OPINION OF COMMISSIONER GALLAGHER, concurring in part and dissenting in part with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations.

I concur with the judgment, except that I respectfully dissent from the imposition of municipal advisor and nationally recognized statistical rating organization ("NRSRO") bars against the respondent.

I. Background and Proceedings Below

This matter arises out of the misconduct of respondent John W. Lawton, who committed multiple violations of the antifraud provisions of the securities laws.[1] The respondent's misconduct resulted in the imposition of a permanent injunction against him in July 2009, as well as a criminal conviction.[2] All of the respondent's misconduct occurred before the July 21, 2010 enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Dodd-Frank").[3]

In December 2010, after passage of the Dodd-Frank Act, the Commission instituted follow-on administrative proceedings against the respondent under the Investment Advisers Act of 1940 ("Advisers Act"), relying solely on the permanent

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[1] *In the Matter of John W. Lawton*, Investment Advisers Act Release No. 3513, at 4 (Dec. 13, 2012), available at http://www.sec.gov/litigation/opinions/2012/ia-3513.pdf [hereinafter *Maj. Op.*].

[2] *Id.* at 4-5.

[3] *See id.* at 2-3 (noting, *inter alia*, that the Division of Enforcement's complaint against the respondent was filed on February 18, 2009 – i.e., before the passage of the Dodd-Frank Act).

injunction as the jurisdictional predicate.[4] In April 2011, the law judge issued an initial decision by summary disposition, barring the respondent from associating with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent.[5] The law judge rightfully declined to impose municipal advisor or NRSRO bars against the respondent, holding that to impose those bars – based entirely on pre-Dodd-Frank misconduct – would have given impermissible retroactive effect to the collateral bar provisions of the Dodd-Frank Act.[6]

The law judge's imposition of the investment adviser bar was non-collateral – that is, it was an Advisers Act sanction imposed in a follow-on administrative proceeding authorized under the Advisers Act itself. In contrast, the broker, dealer, municipal securities dealer, and transfer agent bars were imposed collaterally – that is, they were imposed in an administrative proceeding authorized solely under the Advisers Act even though those bars are not authorized under the Advisers Act, but rather are authorized under the provisions of a separate statute, the Securities Exchange Act of 1934 ("Exchange Act").

Before Dodd-Frank, the Commission did not impose collateral bars following the decision of the United States Court of Appeals for the District of Columbia in *Teicher v.*

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[4] *Id.* at 5.
[5] *Id.* at 5-6.
[6] *See id.* at 6; *see generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 925, 124 Stat. 1376, 1850-51 (2010) (codified at 15 U.S.C. §§ 78o(b)(6)(A), 78o–4(c)(4), 78q–1(c)(4)(C), 80b–3(f)) (amending Securities Exchange Act of 1934 Sections 15(b)(6)(A), 15B(c)(4), and 17A(c)(4)(C) and Advisers Act Section 203(f) to provide the Commission with collateral bar authority) [hereinafter *Dodd-Frank Act*].

SEC.[7] Section 925 of the Dodd-Frank Act, however, amended the federal securities laws to provide the Commission with express authority to impose collateral bars.[8] Section 925 also created the new municipal advisor and NRSRO bars.[9]

In the proceedings below, the law judge was presented with the question of whether the Commission has the authority to impose collateral broker, dealer, municipal securities dealer, and transfer agent bars retrospectively without giving impermissible retroactive effect to Section 925 of the Dodd-Frank Act, and concluded that it does.[10] The law judge also was presented with another important question, which arises from the Dodd-Frank Act's creation, from whole cloth, of two entirely new bars, namely, the municipal advisor and NRSRO bars.

Before the Dodd-Frank Act, those bars did not exist, and the Commission did not have statutory authority to suspend or bar someone from association with a municipal advisor or NRSRO.[11] Thus, before the passage of the Dodd-Frank Act, no person

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[7] 177 F.3d 1016 (D.C. Cir. 1999). Before *Teicher*, the Commission freely imposed collateral bars. In *Teicher*, the D.C. Circuit held that the Commission did not have statutory authority to impose collateral bars absent a nexus between the respondent and another branch of the securities industry for which the Commission had suspension and bar authority (a nexus such as the respondent being in, or seeking to enter, such other branch of the securities industry). *See id.* at 1020-21. Following the D.C. Circuit's decision in *Teicher*, the Commission refrained from imposing collateral bars until it was given explicit statutory authority to do so by the Dodd-Frank Act. *See Dodd-Frank Act* § 925.

