Journal of Business & Technology Law

Volume 7 | Issue 2 Article 2

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Recommended Citation

Chad Howell, *Back to the Future: Applying the Collateral Bars of Section 925 of the Dodd-Frank Act to Previous Bad Acts*, 7 J. Bus. & Tech. L. 285 (2012)
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Chad Howell*

Back to the Future: Applying the Collateral Bars of Section 925 of the Dodd-Frank Act to Previous Bad Acts

Introduction

On Thursday, July 15, 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1] Six days later, President Obama signed Dodd-Frank into law.[2] Dodd-Frank contained the most sweeping change in the legal and regulatory landscape of the American financial markets since the Great Depression.[3] Among the many formidable weapons acquired by the Securities and Exchange Commission ("Commission")[4] in the new legislation, Dodd-Frank gave the Commission the authority to impose collateral bars on people who violated certain provisions of existing securities laws.[5]

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* J.D., George Mason University School of Law, Class of 2011. I would like to thank Tracy Leyba and the members of the editorial staff of the Journal of Business & Technology Law for their assistance in preparing this article for publication.

1. Brady Dennis, *Financial Regulation Moves into New Era; Senate Passes Landmark Bill in Triumph for Obama*, Wash. Post, July 16, 2010, at A01.

2. Helene Cooper, *Obama Signs a Contentious Overhaul of the U.S. Financial System*, N.Y. Times, July 22, 2010, at B3.

3. Bruce Hiler & Sharon Rose, *Analysis of Changes to the Securities and Exchange Commission's Enforcement Powers in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 42 Sec. Reg. & L. Rep. (BNA) No. 48, at 2354 (Dec. 13, 2010); Comm'r Kathleen L. Casey, *Speech by SEC Comm'r: Address to Practising Law Institute's SEC Speaks in 2011 Program*, Sec. & Exch. Comm'n, at 1 (Feb. 4, 2011), http://www.sec.gov/news/speech/2011/spch020411klc.htm; David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. Bus. & Tech. L. 327, 327 (2011).

4. *See* K. Fred Skousen, An Introduction to the SEC 1–40 (5th ed. 1991) (providing a brief history and overview of the Commission). *See also* Rose Arce, Note, *The SEC and the Extent of Its Power to Sanction: An Analysis of* Teicher v. Securities and Exchange Commission – *Did the Court Apply* Chevron v. Natural Resources Defense Council *to a Matter of Agency Interpretation?*, 30 Golden Gate U. L. Rev. 593, 595–97 (2000).

5. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 925, 124 Stat. 1376, 1850–51 (2010) (amending Exchange Act §§ 15(b)(6)(A), 15B(c)(4), and 17A(c)(4)(C)); *see also* Investment Advisers Act § 203(f) (enacting the collateral bars provisions) [hereinafter Dodd-Frank Act].

Prior to the enactment of Dodd-Frank, the Commission could bar individuals who violated securities laws from associating with a regulated entity of the same type that the person was associated with at the time of the violation.[6] Under Dodd-Frank, the Commission is authorized to bar those same individuals from associating with "a broker, dealer, investment advisor, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization," effectively eliminating that individual from working in the field of regulated securities.[7]

In implementing Dodd-Frank's collateral bar provisions, the Commission will face two challenges that will likely end up being litigated in the federal courts. First, the Commission will face the issue of whether these collateral bars can be applied to individuals who violated the securities law before Dodd-Frank was signed into law, but whose cases are still active or are about to be opened.[8] The outcome of this litigation will not only impact collateral bars specifically, but will impact the implementation of future securities legislation.[9] Second, the Commission must develop standards for implementing these collateral bars to satisfy the federal courts.

This article will argue that section 925 of Dodd-Frank can be successfully applied to securities violations that occurred prior to Dodd-Frank being signed into law.[10] This article will further examine standards for the implementation of section 925's collateral bars that will survive the scrutiny of federal courts.[11] Part I defines collateral bars and discusses their development by the Commission, the federal courts' response, and the Dodd-Frank legislation granting the Commission explicit authority to use these bars as a remedy for violating securities law.[12] Part II examines whether these collateral bars can be applied to violations that occurred prior to the passage of Dodd-Frank.[13] Section 925 of Dodd-Frank can be so applied because it qualifies as the type of prospective relief authorized by the Supreme Court in *Landgraf v. USI Film Products*.[14] Part II further examines two different types of prospective relief from *Landgraf*, and argues that section 925 qualifies

6. Hiler & Rose, *supra* note 3, at 2356.

7. Dodd-Frank Act § 925(a)(1).

8. Commissioner Casey has already expressed interest in how the federal courts will view the Commission's authority to implement collateral bars in such a manner. *See* Casey, *supra* note 3, at 7.

9. *See, e.g.*, John W. Lawton, Initial Decision Release No. 419 (ALJ Apr. 29, 2011), http://sec.gov/litigation/aljdec/2011/id419bpm.pdf (holding that collateral bars are retroactive and cannot affect pre-Dodd-Frank conduct). How Section 925 is interpreted when challenged may affect other kinds of prospective relief for past-actions.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part I.

13. *See infra* Part II.

14. *See* 511 U.S. 244, 273 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

under both types.[15] Part II concludes with an analysis of how prospective relief will be applied to new securities legislation.[16] Part III examines the standards the Commission previously used to implement collateral bars and argues that these standards should survive the scrutiny of federal courts if utilized when implementing section 925 collateral bars.[17]

I. Collateral Bars in Securities Regulation[18]

Part I defines collateral bars in the context of securities law, as codified by Dodd-Frank. It then explores the pre-Dodd-Frank history of these collateral bars by first examining the Commission's 1997 opinion *In re Blinder*,[19] and then examining *Teicher v. SEC*,[20] the seminal D.C. Circuit opinion that ended collateral bars for a decade.[21] Part I concludes with a brief textual analysis of section 925 of Dodd-Frank, which reinstated the Commission's ability to impose collateral bars.[22]

A. *Collateral Bars Defined*

The Enforcement Division of the Securities and Exchange Commission ("Enforcement") is tasked with enforcing the federal securities laws.[23] Enforcement has the authority to provide remedial remedies-like injunctions and disgorgement of profits for violations of securities laws, as well as punitive penalties such as the imposition of officer and director bars and financial penalties against individuals.[24]

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15. See *infra* Part II.A for a discussion of limited and permissive prospective relief and *infra* Part II.B for a discussion of prospective relief in the context of securities law.

16. *See infra* notes 165–171 and accompanying text.

17. *See infra* Part III.

