 9(a)(1) of the Investment Company Act refer to convictions for a "felony or misdemeanor" as the basis for a Commission sanction. A securities professional who was convicted in a country that does not define crimes as "felonies" or "misdemeanor" might challenge the Commission's authority under these sections. A Commission administrative sanction also might be challenged when the foreign offense for which the securities professional was convicted is not one of the exact offenses specifically covered by the statutory provisions. As discussed below, the proposed legislation would undercut such defenses by providing for Commission sanctions based upon foreign convictions for crimes "substantially equivalent" to those listed in the statute. The legislation also would foreclose the potential argument that the statutory provisions that allow the Commission to impose sanctions on professionals who have been enjoined from acting in specific capacities, such as underwriters or investment advisers,[22] do not apply to persons whose profession is not so defined in a foreign country. The proposed amendments would resolve the potential difficulties posed by differences in employment terms by permitting sanctions based upon an injunction entered against a professional who performs a "substantially equivalent" function to the activities currently listed in the statute.

Section 3(b) of the proposed legislation would create a "statutory disqualification," as defined in Section 3(a)(39) of the Exchange Act, when a foreign securities authority or foreign court makes findings of illegal or improper conduct.

The Commission's action against a securities professional would not be automatic. The statutory procedure for imposing sanctions

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[18] See Section 15(b)(4)(D) of the Exchange Act and Section 203(e)(4) of the Investment Advisers Act.

[19] See Section 9(b)(2) of the Investment Company Act.

[20] See Section 15(b)(4)(E) of the Exchange Act and Section 203(e)(5) of the Investment Advisers Act.

[21] See Section 9(b)(3) of the Investment Company Act.

[22] Section 15(b)(4)(C) of the Exchange Act; Section 203(e)(3) of the Investment Advisers Act; and Section 9(a)(2) of the Investment Company Act.

for foreign misconduct would be the same as that currently in place for imposing sanctions for domestic misconduct. The Commission would provide the securities professional with notice and an opportunity for a hearing prior to taking such action. The securities professional would thus have an opportunity to present evidence on his own behalf, in order to demonstrate that the imposition of sanctions would not be in the public interest. In addition, if the professional makes a persuasive due process or jurisdictional attack on the foreign adjudicative proceedings, the Commission may be required to permit relitigation of the underlying offense. In such a case, as is presently the case in those situations in which the Commission may proceed against a securities professional based upon a foreign finding of misconduct, the foreign finding would provide the basis for a Commission administrative proceeding even though principles of collateral estoppel might not be available to the Commission.[23]

In addition, the legislation would amend newly redesignated subparagraph (F) of Section 3(a)(39) of the Exchange Act, which by cross reference to Section 15(b)(4) of that act makes persons convicted of specified felonies and misdemeanors subject to statutory disqualification, by adding "any other felony" to the crimes listed as possible for denial of SRO membership or participation or association with an SRO member. As explained above,[24] this provision would permit the Commission and the SROs to provide special scrutiny of persons who have been convicted of crimes that are not currently specified, such as taking of property, assault, murder, and drug trafficking.

2. The proposed legislation

Sections 3 through 6 of the proposed legislation would add new Sections 15(b)(4)(G) to the Exchange Act, 203(e)(7) to the Investment Advisers Act, and 9(b)(4) to the Investment Company Act. These provisions would apply the proscriptions of Section 15(b)(4)(A), (D), and (E) of the Exchange Act, Section 2032(e)(1), (4), and (5) of the Investment Advisers Act, and Section 9(b)(1)–(3) of the Investment Company Act to an international context. Thus, the Commission would be able to impose sanctions on the professional if he has been found by a "foreign financial regulatory authority"—a defined term in the Acts—to have made false or misleading statements in registration statements or reports filed with the authority; violated foreign statutory or regulatory provisions regarding securities or commodities transactions; or aided, abetted, or otherwise caused another person's violation of such foreign securities or commodities provisions or failed to supervise a person who has committed a violation of such provisions. The term "foreign financial regulatory authority" would be defined in new Sections 3(a)(51) of the Exchange Act, 202(a)(24) of the Investment Advisers Act, and 2(a)(50) of the Investment Company Act to include a "foreign secu-

[23] Similarly, in a Commission review, pursuant to 15 U.S.C. 19(d)–(f), of an SRO disciplinary or membership proceeding against a person subject to a statutory disqualification, the Commission might find it necessary to remand the proceeding to the SRO for relitigation of the underlying offense in cases where persuasive due process or jurisdictional challenges to the foreign proceeding are made.

[24] See supra at 3.

rities authority" or organization that is essentially equivalent to a self-regulatory organization. The term "foreign securities authority," in turn, is defined in new Sections 202(a)(23) of the Investment Advisers Act, and 2(a)(49) of the Investment Company Act as "any foreign government or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws relating to securities." [25]

Sections 15(b)(4)(G), 203(e)(7), and 9(b)(4) are substantially similar to Sections 15(b)(4), 203(e), and 9(b) described above. The most significant difference between the existing and the new provisions is that the legislation would not require that the foreign authorities find "willfull" misconduct, i.e., a "willfull" false filing, a "willfull" statutory violation, or "willfull" secondary liability. The Commission recommends this approach because of a potential disparity in standards of willfullness in different countries and because some countries may not require a "willfull" violation. The proposed language would provide the Commission with flexibility in deciding whether the facts of a particular case warrant imposition of sanctions.

