Getting Back Into the Game – How Barred Financial Professionals Can Apply for Readmission to the Securities Industry Under SEC Rule of Practice 193

By Matthew P. Allen

Introduction

The procedures are not always clear for financial advisors seeking to reapply with a securities regulator to sell financial products and services after being barred from the securities industry. I've had occasion to navigate these procedures and offer what I hope is a helpful primer on the reapplication process. To make this article as useful as possible without turning it into a legal brief or magnum opus, I have limited my discussion to applications from professionals licensed and regulated by the U.S. Securities & Exchange Commission ("the Commission" or "the SEC") under SEC Rule of Practice 193.[1] However, the general principles discussed herein can be applied to professionals regulated by state regulators or self-regulated organizations like the Financial Industry Regulatory Authority ("FINRA"). Where relevant, I cite some of the applicable procedures and rules from FINRA and the Michigan Uniform Securities Act. A brief summary of the regulatory and licensing structures for federally regulated securities professionals is useful context for the reapplication discussion. So that is where this article begins.

Overview of Securities Regulatory & Licensing Structure for Financial Professionals

The purchase and sale of securities—and the provision of investment advice—in the United States is regulated by the Commission, as authorized by Congress under the Investment Advisers Act of 1940[2] and the Securities Exchange Act of 1934.[3] These retail securities services are generally provided by individuals that must be registered with and licensed by the Commission, a state securities regulator,[4] or a self-regulated organization.[5] The SEC regulates professionals associated with six classes of securities entities: broker dealers, investment advisors, municipal securities dealers, transfer agents, municipal advisors, and nationally recognized statistical rating agencies ("NRSROs").[6] The SEC wields significant power over these professionals, and it can impose criminal-like sanctions if the SEC determines that these individuals have violated the securities laws.[7] For example, Congress has provided the SEC with the power to suspend financial advisers, fine them, require them to disgorge ill-gotten gains, and as applicable here, bar them outright from participating in the securities industry.[8] An industry bar order is arguably the SEC's severest sanction because it cuts off a person's ability to earn a living in their chosen profession and industry.[9] These industry bars were made more onerous in 2010 when Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank"). Under Dodd Frank, Congress empowered the SEC to impose "collateral bars," which allows the SEC to bar someone from all six securities industry classes based on misconduct in only one class.[10] In other words, since 2010 the SEC has the power to bar someone from a securities profession they may not have even chosen, but are nonetheless restricted from choosing in the future.

Given the gravity and long reach of an industry bar, it stands to reason barred individuals may reapply to participate in the securities industry as long as the individual is "rehabilitated" and the public's interest is served and not harmed.

Reapplication Options for Licensed Financial Professionals

A securities industry bar order is issued by the SEC as part of a settlement by an SEC

administrative law judge as part of an administrative proceeding[11] or a federal court after an enforcement action filed by the SEC. The order will typically permit the barred individual to reapply for association "subject to the applicable laws and regulations governing the reentry process." Generally speaking, there are three options for a barred financial advisor to regain admission to the industry: 1) petition the SEC to modify or vacate the bar order; 2) broker dealer representatives can apply with FINRA to associate with a broker dealer;[12] or 3) a broker dealer or investment advisor representative can apply to associate with an investment advisor or broker dealer under SEC Rule of Practice 193. Since the SEC informally requires that a Rule 193 application be filed and rejected as a precondition to filing a petition to vacate a bar order,[13] and because Rule 193 does not permit a Rule 193 application to be filed concurrently with a FINRA application to associate,[14] this article focuses on Rule 193 applications to associate.