18. This article will discuss collateral bars as remedial remedies for violating securities law, not procedural collateral bars. *Compare, e.g.*, 17 Am. Jur. 2d *Contempt* § 130 (2012) (discussing the collateral bar rule as applied to criminal contempt proceedings); *with, e.g.*, 47 Am. Jur. 2d *Judgments* § 487 (2012) (discussing collateral estoppel bars, also known as issue preclusion).

19. 53 S.E.C. 250 (1997).

20. 177 F.3d 1016 (D.C. Cir. 1999).

21. *See id.* at 1021–22 (finding the Commission's interpretation about collateral bars unreasonable, so the Commission's order was in excess of the Commission's powers).

22. *See infra* Part I.D.

23. *See* 17 C.F.R. § 200.30–4 (2011) (delegating authorities necessary to enforce securities laws to the Director of Division of Enforcement, such as subpoena and investigation powers); *see also* Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 Fordham J. Corp. & Fin. L. 367, 372–416 (2008) (providing a history of the Enforcement Division).

24. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78-u(d)(1) (2006) (stipulating that the Commission may bring actions in any Federal court to enjoin practices which violate federal securities law); *Id.* § 78-u(d)(5) (stipulating the Commission may seek equitable relief that may be appropriate or necessary for the benefit of investors); *see also* S.E.C. v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("Indeed, appellants concede that disgorgement is rather routinely ordered for insider trading violations despite a similar lack of specific authorizations for that remedy under the securities law."). *See* Atkins & Bondi, *supra* note 23, at 383 (describing the powers Congress allocated to the S.E.C.).

Prior to Dodd-Frank, Enforcement could bar individuals from associating with regulated entities of the same type with which that person was associated when that individual violated the securities law.[25] With the passage of Dodd-Frank, Enforcement gained the authority to bar those same individuals not only from associating with entities where securities violations occurred, but also from associating with any entity regulated by the Commission.[26] These bars are called "collateral bars," and they include barring individuals from associating with a "broker, dealer, investment advisor, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSO)."[27] Essentially, the Commission is now authorized to put an individual completely out of the regulated securities business, even out of areas that had nothing to do with the violation of the securities law for which the individual was charged.[28] Along with the ability to levy a complete bar, the Commission can also "censure, place limitations . . . or suspend" individuals across all regulated securities entities.[29]

B. In re Blinder *and the Commission's Justification for Imposing Collateral Bars*

Before Dodd-Frank, the Commission lacked a clear statement of Congressional intent that it was empowered to impose collateral bars. Without explicit intent, the Commission attempted to fashion a justification for imposing these bars in *In re Blinder*.[30] *Blinder* was a case of first impression for the Commission concerning whether it had the authority to impose collateral bars.[31] Meyer Blinder was the president of a broker-dealer that Enforcement charged with various securities law violations.[32] An administrative law judge permanently barred Blinder from associating with any broker or dealer, but declined to bar him from associating with

25. *See* Securities Exchange Act, 15 U.S.C. § 78o(b)(6)(A) (2006) (barring individuals who violated securities law while associated with a broker or dealer from associating with a broker or dealer); *see also* Securities Exchange Act, 15 U.S.C. § 78o-4(c)(4) (2006) (barring individuals who violated securities law while associated with a municipal securities dealer from associating with a municipal securities dealer); Securities Exchange Act, 15 U.S.C. § 78q-1(c)(4)(C) (2006) (barring individuals who violated securities law while associated with a transfer agent from associating with a transfer agent); Investment Advisers Act, 15 U.S.C. § 80b-3(f) (2006) (barring individuals who violated securities law while associated with an investment adviser from associating with an investment advisor). *See also* Hiler & Rose, *supra* note 3, at 2356.

26. Dodd-Frank Act § 925.

27. *Id.*

28. *See* David Bayless & David L. Kornblau, *Dodd-Frank Beefs up SEC and CFTC Enforcement*, J. Investment Compliance, 2010, at 38–39 (discussing how previously the Commission could bar an associated person of a regulated entity only from the type of business the person was in when the violation occurred, but now the Commission can apply collateral bar that bars a person from any part of the securities business)

29. Securities Exchange Act, 15 U.S.C. § 78o(b)(6)(A) (2006 & Supp. 2010).

30. 53 S.E.C. 250, 254 (1997).

31. *Id.* at 263–64 n.1 (Comm'r Hunt, concurring in part and dissenting in part).

32. *Id.* at 251.

other entities regulated by the Commission.[33] Enforcement appealed the decision to the Commission.[34]

The Commission determined that it had the authority to impose collateral bars to prevent what would otherwise be a regulatory gap:

> *The initial question presented here is whether we have the authority under Section 15(b)(6) of the Exchange Act to bar Blinder from securities activities other than those associated with a broker-dealer. Based on that section and other related statutory provisions governing the admission and exclusion of certain securities professionals from other aspects of the securities business, relevant legislative history, and the animating purpose of securities laws, we conclude that we have such authority. Moreover, our recognition of such authority is both necessary and appropriate to enable us to fulfill our statutory duties to protect investors* and markets and to avoid what would otherwise be a regulatory gap that we believe Congress did not intend to exist.[35]

To justify imposing collateral bars in the absence of the authority clearly stated by Congress in legislation, the Commission looked to 1) the statutory phrase "place limitations," 2) Congressional intent, and 3) the underlying purpose of the securities law.[36] While recognizing that section 15(b)(6) did not grant the Commission explicit authority to impose collateral bars, the Commission reasoned that the phrase "place limitations," added to the section by Congress in 1975, was broad enough to allow it to impose the bars.[37] Next, the Commission looked to the legislative history of section 15B of the Exchange Act, in which Congress recognized that "place limitations" allows flexibility in fashioning remedies.[38] Although the legislative history concerned an amendment to section 15B that was passed twelve years after the relevant amendment to section 15(b)(6), the same phrase was added.[39] The Commission, therefore, felt comfortable applying the same reasoning to 15(b)(6).[40] Finally, the Commission turned to the underlying purpose of the

33. *Id.*

34. *Id.* at 254.

35. *Id.* at 254–55 (footnote call number omitted) (emphasis added).

36. *Id.* at 255–57.

37. *See id.* at 255–56 (noting that interpreting "place limitations" to authorize a collateral bar permits the Commission to collapse into one processing what could otherwise take place over multiple proceedings). Section 15(b)(6) of the Securities Exchange Act is codified at 15 U.S.C. § 78o(b)(6)(A). *See* 15 U.S.C. § 78o(b)(6)(A) (2006) (". . . if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, *placing of limitations*, suspension, or bar is in the public interest . . . ") (emphasis added).

38. *Blinder*, 53 S.E.C. at 256.

39. *Id.* at 257.

