

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 69922 / July 2, 2013

ACCOUNTING AND AUDITING ENFORCEMENT

Release No. 3470 / July 2, 2013

Admin. Proc. File No. 3-14171

In the Matter of

JAMES M. SCHNEIDER, CPA  
c/o W. Neil Eggleston  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005

ORDER DENYING MOTION OR  
IN THE ALTERNATIVE  
APPLICATION TO MODIFY  
COMMISSION ORDER IMPOSING  
REMEDIAL SANCTION

James M. Schneider is a certified public accountant and the former chief financial officer of Dell, Inc. On July 22, 2010, we filed a civil injunctive action against Dell, Schneider, and other Dell executives for fraud and various reporting and recordkeeping violations.<sup>1</sup> Schneider subsequently agreed to be permanently enjoined by a U.S. district court from future violations of, among other things, the antifraud provisions of the federal securities laws. He also agreed to the Commission's filing a follow-on administrative proceeding against him, pursuant to which Schneider consented to our suspending him from appearing or practicing before the Commission as an accountant, with the right to apply for reinstatement after five years. Schneider now asks the Commission to clarify that suspension order "to prevent the existing order from being construed by the Staff of the Commission as barring activities that are outside the scope of [our Rule of Practice Rule 102(e)(3)(i)]."<sup>2</sup> In particular, Schneider asks us to clarify that our Rule

<sup>1</sup> *SEC v. Dell Inc.*, No. Civ. 1:10-cv-01245 (D.D.C. July 22, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp21599.pdf>.

<sup>2</sup> Respondent's Mot. Under SEC Rule[ ] of Practice 154 or in the Alternative Appl. for Modification of Comm'n Order Imposing Remedial Sanctions Against James M. Schneider at 1 ("Respondent's Mot.") (citing 17 C.F.R. § 201.102(e)(3)(i) (providing that the Commission may suspend from practicing before it any accountant who has been "permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder"))).

102(e) order "does not preclude Mr. Schneider from serving on the audit committee of a Commission registrant or as the CFO of a public company, so long as he does not serve as the principal accounting officer."<sup>3</sup> For the reasons below, we deny Schneider's motion.

## I.

### A. **Schneider consented to a suspension from appearing or practicing before the Commission as an accountant after the Commission instituted civil proceedings against him.**

On July 22, 2010, we instituted civil proceedings against Dell and certain of its executives, including Schneider, in the United States District Court for the District of Columbia. Among other violations, the complaint alleged that Dell, Schneider, and other Dell executives engaged in fraud by failing to disclose material information and using an accounting scheme to create the false appearance that the company was consistently meeting Wall Street earnings targets and reducing its operating expenses. According to the complaint, Dell had failed to disclose large "exclusivity payments" that Intel Corporation made to Dell not to use processors made by Intel's rival, Advanced Micro Devices, Inc. ("AMD"). The complaint alleged that, without these payments, Dell would have missed analysts' consensus earnings-per-share estimates for every quarter from fiscal years 2002 through 2006. Although these payments amounted to 76% of Dell's operating income by the first quarter of fiscal year 2007, "Dell did not disclose the existence, much less the magnitude, of the Intel exclusivity payments."<sup>4</sup>

In May 2006, Dell announced its intention to use AMD's processors in some of its products. Intel responded by cutting its exclusivity payments, and Dell subsequently reported a 36% drop in its operating income. "In dollar terms," the complaint explained, "the reduction in Intel exclusivity payments was equivalent to 75% of the decline in Dell's operating income."<sup>5</sup> But Schneider falsely told analysts and investors in a quarterly earnings call that the drop in the company's operating results "was attributable to Dell pricing too aggressively in the face of slowing demand and to component costs declining 'less than we anticipated.'"<sup>6</sup>

According to the complaint, Schneider also "engaged in a wide-ranging accounting fraud by maintaining a series of 'cookie jar' reserves that [the company] used to cover shortfalls in operating results from FY02 to FY05."<sup>7</sup> These manipulations, the complaint explained, "were undertaken to meet consensus earnings targets or to misstate materially important financial

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<sup>3</sup> Respondent's Mot. ¶ 29.