Reapplication Process Under SEC Rule of Practice 193

SEC Rule 193 allows someone to apply to the SEC for permission to associate with a broker dealer, an investment advisor, and several other classes of securities brokers, dealers, and agents. The following are five general steps to consider in framing and drafting a Rule 193 application to the SEC:

Step One — Know the Standard of Review and Your Audience

Rule 193 requires an application to "make a showing satisfactory to the Commission that the proposed association would be consistent with the *public interest*."[15] Though the public interest standard is not expressly defined, the long list of materials and undertakings required by the Rule is essentially the standard. Advocates should also research and use as illustrative authority Commission decisions on prior Rule 193 applications, and court decisions reviewing Commission decisions on Rule 193 applications. Though not required, it may make the application more persuasive to illustrate why your client's application is more like prior applications that have been granted than those which have not. In any event, it makes sense to ensure the application's clear and consistent theme is that the SEC granting your client's application is in the public interest.

The initial audience for your Rule 193 application will be the Chief Counsel for the SEC Division of Enforcement and his or her staff. The Commission has delegated authority to the Division of Enforcement to make a recommendation on the application to the five SEC commissioners who are appointed by the President of the United States with the advice and consent of the U.S. Senate.[16] Establishing a good working relationship with the division staff during this process is important for a variety of reasons, not the least of which is that it enables the lawyer to understand particular areas of concern the staff or the commissioners may have with an applicant or an application.

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Step Two—Understand and Implement into Your Application the Principles Distilled from Rule 193's Preliminary Note

Rule 193 is fairly unique in that it begins with a "Preliminary note" that does not contain formal or required elements but does contain important guideposts that a persuasive application should highlight. Distilled to its essence, the Preliminary note provides four principles around which the application should be drafted:

1. The application "must demonstrate that the proposed supervision, procedures, or terms and conditions of employment are reasonably designed to prevent a recurrence of the conduct that led to the imposition of the bar;"
2. An applicant's burden will be "difficult to meet" if the applicant proposes to be supervised by another barred individual, or seeks to become a sole proprietor of a registered entity with an absence of supervision;
3. An application will not be considered if it "attempts to reargue or collaterally attack the findings that resulted in the Commission's bar order."
4. Applicants would do well to include written statements from former customers and others who are "competent to attest to the applicant's character, employment performance, and other relevant information."[17]

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Step Three—Understand Whether You're Applying to Associate with a Self-Regulated Organization & the Effects That Decision Has on the Applicant's Burden in the Eyes of the SEC

Rule 193 provides for two classes of applications:

1. Applications from barred individuals who seek "to become associated with an entity that is ***not*** a member of a self-regulatory organization [SRO]" such as FINRA; "***or***"
2. The order barring the individual "contains a proviso that application may be made to the Commission after a specified period of time."[18]

Under a plain reading, a person can apply to associate with a non-SRO such as a registered investment advisor. But if a person applies to associate with a member of an SRO—such as a broker-dealer member of FINRA—that person's bar order must contain a proviso that permits a the barred person to reapply after a certain period of time. There is some controversy over how a bar order with a general right to reapply, but without a proviso permitting reapplication after a certain period of time, affects applicants who do not seek to associate with an SRO. Therefore, it's important for securities lawyers negotiating securities fraud settlements with the SEC or FINRA to understand the effect of the language of any bar order in the eyes of the SEC if their client wants to reapply down the road.

a) The Commission's Interpretation of "Qualified" and "Unqualified" Bar Orders

The SEC has taken the position that a bar order that does not contain a provision permitting reapplication after expiration of a certain period of time is an "unqualified," permanent bar. The genesis of this position is found in a half-page 1994 letter from two Commission division directors to the National Association of Securities Dealers ("NASD") (now FINRA), the New York Stock Exchange, and the American Stock Exchange addressing broker dealers and disqualifications under the Securities Exchange Act of 1934 ("1994 Letter").[19] The 1994 Letter generally addresses applications by barred individuals seeking to associate with an SRO, where the individuals' "bar orders do not contain any proviso for reapplication for such association after the expiration of a specified period of time (i.e., unqualified bars)."[20] The 1994 Letter takes the position that these "unqualified bars" reflect "a particularly severe sanction and [are] reserved for egregious cases."[21] The 1994 Letter opines that these unqualified bars in egregious cases are permanent unless an applicant demonstrates "extraordinary circumstances." But the 1994 Letter does not define "egregious cases," "extraordinary circumstances," explain the test to be applied in such cases, nor provide examples of how these standards can be satisfied. Critically, the 1994 Letter does not address advisor representatives who seek to associate with non-SRO entities. Despite this, the SEC has applied its interpretation of unqualified bars to applications to non-SRO entities.