In addition, Section 15(b)(4)(B) of the Exchange Act and Section 203(e)(2) of the Investment Advisers Act would be amended to grant the Commission explicit authority to consider convictions by a foreign court of competent jurisdiction of any crime enumerated in current Section 15(b)(4)(B) and Section 203(e)(2) or a "substantially equivalent" foreign crime; Section 15(b)(4)(C) of the Exchange Act and Section 203(e)(3) of the Investment Advisers Act would be amended to state explicitly that the Commission may consider injunctions imposed by a foreign court of competent jurisdiction in connection with any of the activities designated in the statute, or a "substantially equivalent" foreign activity. The Commission would have authority to restrict association with a registered investment company based on the same factors in new Sections 9(b)(5) and (6).

It should also be noted that the Commission determined not to recommend an amendment to Section 9(a) of the Investment Company Act, which prohibits association in certain capacities with a registered investment company by persons who have been convicted of certain offenses or who have been subject to specified injunctions. Section 9(a) is a self-policing mechamism, the purpose of which "is to prevent persons with unsavory records from occupying these positions where they have so much power and where faithfulness to the fiduciary obligations is so important." [26] The automatic disqualification provisions of Section 9(a), coupled with the Commission's exemptive authority under Section 9(c) to avoid any inequitable results, are indispensable means of safeguarding the in-

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[25] This is the same definition that was enacted as Section 3(a)(50) of the Exchange Act in Section 6 of the Insider Trading and Securities Fraud Enforcement Act of 1988. As noted above (supra note 13), Section 15(b)(6) of the Exchange Act and Section 203(f) of the Investment Advisers Act authorize the Commission to limit activities of a person associated or seeking to become associated with a broker-dealer or investment adviser if the Commission finds that the person has committed any of the acts or has been convicted or enjoined as designated in Section 15(b)(4) or Section 203(e). Because Sections 3 and 5 require the addition of new paragraphs to Section 15(b)(4) and Section 203(e), the legislation will provide for conforming amendments to Section 15(b)(6) and Section 203(f). It would also make conforming amendments to Sections 15B(c), 15C(c), 15C(f) and 17A(c) of the Exchange Act.

[26] Hearings on S. 3580 Before a Subcomm. of the Sen. Comm. on Banking and Currency, 76th Cong., 3d Sess. 46 (1940).

tegrity of registered investment companies. However, due process concerns may be presented by legislation that would automatically bar a person solely on the basis of a foreign finding of a violation of foreign law, without any prior notice or opportunity for hearing by a U.S. court or administrative agency. These concerns are avoided if the Commission determines, on a case-by-case basis, whether the foreign finding justifies a bar, rather than relying exclusively on a foreign finding of a violation of foreign law. The amendment would not create any competitive disparities because, just as Section 9(a) applies equally to U.S. and foreign persons that have been convicted or enjoined in a manner specified in the statute, amended Section 9(b) would grant the Commission authority to institute an administrative proceeding against either a U.S. or foreign person that has committed an equivalent foreign violation and has been sanctioned by a foreign authority.

The Commission is also proposing amendments to Section 3(a)(39). That section establishes the bases for imposing a "statutory disqualification" on a broker or dealer, thereby subjecting it to the possibility of disciplinary sanctions by the Commission or a self-regulatory organization as set forth in Section 15A(g)(2) of the Exchange Act and Rule 19h-1 thereunder. The proposed amendment would amend Section 3(a)(39) by creating a statutory disqualification for misconduct in foreign countries, and by adding "all other felonies" to the list of crimes that warrant special review by the Commission and SROs for statutory disqualification from the securities industry.

D. Reimbursement of expenses incurred by the Commission in assisting foreign securities authorities

Finally, Section 7 the bill would amend Section 4(c) of the Exchange Act to permit the Commission to accept payment and reimbursement from a foreign securities authority or on behalf of such authority, for travel, subsistence, and other necessary expenses incurred by the Commission, its members, and employees in carrying out investigations for that authority pursuant to Section 21(a)(2) of the Exchange Act. This amendment parallels the language of Section 4(c) which permits such reimbursement from non-Federal agencies, organizations, and individuals of necessary expenses incurred by the Commission. This amendment will enable the Commission to accept reimbursement from foreign securities authorities the expenses for investigations of possible violations of foreign law conducted on behalf of those authorities or for other assistance.