<sup>4</sup> Compl. ¶ 69.

<sup>5</sup> *Id.* ¶ 3.

<sup>6</sup> *Id.* ¶ 63 (quoting statements that were in a script circulated before the earnings call to certain Dell personnel).

<sup>7</sup> *Id.* ¶ 4.

metrics."<sup>8</sup> This manipulation "not only materially misstated Dell's financial results, but caused material misstatements in Dell's annual and quarterly reports filed with the Commission during the period."<sup>9</sup> For example, in the second quarter of 2004, a Dell finance director told Schneider that Dell's Europe, Middle East, and Asia ("EMEA") unit "was having difficulty meeting its \$159 million operating income target."<sup>10</sup> Schneider replied, "We need \$175m. You need to tell me how we will get it. I suggest you not be too proud and see what [a vice president of marketing] has socked away."<sup>11</sup> The finance director complied with Schneider's request and released \$16 million that had been put away. "The release of this cookie jar reserve," the complaint explained, "allowed the EMEA segment to report eight consecutive quarters of increasing operating income."<sup>12</sup> Without the reserve, "EMEA's operating income in Q1FY05 would have declined by about 12.5% from the prior quarter, rather than increased by 3.1%."<sup>13</sup>

The complaint concluded that, because of this misconduct, Schneider violated Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933,<sup>14</sup> Section 13(b)(5) of the Securities Exchange Act of 1934,<sup>15</sup> and Exchange Act Rules 13a-14, 13b2-1, and 13b2-2.<sup>16</sup> It also alleged that Schneider aided and abetted Dell's violations of Exchange Act Sections 13(a),

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<sup>8</sup> *Id.* ¶ 84.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* ¶ 110.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 111.

<sup>13</sup> *Id.*

<sup>14</sup> 15 U.S.C. §§ 77q(a)(2) (prohibiting any person from "obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact"), 77q(a)(3) (prohibiting any person from "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser").

<sup>15</sup> *Id.* § 78m(b)(5) (providing that "[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record or account . . .").

<sup>16</sup> 17 C.F.R. §§ 240.13a-14 (requiring CFOs to certify in periodic reports that, based on personal knowledge, the report does not contain any untrue statement of material fact or omit any material fact), 240.13b2-1 (providing, in part, that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account . . ."), 240.13b2-2 (prohibiting any officer or director of an issuer from making or causing to be made any materially false or misleading statement in connection with the preparation of reports and documents required by the Exchange Act).

13(b)(2)(A), and 13(b)(2)(B)<sup>17</sup> and Rules 12b-20, 13a-1, and 13a-13.<sup>18</sup> Without admitting or denying the allegations, Schneider consented to a permanent injunction, disgorgement, and civil penalties.<sup>19</sup>

On December 22, 2010, Schneider consented to our initiating administrative follow-on proceedings against him pursuant to our Rule of Practice 102(e)(3)(i).<sup>20</sup> In connection with an order instituting and settling those proceedings, Schneider consented to being "suspended from appearing or practicing before the Commission as an accountant" with a right to reapply after five years.<sup>21</sup>

**B. Schneider continued to serve as a member of a public company's audit committee after the Commission imposed a bar.**

At the time we instituted the civil injunctive proceedings, Schneider was serving as a director and audit committee member at three publicly held companies. Schneider subsequently resigned from two of those companies, but he continued to serve as an audit committee member at General Communications, Inc. ("GCI"), an Alaska-based communications provider listed on NASDAQ. According to GCI's proxy statement filed with the Commission on May 12, 2011, Schneider was chair of GCI's audit committee and was designated as an audit committee financial expert.<sup>22</sup> Schneider's name, as chair of the audit committee, also appeared on GCI's audit committee report, which the company included in its proxy statement.<sup>23</sup> In its filing, GCI stated that the company's audit committee reviewed GCI's financial statements, discussed the financial statements and the accounting principles applied in those financial statements with

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<sup>17</sup> 15 U.S.C. §§ 78m(a) (requiring issuers to file periodic reports in accordance with Commission rules), 78m(b)(2)(A) (requiring issuers to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect their transactions and dispositions of assets), 78m(b)(2)(B) (requiring issuers to devise and maintain internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with Generally Accepted Accounting Principles and to maintain accountability for assets).