40. *See id.* (acknowledging that while "*post hoc* legislative history is not dispositive of Congress' intent at the time a statute is enacted," the Commission concluded that the 1987 amendment of 15B was designed to affect that section's sanctioning authority, including Section 15(b)(6)) (emphasis in original).

securities law: to maintain high standards in the securities industry for the public interest.[41] Toward this end, the Commission believed it had the authority to construe the securities law flexibly.[42]

Prior to *Blinder*, the Commission imposed collateral bars in settled matters, meaning that the individuals did not contest the Commission's authority to do so.[43] In *Blinder*, this authority was challenged administratively, and the challenge gave the Commission the opportunity to lay out its case for imposing collateral bars.[44] Two years later that authority was successfully challenged in federal court.[45]

C. Teicher v. SEC

Prior to the D.C. Circuit's ruling in *Teicher v. SEC*,[46] "the Commission believed it had the authority to impose collateral bars . . . ."[47] The D.C. Circuit disagreed, issuing a 1999 ruling that collateral bars exceeded the Commission's authority.[48]

Victor Teicher was an investment advisor and Ross Frankel was a broker-dealer, and both were subject to the federal securities law.[49] A jury convicted both men of crimes related to securities fraud for participating in an insider-trading scheme.[50] Enforcement brought related civil actions, and eventually obtained bars against both men, barring each from participating in the various branches of the regulated securities industry.[51] Teicher and Frankel appealed these collateral bars to the D.C. Circuit.[52] While Teicher lost his appeal, the D.C. Circuit ruled that the collateral bars imposed on Frankel exceed the Commission's regulatory power.[53]

In its opinion, the D.C. Circuit specifically addressed the Commission's arguments for the authority to impose collateral bars as laid out in *Blinder*.[54]

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41. *Id.* at 258.

42. *Id.* at 261.

43. *See* Casey, *supra* note 3; *see also supra* note 6 and accompanying text.

44. *See Blinder*, 53 S.E.C. at 251 (explaining that the Enforcement Division was appealing the administrative law judge's decision to the Commission); *see also* Teicher v. S.E.C., 177 F.3d 1016, 1019 (D.C. Cir. 1999) (citing *Blinder* as the case where the Commission initiated was claimed ability to impose collateral bars).

45. *See Teicher* v. S.E.C., 177 F.3d 1016, 1021–22 (D.C. Cir. 1999) (finding the collateral bar in excess of the Commission's powers).

46. 177 F.3d 1016 (D.C. Cir. 1999).

47. *See* Casey, *supra* note 3, at 6 (discussing the pre-*Teicher* history of collateral bars); *see also Blinder*, 53 S.E.C. at 261 (concluding the Commission has the power to impose collateral bars).

48. *Teicher*, 177 F.3d at 1021–22.

49. Teicher and Frankel, 53 S.E.C. 581, 582 (1998).

50. *Teicher*, 177 F.3d at 1017.

51. Brief of the Securities and Exchange Commission, Respondent at 10–11, Teicher v. S.E.C., 177 F.3d 1016 (D.C. Cir. 1999) (No. 98-1287, Consolidated with 98-1414). *See Teicher*, 177 F.3d at 1017 (explaining the Commission issued an order against both men barring them from various branches of the securities industry).

52. *Teicher*, 177 F.3d at 1017.

53. *Id.* at 1021–22.

54. *Id.* at 1019–20.

Although the *Blinder* opinion suggests that the Commission believed it had the authority to impose collateral bars across the board, the court narrowed *Blinder*'s claim to authority and still rejected it:

> *Because of the Commission's regulatory "gap" claim, however, we infer that it is only seriously claiming that the "place limitations" power enables it to bar an offender from a branch of the securities industry from which it might later have explicit authority to exclude him. Even this claim, however, turns out to contradict the way in which Congress has structured the relevant occupational license regimes and related sanctions.*[55]

Instead of collateral bars, the D.C. Circuit held that the Commission must bring a second, separate action to bar an individual from associating with an entity in a field unrelated to the violation, and even then only after it could "show the nexus [of the securities law violation] matching that branch."[56] General collateral bars, the court ruled, were intentionally withheld by Congress.[57] Furthermore, the court dismissed the Commission's argument from post-enactment legislative history, calling it ambiguous and finding that it fell short of the reasonableness standard established in *Chevron*.[58]

The Supreme Court declined to hear the case when the Commission appealed the decision.[59] After *Teicher*, the Commission neither contested the collateral bar issue in other circuits nor continued to impose administrative collateral bars.[60] The enactment of Dodd-Frank in 2010, however, has enabled the Commission to once again obtain the formidable collateral bar remedy.[61]

D. Section 925 of Dodd-Frank

Section 925 of Dodd-Frank authorizes the Commission to impose collateral bars by amending language in four different places of the federal securities laws.[62] In each of these amendments, Congress also appears to have given the Commission the latitude to decide how broadly to impose these collateral bars. Because of the statutory construction of section 925, the Commission should not be required to

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55. *Id.* at 1020.

56. *Id.*

57. *Id.* at 1021.

58. *Id. See also* Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (establishing that courts should give deference to an administrative agency's interpretation of statutory language).

59. Teicher v. S.E.C., 177 F.3d 1016, 1021 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000).

60. Casey, *supra* note 3, at 6.

61. Dodd-Frank Act § 925 (2010). *See also* Sec. and Exch. Comm'n v. Daifotis, No. C 11-00137 WHA, 2011 WL 2183314, at *13 (N.D. Cal. 2011) (acknowledging that the Dodd-Frank Act provides new remedies with greater penalties).

62. Dodd-Frank Act § 925.

seek a collateral bar for every regulated field listed in the amendments; rather, it should have the authority to impose the specific collateral bars when applicable to a specific factual situation. The Commission has already employed collateral bars in settle actions that have not been litigated in the federal courts.[63]

Section 925 amends section 15(b)(6)(A), section 15B, and section 17A(c)(4)(C) of the Securities Exchange Act, and section 203(f) of the Investment Advisers Act:[64]

> *[Each section] is amended by striking "12 months, or bar such person from being associated with a [broker or dealer, municipal securities dealer, transfer agent, investment adviser]," and inserting [a variation of] "12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization."*[65]

In effect, section 925 overrides *Teicher* and codifies the Commission's authority to implement the collateral bars it sought in *Blinder*.[66] Congressional intent is clear in one respect: if a bad actor violates federal securities laws, the Commission can bar that actor across the board from the regulated securities industry.[67]

The Commission will face the question of whether the use of "or" in section 925 suggests that the collateral bars can be sought individually.[68] Courts look to the plain meaning of the statute unless that meaning is absurd or clearly contrary to what the legislation was intended to accomplish.[69] Courts have consistently read "or" as a disjunctive indicating distinct elements of a statute.[70]

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63. Casey, *supra* note 3, at 7.

