

Public Statements & Remarks

Supporting Statement of Commissioner Dan M. Berkovitz Regarding Historic Penalty against JPMorgan and Opposing “Bad Actor” Waiver

September 29, 2020

I support today’s Commission action ordering JPMorgan^[1] to pay \$920 million—the largest monetary settlement in this agency’s history—for manipulating the precious metals and U.S. Treasury futures markets. However, I oppose the CFTC’s determination that JPMorgan’s conduct should not result in any disqualifications under the “bad actor” provisions of the securities laws, for the reasons outlined below.

For eight years, a group of traders at JPMorgan systematically “spoofed” precious metals and Treasury futures markets by entering hundreds of thousands of orders with the intent to cancel them before execution. The Commission’s Order finds that JPMorgan manipulated these markets and failed to diligently supervise its traders. The scope of misconduct and market harm described in the Order is unparalleled among prior spoofing cases brought by the Commission. This enforcement action illustrates how vital it is for firms to maintain adequate surveillance systems and promptly investigate red flags.

These egregious violations warrant the historic level of monetary sanctions imposed by the CFTC. However, it is the responsibility of the SEC, not the CFTC, to determine who is subject to registration requirements for the offer and sale of securities, and whether such misconduct warrants any disqualifications in the securities markets.

Various SEC regulations, including Regulations A and D, exempt companies from the requirement to register securities offerings with the SEC.^[2] “Bad actors” found to have committed certain violations of the securities laws are automatically disqualified from claiming such exemptions absent a determination by the SEC to provide a waiver. SEC regulations also provide for automatic disqualification for certain violations of the Commodity Exchange Act (“CEA”). However, under those SEC regulations, the automatic disqualification does not apply if the CFTC “advises” the SEC that disqualification under Regulations A and D should not arise as a consequence of the CFTC’s order.

This SEC-created process has complicated the CFTC’s ability to settle its own enforcement cases without resource-intensive litigation. Respondents in CFTC cases subject to automatic disqualification under the SEC’s regulations often do not agree to settle their CFTC cases unless and until either the SEC grants a waiver of the disqualification, or the CFTC “advises” the SEC that the disqualification shall not apply. In a number of instances, such as this one today, rather than indefinitely delay enforcement of the CEA in anticipation of a potential waiver by the SEC, CFTC enforcement staff will notify SEC staff of the request to waive the bad actor provisions. Where SEC staff does not object or raise concerns, the Commission will then “advise” the SEC that the disqualification shall not apply. Essentially, the SEC advises the CFTC on whether the CFTC should advise the SEC that the SEC’s regulation shall not apply. This circular consultation obscures public transparency and accountability and wastes scarce CFTC resources.

More fundamentally, the CFTC’s advice on the application of the SEC’s regulations has no legal effect. Congress has not authorized the CFTC—the federal *derivatives* regulator—to determine whether companies should be required to register *securities* offerings with the SEC. Nor did it authorize the SEC to delegate this responsibility to the CFTC.^[3]

Accordingly, any advice the CFTC offers about compliance with securities registration requirements is, as the term indicates, purely advisory and has no effect on JPMorgan’s qualifications under the securities laws. For this reason, although I disagree with the proffering of this advice, its inclusion does not affect my overall support of this enforcement action.

As I have said before, the CFTC and the SEC should develop a process in which the SEC exclusively will consider and decide whether a company subject to a CFTC enforcement order should be exempt from registration under the securities laws, within a timeframe that does not unreasonably delay the CFTC’s issuance of the order. I urge my colleagues at the SEC to continue to work with us to speedily resolve this issue.

I thank the staff of the Division of Enforcement for their dedication and hard work in this case.

[1] Referring to JPMorgan Chase & Co., JPMorgan Chase Bank N.A., and J.P. Morgan Securities LLC collectively as “JPMorgan.”

[2] See 17 CFR § 230.251 (“Regulation A”); 17 CFR § 230.506 (“Regulation D”).

[3] For more detailed statutory background and analysis of legal authority, see Dissenting Statement of Commissioner Dan M. Berkovitz: In re Tower Research Capital LLC: Waiver of SEC “Bad Actor” Disqualifications (Nov. 7, 2019), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement110719>.

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