

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 33-10900; 34-90623; IA-5644; IC-34134]

Delegation of Authority to Director of the Division of Enforcement

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is revising its regulations with respect to the delegations of authority to the Director of the Division of Enforcement. These revisions are the result of the Commission’s experience with its nonpublic investigations, litigation in Federal court, and disgorgement and Fair Fund plans in administrative and cease-and-desist proceedings instituted by the Commission. The revisions are intended to conserve Commission resources and make Commission operations more efficient by delegating to the Director the discretion to take the actions described below.

DATES: Effective December 29, 2020.

FOR FURTHER INFORMATION CONTACT: Joseph K. Brenner, Chief Counsel, at (202) 551-5055, Division of Enforcement, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-6553.

SUPPLEMENTARY INFORMATION:

Background

The Commission is revising its delegations of authority to the Director of the Division of Enforcement as a result of its experience with its nonpublic investigations, litigation in Federal court, and disgorgement and Fair Fund plans in administrative and cease-and-desist proceedings

instituted by the Commission. The revisions are intended to conserve Commission resources and make Commission operations more efficient. Congress has authorized such delegation by Public Law No. 87-592, 76 Stat. 394, 15 U.S.C. 78d-1(a), which provides that the Commission “shall have the authority to delegate, by published order or rule, any of its functions to . . . an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business or matter.”

The Commission is authorized to bring actions in United States District Court seeking injunctive and other relief for violations of the Federal securities laws and regulations. *See* Section 20(b) of the Securities Act of 1933 (15 U.S.C. 77t(b)); Section 21(d)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(1)); Section 42(d) of the Investment Company Act of 1940 (15 U.S.C. 80a-41(d)); Section 209(d) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-9(d)). With respect to Federal court litigation, the Commission routinely authorizes its staff to commence litigation against particular parties seeking particular relief. The addition of 17 CFR 200.30-4(a)(18) will allow the Director to carry out these authorizations more efficiently by taking the following actions: (i) dismissing claims against entities that are defunct, the subject of bankruptcy proceedings, or without material assets; and (ii) dismissing claims against persons or entities that are duplicative of other pending claims against those persons or entities.

The Commission is authorized to conduct investigations concerning potential violations of the Federal securities laws and regulations and, as part of those investigations, to require the production of records. *See* Section 19(c) of the Securities Act of 1933 (15 U.S.C. 77s(c)); Section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)); Section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a-41(b)); Section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-9(b)). Pursuant to Section 21(h)(4)(A) of the Securities

Exchange Act of 1934, (15 U.S.C. 78u(h)(4)(A)), United States District Courts are authorized to issue orders delaying prior notice of a subpoena for records subject to the Right to Financial Privacy Act (12 U.S.C. 3401 *et seq.*) and prohibiting financial institutions from disclosing that records have been sought or obtained. The addition of 17 CFR 200.30-4(a)(19) will authorize the Director to file applications in United States District Court with respect to such orders.

The Commission is authorized to deny, suspend the effective date of, suspend for a period not exceeding 12 months, or revoke the registration of a security if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of the security has failed to comply with the Federal securities laws or regulations. *See* Section 12(j) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(j)). The Commission also is authorized to suspend trading in any security (other than an exempted security) for a period not exceeding ten business days if, in its opinion, the public interest and protection of investors so require. *See* Section 12(k)(1)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(k)(1)(A)). The addition of 17 CFR 200.30-4(a)(20) will authorize the Director to institute public administrative proceedings pursuant to Section 12(j) with respect to a security based on the issuer's alleged failure to file required periodic reports and, in connection with the institution of such proceedings, issue an order pursuant to Section 12(k)(1)(A).

In administrative and cease-and-desist proceedings instituted by the Commission to enforce the Federal securities laws, the Commission, in the exercise of its discretion, may distribute to investor victims amounts collected as disgorgement, prejudgment interest, and civil money penalties. *See* Section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7261). The addition of § 200.30-4(a)(21) will improve the efficiency of the Commission's distribution processes by authorizing the Director to: (i) grant extensions of time to submit proposed

distribution plans to the Commission; (ii) appoint tax administrators, pursuant to a Commission-approved omnibus order; (iii) publish notice of proposed plans, including plans that omit elements required by 17 CFR 201.1101, Rule 1101 of the Commission's Rules on Fair Fund and Disgorgement Plans; (iv) issue orders adopting plans as to which no negative comments have been received; (v) approve disbursements to investors in accordance with the plans; (vi) approve payment of the fees and expenses of administration; and (vii) approve final fund accountings.