64. Securities Exchange Act of 1934, 15 U.S.C.A. § 78o(b)(6)(A) (West 2010); Securities Exchange Act of 1934, 15 U.S.C.A. § 78o-4(c)(4) (West 2010); Securities Exchange Act of 1934, 15 U.S.C.A. § 78q-1(c)(4)(C) (West 2010); Investment Advisers Act of 1940, 15 U.S.C.A. § 80b-3(f) (West 2010).

65. Dodd-Frank Act § 925. The amended provision for 15 U.S.C. § 78q-1(c)(4)(C) and 15 U.S.C. § 80b-3(f) contains the same list of securities businesses, but in a different order. *See, e.g.,* Investment Advisors Act of 1940, § 80b-3(f) ("12 months or bar any such person from being associated with an *investment adviser*, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.") (emphasis added).

66. *See* Blinder, 53 S.E.C. 250, 254 (1997) (concluding that the Commission has authority to impose collateral bars, as Dodd-Frank Act § 925 confirms).

67. *See* Dodd-Frank Act § 925 (noting the range of securities businesses which a bad actor may be barred).

68. *Id.*

69. *See* United States v. Am. Trucking Ass'ns. Inc., 310 U.S. 534, 543 (1940) (directing courts to look to the plain meaning of words in a statute unless the meaning leads to "absurd or futile results" in light of the purpose of the legislation); *see also* Consumers Union of the United States v. Heimann, 589 F.2d 531, 533-34 (D.C. Cir. 1978) (according initial statutory interpretation to the plain meaning unless there is either a "significant change in circumstances since enactment" or an "unreasonable result"); Norman J. Singer & J.D. Shambie Singer, 2A Sutherland Statute and Statutory Construction § 46:1 (7th ed. 2007).

70. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979) (stating that a disjunctive "or" should be construed so that each phrase of a statute is given different meanings); *see also* Mizrahi v. Gonzales, 492 F.3d 156, 164 (2d Cir. 2007) (indicating that Congress's use of the word "or" provided intent for different statutory constructions); Guam Indus. Servs., Inc. v. Rumsfeld, 383 F. Supp. 2d 112, 117 (D. D.C. 2005) (construing a statute that uses the disjunctive "or" as indicating two distinct readings). *See also* 73 Am. Jur. 2d *Statutes* § 156

The phrase at issue in section 925 of Dodd-Frank is "or bar any such person from being associated with a broker, dealer, investment advisor, municipal securities dealer, municipal advisor, transfer agent, *or* nationally recognized statistical rating organization."[71] Based on Supreme Court decisions regarding statutory construction and lower court decisions determining how to read "or," section 925 should be read as providing distinct collateral bars rather than one bar that includes all of the elements. There is also a line of D.C. Circuit cases that touches on how to interpret commas and conjunctions, but these cases are not applicable to section 925.[72]

In determining the meaning of a statute, the Supreme Court gives words their ordinary meaning.[73] The Court has also decided that the meaning of those words and construction of the statutes should be determined by the rules of grammar.[74] Because the "or" at issue links several different bars in a series, applying the ordinary meaning of "or" means that each bar in section 925 should be considered as an individual bar. The ordinary meaning of "and" indicates that each of the elements in a series is part of a whole.[75] Congress chose to use "or," and under the ordinary meaning and rules of grammar, that "or" should be read to establish several different collateral bars.[76] The Supreme Court has further decided that statutes can be interpreted against their literal meaning when the words could not conceivably have been intended to apply to a particular case.[77] It is likely that the federal courts could find it to be conceivable that section 925 intended to enhance the effectiveness of these bars by allowing the Commission to apply them

(2012) (discussing that "or" is a disjunctive particle indicating that "various members" of a sentence should be read separately).

71. Dodd-Frank Act § 925 (emphasis added).

72. *See* Ala. Educ. Ass'n v. Chao, 455 F.3d 386, 394–95 (D.C. Cir. 2006) (maintaining that even the comma rules must be read in light of congressional intent and that "patent ambiguity" must be settled by administrative interpretation); *see also* United States v. Barnes, 295 F.3d 1354, 1363 (D.C. Cir. 2002) (observing that language set off by a comma "reinforces the separateness" of the elements); United States v. Pritchett, 470 F.2d 455, 459 (D.C. Cir. 1972) (finding that commas before certain phrases separate clauses and are indicative of congressional intent). The District of Columbia Circuit has also paid special attention to conjunctive terms such as "and any." *See Chao*, 455 F.3d at 394.

73. *See, e.g.,* Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149, 2156 (2010) (beginning statutory analysis by observing the ordinary meaning of the statute's language); *see also* 73 Am. Jur. 2d *Statutes* § 124 (2012) (stating that courts ordinarily give words in a statute their "plain and ordinary meanings").

74. *See, e.g.,* Bloate v. United States, 130 S. Ct. 1345, 1354 (2010) (noting the importance of following the rules of grammar in statutory construction); *see also* Unif. Statute and Rule Constr. Act § 2 U.L.A. (1995).

75. *See* Norman J. Singer & J.D. Shambie Singer, 1a Sutherland Statute and Statutory Construction § 21:14 (7th ed. 2007) (stating that the statutory phrases connected by "and" are interpreted in the conjunctive); *see also* 82 C.J.S. *Statutes* § 442 (2011) ("The word 'and' ordinarily is used in a statute as a conjunctive.").

76. Dodd-Frank Act § 925. *See* 73 Am. Jur. 2d *Statutes* § 156 (2012) (providing the theory that "or" indicates that different elements of a sentence are "to be taken separately"); *see also* Richard F. Conklin, Note, *Why "Or" Really Means "Or": In Defense of the Plain Meaning of the Private Securities Litigation Reform Act's Safe Harbor Provision*, 51 B.C. L. Rev. 1209, 1241 (2010) (arguing for the application of the plain meaning of a disjunctive "or" in the Private Securities Litigation Reform Act's safe harbor provision).

77. Logan v. United States, 552 U.S. 23, 36 (2007).

individually in a discretionary manner. If the courts decide that the literal meaning of "or" allows the bars to be applied individually, the courts should not interpret against that literal meaning.

Several lower courts have directly discussed the use of the disjunctive "or" and the conjunctive "and."[78] When Congress writes disjunctively, the Eleventh Circuit has interpreted that writing as indicating alternatives that should be considered independently.[79] When faced with a different statute containing the word "or," the Ninth Circuit read that statute as disjunctive, requiring the alternatives presented to be treated separately.[80] The D.C Circuit has similarly determined that statutes written in the disjunctive set out separate, distinct alternatives.[81] Based on these and other court decisions, the "or" in section 925 should be read as a disjunctive, creating several alternative collateral bars rather than one all-inclusive collateral bar.