[8] *See Dodd-Frank Act* § 925.

[9] *Id*.

[10] *Maj. Op.* at 7-8 n.16.

[11] Indeed, the Commission has only had authority over NRSROs since the passage of the Credit Rating Agency Reform Act in 2006 and over municipal advisors since they were created by Dodd-Frank in 2010.

committing a securities law violation could reasonably have been on notice that the Commission had the authority to bar persons from working in the municipal advisor or NRSRO branches of the securities industry. This gives rise to the central question in this case: even if the Commission does have the authority to impose certain bars collaterally and retrospectively, would the retrospective imposition of the two new Dodd-Frank bars – based entirely on pre-Dodd-Frank conduct – give impermissible retroactive effect to Section 925 of the Dodd-Frank Act? I agree with the law judge that it would and therefore dissent from the imposition of those two bars against the respondent.

II. Governing Legal Standard

The Supreme Court's leading precedent on retroactivity is *Landgraf v. USI Film Products*.[12] In that case, the Court explained the rationale underlying the longstanding reluctance of courts to give statutes retroactive effect: "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[13] "For that reason," the Court continued, "the principle that the legal effect of conduct should

[12] 511 U.S. 244 (1994).

[13] *Id.* at 265 (citations omitted); *see also Statement of Commissioner Troy A. Paredes at Open Meeting to Propose Rules Regarding Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings* at 1, available at http://www.sec.gov/news/speech/2011/spch052511tap-item1.htm.

ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."[14]

The legal test laid out in *Landgraf* for determining whether the presumption against retroactivity may be overcome begins with the question of whether Congress "has expressly prescribed the statute's proper [temporal] reach."[15] If so, then the inquiry is over, and the statute should be interpreted in accordance with its explicit terms. Although Section 925 of the Dodd-Frank Act is silent on its temporal reach, the statute does expressly provide an effective date of one day after enactment (i.e., July 22, 2010), unless otherwise specified in the text.[16]

There is a reasonable argument that the effective date provision is a statement of Congressional intent that, unless otherwise specified, each provision of the Dodd-Frank Act should apply prospectively only. For the sake of this discussion, however, I assume that the effective date provision does not dispositively answer the temporal reach question. Accordingly, I must continue with the *Landgraf* analysis. As *Landgraf* instructs, where Congress has not provided "an express command" concerning the statute's temporal reach, we must undertake a more searching inquiry to determine whether the presumption against retroactivity may be overcome.[17] Specifically, we must ask whether applying the statute to pre-enactment conduct "would impair rights a party

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[14] *Landgraf*, 511 U.S. at 265 (citations and internal quotations omitted).
[15] *Id.* at 280.
[16] *See Dodd-Frank Act* § 4 ("Except as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act.").
[17] *See id.* at 280.

possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[18] Put another way, we must determine "whether the new provision attaches new legal consequences to events completed before its enactment."[19] In carrying out this legal inquiry, the Court indicated that we should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations."[20]

III. Analysis of Bars Imposed on Respondent Lawton

In this matter, the respondent indisputably was on notice that violating the Advisers Act could result in him being barred from associating with an investment adviser. Additionally, the respondent was on notice – even after *Teicher* – that violating the Advisers Act could have resulted in him eventually being barred from the broker, dealer, municipal securities dealer, and transfer agent branches of the securities industry, assuming the Commission could show a nexus between him and those branches of the industry. Thus, it was reasonable for the Commission to conclude that using its Section 925 authority to impose collateral broker, dealer, municipal securities dealer, and transfer agent bars with respect to respondent's pre-enactment conduct did not attach new legal consequences to such conduct, did not impair rights that the respondent possessed when he acted, and did not increase his liability for past conduct. Rather, the imposition of those collateral bars merely accelerated the realization of such consequences and

[18] *Id.* at 280.
[19] *Id.* at 270.
[20] *Id.* at 270.

consolidated them into a single proceeding rather than requiring that they be imposed piecemeal and over time. Accordingly, I agree with the law judge and the majority's imposition of collateral broker, dealer, municipal securities dealer, and transfer agent bars against the respondent.

