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The Securities Lawyer's Deskbook**Securities Exchange Act of 1934****Section 21 -- Investigations, Injunctions and Prosecution of Offenses**

a.

1. The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this title, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.
2. On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether
 - A. the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and
 - B. compliance with the request would prejudice the public interest of the United States.

b. For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and

affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

c. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

d.

1. Whenever it shall appear to the Commission that any person is engaged or is about to engage in any acts or practices constituting a violation of any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

2. **Authority Of A Court To Prohibit Persons From Serving As Officers And Directors.**--In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated Section 10(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of this title or that is required to file reports pursuant to Section 15(d) of this title if the person's conduct demonstrates substantial unfitness to serve as an officer or director of any such issuer.

3. **Money Penalties In Civil Actions.**---

A. **Authority of Commission.**---Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to Section 21C of this title, other than by committing a violation subject to a penalty pursuant to Section 21A, the Commission may bring an action in the United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

B. **Amount Of Penalty.**---

i. **First Tier.**---The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of

- I. \$5,000 for a natural person or \$50,000 for any other person, or
- II. the gross amount of pecuniary gain to such defendant as a result of the violation.

ii. **Second Tier.**---Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of

- I. \$50,000 for a natural person or \$250,000 for any other person, or
- II. the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

iii. **Third Tier.**---Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of

- I. \$100,000 for a natural person or \$500,000 for any other person, or
- II. the gross amount of pecuniary gain to such defendant as a result of a violation, if---
 1. the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and
 2. such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

C. **Procedures For Collection.**---

i. **Payment Of Penalty To Treasury.**---A penalty imposed under this section

shall be payable into the Treasury of the United States.

- ii. **Collection Of Penalties.**---If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.
- iii. **Remedy Not Exclusive.**---The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.
- iv. **Jurisdiction And Venue.**---For purposes of Section 27 of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this title.

D. Special Provisions Relating To A Violation Of A Cease-And-Desist Order.---
In an action to enforce a cease-and-desist order entered by the Commission pursuant to Section 21C, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

4. Prohibition Of Attorneys' Fees Paid From Commission Disgorgement Funds---
Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

- e. Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, injunctions, and orders commanding
 1. any person to comply with the provisions of this title, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, and the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of Section 15 of this title.
 2. any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this title, the rules, regulations, and orders thereunder, and the rules of such exchange or association, or
 3. any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

- f. Notwithstanding any other provision of this title, the Commission shall not bring any action pursuant to subsection (d) or (e) of this section against any person for violation of, or to command compliance with, the rules of a self-regulatory organization unless it appears to the Commission that
1. such self-regulatory organization is unable or unwilling to take appropriate action against such person in the public interest and for the protection of investors, or
 2. such action is otherwise necessary or appropriate in the public interest or for the protection of investors.
- g. Notwithstanding the provisions of Section 1407(a) of Title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.
- h.
1. The Right to Financial Privacy Act of 1978 shall apply with respect to the Commission, except as otherwise provided in this subsection.
 2. Notwithstanding Section 1105 or 1107 of the Right to Financial Privacy Act of 1978, the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpoena issued in conformity with the requirements of Section 19(b) of the Securities Act of 1933, Section 21(b) of the Securities Exchange Act of 1934, Section 18(c) of the Public Utility Holding Company Act of 1935, Section 42(b) of the Investment Company Act of 1940, or Section 209(b) of the Investment Advisers Act of 1940, and that the Commission has reason to believe that---
 - A. delay in obtaining access to such financial records, or the required notice, will result in---
 - i. flight from prosecution;
 - ii. destruction of or tampering with evidence;
 - iii. transfer of assets or records outside the territorial limits of the United States;
 - iv. improper conversion of investor assets; or
 - v. impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

- B. such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;
 - C. the acts, practices or course of conduct under investigation involve--
 - i. the dissemination of materially false or misleading information concerning any security, issuer, or market, or the failure to make disclosures required under the securities laws, which remain uncorrected; or
 - ii. a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or
 - D. the acts, practices or course of conduct under investigation--
 - i. involve significant financial speculation in securities; or
 - ii. endanger the stability of any financial or investment intermediary.
3. Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.
- 4.
- A. Upon a showing described in paragraph (2), the presiding judge or magistrate shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.
 - B. Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or Section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978.
 - C. Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpoena insofar as it applies to the customer together with the following notice which shall describe with reasonable specificity the nature of the investigation for which the Commission sought the financial records: "Records or information concerning your transactions which are held by the financial institutions named in the attached subpoena were supplied to the Securities and Exchange Commission on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) under Section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose)".
5. Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate may permit.

6. The Commission shall compile an annual tabulation of the occasions on which the Commission used each separate subparagraph or clause of paragraph (2) of this subsection or the provisions of the Right to Financial Privacy Act of 1978 to obtain access to financial records of a customer and include it in its annual report to the Congress. Section 1121(b) of the Right to Financial Privacy Act of 1978 shall not apply with respect to the Commission.
7.
 - A. Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount equal to the sum of---
 - i. \$100 without regard to the volume of records involved;
 - ii. any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and
 - iii. if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorneys' fees as determined by the court.
 - B. Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpoena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.
 - C. Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.
8. The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other than paragraph (1), and

nothing herein or in the Right to Financial Privacy Act of 1978 shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a subpoena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorneys' fees to the Commission if the presiding judge or magistrate finds that the customer's claims were made in bad faith.

9.

- A. The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with Section 1112 of the Right to Financial Privacy Act of 1978, except that the customer notice required under Section 1112(b) or (c) of such Act may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (B) of paragraph (2) apply.
 - B. The Commission may, without notice to the customer pursuant to Section 1112 of the Right to Financial Privacy Act of 1978, transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be disclosed or used only in an administrative, civil, or criminal action or investigation by the Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978, within 30 days of its determination, or complies with the requirements of Section 1109 of such Act regarding delay of notice.
10. Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.
 11. Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978.
 12. Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.
 13. Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 which are common to this subsection shall have the same meaning as in such Act.

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