There is another line of cases in the D.C. Circuit that discusses how to interpret antecedents in statutes.[82] An antecedent in these cases is a conditional element in a proposition. In *Chao*, the court attempted to determine what preceding nouns the phrase "in which" applied to in a labor statute.[83] In *Nofziger*, the Court attempted to determine to what elements the word "knowingly" applied.[84] Despite the discussion of grammar, including commas and conjunctions, these cases do not apply to section 925 of Dodd-Frank. The relevant phrase in section 925 does not lay out a conditional element.

Properly interpreting section 925 of Dodd-Frank is particularly important because *Chevron* gives great weight to the agency interpretation of ambiguous statutes.[85] This statute, however, is ambiguous. Because of the "or" included in the series of possible bars in section 925 of Dodd-Frank, the ordinary meaning of the section is that the bars can be applied individually. Because this meaning is also conceivable, the courts will most likely not interpret the section against its ordinary

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78. *See* United States v. One 1973 Rolls Royce, 43 F.3d 794, 814–15 (3d Cir. 1994) (discussing how the application of the disjunctive "or" requires first reviewing the language's context to make a determination as to whether it should be treated as a conjunctive or a disjunctive); *see also* United States v. Smeathers, 884 F.2d 363, 364 (8th Cir. 1989) (relaying the Eighth Circuit's interpretation of "or" as identifying separate alternatives); United States v. Astolas, 487 F.2d 275, 279 (2d Cir. 1973) (providing the Second Circuit's interpretation that "or" suggests disjunctive criteria); Price v. United States, 150 F.2d 283, 285 (5th Cir. 1945) (interpreting "and" to be a conjunctive term in statutes (citing Ackley v. United States, 200 F. 217, 221 (1912))).

79. Rine v. Imagitas, Inc., 590 F.3d 1215, 1224 (11th Cir. 2009) (citing Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997)).

80. Morrison v. Comm'r, 565 F.3d 658, 662 (9th Cir. 2009).

81. *In re* Espy, 80 F.3d 501, 505 (D.C. Cir. 1996) (citing United States v. Behnezhad, 907 F. 2d 896, 898 (9th Cir. 1990)).

82. United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237–38 (D.C. Cir. 2008); Ala. Educ. Ass'n v. Chao, 455 F.3d 386, 394 (D.C. Cir. 2006); United States v. Nofziger, 878 F.2d 442, 447–48 (D.C. Cir. 1989).

83. 455 F.3d at 394.

84. 878 F.2d at 448.

85. *See* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (providing that deference must be given to an agency's permissible construction of a statute if the statute is "silent or ambiguous" with respect to an issue).

meaning. Furthermore, federal courts that have interpreted "or" have decided that it is disjunctive and therefore, that "or" indicates separate elements.[86]

II. Collateral Bars as Prospective Relief

"Retroactive laws are all those that explicitly refer to and change the past legal consequences of past behavior."[87] As such, the Supreme Court has recognized a strong presumption against retroactive application.[88] In *Landgraf v. USI Film Products*,[89] the Court considered whether section 102 of the 1991 Civil Rights Act was applicable to a case pending appeal before it was enacted.[90] In considering this case, the Court provided guidance into the retroactive application of new statutes to conduct and cases arising before the statutes were enacted.[91] The Court established a two-part analysis to determine whether a statute was impermissibly retroactive: 1) did Congress express a clear intent that the statute be applied retroactively, and, if not, 2) does the statute impair rights a party had when he acted, increase liability for past conduct, or impose new duties on completed transactions.[92] This analysis should be guided by considerations of fair notice, reasonable reliance, and settled expectations.[93] One type of statute that passes the analysis without a clear expression of congressional intent is the type that authorizes proper prospective relief.[94] Because section 925 of Dodd-Frank does not contain a clear expression of congressional intent that it be applied retroactively, it must offer prospective relief to be applied to past actions.[95]

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86. *See* Azure v. Morton, 514 F.2d 897, 900 (9th Cir. 1975) ("As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately."); *see also* Quindlen v. Prudential Ins. Co. of Am., 482 F.2d 876, 878 (5th Cir. 1973) (stating the general rule that disjunctives require alternatives to be treated separately); Springfield v. Buckles, 116 F. Supp. 2d 85, 89 (D. D.C. 2000) ("Cannons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless context dictates otherwise[.]" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979))).

87. Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 Ala. L. Rev. 1329, 1334 (2000).

88. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994) (establishing that administrative rules and acts of Congress will ordinarily "not be construed to have retroactive effect unless their language requires this result" (quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988))).

89. 511 U.S. 244 (1994).

90. *Id.* at 247. *See also* Harvard Law Review Ass'n, *The Supreme Court, 1993 Term: Leading Cases*, 108 Harv. L. Rev. 139, 312 (1994) (discussing retroactive application of statutory language in *Landgraf*).

91. *Landgraf*, 511 U.S. at 256.

92. *Id.* at 280.

93. INS v. St. Cyr., 533 U.S. 289, 321 (2001) (quoting Martin v. Hadix, 527 U.S. 343, 358 (1999)).

94. *See Landgraf*, 511 U.S. at 273 (stating that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive").

95. *See* Dodd-Frank Act § 925. Under *Landgraf*, new legislation may also be applied if it confers or ousts jurisdiction. *Landgraf*, 511 U.S. at 274. See Troy, *supra* note 87, at 1347–48, for a discussion on the differences between prospective and retroactive legislation.

A. Landgraf*, Limited Prospective Relief, and Permissive Prospective Relief*

In *Landgraf*, the Supreme Court held up an injunction as an example of prospective relief because it operated *in futuro* and because the plaintiff had no vested right in the trial court's decree.[96] In his concurrence, Justice Scalia reasoned that prospective relief is not retroactive because its purpose is to "affect the future rather than remedy the past."[97] Under this reasoning, collateral bars are analogous to the injunction that *Landgraf* discussed because these bars operate to protect the public in the future by barring a bad actor from working in the securities industry that the investing public depends upon to be regulated and transparent. In applying *Landgraf*, some courts have limited prospective relief by claiming that it is not impermissibly retroactive *only when* it involves new remedies for conduct that was already illegal prior to the new legislation.[98] Other courts hold that prospective relief includes all injunctions and is never retroactive.[99] Section 925 of Dodd-Frank should accordingly be considered prospective relief under either line of reasoning despite the fact that both of these lines of cases were concerned with the application of the Federal Trademark Dilution Act ("Dilution Act").[100]

1. Circuit City Stores v. OfficeMax, Inc.*, and Limited Prospective Relief*

Circuit City Stores v. OfficeMax, Inc.,[101] is a frequently cited case to interpret *Landgraf* as finding prospective relief to not be impermissibly retroactive only when the relevant conduct was already illegal.[102] In this case, OfficeMax sought injunctive

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96. *See generally Landgraf*, 511 U.S. at 273 (discussing the retroactivity of statutes when they affect or authorize the propriety of prospective relief; *see also id.* at 274 (citing American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 201 (1921)).