That argument, however, cannot apply to the two new bars created by Section 925 of the Dodd-Frank Act. Before passage of that provision, the Commission had no authority to suspend or bar a person from associating with a municipal advisor or NRSRO. It follows then that no person could possibly have known, before the enactment of the Dodd-Frank Act, that the consequences of his or her misconduct could have included being suspended or barred from those two industries. Indeed, imposing retroactive collateral municipal advisor and NRSRO bars has attached new legal consequences to, and has increased the respondent's liability for, conduct that occurred entirely before the enactment of the Dodd-Frank Act. Thus, under "familiar considerations of fair notice, reasonable reliance, and settled expectations," applying the Commission's municipal advisor or NRSRO suspension or bar authority to respondent's pre-Dodd-Frank conduct has given that statute impermissible retroactive effect and has violated the Supreme Court's holdings in *Landgraf* and other retroactivity cases. Accordingly, I agree with the law judge that the respondent should not be barred from associating with a municipal advisor or NRSRO, and I believe that the majority has erred by imposing those bars against the respondent. I therefore respectfully dissent from that aspect of the judgment.

IV. The "Prospective Relief" Red Herring

The majority makes much of an exception to the presumption against retroactivity, set out in the *Landgraf* opinion, for measures that constitute "prospective relief",[21] relying heavily on that exception to avoid concluding that its imposition of municipal advisor and NRSRO bars against the respondent has given impermissible retroactive effect to Section 925 of the Dodd-Frank Act. Statutes that affect *in futuro* injunctive relief are classic examples of measures that affect the propriety of "prospective relief".[22] As explained below, the "prospective relief" argument is a red herring and is inapposite in this proceeding.

The majority seizes on an exchange of dicta between competing opinions in the Supreme Court case of *Vartelas v. Holder* in order to justify its invocation of the "prospective relief" exception to the presumption against retroactivity.[23] In *Vartelas*, the Court addressed the retroactivity *vel non* of a provision of an immigration reform statute promulgated in 1996.[24] As the Commission majority acknowledges, the Supreme Court held in *Vartelas* that the provision at issue there *was* impermissibly retroactive and that it imposed a new disability for past conduct.[25] Thus, as a threshold matter, it seems awkward for the majority to rely so heavily on a case holding that a statutory provision *is*

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[21] *Maj. Op.* at 11-16; *see Landgraf*, 511 U.S. at 273-74.
[22] *See Landgraf*, 511 U.S. at 273-75.
[23] 132 S. Ct. 1479 (2012) (handed down after the law judge had issued the initial decision in this matter).
[24] *See Maj. Op.* at 10.
[25] *See id.* at 10.

impermissibly retroactive in order to hold that Section 925 of the Dodd-Frank Act *is not* impermissibly retroactive.

The majority places undue emphasis on a tangential discussion, offered by the *Vartelas* dissent, of non-securities statutes that were not before the *Vartelas* Court, as well as on the *Vartelas* majority's response to that discussion.[26] Although this exchange of dicta may appear to raise questions about the case at hand, it does not answer those questions. The Court did not have those scenarios before it, and therefore a case or controversy did not exist as to those issues. Consequently, the *Vartelas* Court lacked a well-developed factual record and robust briefing on those scenarios, and therefore I do not believe that the Court would expect the Commission to give dispositive weight to the Court's discussion of those hypothetical scenarios.

Rather than focusing on the tangential exchange of dicta in the *Vartelas* opinions, the majority should have more carefully considered other binding legal precedent that more closely tracks the facts and issues in this case. Specifically, the Commission majority gives short shrift to the D.C. Circuit's decision in *Johnson v. SEC*,[27] which I believe largely answers the questions raised by the majority with respect to the "prospective relief" exception discussed in *Landgraf*.

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[26] *See Vartelas*, 132 S. Ct. at 1495 (dissenting opinion) (speculating about certain laws that the dissent would not consider retroactive, specifically, "a statute making persons convicted of drug crimes ineligible for student loans," "laws prohibiting those convicted of sex crimes from working in certain jobs that involve repeated contact with minors," and "laws prohibiting those previously committed for mental instability from purchasing guns"); *see also id.* at 1489 n.7 (majority opinion) (agreeing, under different reasoning, that such statutes would not be retroactive).

[27] 87 F.3d 484 (D.C. Cir. 1996).