III. CONCLUSION

The proposed legislation, by permitting confidentiality of foreign documents, would promote the negotiation of mutual assistance agreements which enhance the Commission's ability to obtain evidence for the investigation and prosecution of securities law violators operating in or through foreign countries. In addition, the legislation would provide the Commission with expanded authority to bring administrative proceedings against securities professionals based upon their illegal or improper activities in foreign countries. It would authorize the Commission and SROs to give special scruti-

ny under the statutory disqualification provisions of the Exchange Act to all felons. The legislation would clarify the statutory authority for the Commission's access rules. Finally, the legislation would permit the Commission to accept reimbursement of investigatory expenses incurred on behalf of foreign securities authorities. In view of the rapid internationalization of the securities markets, these are important and needed amendments.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, March 22, 1989.

Hon. DAVID S. RUDER,
Chairman, U.S. Securities and Exchange Commission, Washington, DC.

DEAR CHAIRMAN RUDER: I appreciated your testimony on March 21, 1989 before the Subcommittee on Telecommunications and Finance regarding the International Securities Enforcement Cooperation Act of 1989 ("ISECA"). In my judgment, the Commission has presented an excellent set of recommendations and I am pleased to be an original co-sponsor of the bill.

As noted at the hearing, I have identified several technical questions with respect to the proposed legislation. These questions are included as an attachment to this letter. I would appreciate receiving your responses to these questions prior to further Subcommittee action on this legislation. I also have included several of the questions that I propounded at the hearing and would welcome any further thoughts you have on the issues that they raise.

Thank you for your cooperation with this matter. Please send copies of your response to Congressman Lent and Chairmen Dingell and Markey. If you have any questions regarding this letter, please contact me or have your staff contact Stuart J. Kaswell of the Minority Counsel's office.

Very truly yours,

MATTHEW J. RINALDO,
Ranking Republican Member,
Subcommittee on Telecommunications and Finance.

Attachment.

Questions marked with an asterisk (*) were discussed at the hearing.

1. Section 3(b) of ISECA would amend Section 3(a)(39) of the Securities Exchange Act of 1934 (the "Exchange Act") to expand the definition of statutory disqualification to include "any other felony". The Commission is not recommending a similar amendment to Section 15(b)(4)(B) of the Exchange Act.

*a. Why should self-regulatory organizations ("SROs") have the authority to exclude a broader class of felons when the Commission will not have this broader authority to limit or revoke the registration of a broker-dealer?

b. Will this provision impose any substantial new burdens on SROs?

2. Section 2 of ISECA would amend Section 24 of the Exchange Act and create a new exemption of the Freedom of Information Act ("FOIA"). The provision states that "the Commission shall not be

compelled to disclose records obtained from a foreign securities authority of the foreign securities authority has in good faith represented to the Commission that public disclosure of such records would be contrary to the laws applicable to that foreign securities authority."

a. What constitutes a disclosure being "contrary to the laws"? Must the disclosure violate a statute, rule, code, or case?

b. What constitutes a "good faith" representation from a foreign securities authority? Could the Commission ever challenge such a determination and then hope to receive cooperation from that foreign authority in the future?

c. This exemption to the FOIA would be available to the Commission only if the foreign laws prevent public disclosure by the foreign securities authority. (Section 6(a) of the Insider Trading and Securities Fraud Enforcement Act of 1988 added Section 3(a)(50) of the Exchange Act to include a definition of "foreign securities authority". That definition only includes governmental bodies administering or enforcing a foreign country's securities laws.) If the law of a foreign country prohibited disclosure by, for example, privately owned banks, rather than by the foreign securities authority, this exemption from the FOIA might not be available to the Commission. Should the exemption from the FOIA be somewhat more broad?

*d. This exemption to the FOIA would be available to the Commission only if the foreign law prohibited disclosure. However, a foreign government might be unwilling to release sensitive information to the Commission without assurances of confidentiality, even if the foreign law did not prohibit disclosure of that information. Under these circumstances the FOIA exemption might not be available to the Commission. Should the exemption from the FOIA be somewhat more broad?

2. Section 2 of ISECA would amend Section 24 of the Exchange Act to provide that "notwithstanding any other provisions of law, the Commission may, in its discretion and upon a showing that such information is needed, provide all records * * * and other information in its possession to such persons, foreign and domestic as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate."

a. Who would make the "showing" required for the release of the documents and information? What procedures does the Commission anticipate using for this process?

b. As currently drafted, the Commission could authorize the release of documents and information only by rule. Should this provision allow the Commission to release this material by "rule or order"?

c. The release of documents and information is conditioned on such assurances of confidentiality as the Commission deems appropriate. Please elaborate on when you would seek these assurances. Are there circumstances in which you would want a foreign authority to maintain confidentiality for some limited period of time, such as during an investigation, but then release the information to the public, such as in court proceedings?

d. At page 9, n. 8 of the Commission's Memorandum In Support of ISECA, the Commission notes that "by including the phrase 'notwithstanding any other provision of law,' the amendment will supersede the disclosure provisions of Section 45(a) of the Investment Company Act and Section 210(b) of the Investment Advisers Act." Should ISECA include conforming amendments to those statutes?

U.S. SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, May 22, 1989.

