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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15896

In the Matter of

EVERETT C. MILLER,

Respondent.

SECURITIES AND EXCHANGE COMMISSION'S DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF MAINTAINING THE BARS AGAINST RESPONDENT

I. INTRODUCTION

The Securities and Exchange Commission's Division of Enforcement respectfully requests that the Securities and Exchange Commission (the "Commission") not vacate the nationally recognized statistical rating organization ("NRSRO") and/or municipal advisor bars imposed on Respondent Everett C. Miller. *Everett C. Miller*, Initial Decision Rel. No. 3840, 2014 WL 2418766 (May 30, 2014). On February 1, 2017, the Commission asked the parties to submit briefs addressing whether the decision in *Koch v. SEC*, effects the imposition of these two bars. Because Respondent's conduct supporting imposition of these bars occurred, in part, after Dodd-Frank's enactment on July 22, 2010, there is no reason to vacate the NRSRO or municipal advisor bars.

II. BACKGROUND

On July 9, 2013, the United States Attorney's Office for the District of New Jersey filed a two count information, charging Respondent with securities fraud, in violation of 15 U.S.C. § 78j(b) and 78ff, and 17 C.F.R. § 240.10b-5, and tax evasion, in violation of 26 U.S.C. § 7201.

United States v. Everett C. Miller, 1:13-cr-00451-RMB, Dkt. 1 (July 9, 2013). The Information alleged that from August 2009 to December 2010, Respondent engaged in securities fraud when he (and his company) issued approximately $41 million in promissory notes and: (1) misrepresented how investor money would be used; (2) used investor money to finance his expensive lifestyle; and (3) misled investors about the risks of their investments. *Id.* at 3-4. On July 9, 2013, Respondent pled guilty and on June 4, 2015, he was sentenced to 120 months' imprisonment, three years' supervised release, and ordered to pay restitution of $22,339,810. *United States v. Everett C. Miller*, 1:13-cr-00451-RMB, Dkt. 20. *See also United States v. Miller*, 833 F.3d 274, 277 (3d Cir. 2016).

On May 30, 2014, the Commission issued a settled Order Instituting Proceedings ("OIP") against Respondent. *Miller*, 2014 WL 2418766 at *1. The proceeding was a follow-on proceeding based on Respondent's conviction in *United States v. Miller*. The OIP tracked the Information, and contained the following relevant facts:

(1) "From approximately June 2006 through December 2010, Miller was associated with Carr Miller Capital Investments LLC, an investment adviser . . . ." *Miller*, 2014 WL 2418766 at *1.

(2) "From approximately June 2006 through December 2010, Miller was chief executive officer, president, principal, and sole owner of Carr Miller Capital LLC ("CMC")." *Id.*

(3) "On July 9, 2013, Miller pled guilty to one count of securities fraud . . . before the United States District Court for the District of New Jersey, in *United States v. Everett C. Miller* . . . ." *Id.* at **1-2.

(4) "The criminal information to which Miller pled guilty alleged . . . that from approximately August 2009 through December 2010, Miller defrauded members of the investing public in conjunction with the offer and sale of securities in the form of CMC promissory notes (the 'notes') to approximately 40 investors in New Jersey, Pennsylvania, Texas, and elsewhere. Miller falsely represented to investors how their monies would be invested, by either failing to provide material information about the investments, or misleading them about the risks of the investments." *Id.* at *2.

Contemporaneously with the filing of the OIP, the Division of Enforcement filed Respondent's Offer of Settlement (the "Offer") which repeated the facts stated in the OIP. In the Offer, Miller agreed that pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, the Commission should bar him from "association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization . . . ." Pursuant to the settled OIP, the Commission barred Respondent from association with any municipal advisor or NRSRO.

III. ARGUMENT

The decision in *Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015), has no effect on this case. In *Koch*, in April 2011, the Commission instituted proceedings against registered investment adviser Koch Asset Management and its founder and principal Donald L. Koch, charging both with violations of the Exchange Act and Advisers Act and regulations thereunder based on Koch's efforts to manipulate three bank stocks. All of Koch's misconduct predated the enactment of Dodd-Frank. *Id.* at 157. Upon reviewing the ALJ's initial decision, the Commission affirmed and extended the sanctions against Koch to include a full collateral industry bar, including bars from association with a broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and NRSRO. *Id.* at 151.