In *Johnson*, the D.C. Circuit considered the Commission's decision to impose the sanctions of censure and a six-month supervisory bar on the defendant, Patricia A. Johnson, for failure to supervise a broker who misappropriated funds from customer accounts. The Commission had instituted proceedings against Johnson more than five years after the alleged misconduct. Johnson argued that the statute of limitations, 28 U.S.C. § 2462, barred the SEC's action. That provision states: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . . ."[28]

The decision hinged on the meaning of the word "penalty" in that provision and on the nature of the sanctions imposed by the Commission (a censure and a six-month supervisory bar)[29] – if those sanctions were found to constitute a penalty, then the action to impose them would be time-barred under Section 2462. After concluding that the statute itself did not define the term "penalty," the court – taking guidance from the Supreme Court – ascribed to that term its "'ordinary, contemporary, common meaning.'"[30] The *Johnson* court ultimately concluded that the ordinary meaning of the term penalty is "a form of punishment imposed by the government for unlawful or

[28] *Id.* at 486 (quoting 28 U.S.C. § 2462).
[29] *See id.* at 486.
[30] *Id.* at 487 (quoting two Supreme Court cases).

proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action."[31]

The *Johnson* court went on to hold that the sanctions imposed by the Commission – a censure and six-month supervisory bar – "clearly resemble[d] punishment in the ordinary sense of the word."[32] In support of its conclusion, the court cited several factors: (1) the sanctions imposed collateral consequences beyond merely repairing the harm inflicted on the defendant's victims, including restricting the defendant's ability to earn a living as a supervisor as well as tarnishing her regulatory history; (2) historically, courts have held that restricting occupational freedom by revocation of professional licenses – citing the examples of attorneys, insurance agents, and dentists – is a penalty; and (3) notwithstanding, as the Commission argued, that the sanctions may have a remedial *purpose*, the sanctions were by their nature punitive in their *effect*, and the court noted that it was entirely possible for a sanction to be both remedial in purpose and punitive in effect.[33]

Applying the reasoning of the *Johnson* court to the case before us, the imposition of the collateral municipal advisor and NRSRO bars (1) inflicts collateral consequences on the respondent beyond merely repairing the harm to his victims; (2) punishes the respondent by restricting his occupational freedom, and does so not merely by revoking a license, but by prohibiting him from ever obtaining one; and (3) is punitive in effect even

[31] *Id.* at 488.
[32] *Johnson*, 87 F.3d at 488.
[33] *See id.* at 488-92 and n.11.

if one assumes that it also is remedial in purpose. If the censure and six-month supervisory suspension in *Johnson* were considered penalties, then, *a fortiori*, the permanent industry bars in this case must be considered penalties.

The majority attempts to distinguish *Johnson* on two grounds, neither of which is persuasive. First, the majority seizes on language in the *Johnson* opinion calling into question the robustness of the Commission's consideration of whether the defendant presented a current danger to the investing public.[34] The majority argues that the present case is distinct from *Johnson* because the Commission did, in fact, make its public interest determination by focusing on the extent to which the respondent poses a risk of future harm to the public.[35] Notwithstanding that argument, the bars at issue still go "beyond remedying the damage caused to the harmed parties by the defendant's action"[36] and are therefore punitive in effect, even if they also are animated by a remedial purpose. Indeed, it should be noted that the argument that suspensions (and, *a fortiori*, bars) have a "remedial purpose" is by no means a new argument. Rather, the Commission made that very argument to the D.C. Circuit in the *Johnson* case.[37] The court rejected it. Accordingly, I do not see how it may be used to distinguish *Johnson*.

[34] *See id.* at 489-90 and n.9.
[35] *See Maj. Op.* at 12 n.34.
[36] *Johnson*, 87 F.3d at 488.
[37] *See, e.g.*, *id.* at 489 n.6, 490-91.

The majority also attempts to distinguish *Johnson* on the ground that its reasoning is limited to cases involving statutes of limitations.[38] In fact, the majority articulated no persuasive reason for limiting the reasoning of *Johnson* in this fashion. The *Johnson* court was faced with a general question of statutory interpretation and, lacking an express statement of Congressional intent, ascribed to the term "penalty" its ordinary meaning. Although the *Johnson* court then applied that interpretation to a statute of limitation, nothing in the court's opinion suggests that its reasoning and interpretive approach should be confined only to statutes of limitation. To the contrary, the court's approach suggests that the *Johnson* holding should be given broad effect.