Hon. MATTHEW J. RINALDO,
U.S. House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR CONGRESSMAN RINALDO: This letter responds to your letter dated march 22, 1989, in which you asked questions about amendments to Sections 3(a)(39) and 24 of the Securities Exchange Act of 1934 that would be made if H.R. 1396, the proposed "International Securities Enforcement Cooperation Act of 1989" ("ISECA"), were enacted. The Commission appreciates your co-sponsorship of the bill. Your questions, with my responses, are set forth below.

1. Section 3(b) of ISECA would amend Section 3(a)(39) of the Securities Exchange Act of 1934 (the "Exchange Act") to expand the definition of statutory disqualification to include "any other felony." The Commission is not recommending a similar amendment to Section 15(b)(4)(B) of the Exchange Act.

a. Why should self-regulatory organizations ("SROs") have the authority to exclude a broader class of felons when the Commission will not have this broader authority to limit or revoke the registration of a broker-dealer?

Answer: The Commission generally utilizes its authority under Sections 15(b)(4) and 15(b)(6) to institute administrative proceedings based upon the criminal convictions enumerated in those sections to the extent that they constitute violations of the securities laws or related offenses, such as mail fraud. The proposal to expand the definition of statutory disqualification to include "any other felony" stems from the recently-expressed concerns of the National Association of Securities Dealers that current law does not authorize it to prevent persons who have been convicted of serious crimes, such as drug trafficking or assault, from association with members firms.

Because the Commission may review any SRO decision to permit or deny membership to a broker or dealer or the association of a person with a member, the proposal would allow both the Commission and the SROs to consider the facts and circumstances surrounding a particular felony conviction and to impose appropriate safeguards to protect the U.S. markets and investors from unreasonable risks. Therefore, at this time, direct authority for the Commission to bar any felon does not appear to be necessary.

b. Will this provision impose any substantial new burdens on SROs?

Answer: It is anticipated that the number of cases subject to SRO review will increase. However, based upon statements by NASD representatives to the Commission's staff, it does not appear that this increase will create a substantial burden on the SROs.

2. Section 2 of ISECA would amend Section 24 of the Exchange Act and create a new exemption to the Freedom of Information Act ("FOIA"). The provision states that "the Commission shall not be compelled to disclose records obtained from a foreign securities authority if the foreign securities authority has in good faith represented to the Commission that public disclosure of such records would be contrary to the laws applicable to that foreign securities authority."

a. What constitutes a disclosure being "contrary to the laws"? Must the disclosure violate a statute, rule, code, or case?

Answer: The purpose of the proposed exemption from the FOIA is to protect from disclosure foreign documents obtained by the Commission to the same extent that they would be protected while in the custody of the foreign securities authority. When providing information to the Commission, a foreign securities authority would represent whether public disclosure of that information by the authority would be prohibited by the applicable foreign laws. The term "laws" in this exemption is intended to include any criminal or civil statute, any regulation, rule or order, and any interpretation of such statute, regulation, rule or order provided for by applicable foreign law.

The Commission could invoke the exemption with respect to the information if the foreign authority has represented in good faith that disclosure of the information would be "contrary to the laws applicable to that foreign securities authority." It is expected that the foreign securities authority will state the legal basis for its assertion of foreign legal protection or that the basis would be contained in a memorandum of understanding on cooperation.

b. What constitutes a "good faith" representation from a foreign securities authority? Could the Commission ever challenge such a determination and then hope to receive cooperation from that foreign authority in the future?

Answer: As discussed above, in cases where the FOIA exemption could be used, it is expected that the foreign authority will state the legal basis for its assertion or that the basis would be contained in a memorandum of understanding, thus giving an indication of good faith. Additionally, successful cooperation with foreign authorities requires that each side act in good faith. Consequently, when the appropriate official of the foreign authority makes an assertion regarding the need for confidentiality of documents being provided to the Commission, absent an indication to the contrary, the Commission will assume that the assertion is made in good faith.

c. This exemption to the FOIA would be available to the Commission only if the foreign laws prevent public disclosure by the foreign securities authority. (Section 6(a) of the Insider Trading and Securities Fraud Enforcement Act of 1988 added Section 3(a)(50) of the Exchange Act to include a definition of "foreign securities authority." That definition only includes governmental bodies administering or enforcing a foreign country's securities laws.) If the law of a foreign country prohibited disclosure by, for example, privately owned banks, rather than by the foreign securities authority, this exemption from the FOIA might not be available to the Commis-

sion. Should the exemption from the FOIA be somewhat more broad?

Answer: The principal purpose of the ISECA is to facilitate negotiation of information-sharing agreements and international cooperation with foreign securities authorities, rather than with foreign private parties. The proposed exemption would further that purpose by assuring foreign authorities that the confidentiality of certain documents that they furnish to the Commission will be maintained to the same degree as required under foreign law, and that exemption would include information obtained from private persons and transmitted to us by foreign securities authorities. As a result, an expansion of the exemption to cover information furnished by private persons would not materially assist our negotiation of these agreements with foreign authorities.

d. This exemption to the FOIA would be available to the Commission only if the foreign law prohibited disclosure. However, a foreign government might be unwilling to release sensitive information to the Commission without assurances of confidentiality, even if the foreign law did not prohibit disclosure of that information. Under these circumstances the FOIA exemption might not be available to the Commission. Should the exemption from the FOIA be somewhat more broad?