<sup>18</sup> 17 C.F.R. §§ 240.12b-20 (requiring issuers to provide any additional material information necessary to make required statements, in the light of the circumstances under which they are made, not misleading), 240.13a-1 (requiring issuers to file annual reports), 240.13a-13 (requiring issuers to file quarterly reports).

<sup>19</sup> *SEC v. Dell*, No. Civ. 1:10-cv-01245 (D.D.C. Oct. 13, 2010) (imposing final judgment as to Schneider).

<sup>20</sup> *James M. Schneider, CPA*, Securities Exchange Act Release No. 63600, 2010 SEC LEXIS 4422, at \*6 (Dec. 22, 2010).

<sup>21</sup> *Id.* In consenting to the suspension, Schneider neither admitted nor denied our findings, except as to the Commission's jurisdiction over him, the subject matter of the proceedings, the Commission's having filed a complaint against him, and the district court's having permanently enjoined him from violating certain securities laws.

<sup>22</sup> Gen. Commc'ns, Inc., Definitive Proxy Statement (Form Def 14A) 23–24 (May 12, 2011); see Regulation S-K, Item 407, 17 C.F.R. § 229.407(d)(5) (defining "audit committee financial expert").

<sup>23</sup> Gen. Commc'ns, Inc., Definitive Proxy Statement 75.

GCI's auditor, and recommended to GCI's board that the financial statements be filed with the Commission.

On August 5, 2011, Commission staff notified GCI and Schneider's counsel that Schneider was violating the terms of the Commission's Rule 102(e) order by serving on GCI's audit committee. Schneider resigned from GCI's audit committee and then filed the present motion seeking clarification of our Rule 102(e) order.

## II.

### A. **Schneider seeks a ruling that our Rule 102(e) order does not preclude Schneider from serving in certain positions, such as a CFO or audit committee member.**

Schneider asks us to "issue an order clarifying that the Rule 102(e) Order does not prohibit him from accepting non-accountant positions, such as positions on an audit committee or as a non-accountant CFO."<sup>24</sup> He argues that the reason for such a clarification is "to prevent the existing order from being construed by the Staff of the Commission as barring activities outside the scope of [Rule 102(e)]."<sup>25</sup> In support, Schneider argues that the staff has already once exceeded its authority under our order by demanding that he resign from GCI's audit committee.<sup>26</sup>

Schneider contends that Commission staff has not cited any authority, nor is he aware of any, that "would have given [him] notice that," by agreeing to the Rule 102(e) order, he would be prohibited from "serv[ing] on an audit committee or as the CFO of a public company so long as he did not act as the principal accounting officer."<sup>27</sup> Schneider concedes that he "theoretically could attempt to accept such a position and require the Staff to bring an enforcement action," but argues that "the Staff's past conduct with GCI demonstrates that any issuer that would appoint Mr. Schneider to its audit committee or as its CFO is likely to be threatened with an enforcement action."<sup>28</sup> Because of this, Schneider argues, a clarification of our order is necessary.

The Division opposes Schneider's motion, arguing that Schneider had fair notice that our Rule 102(e) order would prohibit him from serving on a public company's audit committee or as a CFO. The Division contends that such a prohibition is consistent with Rule 102(e)'s remedial purpose of ensuring that accountants, "on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of

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<sup>24</sup> Respondent's Reply to Br. of the Div. of Enforcement in Opp'n to Respondent's Mot. ("Respondent's Reply") at 3.

<sup>25</sup> Respondent's Mot. at 1.