97. *Id.* at 293 (Scalia, J., concurring).

98. *See, e.g.*, S. Indus., Inc. v. Diamond Multimedia Sys., 991 F. Supp. 1012, 1021 (N.D. Ill. 1998) (interpreting *Landgraf* as not allowing new statutes with new legal consequences to apply to events completed before its enactment); Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Dev. Corp., 973 F. Supp. 552, 559–60 (M.D. N.C. 1997) (interpreting *Landgraf* as allowing prospective relief only when the relevant conduct was already illegal); Circuit City Stores, Inc. v. Officemax, Inc., 949 F. Supp. 409, 417 (E.D. Va. 1996) (interpreting *Landgraf* as allowing prospective relief only when the relevant conduct was already illegal).

99. *See* Viacom Inc. v. Ingram Enters., Inc., 141 F.3d 886, 889 (8th Cir. 1998) (finding injunctions as permissive prospective relief because they enjoin continuing conduct); *see also* Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117, 129 (D. Mass. 1999), *aff'd*, 232 F.3d 1 (1st Cir. 2000) (finding under *Landgraf* that injunctive relief is prospective and not retroactive even when "prohibited conduct was legal when it first began").

100. *See Circuit City Stores, Inc.*, 949 F. Supp. at 412 ("OfficeMax asserts a claim under the Dilution Act which became effective January 16, 1996 as an amendment to the Lanham Act."). *Circuit City Stores, Inc.* emphasizes that there should be retroactive relief in circumstances where there are new remedies granted for conduct that was already illegal prior to legislation. *Id.* at 414. However, cases that follow the *Viacom, Inc.* perspective depart from the *Circuit City, Inc.* analysis and instead suggest that prospective relief, including injunctions, is never retroactive. *See Viacom, Inc.*, 141 F.3d 886 at 889 (finding that the *Circuit City, Inc.* court had inappropriately labeled binding precedent as dicta); *Hasbro, Inc.*, 66 F. Supp. 2d at 129 (resolving the *Landgraf* interpretation issue by following the *Viacom, Inc.* court's lead). *See also* Federal Trademark Dilution Act of 1996, 15 U.S.C. § 1051 (2006).

101. 949 F. Supp. 409 (E.D. Va. 1996).

102. *Id.* at 417.

relief against CarMax under the recently enacted Dilution Act.[103] The court granted CarMax's motion for summary judgment, finding that the Dilution Act may not be enforced retroactively.[104] CarMax began operating in 1993, but OfficeMax did not bring this action until 1996, after CarMax announced a nation-wide expansion.[105] The Dilution Act became effective in January 1996, and it created for the first time a federal claim for trademark dilution.[106] The Dilution Act differed significantly from previous trademark claims because it did not require the plaintiff to show a likelihood of confusion between the trademarks at issue.[107] OfficeMax argued that an injunction under the Dilution Act was permissible under *Landgraf's* explanation of proper prospective relief because the injunction would stop ongoing conduct.[108] The court disagreed because ". . . *Landgraf* does not stand for the proposition that the enforcement of a statute providing for injunctive relief can *never* be impermissibly 'retroactive.' Rather, the dicta on which OfficeMax relies speaks solely to cases in which the relevant conduct was *already illegal* before the effective date of the intervening statute."[109] The court reasoned that the Dilution Act was impermissibly retroactive because CarMax's actions were not illegal prior to the Act's effective date.[110]

Under the *OfficeMax* court's reasoning, section 925 of Dodd-Frank should provide prospective relief that is not impermissibly retroactive. The court was concerned that the Dilution Act provided a new cause of action, trademark dilution, which did not exist when CarMax initially began operating in 1993.[111] Further, this new cause of action eliminated the "likelihood of confusion" element of previous federal trademark claims.[112] Unlike the Dilution Act, section 925 does not provide a new cause of action and does not affect the elements of existing causes of action. Rather, it updates the kinds of bars the Commission may impose as a result of actions that are already prohibited in the sections of the securities law that section 925 amends.[113] While the actions of CarMax were "entirely proper" when

103. *Id.* at 410.

104. *Id.*

105. *Id.* at 411.

106. *Id.* at 412.

107. *Id.*

108. *Id.* at 416–17.

109. *Id.* at 417.

110. *Id.* at 418.

111. *Id.* at 418–19.

112. *Id.* at 415.

113. *See* Dodd-Frank Act, Pub. L. No. 111–203, § 925, 124 Stat. 1376, 1850–51 (2010) (amending sections 15(b)(6)(A), 15B, and 17A(c)(4)(C) of the Securities Exchange Act, and Section 203(f) of the Investment Advisers Act).

they were undertaken prior to the Dilution Act,[114] those actions that fall under the collateral bars of section 925 were already illegal when they were undertaken.

2. Hasbro, Inc. v. Clue Computing, Inc., *and Permissive Prospective Relief*

In *Hasbro, Inc. v. Clue Computing, Inc.*,[115] the court considered another Dilution Act case, and decided that *Landgraf* made injunctions based on that Act permissible in all instances.[116] Hasbro sued Clue Computing for dilution of the Clue trademark through Clue Computing's use of clue.com web address.[117] Clue Computing registered and began using clue.com in 1994, and Hasbro brought its dilution claim after the Dilution Act passed in 1996.[118] Clue Computing argued that an injunction based on the Dilution Act would "deprive it of property rights lawfully acquired before the act was passed" and therefore be impermissibly retroactive.[119] In applying *Landgraf*, the *Hasbro* court determined that injunctions based on the Dilution Act were permissible in all instances, even if the prohibited conduct was legal when it first began.[120] The court further reasoned that even though Clue Computing had no expectation that such a problem would arise, a law that determines the status solely of future matters is prospective.[121] The court declined to dismiss the Dilution Act claim as impermissibly retroactive.[122]

Section 925 of Dodd-Frank should also provide prospective relief under this more lenient standard. The bars in section 925 can be analogized to the *Hasbro* court's always-permissible Dilution Act injunctions. Both the bars and the injunctions determine the status solely of future matters.[123] The *Hasbro* court applied *Landgraf*'s reasoning to the Dilution Act's injunctive relief.[124] The same reasoning should be successfully applied to collateral bars. Furthermore, these bars apply to acts that were already illegal, so they do not have to clear the hurdle that the Dilution Act does when it makes previously legal conduct illegal.