Answer: The proposed exemption would establish a clear standard for nondisclosure: whether the information is protected by applicable foreign law. A more subjective test, such as one dependent upon a showing that the information is sensitive, could be the subject of extensive litigation in FOIA actions, thereby complicating our cooperative efforts. Moreover, this exemption is intended to strike a balance between the necessity for international enforcement cooperation and the important disclosure objectives of the FOIA. Finally, the Commission believes that principles of comity make it appropriate to exempt from disclosure confidential documents obtained from a foreign government if those documents could not be publicly disclosed under the laws of the foreign country. Such principles would not apply to information that could be legally disclosed under the foreign laws, even if the information were sensitive.

3. Section 2 of ISECA would amend Section 24 of the Exchange Act to provide that "notwithstanding any other provisions of law, the Commission may, in its discretion and upon a showing that such information is needed, provide all records * * * and other information in its possession to such persons, foreign and domestic as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate."

a. Who would make the "showing" required for the release of the documents and information? What procedures does the Commission anticipate using for this process?

Answer: The Commission's general procedure for providing a foreign authority with access to confidential information requires that the authority submit its request in accordance with a specific form, a copy of which is attached for your information. The foreign authority must represent facts which demonstrate that the request is "made in connection with an ongoing lawful investigation or offi-

cial proceeding inquiring into a violation of, or failure to comply with, a criminal or civil statute or regulation, rule or order issued pursuant thereto, being conducted by [name of requesting agency]." This representation would be considered by the Commission to constitute a "showing" within the meaning of the proposed amendment to Section 24 of the Exchange Act. The requesting authority also must represent that it "will establish and maintain such safeguards as are necessary and appropriate to protect the confidentiality of files to which access is granted and information derived therefrom." Similar forms must be used by various domestic persons requesting access to information in the Commission's custody. With respect to disclosure pursuant to the Commission's memoranda of understanding with foreign authorities, the MOUs are, in effect, grants of access which are activated whenever a particular request is made pursuant to their terms. As a result, the MOUs provide specific procedures that govern the manner in which requested information can be used and the degree to which it must be kept confidential.

b. As currently drafted the Commission could authorize the release of documents and information only by rule. Should this provision allow the Commission to release this material by "rule or order"?

Answer: The proposed amendment to Section 24 would provide for the establishment by rule, of the framework by which information may be released. Under the proposal, the Commission could promulgate rules describing the types of information that will be released under the ISECA and the procedures for releasing it. These rules would facilitate international cooperation by indicating to foreign authorities and bases upon which their access requests will be granted and the procedure for requesting such information. It is anticipated that the rules would be flexible enough to permit the Commission to consider all requests for information.

c. The release of documents and information is conditioned on such assurances of confidentiality as the Commission deems appropriate. Please elaborate on when you would seek these assurances. Are there circumstances in which you would want a foreign authority to maintain confidentiality for some limited period of time, such as during an investigation, but then release the information to the public, such as in court proceedings?

Answer: As discussed in the answer to question 3.a. above, the Commission's access request procedure requires a representation that appropriate safeguards will be established to maintain the confidentiality of protected information. The access request form also states that the information may be used for the foreign authority's "investigation and/or proceeding, and any resulting proceedings," and that it may be transferred to the foreign government's "criminal law enforcement authorities and self-regulatory organizations subject to [the foreign authority's] oversight." The form requires the foreign authority to represent that it will use its "best efforts to obtain appropriate assurances of confidentiality" in the event of such a transfer. As a result, it is contemplated that information provided by the Commission may be made public in the course of such proceedings or may be revealed to witnesses in the

course of an investigation to determine whether a violation of the law has occured.

d. At page 9, n.8 of the Commission's Memorandum In Support of ISECA, the Commission notes that "by including the phrase 'notwithstanding any other provision of law,' the amendment will supersede the enclosure provisons of Section 45(a) of the Investment Company Act and Section 210(b) of the Investment Advertisers Act." Should ISECA include conforming amendments to those statutes?

Answer: The Commission's staff considered the possibility of recommending conforming amendments to the Investment Company Act and Investment Advertisers Act, but concluded that such amendments were not necessary in light of the language "notwithstanding any other provision of law." However, conforming amendments would not be objectionable if the Subcommittee believes that they would clarify the relationship between the relevant statutes.

I hope that the foregoing disccussion of H.R. 1396 is helpful. Please contact me if you have any further questions regarding this important legislation.

Sincerely,

DAVID S. RUDER, *Chairman.*

Attachment.

[Disclosure of Nonpublic Information and Obtaining Information from Other Agencies]

ACCESS REQUEST BY FOREIGN GOVERNMENT

Re: [Name of investigation]

Dear ————: We request access to the investigative and other non-public files of the U.S. Securities and Exchange Commission (the "Commission") related to captioned matter. This request is made in connection with an ongoing lawful investigation or official proceedings inquiring into a violation of, or failure to comply with, a criminal or civil statute or regulation, rule or order issued pursuant thereto, being conducted by [name of requesting agency].