<sup>26</sup> *Id.* ¶ 19.

<sup>27</sup> *Id.* ¶ 26.

<sup>28</sup> *Id.* ¶ 28.

competence."<sup>29</sup> The Division further concludes that Schneider's request is not ripe for review "because Schneider fails to present any specific job functions for Commission review, and the staff stands ready to provide specific guidance when necessary [about any future role Schneider may wish to take]."<sup>30</sup>

**B. Schneider's proposed clarification is inconsistent with our order and the rule on which it is based.**

Schneider seeks a ruling from us that our Rule 102(e) order does not prohibit him from "accepting non-accountant positions, such as positions on an audit committee or as a non-accountant CFO."<sup>31</sup> We find no basis for granting this request. As explained below, the applicability of our order depends on the particular tasks and responsibilities involved with any future position that Schneider may seek to undertake. Schneider's proposed clarification, by comparison, would exempt entire job titles from our order, regardless of what tasks or responsibilities those positions entailed. Granting such a request would undermine the remedial purpose of our order and the rule on which it is based.

We barred Schneider from appearing or practicing before us as an accountant pursuant to our authority under Rule 102. That rule defines "practicing before the Commission" as including, but not limited to, "[t]ransacting any business with the Commission" and "[t]he preparation of any statement, opinion or other paper by any . . . accountant . . . filed with the Commission in any registration statement, notification, application, report or other document with the consent of such . . . accountant."<sup>32</sup> Determining whether a particular position fits within that definition involves a "fact-specific inquiry" into the conduct involved when serving in such a position.<sup>33</sup> As a U.S. district court recently explained, someone who is appearing or practicing before the Commission as an accountant includes persons who "participate[d] in the preparation of financial statements filed with the Commission by, for example, 'creat[ing],' 'compil[ing]' or

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<sup>29</sup> Br. of the Div. of Enforcement in Opp'n to Respondent's Mot. at 12 (quoting *Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 SEC LEXIS 2973, at \*16 (Sept. 20, 2012)).

<sup>30</sup> *Id.* at 19.

<sup>31</sup> Respondent's Reply at 3.

<sup>32</sup> 17 C.F.R. § 201.102(f). Because we barred Schneider pursuant to our authority under Rule 102, that rule's definitions apply to our order. *Cf. Charles E. Gaecke*, Investment Advisers Act Release No. 2681, 2007 SEC LEXIS 2809, at \*9 (Dec. 4, 2007) (stating that, because "we issued the Bar Order pursuant to our authority under the Advisers Act . . . the definition of 'investment adviser' in the Advisers Act applies when that term is used in the Bar Order").

<sup>33</sup> Br. of the Div. of Enforcement in Opp'n to Respondent's Mot. at 18 (quoting *SEC v. Brown*, 878 F. Supp. 2d 109, 127 (D.D.C. 2012)).

'edit[ing]' information or data incorporated into those documents and consenting to their incorporation."<sup>34</sup>

Nothing in this definition discusses, let alone exempts, specific job titles, such as CFO or audit committee member. This is by design. As we recognized in our release adopting the 1998 amendments to Rule 102(e), the Commission's limited resources mean that the Commission and the investing public must "rely heavily on accountants to assure corporate compliance with federal securities law and disclosure of accurate and reliable financial information."<sup>35</sup> Accountants play "a particularly important role . . . in preparing and certifying the accuracy of financial statements of public companies that are so heavily relied upon by the public in making investment decisions."<sup>36</sup> This process is impaired if incompetent or unethical accountants are permitted to participate in the preparation of financial statements certified and filed with the Commission.<sup>37</sup> We therefore promulgated Rule 102(e) to ensure that these professionals on whom we rely so heavily "perform their tasks diligently and with a reasonable degree of competence."<sup>38</sup>

These remedial purposes would be undermined if we were to hold that Schneider could avoid the prohibition in our Rule 102(e) order by accepting a position based only on that position's title or on whether non-accountants could accept such a position.<sup>39</sup> Incompetent or