The critical point is that securities lawyers negotiating settlements that include bar orders should pay close attention to the issue of whether it contains language permitting reapplication within a specified period of time since it may result in a higher reapplication standard later on.

b) Does the 1994 Letter Apply to Investment Advisor Representatives Who Seek to Associate with Entities That Are Not SROs?

When Rule 193 was first introduced as Rule 29 in 1983, the Commission signaled that only bar orders against SRO broker dealer representatives needed to state a period of time before reapplication. Commission bar orders for investment advisor representatives, on the other hand, did not seem to require any reapplication time period in the order to permit an advisor to reapply under the Rule, as indicated in the notice of proposed rulemaking explaining Rule 29 ("1983 Release").[22] The Commission stated that "the procedural channels available to applicants barred by Commission order to obtain the necessary Commission consent depend upon (a) the entity with which the applicant seeks to become associated; and (b) the terms of the order imposing the bar."[23] The Commission then explained the different procedural channels for SRO and non-SRO applicants: an individual seeking to reapply with a broker dealer that was a member of an SRO could reapply with the SRO or the Commission if the bar order contained a "proviso that application may be made 'to the Commission' after a specified period of time," and otherwise to the SRO only.[24] Investment advisor representatives, on the other hand, could reapply to the Commission to associate with a non-SRO entity investment advi-

sor regardless of whether their bar order contained a reapplication time period proviso.[25]

The current version Rule 193 has kept these separate reapplication standards for applicants seeking to associate with SRO versus non-SRO entities.[26] And the 1994 Letter seemed aimed at SRO applicants since it only addressed 1934 Securities Exchange Act disqualifications, was sent to the NASD and the New York Stock Exchange, was issued only as an Exchange Act and not an Advisers Act release, and specifically addressed only "such persons" barred under the 1934 Exchange Act (who are SRO members).[27] One can argue that the plain language of the 1994 Letter indicates that its higher standard for "unqualified bars" was not intended to apply to investment advisor representative applications to associate with non-SRO entities.[28]

c) Does the 1994 Letter Bind the Commission, and If So, Is It Valid Under the Administrative Procedures Act?

The standards set forth in the 1994 Letter are not found in Rule 193, were not subject to the SEC's rule-making process, were not the product of adversarial briefing, and did not seek to apply specific facts in a specific dispute to articulable legal standards. These factors could be applied to legal authority to argue to the Commission that it should not apply the standards in the 1994 Letter to a Rule 193 application.[29]

Application of the 1994 Letter may also be challengeable under the Administrative Procedures Act (APA). Under the APA, federal administrative agencies like the Commission must use the notice and comment procedures under the APA when it issues "legislative rules," but not when it issues "interpretive rules." "Legislative rules impose new rights or duties and change the legal status of regulated parties; interpretive rules articulate what an agency thinks a statute means or remind parties of preexisting duties."[30] The U.S. Supreme Court has required APA notice and comment procedures to be followed when a federal agency "wishes to issue a new interpretation of a regulation that deviates significantly from the one the agency has previously adopted."[31]

If the 1994 Letter is interpreted as imposing industry reassociation rules and standards found nowhere in Rule 193, the 1994 Letter could be found to have "the 'force and effect of law'" and thus be a legislative rule required to undergo the APA notice and comment procedures.[32]

If the 1994 Letter is found to effectively amend Rule 193 as a legislative rule, it would run afoul of the APA since the 1994 Letter was not issued under APA notice-and-comment procedures.

d) Assuming the 1994 Letter Applies to a Bar Order with No Timeframe to Reapply, the Rule 193 Application May Need to Address Whether the Facts That Led to the Bar Were "Egregious" as Contemplated by the 1994 Letter, and If So, Whether the Application Demonstrates "Extraordinary Circumstances" to Permit Reassociation

The 1994 Letter takes the position that these "unqualified bars"—containing no time frame by which to reapply—reflect "a particularly severe sanction and [are] reserved for egregious cases."[33] The 1994 Letter says that in these "egregious circumstances," an unqualified bar order is "permanent" unless an applicant can demonstrate "extraordinary circumstances."[34] The 1994 Letter does not define "egregious cases," "extraordinary circumstances," explain the test to be applied in such cases, nor provide examples of how that test can be satisfied.