We will establish and maintain such safeguards as are necessary and appropriate to protect the confidentiality of files to which access is granted and information derived therefrom. The files and information may, however, be used for the purposes of our investigation and/or proceedings, and any resulting proceedings. They also may be transferred to our government's criminal law enforcement authorities and self-regulatory organizations subject to our oversight. We shall notify you of any such transfer and use our best efforts to obtain appropriate assurances of confidentiality.

Other than as set forth in the procceding paragraph, we will:

Make no public use of these files or information without prior approval of your staff;

Notify you of any legally enforceable demand for the files or information prior to complying with the demand, and assert such legal exemptions or privileges on your behalf as you may request; and

Not grant any other demand or request for the files or information without prior notice to the lack of objection by your staff.

We recognize that until this matter has been closed, the Commission continues to have an interest and will take futher investigatory or other steps as it considers necessary in the discharge of its duties and responsibilities.*

Should you have any questions, please contact ————.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECURITIES EXCHANGE ACT OF 1934

* * * * * * *

DEFINITIONS AND APPLICATION OF TITLE

SEC. 3. (a) When used in this title, unless the context otherwise requires—

(1) * * *

* * * * * * *

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person—

(A) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self-regulatory organization, *foreign equivalent of a self-regulatory organization, foreign or international securities exchange,* contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), *or any substantially equivalent foreign statute or regulation,* or futures association registered under section 17 of such Act (7 U.S.C. 21), *or any substantially equivalent foreign statute or regulation,* or has been and is denied trading privileges on any such contract market *or foreign equivalent.*

(B) is subject to an order of the [Commission or other appropriate regulatory agency] *Commission, other appropriate regulatory agency, or foreign financial regulatory authority* denying, suspending for a period not exceeding twelve months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities

* This paragraph may be omitted if the Commission's case is closed.

broker, or government securities dealer, *or limiting his activities as a foreign person performing a function substantially equivalent to any of the above,* or barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, *or foreign person performing a function substantially equivalent to any of the above,* or is subject to an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act [(7 U.S.C. 1 et seq.);] *(7 U.S.C. 1 et seq.); or is subject to an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;*

* * * * * * *

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or any other entity engaged in transaction in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

[(D)] *(E)* has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph [(A), (B), or (C)] *(A), (B), (C), or (D)* of this paragraph; or

[(E)] *(F)* has committed or omitted any act enumerated in subparagraph [(D) or (E)] *(D), (E), or (G)* of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) *or any other felony* within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or

has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

* * * * * * *

(51) The term "foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.

* * * * * * *

SECURITIES AND EXCHANGE COMMISSION

SEC. 4. (a) * * *

* * * * * * *

(f) Notwithstanding any other provision of law, the Commission may accept payment and reimbursement, in cash or in kind, from a foreign securities authority, or made on behalf of such authority, for necessary expenses incurred by the Commission, its members, and employees in carrying out any investigation pursuant to section 21(a)(2) of this title or in providing any other assistance to a foreign securities authority. Any payment or reimbursement accepted shall be considered a reimbursement to the appropriated funds of the Commission.

* * * * * * *

REGISTRATION AND REGULATION OF BROKERS AND DEALERS

SEC. 15. (a) * * *
(b)(1) * * *

* * * * * * *

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) * * *

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor *or has been convicted within 10 years of a substantially equivalent crime by a foreign court of competent jurisdiction* which the Commission finds—

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, *any substantially equivalent activity however denominated by the laws of the relevant foreign government* or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, *foreign person performing a function substantially equivalent to any of the above,* or entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.) *or any substantially equivalent foreign statute or regulation;*

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, *or substantially equivalent activity however denominated by the laws of the relevant foreign government;* or

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code, *or a violation of a substantially equivalent foreign statute.*

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, *foreign person performing a function substantially equivalent to any of the above,* or entity or person required to be registered under the Commodity Exchange Act, *or any substantially equivalent foreign statute or regulation,* or as an affiliated person or employee of any investment company, bank, insurance company, *foreign entity substantially equivalent to any of the above,* or entity or person required to be registered under the Commodity Exchange Act, *or any substantially equivalent foreign statute or regulation,* or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

* * * * * * *

(G) has been found by a foreign financial regulatory authority to have—

(i) made or caused to be made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(ii) violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade;

(iii) aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of such statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision.

* * * * * * *

(6) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspensions, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in subparagraph [(A), (D), or (E)] *(A), (D), (E), or (G)* of paragraph (4) of this subsection, has been convicted of any offense specified in subparagraph (B) of said paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of said paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a broker or dealer is in effect willfully to become, or to be, associated with a broker or dealer without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order.