V. The Commission's Approach to Retroactivity in Whistleblower Matters

In another context, the Commission has applied retroactivity analysis – analysis consistent with my own in the *Lawton* proceeding – to avoid giving impermissible retroactive effect to other provisions of the Dodd-Frank Act. In October 2013, the Commission issued an order denying a whistleblower award sought by a claimant under Sections 922-924 of Dodd-Frank.[39] In that matter, the claimant had provided information to the Commission before the general effective date of the Dodd-Frank Act. However, neither the whistleblower provisions of the Dodd-Frank Act nor the Commission's

[38] *Cf. Maj. Op.* at 12 n.34 ("As *Johnson* acknowledged, occupational bars are not necessarily punitive in contexts other than the statute of limitations….") (citation omitted). Having made this statement, the majority fails to mention that the *Johnson* court explicitly concluded that at least three types of occupational licensing restrictions – attorney disbarment, insurance agent license revocation, and dental license revocation – are penalties. *See Johnson*, 87 F.3d at 489 n.6.

[39] Order Denying Whistleblower Award Claim, Exchange Act Release No. 70772, Whistleblower Award Proceeding File No. 2014-1 (Oct. 30, 2013).

implementing regulations authorize whistleblower awards to persons unless, among other things, they provide such information *after* the effective date of Dodd-Frank (not before).[40]

Among other items, the claimant argued that the Dodd-Frank whistleblower provisions should be given retroactive effect so as to permit the claimant to receive an award for the information submitted to the Commission before the effective date of the Dodd-Frank Act.[41] The Commission's rationale for rejecting this argument is instructive for purposes of the *Lawton* proceeding. Among other things, the Commission reasoned:

- Nothing in the text of Dodd-Frank indicated a Congressional intent to pay awards for information submitted before the enactment date.
- The Dodd-Frank Act has a general effective date of one day after enactment, unless a different effective date for a provision is specified.
- Section 924(b) permits awards based on information submitted after Dodd-Frank's enactment date, but before the effective date of the Commission's implementing regulations (thus demonstrating that Congress could and did pay attention to temporal reach concerns in the Dodd-Frank Act when it wanted to do so).
- Section 924(c) permits awards based on violations that occurred before enactment of Dodd-Frank (again demonstrating that Congress could and did

[40] *See id.* at 4, 8-12 (citing, *inter alia*, *Dodd-Frank Act* §§ 4, 924(b), 924(c) and 17 C.F.R. § 240.21F-4.
[41] *See id.* at 8.

> pay attention to temporal reach concerns in the Dodd-Frank Act when it wanted to do so).[42]

In interpreting the above provisions, and relying on the canon of statutory construction known as *expressio unius est exclusio alterius,*[43] the Commission concluded that the whistleblower provisions of Dodd-Frank Sections 922-924 should not be given retroactive effect.

This same analysis, if applied to *Lawton*, would support my conclusions rather than those of the majority. First, no text in Dodd-Frank indicates a Congressional intent to have the collateral bar provision of the statute apply to pre-enactment conduct. Second, the general effective date of Dodd-Frank is one day after enactment, unless otherwise specified (and there was no such specification here). Third, Sections 924(b) and (c) demonstrate that Congress was not only capable of specifying the temporal reach of provisions of Dodd-Frank when it wanted to, but that it in fact did so for those two provisions. And yet Congress was silent on the temporal reach of a neighboring provision, namely Section 925, the collateral bar provision. Both logic and the interpretive canon of *expressio unius est exclusio alterius* compel the conclusion that Congress did not intend for Section 925 of the Dodd-Frank Act to apply retroactively. Additionally, purely as a matter of statutory interpretation, it seems highly implausible that Congress intended for its silence on the temporal reach of Sections 922-924 to be

[42] *See id.* at 9-10. The Commission made other non-textual arguments in support of its determination to deny an award. *See id.* at 10-13.
[43] *See id*. at 9 n.21.

interpreted in one way and for its silence on the temporal reach of Section 925 to be interpreted in precisely the opposite way.

VI. Conclusion

Based on the above reasoning, I agree with the law judge that collaterally imposing the two new Dodd-Frank bars, the municipal advisor and NRSRO bars, on the respondent attached new legal consequences to, and increased respondent's liability for, conduct that occurred entirely before the enactment of the Dodd-Frank Act. In imposing those bars here, the Commission has given impermissible retroactive effect to Section 925 of the Dodd-Frank Act, thus violating the presumption against retroactivity recognized and venerated by *Landgraf* and its progeny. I therefore respectfully dissent from the decision to impose the municipal advisor and NRSRO bars against the respondent.