

SPEECHES & TESTIMONY

Statement of Commissioner Rostin Behnam Regarding Tower Research Capital LLC November 7, 2019

I respectfully concur as to the Commission's determination today to accept an Offer of Settlement with Tower Research Capital LLC ("Tower") and issue an order (the "Consent Order") finding, among other things, that Tower engaged in a manipulative and deceptive spoofing scheme resulting in the largest civil resolution assessed by the Commission to date for such conduct. [1] I am supporting this determination because I believe the civil monetary penalty, restitution, and disgorgement in this matter are appropriately calibrated to the egregiousness of Tower's actions.

Additionally, and perhaps more relevant to the safety and transparency of CFTC markets, Tower's actions demanded a firm and immediate response to send an unequivocal message to all market participants that any individual or organization who manipulates CFTC markets for personal gain will be held accountable to the fullest extent of the law. I commend the Division of Enforcement for its timely and judicious work on this matter. I also would like to thank the Department of Justice for their assistance.

However, I write to express my extreme reservations with the Commission's decision to issue a Consent Order which includes advice that automatic disqualification under Rule 506(d)(1) of the Securities and Exchange Commission's ("SEC") regulations [2] should not arise as a consequence of the Consent Order. Under these unique circumstances involving such significant violations of the Commodity Exchange Act's anti-fraud and anti-manipulation provisions, I do not believe that the Commission should provide a waiver to automatic disqualification from relying on certain exemptions from registration for private offerings under Rule 506(d)(1). Section 926 of the Dodd-Frank Act [3] clearly states that disqualification from Regulation D offerings should result where there is a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct -- like Tower's actions here. Section 926 further specifies which state and federal financial and/or banking regulators to which the disqualification provision applies.

Despite Section 926 not expressly including the Commission, in its 2013 rulemaking, the SEC, after receiving public input, added the "...CFTC to the list of regulators whose regulatory bars and other final orders will trigger disqualification." [4] The SEC added that "...conduct that would typically give rise to CFTC sanctions is similar to the type of conduct that would result in disqualification if it were the subject of sanctions by another financial services industry regulator." [5]

Rule 506(d)(2)(iii) of the SEC's regulations expressly provides that disqualification "shall not apply" if the *relevant regulator* "advises in writing" that disqualification "should not arise as a consequence of such order." According to the preamble, this "allows the relevant authorities to determine the impact of their orders." [6]

Today, the CFTC chooses to provide this advice in writing. However, given the gravity of Tower's actions, which involved unprecedented levels of spoofing, I am not comfortable advising the SEC that the automatic disqualification should not apply. In instances of this magnitude, where fraud and abuse harmed market integrity and market participants, the SEC should be the sole authority regarding whether or not a waiver should result. In much the same way that the SEC's rule allows relevant authorities to determine the impact of their orders, allowing the SEC to determine whether automatic disqualification should apply here would insure that the relevant authority determines the impact of Regulation D.

I also note that, Rule 506(d)(2)(iii) of the SEC's regulations does not require that the written advice be included in a final order of the Commission; it only requires that such advice be provided "before the relevant sale."^[7] Accordingly, it is not clear to me that, at this point, the Regulation D issue is ripe, and therefore, it should not have been a matter for settlement negotiations at this time.

Finally, and as a general matter, regardless of how major the infraction, I am concerned that the SEC's 2013 amendments to Rule 506(d)(1), which added the CFTC to the list of regulators whose "regulatory bars and other final orders will trigger disqualification",^[8] and corresponding waiver authority, has added an unintended layer of complexity to the Commission's ability, under the Commodity Exchange Act, to efficiently and effectively execute its enforcement duties. In short, the SEC is best suited to issue waivers to its market participants from its rule; not the Commission. In this instance, where Tower has not previously been required to register with the CFTC or the SEC, there is ample time for the SEC to consider whether the CFTC's action against Tower today should result in automatic disqualification.

For these reasons, while I concur in the sanctions in today's matter, I do not agree with the Commission's issuance of a statement that automatic disqualification under Section 506(d)(1) should not arise as a consequence of the order.

I look forward to working with my fellow Commissioners to find an approach to the issuance of advice under Rule 506(d)(1) going forward that allows our Division of Enforcement to focus on the robust enforcement of the Commodity Exchange Act, and also allows the SEC to determine whether automatic disqualification should occur under its rules.

^[1] See 7 U.S.C. § 6c(a)(5)(C)(2012).

^[2] 17 C.F.R. §230.506(d)(1)(2019).

^[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 926, 124 Stat. 1376, 1851 (2010).

^[4] Disqualification of Felons and Other "Bad Actors" From Rule 506 Offerings, 78 F.R. 44,730, 44,742 (July 24, 2013).

^[5] *Id.*

^[6] *Id.* At 44,748. The SEC also notes that allowing "the relevant authorities to determine the impact of their orders ... conserves Commission resources (which might otherwise be devoted to consideration of waiver applications) in cases where the relevant authority determines that disqualification from Rule 506 offerings is not warranted."

^[7] 17 C.F.R. §230.506(d)(2)(iii).

^[8] *Id.* at 44,742.