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114. *See OfficeMax, Inc.*, 949 F. Supp. at 415 (declaring CarMax's actions to be "entirely proper" as far as federal law was concerned).

115. 66 F. Supp. 2d 117 (D. Mass. 1999).

116. *Id.* at 128.

117. *Id.* at 119.

118. *Id.* at 119, 126.

119. *Id.* at 126.

120. *Id.* at 128–29.

121. *Id.* at 129–30.

122. *Id.* at 130.

123. *See* Dodd-Frank Act, Pub. L. No. 111–203, § 925, 124 Stat. 1376, 1850–51 (2010) (amending 15 U.S.C. § 78o(b)(6)(A)); *see also* Teicher v. S.E.C., 177 F.3d 1016, 1017 (D.C. Cir. 1999) (stating "15 U.S.C. § 78o(b)(6). . . is triggered by a person's past, present or *future* association with a broker-dealer. . .") (emphasis added); *Hasbro*, 66 F. Supp. 2d at 127, *aff'd*, 232 F.3d 1 (1st Cir. 2000) ("'[R]elief by injunction operates in future. . .'") (quoting Am. Steel Foundries v. Tri–City Central Trades Council, 257 U.S. 184, 201 (1921)).

124. *Hasbro*, 66 F. Supp. 2d at 127.

B. *Application to Securities Law*

A few cases concerning the federal securities law provide insight into how federal courts may respond to the argument that section 925 of Dodd-Frank is permissible prospective relief. These cases specifically address actions by the Commission and, in the case of *Johnson v. SEC*,[125] present possible hurdles the Commission may have to overcome when it is forced to litigate the application of collateral bars to past bad acts.[126] In *Johnson*, the D.C. Circuit rejected a bar imposed by the Commission because it punished conduct that fell outside the statute of limitations.[127] Since collateral bars may be imposed against bad acts that occurred prior to the passage of Dodd-Frank, timing could become an issue.[128] More importantly, the court rejected the Commission's argument that the bar was a remedial action designed "to protect the public from future harm . . . ."[129] In light of the *Landgraf* decision, courts will need to find that collateral bars are prospective relief designed to protect the public, rather than punishment, in order to allow such bars to pass the *Landgraf* analysis.[130]

1. SEC v. Johnson

In *SEC v. Johnson*,[131] the D.C. Circuit vacated a Commission order imposing sanctions against Johnson because the five-year statute of limitations to do so had run.[132] The Commission claimed Johnson had failed to properly supervise an account representative named Zetterstrom under section 15(b) of the Exchange Act.[133] This claim was based on actions that occurred in 1987 and 1988, but was not brought until 1993, just beyond the five-year limitation deadline.[134] The Commission argued that the sanctions imposed on Johnson were not penalties and

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125. 87 F.3d 484 (D.C. Cir. 1996).

126. *See id.* at 490 (stating that the Commission's focus on Johnson's past misconduct belied the SEC's claim that the sanctions it issued were for "Johnson's present danger to the public").

127. *See id.* at 492 (holding that the five-year statute of limitation set forth in 28 U.S.C. § 2462 applies to Commission proceedings "which seek to censure and suspend a securities supervisor").

128. *Cf. id.* at 492 n.14 ("[O]nce the SEC has delayed … in proceeding against a broker it considers a grave threat to the public, the bulk of the harm has already been done."); *see also* Casey, *supra* note 3, at 7 (stating that collateral bars have already been sought in administrative actions against Paul George Chironis and Gregory J. Buchholz).

129. *Johnson*, 87 F.3d at 486 (citations omitted).

130. *See* Meadows v. S.E.C., 119 F.3d 1219, 1228 (5th Cir. 1997) (holding that a temporary bar was an appropriate remedy because it was designed to protect the public from future misconduct); *see also* S.E.C. v. Jones, 476 F. Supp. 2d 374, 380 (S.D.N.Y. 2007) ("Most … courts have determined that § 2462 does not apply to equitable relief that seeks to undo prior damage or protect the public from future harm."); *Johnson*, 87 F.3d at 489, 492 (finding the sanction the Commission attempted to impose had "punishment-like" qualities, and therefore vacating the sanction); *see also* Landgraf v. USI Film Products, 511 U.S. 244, 293 (1994) ("[T]he purpose of prospective relief is to affect the future rather than remedy the past").

131. 87 F.3d 484 (D.C. Cir. 1996).

132. *Id.* at 485, 492.

133. *Id.* at 485–86.

134. *Id.* at 485.

therefore, the sanctions were not disallowed by the statute of limitations because they were remedial and intended to protect the public from future harm.[135] The court disagreed, finding no evidence the sanctions were based on Johnson's unfitness as supervisor or risk posed to the public.[136] Instead, the court found that the sanctions were based on her previous conduct:

> *This sanction would less resemble punishment if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public. . . . [I]t is evident that the sanctions here were not based on any general finding of Johnson's unfitness as supervisor, nor any showing of risk she posed to the public, but rather were based on Johnson's alleged failure reasonably to supervise Zetterstrom . . . . The SEC initiated these proceedings with an indictment-like document . . . .*[137]

The D.C. Circuit further refused to allow an exception for the remedial purpose of protecting the public, and it refused to narrowly construe penalty as a matter of public policy.[138]

Because section 925 is a new statute, it should avoid the *Johnson* court's analysis by way of *Landgraf*.[139] However, even if it did not, it should still survive *Johnson*. Any claims for which section 925 collateral bars are sought that are based on underlying acts less than five years old should not be barred by the statute of limitations applied in *Johnson*. Further, the Commission can avoid a finding that the collateral bars are penalties in two ways. First, it should articulate why the defendant poses a current risk to the investing public and provide evidence of the risk. Providing this evidence will satisfy the *Johnson* court's main concern.[140] Second, the Commission should seek the section 925 collateral bars immediately, and then argue that *Johnson* should not apply because it sought the sanction as soon as Congress made the sanction available.

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135. *Id.* at 486.

136. *Id.* at 489.

137. *Id.*

138. *See id.* at 491, 492. ("The sanctions imposed here, however, are certainly not 'remedial' in the sense that term is used [to protect the public] . . . . We therefore find no reason based on public policy or general concerns about statutes of limitation to depart from the 'ordinary, contemporary, common meaning' of the word 'penalty.'").

139. *See* Casey, *supra* note 3, at 7 (stating that Section 925, under the *Landgraf* standard, is silent as to Congress's intent of retroactivity, therefore courts need to inquire "whether the statute… 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed' . . . .").