As examples of "egregious cases," the 1994 Letter cites two Commission opinions: *In re Lester Kuznetz*, SEC Release No. 23526, 1986 WL 625417 (Aug 12, 1986), and *In re Stephanie Hibler*, Release No. 22067, 1985 WL 548465 (May 23, 1985).[35] Therefore, an argument can be made that *Kuznetz* and *Hibler* are the standards by which "egregious" must be interpreted as used in the 1994 Letter.[36] The next step would be to explain to the Commission that the applicant's case is not like these two cases cited in the 1994 Letter, therefore the applicant's case is not "egregious," and thus the heightened standard of review in the 1994 Letter does not apply.

Kuznetz involved a registered representative of a broker dealer selling over 100,000 shares of a single, very risky company stock to all of his clients. Kuznetz went a step further and sold this risky stock on margin to his customers. He told his clients this risky stock was "guaranteed" and "riskless," and that it would more than double in value. Kuznetz based his fraudulent statements on patently unreliable inside information. Kuznetz never told his customers the stock lost over $9 million in value, and he never repaid the investors harmed by his fraud.

Hibler involved a registered representative of a broker dealer who was criminally

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convicted of securities fraud. Hibler sold a single company stock to her clients without disclosing that she received "substantial payments" from the company to do so. Hibler sough to reapply 14 months after her bar order entered. The NASD approved Hibler's reapplication, but the Commission denied it. The Commission said that not enough time had elapsed since the bar order, and that the supervisory procedures proposed for Hibler were insufficient.

Taking the relevant facts of *Kuznetz* and *Hibler*, an argument can be made that "egregious cases" involve the following facts:

- An act by a registered representative
- A criminal conviction for securities fraud
- Taking bribes to sell risky, individual stock
- Guarantying returns on risky stock
- Misappropriating material inside information
- Promising that a stock would double in value
- Selling individual stocks to customers on margin
- Not paying disgorgement and penalty amounts required in the bar order.

Similarly, the 1994 Letter does not indicate when someone with an egregious case can demonstrate "extraordinary circumstances" sufficient to reassociate.

Similarly, the 1994 Letter does not indicate when someone with an egregious case can demonstrate "extraordinary circumstances" sufficient to reassociate. There is a dearth of any SEC authority that attempts to analyze this "extraordinary circumstances" standard. One case is *In re Matthew Sample*, Release No. 4193, 2015 WL 5305992 (Sept. 10, 2015). In *Sample,* a financial advisor used an unregistered hedge fund to run a Madoff-type Ponzi scheme. The advisor took money for fabricated investments and spent it on himself or paid fake returns to earlier investors. The advisor never repaid any of the money he stole. Sample filed his Rule 193 application only two months after the Commission imposed its bar order against him.

After applying the Rule 193 factors, the Commission indicated that the following five factors prevented Sample from showing "extraordinary circumstances" as used in the 1994 Letter:

- Sample waited less than two months after his bar order to file his Rule 193 application
- The employment offer from the registered investment advisor in Sample's application was conditioned on various events that may never occur, namely approval for hiring Sample from clients and the registered investment advisor's parent company
- The supervisory procedures in Sample's proposed compliance plan did not ensure that the misconduct that led to his bar would not reoccur
- Sample did not repay the investors he defrauded
- Sample submitted two client letters saying they supported Sample returning to the industry, but only because it was their best hope at recovering their losses.

Practitioners can argue that if these five factors are not present in their applicant's case, or are somehow different, then the applicant can demonstrate extraordinary circumstances.