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<sup>34</sup> *Brown*, 878 F. Supp. 2d at 125 (quoting *Robert W. Armstrong III*, Exchange Act Release No. 51920, 2005 SEC LEXIS 1497, at \*47–48 (June 24, 2005) (finding that the controller of a public company's subsidiary appeared and practiced before the Commission as an accountant)); *accord SEC v. Prince*, No. 09-1423, 2013 U.S. Dist. LEXIS 62691, at \*99 (D.D.C. May 2, 2013) (quoting *Armstrong* and finding that a public company employee, serving as "Director of Mergers and Acquisitions," violated a Rule 102(e) order by appearing and practicing before the Commission as an accountant).

<sup>35</sup> *Amendment to Rule 102(e) of the Commission's Rules of Practice*, 63 Fed. Reg. 57,164, 57,165 (Oct. 26, 1998).

<sup>36</sup> *Marrie v. SEC*, 374 F.3d 1196, 1200–01 (D.C. Cir. 2004) (noting the reason for the Commission's adoption of the amendments to Rule 102(e)); *accord Amendment to Rule 102(e)*, 63 Fed. Reg. at 57,165 (stating that, because of the Commission's limited resources, it "must rely on the competence and independence of . . . the accountants who prepare . . . financial statements).

<sup>37</sup> *See Armstrong*, 2005 SEC LEXIS 1497, at \*48 (concluding that the "disciplining [of] accountants pursuant to Rule 102(e) for effecting a fraudulent scheme by computing the figures and providing the information incorporated into Commission filings furthers the Rule's remedial purpose of protecting the integrity of the Commission's processes").

<sup>38</sup> *Marrie*, 374 F.3d at 1200 (quoting *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979)); *accord Gregory M. Dearlove, CPA*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, at \*107 (Jan. 31, 2008) (noting that the Commission adopted Rule 102(e) "to ensure the Commission's 'processes continue to be protected, and that the investing public continues to have confidence in the integrity of the financial reporting process'" (quoting *Amendment to Rule 102(e)*, 63 Fed. Reg. at 57,164)), *petition denied*, 573 F.3d 801 (D.C. Cir. 2009).

<sup>39</sup> *Cf. Armstrong*, 2005 SEC LEXIS 1497, at \*46 (finding that controller of a registrant's subsidiary was appearing or practicing before the Commission despite not signing the financial statements filed with the Commission because to find otherwise "would allow accountants to escape discipline under Rule 102(e) simply by instructing someone else to draft, sign, and file fraudulent documents").

unethical accountants pose a risk to our process regardless of what title they hold—or whether or not they are even licensed accountants. Accountants, we have explained, "often serve as corporate officers, and the integrity of the Commission's processes is threatened when they execute fraudulent schemes by providing falsified financial information just as when licensed accountants engage in this conduct."<sup>40</sup> This interpretation of Rule 102(e)'s remedial purpose, we have noted, also accords with cases in which we have denied the privilege of appearing or practicing before the Commission to incompetent or unethical accountants serving in a variety of positions, including the very ones that Schneider seeks to carve out of our order.<sup>41</sup> And a U.S. district court recently found that someone serving in a "general advisory role" with the title "Director of Mergers and Acquisitions" violated a Rule 102(e) order prohibiting him from appearing or practicing before the Commission as an accountant.<sup>42</sup> The court found that, even though the company established procedures designed to ensure that this person "would not be involved with the accounting department and accounting data," he violated the Rule 102(e) order by preparing financial data and determining how particular data should be treated in the company's financial statements.<sup>43</sup>

This breadth of ways in which accountants can threaten our processes highlights the inherent difficulty of enumerating every position that Schneider could take that would be prohibited by, or consistent with, our Rule 102(e) order, but that does not, as Schneider argues, render our order impermissibly vague.<sup>44</sup> As courts have explained, it is often sufficient that a

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<sup>40</sup> *Id.* at \*52.