* * * * * * *

MUNICIPAL SECURITIES

SEC. 15B. (a) * * *

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(c)(1) * * *

(2) The Commission, by order, shall censure, place limitations on the activities, functions, or operations, suspend for a period not exceeding twelve months, or revoke the registration of any municipal securities dealer, if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, denial,

suspension, or revocation, is in the public interest and that such municipal securities dealer has committed or omitted any act or omission enumerated in subparagraph [(A), (D), or (E)] *(A), (D), (E), or (G)* of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) or such paragraph (4).

* * * * * * *

(4) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a municipal securities dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a municipal securities dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed any act or omission enumerated in subparagraph [(A), (D), or (E)] *(A), (D), (E), or (G)* of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4). It shall be unlawful for any person as to whom an order entered pursuant to this paragraph or paragraph (5) of this subsection suspending or barring him from being associated with a municipal securities dealer is in effect willfully to become, or to be, associated with a municipal securities dealer without the consent of the Commission, and it shall be unlawful for any municipal securities dealer to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such municipal securities dealer knew, or, in the exercise of reasonable care should have known, of such order.

* * * * * * *

GOVERNMENT SECURITIES BROKERS AND DEALERS

SEC. 15C. (a) * * *

* * * * * * *

(c)(1) With respect to any government securities broker or government securities dealer registered or required to register under subsection (a)(1)(A) of this section—

(A) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such government securities broker or government securities dealer, if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such government securities dealer, or any person associated with such government securities broker or government securities dealer (whether prior or subsequent to becoming so associated), has

committed or omitted any act or omission enumerated in subparagraph [(A), (D), or (E)] *(A), (D), (E), or (G)* of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

* * * * * * *

(C) The Commission, by order, shall censure, place limitations on the activities or functions of any person associated, or seeking to become associated, with a government securities broker or government securities dealer registered or required to register under subsection (a)(1)(A) of this section or suspend for a period not exceeding 12 months or bar any such person from being associated with such government securities broker or government securities dealer if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in subparagraph [(A), (D), or (E)] *(A), (D), (E), or (G)* of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

* * * * * * *

(f)(1) * * *

(2) Notwithstanding any other provision of this title, the Commission shall not have any authority to make investigations of, require the filing of a statement by, or take any other action under this title against a government securities broker or government securities dealer, or any person associated with a government securities broker or government securities dealer, for any violation or threatened violation of the provisions of this section or the rules or regulations thereunder, unless the Commission is the appropriate regulatory agency for such government securities broker or government securities dealer. Nothing in the preceding sentence shall be construed to limit the authority of the Commission with respect to violations or threatened violations of any provision of this title other than this section, [or the rules or regulations under any such other provisions] *the rules or regulations under any such other provision, or investigations pursuant to section 21(a)(2) of this title to assist a foreign securities authority.*

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NATIONAL SYSTEM FOR CLEARANCE AND SETTLEMENT OF SECURITIES TRANSACTIONS

SEC. 17A. (a) * * *

* * * * * * *

(c)(1) * * *

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(3) The appropriate regulatory agency for a transfer agent, by order, shall deny registration to, censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such transfer agent, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such denial, censure, placing of limitations, suspension, or revocation is in the public interest and that such transfer agent, whether prior or subsequent to becoming such, or any person associated with such transfer agent, whether prior or subsequent to becoming so associated—

(A) has committed or omitted any act enumerated in subparagraph [(A), (D), or (E)] *(A), (D), (E), or (G)* of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4); or

* * * * * * *

(4)(A) * * *

* * * * * * *

(C) The appropriate regulatory agency for a transfer agent, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with the transfer agent, or suspend for period not exceeding twelve months or bar any such person from being associated with the transfer agent, if the appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act enumerated in subparagraph [(A), (D), or (E)] *(A), (D), (E), or (G)* or paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a transfer agent is in effect willfully to become, or to be, associated with a transfer agent without the consent of the appropriate regulatory agency that entered the order and the appropriate regulatory agency for that transfer agent. It shall be unlawful for any transfer agent to permit such a person to become, or remain, a person associated with it without the consent of such appropriate regulatory agencies, if the transfer agent knew, or in the exercise of reasonable care should have known, of such order. The Commission may establish, by rule, procedures by which a transfer agent reasonably can determine whether a person associated or seeking to become associated with it

is subject to any such order, and may require, by rule, that any transfer agent comply with such procedures.

* * * * * * *

PUBLIC AVAILABILITY OF INFORMATION

SEC. 24. (a) * * *

(b) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice, or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of Title 5, United States Code, or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment to such information. [Nothing in this subsection shall authorize the Commission to withhold information from the Congress.]

(c) The Commission may, in its discretion and upon a showing that such information is needed, provide all "records" (as defined in subsection (a)) and other information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.