Step Four—Satisfy All of the Remaining Requirements Under Rule 193 to Complete the Application to Associate

Boiled down to its essence, a Rule 193 Application must contain the following materials:

1. A copy of the SEC order imposing the bar
2. An undertaking by the applicant to notify the SEC if any information submitted in support of the application becomes materially false or misleading while the application is pending
3. A copy of the relevant draft registration form depending on which securities entity the applicant seeks to become associated
4. A written statement from the applicant's proposed employer that describes:
   - The terms and conditions of employment and supervision to be exercised over the applicant
   - The qualifications, experience, and disciplinary records of the proposed supervisor(s) of the applicant
   - The compliance and disciplinary history, during the two years preceding the filing of the application, of the office in which the applicant will be employed; and
   - The names of any associated persons in the same office who have

been previously barred by the Commission, and whether they will supervise the applicant

5. An affidavit by the applicant addressing each of the following:
   - The time period since the imposition of the bar
   - Any restitution or similar action by the applicant to repay any person injured by the misconduct that led to the bar
   - The applicant's compliance with the bar order
   - The applicant's employment during the period subsequent to the bar order
   - The capacity or position in which the applicant proposes to be associated
   - The manner and extent of supervision to be provided over or by the applicant
   - Any relevant courses, seminars, examinations or other action by the applicant to prepare for his or her return to the securities business
   - Any other information material to the application.[37]

Step Five—Understand the Unique SEC Procedures, Formatting, and Electronic Filing System

A full analysis of all of the various procedures and rules governing a Rule 193 application, and lawyers practicing before the Commission, are beyond the scope of this article. Applications should ideally be handled by someone with experience practicing before the SEC. But at a minimum practitioners should review and understand the SEC's Rules of Practice in general,[38] and the relatively new rules pertaining to electronic filing and service under the Commission's Electronic Filings in Administrative Proceedings (eFAP) system.[39]

Procedure to Appeal Adverse Determination on a Rule 193 Application

SEC Rule 193 requires the staff to provide written notice to the applicant that the staff will recommend that the Commission deny the application. The applicant then has 30 days to submit a statement in response to the recommendation.[40] Once the applicant receives an order from the Commission denying the Rule 193 application, the applicant has 60 days to file a petition in the United States Court of Appeals for the circuit in which the applicant resides or has his principal place of business.[41]

Conclusion

An order barring someone from participating in the securities industry is one of the SEC's most severe sanctions. Financial professionals subject to such bar orders should understand their rights to have the Commission consider an application by them to rejoin their chosen profession under SEC Rule of Practice 193. I hope this article provides financial professionals and their lawyers some helpful tips about that application process.

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NOTES

1. 17 CFR 201.193.
2. Section 203(f), 15 USC 80b-3.
3. Sections 15(b), 15B(c), and 17A(c), 15 USC 78o(b), 78o-4(c), 78q-1(c).
4. The SEC oversees investment advisors with $100 million or more of assets under management, and state securities regulators oversee advisors with less than $100 million. While this article is limited to application of the rules specific to regulated securities professionals reapplying with the SEC, the general principles it outlines apply to applications to any securities regulator to reassociate as a professional in the securities industry. For example, the principles discussed herein for applications filed with the SEC can be applied to the laws and rules governing state-regulated securities professionals in the State of Michigan under the Michigan Uniform Securities Act, *see* MCL 451.2101 – 2703, the implementation of which is accomplished by rules issued from the Securities Division of the Michigan Corporations, Securities, and Commercial Licensing Bureau, *see* Mich Admin Code r. 451.1.1 – 451.6.2.
5. For example, FINRA is a self-regulated organization answerable to the SEC and which regulates securities broker dealers and their "registered representatives." See discussion infra note 12 for a summary of the FINRA reapplication process.
6. *See* 15 USC 80b-3, 78o, 78o-4, & 78q-1.
7. For example, the SEC launched a "Cooperation Initiative" in 2010 that was molded in the image of the criminal cooperation tools more traditionally employed by the U.S. Department of Justice (DOJ), such as cooperation, deferred prosecution, nonprosecution, and immunity agreements. *See* SEC Enforcement Manual 6.2.1 – 6.2.4 (analyzed in Matthew P. Allen, *The SEC Cooperation Initiative And Its Criminal Roots* (Feb. 27, 2013), www.millercanfield.com/MattAllen#publications-events (presented with the then-SEC Regional Director in Chicago at the ABA Section of Litigation Annual Meeting).
8. *See generally Gabelli v SEC*, 568 US 442, 451-52 (2013). So influential is the SEC over the securities industry it simultaneously regulates and adjudicates that sometimes financial firms and professionals settle disputes with the SEC simply to avoid litigating a disputed issue with the same agency that licenses and supervises