<sup>41</sup> *See id.* at \*49 (noting that, for purposes of defining what constitutes appearing or practicing before the Commission, broadly interpreting Rule 102(e)'s remedial purpose "accords with the settled cases in which we have denied the privilege of appearing or practicing before the Commission to accountants serving as officers of privately-held subsidiaries of public companies"); *cf., e.g., Pattison*, 2012 SEC LEXIS 2973, at \*51–52 (permanently disqualifying former controller of a public company from appearing or practicing before the Commission as an accountant); *Steven A. Gould, CPA*, Exchange Act Release No. 68500, 2012 SEC LEXIS 4013, at \*4 (Dec. 20, 2012) (settled order) (suspending former CFO from appearing or practicing before the Commission as an accountant); *James S. Quay*, Exchange Act Release No. 68234, 2012 SEC LEXIS 3522, at \*4 (Nov. 14, 2012) (settled order) (suspending respondent, who was not licensed as a certified public accountant, from appearing or practicing before the Commission as an accountant); *H. Clayton Peterson, CPA*, Exchange Act Release No. 67282, 2012 SEC LEXIS 1982, at \*3 (June 27, 2012) (suspension order) (suspending former board member and audit committee chairman, whose certified public accounting license had expired, from appearing or practicing before the Commission because he had been convicted of a felony); *Lynne Norman*, Exchange Act Release No. 66352, 2012 SEC LEXIS 437, at \*5 (Feb. 7, 2012) (settled order) (suspending former controller, who held no accounting licenses or certifications, from appearing or practicing before the Commission as an accountant).

<sup>42</sup> *Prince*, 2013 U.S. Dist. LEXIS 62691, at \*7–8, \*110–11.

<sup>43</sup> *Id.*

<sup>44</sup> *See DiCola v. FDA*, 77 F.3d 504, 509 (D.C. Cir. 1996) ("The FDA chose . . . not to write the debarment order in terms more specific than those in the statute because of the difficulty inherent in defining what constitutes a sufficient nexus with the regulatory scheme under all circumstances." (internal quotation omitted)); *cf. Perez v. Hoblock*, 368 F.3d 166, 175 (2d Cir. 2004) ("Limitations inherent in the English language often prevent the drafting of statutes 'both general enough to take into account a variety of human conduct and sufficiently specific to provide



proscription "mark out the rough area of prohibited conduct, allowing law-abiding individuals to conform their conduct by steering clear of the prohibition."<sup>45</sup> In implementing such a proscription, "[n]o more than a reasonable degree of certainty can be demanded and it is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."<sup>46</sup>

Therefore, while our order in this case may not precisely enumerate the job titles that Schneider could take and comply with our order, we find that our order nevertheless provides a sufficient standard by which Schneider can judge his ability to accept a particular position.<sup>47</sup> There are nearly limitless positions that Schneider could safely take that have nothing to do with preparing financial statements of public companies. Some positions, however, will involve duties that increase the likelihood that Schneider could engage in prohibited conduct, including the two that Schneider seeks to exempt from our order (audit committee member and CFO).<sup>48</sup> Determining whether Schneider could accept such positions will unavoidably involve a closer call. Our order reasonably places Schneider on notice that, the more a prospective position is associated with the preparation of a company's financial statements, the more Schneider's acceptance of such a position without prior approval from the Commission would be done "at his peril."<sup>49</sup> For these reasons, we find no basis for modifying or clarifying our order.<sup>50</sup>

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fair warning that certain kinds of conduct are prohibited." (quoting *Arnett v. Kennedy*, 416 U.S. 134, 159–60 (1974))).

<sup>45</sup> *DiCola*, 77 F.3d at 509 (quoting *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988)).

<sup>46</sup> *Id.* at 508 (quoting *Throckmorton v. Nat'l Transp. Safety Bd.*, 963 F.2d 441, 445 (D.C. Cir. 1992)).