Koch appealed the ruling to the Court of Appeals for the D.C. Circuit, arguing, among other things, that the Commission unlawfully retroactively applied certain sanctions under Dodd-Frank. On July 21, 2010 Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203, 124 Stat. 1376 (2010). Before Dodd-Frank, the Commission was empowered to bar individuals from "associating with various people in the securities world, including stock brokers, dealers, and investment advisers." *Koch*, 793 F.3d at 150 (citing 15 U.S.C. §§ 78o(b)(4)(F) & 80b-3(f)). Dodd-Frank expanded this power to allow the Commission to also bar securities law violators from associating with municipal advisors or rating organizations. *Koch*, 793 F.3d at 150.

The D.C. Circuit affirmed the Commission's decision in all respects except it found the Commission's imposition of the municipal advisor and NRSRO bars to be an impermissible retroactive application of Dodd-Frank. *Id.* at 158. With respect to the municipal advisor and NRSRO bars, however, the court highlighted that the Dodd-Frank provision empowering the Commission to impose such bars does not mention retroactive application, thereby suggesting Congress did not intend for the bars to apply retroactively. *Id.* at 157-58. The court then noted that at the time of Koch's pre-Dodd Frank misconduct, the Commission could not impose municipal advisor and NRSRO bars. *Id.* at 158. The court held that applying the municipal advisor and NRSRO provisions of the Act to pre-Dodd Frank conduct "attached a new legal consequence" for past conduct and therefore was impermissibly retroactive absent a clear and specific statement by Congress to the contrary. *Id.*

After *Koch*, the Commission vacated collateral bars from association with municipal advisors and national recognized statistical rating organizations for conduct that occurred prior to

July 22, 2010. *See, e.g.*, Phillips Dennis Murphy, Securities Exchange Act Release No. 76702, 2015 SEC LEXIS 5178, at *1 (Dec. 21, 2015); *Corey Ribotsky,* Investment Advisers Act Release No. 4396, 2016 SEC LEXIS 1888, at *1 (May 26, 2016); *Michael Antonio Zurita*, Securities Exchange Act Release No. 78467, 2016 SEC LEXIS 2678, at *1 (Aug. 2, 2016). The Commission even provided a form document to assist individuals seeking to vacate their municipal advisor or national recognized statistical rating organization bars and expedite the process.

Of course, the decision in *Koch* in no way effects cases like this, where Respondent's conduct occurred, at least in part, after Dodd-Frank's enactment. Respondent defrauded investors by selling CMC promissory notes from August 2009 through December 2010. Because Respondent's unlawful conduct occurred for five months after Dodd-Frank's enactment, he is subject to the new sanctions that Dodd-Frank created. *See Koch*, 793 F.3d at 150 (stating that post-Dodd-Frank "the Commission may also bar violators from associating with municipal advisors or 'nationally recognized statistical rating organizations.'") (citation omitted).

There is also no factual reason to vacate these bars. Barring Respondent from associating with municipal advisors or NRSRO is in the public interest. *See Steadman v. SEC*, 603 F.2d 1126, 1141 (5th Cir. 1979) (stating that in considering whether to issue an injunction the Commission ought to consider: "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations."). As the OIP makes clear, Miller was the primary architect of a securities fraud that repeatedly harmed more than forty investors in multiple states. And through his conduct, Miller and the businesses he

controlled took in almost $5 million dollars that he used to perpetuate the fraud and pay for a luxurious lifestyle. These facts demonstrate that Respondent's conduct was egregious, was not limited in scope, and involved a high degree of scienter. These facts support the continued imposition of the municipal advisor and NRSRO bars.

IV. CONCLUSION

For the reasons stated above, the Division of Enforcement respectfully requests that the Commission not vacate the municipal advisor and NRSRO bars imposed on Respondent.

Respectfully submitted,

Dated: March 1, 2017.

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STATEMENT OF FILING BY FACSIMILE

I hereby certify that, on this first day of March 2017, with respect to In the Matter of Everett C. Miller, Administrative Proceeding File No. 3-15896, I caused a true and correct copy of the Division of Enforcement's Memorandum of Law in Support of Maintaining the Bars Against Respondent to be filed via facsimile with the Office of the Secretary of the U.S. Securities and Exchange Commission pursuant to SEC Rule of Practice 151, 17 C.F.R. § 201.151. The facsimile was transmitted to (703) 813-9793.

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CERTIFICATE OF SERVICE

I hereby certify that, on this first day of March, 2017, with respect to In the Matter of Everett C. Miller, Administrative Proceeding File No. 3-15896, I caused a true and correct copy of the this filing to be served upon the following by first class mail:

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