The Division of Enforcement will report periodically to the Commission on the Director's use of these delegations. Notwithstanding these delegations, the Director may submit any matter he or she believes appropriate to the Commission. Furthermore, any action taken by the Director pursuant to delegated authority is subject to Commission review as provided by 17 CFR 201.430 and 201.431 and 15 U.S.C. 78d-1(b), Rules 430 and 431 of the Commission's Rules of Practice.

Administrative Law Matters

The Commission finds, in accordance with the Administrative Procedure Act ("APA"), that this amendment relates solely to agency organization, procedure, or practice. Title 5 U.S.C. 553(b)(3)(A). Accordingly, the APA's provisions regarding notice of rulemaking and opportunity for public comment are not applicable. These changes are therefore effective on December 29, 2020. In accord with the APA, we find that there is good cause to establish an effective date less than 30 days after publication of these rules. 5. U.S.C. 553(d). These rules do not substantially affect the rights or obligations of non-agency parties and pertain to increasing efficiency of internal Commission operations. For the same reasons, the provisions of the Small Business Regulatory Enforcement Fairness Act are not applicable. *See* 5 U.S.C. 804(3)(C) (the term "rule" does not include "any rule of agency organization, procedure, or practice that does

not substantially affect the rights or obligations of non-agency parties”). Additionally, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 60 *et seq.*, which apply only when notice and comment are required by the APA or other law, are not applicable. *See* 5 U.S.C. 601(2). These amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995. *See* 5 CFR 1320.3. Further, because these amendments impose no new burdens on private parties, the Commission does not believe that the amendments will have any impact on competition for purposes of Section 23(a)(2) of the Exchange Act. 15 U.S.C. 78w(a)(2).

Statutory Authority

This rule is adopted pursuant to statutory authority granted to the Commission, including Section 19 of the Securities Act, 15 U.S.C. 77s; Sections 4A, 4B, and 23 of the Exchange Act, 15 U.S.C. 78d-1, 78d-2, and 78w; Section 38 of the Investment Company Act, 15 U.S.C. 80a-37; Section 211 of the Investment Advisers Act, 15 U.S.C. 80b-11; and Section 3 of the Sarbanes-Oxley Act, 15 U.S.C. 7202.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies).

Text of Amendments

For the reasons set out in the preamble, the Commission is amending title 17, chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A – Organization and Program Management

1. The authority citation for part 200, subpart A, continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77o, 77s, 77z-3, 77sss, 78d, 78d-1, 78d-2, 78o-4, 78w, 78ll(d), 78mm, 80a-37, 80b-11, 7202, and 7211 *et seq.*, unless otherwise noted.

* * * * *

2. Section 200.30-4 is amended by adding paragraphs (a)(18) through (21) to read as follows:

§ 200.30-4 Delegation of authority to Director of Division of Enforcement.

* * * * *

(a) * * *

(18) With respect to enforcement proceedings in Federal court, to:

(i) Dismiss claims against entities that are defunct, the subject of Federal or foreign bankruptcy proceedings, or without material assets; and

(ii) Dismiss claims against persons or entities that duplicate or overlap with other pending claims against those persons or entities, unless the dismissal would involve claims requiring a higher level of intent than that required by the remaining claims, result in a reduction of disgorgement available for the claims in the Commission's complaint, or eliminate the statutory basis for a bar sought in the Commission's complaint.

(19) To file applications in Federal court to seek an order pursuant to section 21(h)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(h)(2)) in connection with investigations pursuant to section 19(c) of the Securities Act of 1933 (15 U.S.C. 77s(c)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a-42(b)), and section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-9(b)).

(20) To institute proceedings pursuant to section 12(j) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(j)) with respect to a security based on the issuer's alleged failure to file required periodic reports and, in connection with the institution of such proceedings, issue orders pursuant to section 12(k)(1)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(k)(1)(A)).

(21) With respect to disgorgement funds and Fair Fund plans established in administrative or cease-and-desist proceedings instituted by the Commission pursuant to the Federal securities laws, to:

- (i) Grant extensions of time to submit proposed distribution plans to the Commission;
- (ii) Appoint tax administrators, pursuant to a Commission-approved omnibus order;
- (iii) Publish notice of proposed plans, including plans that omit elements required by § 201.1101 of this chapter (Rule 1101 of the Rules on Fair Fund and Disgorgement Plans);
- (iv) Issue orders adopting plans as to which no negative comments have been received;
- (v) Approve disbursements to investors in accordance with the plans;
- (vi) Approve payment of the fees and expenses of administration; and
- (vii) Approve final fund accountings.

* * * * *

By the Commission.

Dated: December 10, 2020.

Vanessa A. Countryman,

Secretary.