them. *See, e.g., Hefty Wall Street Fines Surge Under Biden's SEC*, Wall St J, Oct. 29-30, 2022 at A2.

9. *See, e.g., Steadman v SEC*, 603 F2d 1126, 1139-41 (5th Cir 1979).

10. *See generally Bartko v Securities & Exch Comm'n*, 845 F3d 1217, 1220-21 (5th Cir 2017).

11. It is relevant to note that the U.S. Supreme Court and federal appellate courts around the country have begun to sharply limit the authority of federal administrative agencies, including the SEC. For example, the Supreme Court has recently agreed to decide whether a respondent in a pending SEC administrative case may sue the SEC in federal court to challenge the constitutionality of the restrictions on removal of SEC administrative law judges (ALJs). *See Securities & Exch Comm'n v Cochran*, ___ US ___, 142 S Ct 2773 (2022). And recently the U.S. Court of Appeals for the Fifth Circuit found that it is unconstitutional for the SEC to prosecute securities fraud cases in its in-house administrative proceedings before its own ALJs. *See Jarkesy v Securities & Exch Comm'n*, 34 F4th 446 (5th Cir 2022) (analyzed in Matthew P. Allen, *Federal Court Calls Unconstitutional the U.S. Securities & Exchange Commission's In-House Administrative Proceedings for Securities Fraud Cases*, National L Rev (May 24, 2022)).

12. A broker-dealer representative subject to an industry bar is subject to a "statutory disqualification" from the securities industry under the FINRA Bylaws and the 1934 Securities Exchange Act. *See generally* FINRA Bylaws Art. III, §§3-4; 15 USC 78c(a)(39)(A), (B)(i)(I). A statutorily disqualified broker must submit a FINRA MC-400 Application for Membership Continuance with FINRA to reapply for FINRA membership. FINRA's National Adjudicatory Council reviews and either accepts or rejects the application. If the National Adjudicatory Council accepts the application, it must submit the application to the SEC for approval pursuant to Exchange Act Rule 19h-1, *see* 17 CFR 240.19h-1.

13. *See, e.g, In re Gregory Osborn*, SEC Release No 10641, 2019 WL 2324337, *3 (May 31, 2019); *In re Michael H Johnson*, SEC Release No 75894, 2015 WL 5305993, *4 (Sept 10, 2015).

14. *See* 17 CFR 201.193(g).

15. *Id.* at 193(d) (emphasis added).

16. *See* 17 CFR 200.30-4(a)(5). In an attempt to ensure that the Commission remains nonpartisan, no more than three Commissioners may belong to the same political party. Each Commissioner serves a five-year term, which terms are staggered so that one Commissioner's term ends on June 5 of each year. The President designates one of the Commissioners as the Chairman, which is the Commission's top executive.

17. *Id.* at 193(a).

18. *Id.* at 193(b) (emphasis added).

19. SEC No-Action Letter, Release No 34720, 1994 WL 761717 (Sept. 26, 1994) (the "1994 Letter").

20. *Id.* at 1 n.1 (citing statutory disqualifications under the Exchange Act).

21. *Id.* at 1.