(d) Except as provided in subsection (e), the Commission shall not be compelled to disclose records obtained from a foreign securities authority if (1) the foreign securities authority has in good faith determined and represented to the Commission that public disclosure of such records would violate the laws applicable to that foreign securities authority, and (2) the Commission obtains such records pursuant to (A) such procedure as the Commission may authorize for use in connection with the administration or enforcement of the securities laws, or (B) a memorandum of understanding. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(e) Nothing in this section shall—

(1) alter the Commission's responsibilities under the Right to Finance Privacy Act (12 U.S.C. 3401 et seq.), as limited by section 21(h) of the Securities Exchange Act (15 U.S.C. 78u(h)), with respect to transfers of records covered by such statutes, or

(2) authorize the Commission to withhold information from the Congress or prevent the Commission from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

* * * * * * *

INVESTMENT COMPANY ACT OF 1940

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GENERAL DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

(1) * * *

* * * * * * *

(49) "Foreign securities authority" means any foreign government or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(50) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

* * * * * * *

INELIGIBILITY OF CERTAIN AFFILIATED PERSONS AND UNDERWRITERS

SEC. 9. (a) * * *

(b) The Commission may, after notice and opportunity for hearing, by order prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deen appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, if such person—

(1) * * *

(2) has willfully violated any provision of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of title II of this Act, or of this title, or of the Commodity Exchange Act, or of any rule or regulation under any of such statutes; [or]

(3) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of title II of this Act, or of this title, or of the Commodity Exchange Act, or of any rule or regulation under any of such statutes[.];

(4) has been found by a foreign financial regulatory authority to have—

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect

to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade;

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of an foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade;

(5) within 10 years has been convicted by a foreign court of competent jurisdiction of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense set forth in paragraph (1) of subsection (a); or

(6) by reason of any misconduct, is temporarily or permanently enjoined by any foreign court of competent jurisdiction from acting in any of the capacities, set forth in paragraph (2) of subsection (a), or a substantially equivalent foreign capacity, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security.

* * * * * * *

INFORMATION FILED WITH COMMISSION

SEC. 45. (a) The information contained in any registration statement, application, report, or other document filed with the Commission pursuant to any provision of this title or of any rule or regulation thereunder (as distinguished from any information or document transmitted to the Commission) shall be made available to the public, unless and except insofar as the Commission, by rules and regulations upon its own motion, or by order upon application, finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. [It shall be unlawful] *Except as provided in section 24(c) of the Securities Exchange Act of 1934, it shall be unlawful* for any member, officer, or employee of the Commission to use for personal benefit, or to disclose to any person other than an official or employee of the United States or of a State, for official use, or for any such official or employee to use for personal benefit, any information contained in any document so filed or transmitted, if such information is not available to the public.

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INVESTMENT ADVISERS ACT OF 1940

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DEFINITIONS

SEC. 202. (a) When used in this title, unless the context otherwise requires—

(1) * * *

* * * * * * *

(23) "Foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(24) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.

* * * * * * *

REGISTRATION OF INVESTMENT ADVISERS

SEC. 203. (a) * * *

* * * * * * *

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) * * *

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor *or has been convicted within 10 years of a substantially equivalent crime by a foreign court of competent jurisdiction* which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, *any substantially equivalent activity however denominated by the laws of the relevant foreign government,* or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, government securities broker, government securities dealer, fiduciary, transfer agent, *foreign person performing a function substantially equivalent to any of the above,* or entity or person required to be reg-

istered under the Commodity Exchange Act *or any substantially equivalent statute or regulation;*

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities *or substantially equivalent activity however denominated by the laws of the relevant foreign government;* or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code, *or a violation of a substantially equivalent foreign statute;*

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction, *including any foreign court of competent jurisdiction* from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, *foreign person performing a function substantially equivalent to any of the above,* or entity or person required to be registered under the Commodity Exchange Act *or any substantially equivalent statute or regulation,* or as an affiliated person or employee of any investment company, bank, insurance company, *foreign entity substantially equivalent to any of the above,* or entity or person required to be registered under the Commodity Exchange Act *or any substantially equivalent statute or regulation,* or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

* * * * * * *

(5) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, *the Commodity Exchange Act,* the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

* * * * * * *

(7) has been found by a foreign financial regulatory authority to have—

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade; or

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade, or has been found, by the foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of statutory provisions, and rules and regulations promulgated thereunder, another person who commits such a violation, if such other person is subject to his supervision.

(f) The Commission, by order shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated, with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in [paragraph (1), (4), or (5)] *paragraph (1), (4), (5), or (7)* of subsection (e) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of said subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

* * * * * * *

PUBLICITY

SEC. 210. (a) * * *

(b) Subject to the provisions of [subsections (c) and (e) of section 209] *subsections (c) and (d) of section 209 of this Act and section 24(c) of the Securities Exchange Act of 1934,* the Commission, or any member, officer, or employee thereof, shall not make public the fact that any examination or investigation under this title is being conducted, or the results of or any facts ascertained during any such examination or investigation; and no member, officer, or employee of the Commission shall disclose to any person other than a member, officer, or employee of the Commission any information obtained as a result of any such examination or investigation except with the approval of the Commission. The provisions of this subsection shall not apply—

(1) in the case of any hearing which is public under the provisions of section 212; or

(2) in the case of a resolution or request from either House of Congress.

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