<sup>47</sup> *See id.* at 509 (concluding that it was "fanciful for [debarred person] to say that he can only 'guess' at the meaning of the debarment order; he will usually have a pretty good idea whether a position at a firm that is not itself a drug manufacturer runs afoul of the remedial purpose for which he has been debarred from providing services to a drug house").

<sup>48</sup> *See, e.g.*, 15 U.S.C. §§ 7203(a)(3) (defining audit committee as a committee established "for the purpose of overseeing the accounting and financial processes of the issuer and audits of the financial statements of the issuer"), 7241(a) (requiring chief financial officers, or the equivalent, to certify the issuer's periodic reports).

<sup>49</sup> *DiCola*, 77 F.3d at 505, 509 (noting that an executive barred from "provid[ing] any type of service to a person that has an approved or pending drug product application" was "on notice that, without prior approval from the FDA, he gets close to the pharmaceutical industry at his peril"); *see also Disclosure Required by §§ 404, 406 & 407 of the Sarbanes-Oxley Act of 2002*, Exchange Act Release No. 46701, 67 Fed. Reg. 66,208, 66,212 (Oct. 22, 2002) (noting that, "[b]ecause of the significant role the audit committee plays in the filing of a public company's financial statement, . . . any accountant, while suspended or barred from practice under Rule 102(e) of the Commission's Rules of Practice, generally would not be eligible to serve as a financial expert [on an audit committee]"). Schneider interprets our comments in the immediately preceding authority about financial experts as supporting his argument that he may serve on an audit committee so long as he does not serve as a financial expert. If anything, however, these comments simply emphasize that, the greater one's involvement with a public company's financial statements, the greater the likelihood that one may violate a Rule 102(e) order.

<sup>50</sup> The Division argues that we should also deny Schneider's motion using our more traditional analysis of bar and suspension modifications. Although Schneider titles his motion as a "modification" of our order, he expressly

In denying Schneider's motion, we express no opinion on whether our Rule 102(e) order prohibits Schneider from taking any of the hypothetical positions he posits.<sup>51</sup> Nor do we express any opinion on whether any of the positions Schneider held in the past, such as at CGI, violated our order, as those questions are not before us. Nor can we find any basis, given the record before us, to conclude that Commission staff somehow misled Schneider about the scope or applicability of our Rule 102(e) order when he consented to our order's prohibitions. Schneider asserts, for example, that he lacked notice that he would be prohibited from serving on an audit committee or as a CFO because he was serving on three audit committees at the time he consented to our order. As described herein, however, we find that Rule 102 and case law interpreting that rule gave Schneider sufficient notice of what conduct our order proscribed, and nothing in the record before us provides a basis to conclude otherwise. Furthermore to the extent Schneider is uncertain about an actual position he may seek to take sometime in the future, the Division has represented its willingness to provide guidance to Schneider regarding such potential positions. It is entirely possible, therefore, that Schneider "posits an injury that may never materialize."<sup>52</sup>

Accordingly, IT IS ORDERED that James M. Schneider's motion and, in the alternative, application for modification of the Commission's order imposing remedial sanctions are DENIED.

By the Commission.

Elizabeth M. Murphy  
Secretary

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represents in his reply brief that he is not seeking a modification to our order, only a clarification. *See* Respondent's Reply at 18–19 (explaining that his motion "bears no resemblance to petitions for relief, which seek to absolve a petitioner of an obligation by which he or she is admittedly bound").

<sup>51</sup> *Cf. Hoblock*, 368 F.3d at 175 (stating that the evaluation of whether a regulation is vague as applied to a particular person "must be made with respect to [his] actual conduct and not with respect to hypothetical situations at the periphery of the [regulation's] scope or with respect to the conduct of other parties who might not be forewarned by the broad language").

<sup>52</sup> *United States v. Colasuonno*, 697 F.3d 164, 183 (2d Cir. 2012) (declining to amend a written judgment and citing *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003) (stating that ripeness requirement allows courts "to avoid becoming embroiled in adjudications that may later turn out to be unnecessary")).