22. *See Applications by Barred Individuals for Consent to Associate with a Registered Broker, Dealer, Mun. Sec. Dealer, Inv. Advisor, or Inv. Co.*, Release No 891, 1983 WL 33950, *4 (Nov 18, 1993) ("1983 Release").

23. *Id.*

24. *Id.*

25. *See id.*

26. *See* Rule 193(b)(1)-(2).

27. *See* 1994 Letter at 1 & n.1 (limiting discussion to "such persons" subject to unqualified bar orders with no reapplication time period proviso who seek to become "associated with a member of an SRO ….").

28. After the 1994 Letter issued, the U.S. Court of Appeals for the District of Columbia Circuit held that bar orders issued under the 1934 Securities Exchange Act against SRO representatives at the time the 1994 Letter was issued did not collaterally bar individuals as investment advisers under the Investment Advisors Act of 1940. *See Teicher v SEC*, 177 F3d 1016, 1021-22 (DC Cir 1999); *see also Comm'n Vacates in Part Admin. Bar Order Against William Masucci*, Exchange Act Release No. 53121, 2006 WL 75229 (Jan 13, 2006). One can argue this confirmed that the 1994 Letter could not apply to non-SRO members. However, as part of the 2010 Dodd-Frank Act, Congress empowered the Commission to impose collateral bars across industries starting in 2010. *See Bartko v Securities & Exch Comm'n*, 845 F3d 1217, 1220-21 (DC Cir 2017). A question remains as to whether the Dodd-Frank amendment retroactively applies the 1994 Letter to non-SRO member applicants.

29. *See Christensen v Harris Cty*, 529 US 576, 586-87 (2000) (Commission interpretative letters are not binding); *New York City Emps Ret Sys v SEC*, 45 F3d 7, 12-13 (2d Cir 1995) (same); *In re FXC Investors Corp*, Release No. 218, 2002 WL 31741561, *9-11 (Dec. 9, 2002) (same); *Securities & Exch Comm'n v Chenery Corp*, 318 US 80, 93-94 (1943) (holding that "the grounds upon which [a Commission] order must be judged are those upon which the record discloses that its action was based," and rejecting a Commission order that, like the 1994 Letter, is based on neither a Commission rulemaking procedure nor a specific application of "a particular set of facts" to law in a particular dispute) (quoted in *Beck v Securities & Exch Comm'n*, 413 F2d 832, 833-34 (6th Cir 1969)).

30. *Mann Constr, Inc v United States*, 27 F4th 1138, 1143 (6th Cir 2022).

31. *Perez v Mortgage Bankers Ass'n*, 575 US 92, 95 (2015).

32. *See Mann Constr, Inc*, 27 F4th at 1143 (6th Cir 2022) (holding that IRS notice was legislative because, like the 1994 Letter, it imposed standards that did not arise from a statute or a notice and comment rule); *see also New York City Emps' Ret Sys*, 45 F3d at 13 (2d Cir 1995) (holding that a Commission letter is legislative and has legal effect if it "effectively amends a prior legislative rule.").

33. 1994 Letter at 1.

34. *Id.*

35. *See* 1994 Letter at 1 & n4.

36. *See Chenery Corp*, 318 US at 93-94 (holding that "the grounds upon which [a Commission] order must be judged are those upon which the record discloses that its action was based …"); *see also Beck v Securities & Exch Comm'n*, 413 F2d 832, 833-34 (6th Cir 1969).

37. *See* Rule 193(c), (e).

38. 17 CFR 201.100 – 900.

39. *See* www.sec.gov/eFAP.

40. *See* Rule 193(f).

41. *See* 15 USC 78y(a) (Securities Exchange Act of 1934); 15 USC 80b-13(a) (Investment Advisers Act of 1940).

Matthew P. Allen is a securities, white collar, and business litigator and trial lawyer at Miller Canfield. He has tried and arbitrated a wide variety of cases, ranging from felony matters in Detroit's criminal courts to bet-the-company securities and international intellectual property cases. He also is a skilled appellate lawyer who has handled a variety of cases in state and federal appellate courts.