140. *See Johnson*, 87 F.3d at 490 (criticizing the Commission for focusing "almost exclusively on Johnson's failure reasonably to supervise, not her current competence or risk to the public").

2. SEC v. Fehn *and* SEC v. Platforms Wireless Int'l, Corp.

Both *SEC v. Fehn*[141] and *SEC v. Platforms Wireless Int'l, Corp.*[142] provide some insight into how the federal courts will handle section 925 in light of *Landgraf* and *Johnson*. Both cases indicate that *Johnson* may not provide much of a hurdle for the application of section 925 collateral bars to past acts as prospective relief. In both of these cases, federal courts applied new statutes of the federal securities law to past acts as proper prospective relief.[143]

In *Fehn*, the Ninth Circuit upheld an injunctive action brought by the Commission against California attorney Thomas Fehn.[144] Fehn had worked with CTI Technical, Inc., and its president and CEO, Edwin Wheeler, and he facilitated the making of improper disclosures on at least three 10-Qs.[145] The district court entered final judgment in 1994.[146] On appeal, Fehn argued that the Supreme Court had precluded Commission injunctive actions in *Central Bank of Denver v. First Interstate Bank of Denver*.[147] In 1995, however, Congress passed the Private Securities Litigation Reform Act ("PSLRA"),[148] which contained section 104 to specifically override *Central Bank*'s decision.[149] Because the PSLRA was passed after the underlying action and litigation, the court had to consider whether section 104 applied to Fehn.[150] In applying *Landgraf*, the court found that section 104 did not attach new legal consequences to Fehn's actions, but rather restored legal consequences that had been temporarily eliminated.[151] The court went on to discuss section 104 as prospective relief.[152] It reasoned that prospective relief is an exception to the general presumption of retroactivity, and that "[i]ntervening statutes that

141. 97 F.3d 1276 (9th Cir. 1996).

142. No. 04CV2105 JM (AJB), 2007 U.S. Dist. LEXIS 47775 (S.D. Cal. July 2, 2007), *aff'd*, 617 F.3d 1072 (9th Cir. 2010).

143. *See Fehn*, 97 F.3d at 1287 (applying Section 104 of the Private Securities Litigation Reform Act of 1995 retroactively because it authorizes prospective relief); *see also Platforms Wireless*, 2007 U.S. Dist. LEXIS 47775, at *8 (applying 15 U.S.C.S. § 78u(d)(6) retroactively because it affects prospective relief).

144. *Fehn*, 97 F.3d at 1280.

145. *Id.* at 1281.

146. *Id.* at 1282.

147. *See id.* (referring to Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994)).

148. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (1995).

149. *See Fehn*, 97 F.3d at 1283 ("Sen. Dodd stated that the legislation: restores enforcement authority to the Securities and Exchange Commission. That was lost . . . in the 1994 Supreme Court case, the *Central Bank* case. We, in this bill [the PSLRA], restore what the *Central Bank* took away from the SEC here." (quoting 141 Cong. Rec. S17,933-04, S17,956 (daily ed. Dec. 5, 1995) (statement of Dodd Frank))). Section 104 of the PSLRA adds "persons who aid and abet violations" to those who are liable under sections 10(b) and 15(d) of the Exchange Act. Private Securities Litigation Reform Act § 104.

150. *Fehn*, 97 F.3d at 1284. The court also took into account that *Central Bank* was not decided until eighteen days after the district court had entered the permanent injunction against Fehn. *Id.*

151. *Id.* at 1286.

152. *See id.* at 1287 (stating that Section 104 authorizes prospective relief).

grant injunctive power fall into this category. . . ."[153] The injunction authorized under section 104 of the PSLRA falls into this exception.[154]

Although the Ninth Circuit in *Fehn* did not explicitly state that section 104 would be permissible as prospective relief even if it had attached new legal consequences, it did analyze the prospective relief exception to retroactivity separately from its analysis of whether section 104 attached new legal consequences.[155] Therefore, the Ninth Circuit's analysis resembles the permissive prospective relief analysis found in *Hasbro*, and it indicates that new securities law injunctions would always be prospective relief.[156] Under *Fehn*, section 925 of Dodd-Frank should be able to forego the analysis of whether it attaches new legal consequences because it fits into the prospective relief exception.

Platforms Wireless also found a new securities law remedy to be permissible prospective relief under *Landgraf*.[157] The Commission sought a penny stock bar against Platforms Wireless and its officers under the Securities Enforcement Remedies Act of 1990 ("Remedies Act") as amended in 2002.[158] The defendants argued that their bad conduct had occurred prior to 2002, so the earlier version of the Remedies Act should apply.[159] The amended Remedies Act the Commission sought to use contained a broader bar that extended beyond a prohibition to participate in an offering of penny stocks to include prohibitions in "engaging in activities with a broker, dealer, or issuer" concerning penny stocks.[160] The defendants cited *Koch v. SEC*[161] and claimed that the broader bar was impermissibly retroactive, while the SEC argued that the bar was forward-looking and permissible under *Landgraf*.[162] The court determined that *Koch* did not apply because the Commission had not raised the prospective relief exception when it had argued its case in *Koch*.[163] Here, the Commission had raised the exception, so the broader bar from the amended Remedies Act was found to be permissible prospective relief.[164]

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153. *Id.* at 1287.

154. *Id.*

155. *Id.* at 1286–87.

156. *See* Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117, 129 (D. Mass. 1999), *aff'd*, 232 F.3d 1 (1st Cir. 2000) ("[I]njunctive relief is prospective even if the prohibited conduct was legal when it first began."); *see also Fehn*, 97 F.3d at 1286–87 ("Finally, *Landgraf* articulated another principle that makes the application of Section 104 to this case appropriate . . . .This exception provides that where the new statute 'authorizes or affects the propriety of *prospective relief*,' the 'application of the new provision is not retroactive' . . . . Intervening statutes that grant injunctive power fall into this category . . . .") (quoting Landgraf v. USI Film Products, 511 U.S. 244, 273 (1994) (emphasis added)).

157. S.E.C. v. Platforms Wireless Int'l, Corp., No. 04CV2105 JM (AJB), 2007 U.S. Dist. LEXIS 47775, at *8 (S.D. Cal. July 2, 2007).

158. *Id.* at *6.

159. *Id.* at *6–*7.

160. *Id.* at *7.

161. 177 F.3d 784 (9th Cir. 1999).

162. *Platforms Wireless*, 2007 U.S. Dist. LEXIS 47775, at *7.

163. *Id.* at *8.

164. *Id.*

The collateral bars under section 925 of Dodd-Frank should similarly be considered permissible prospective relief under the same reasoning.

Section 925 of Dodd-Frank should be considered permissible prospective relief and therefore, legally available for application to conduct that pre-dated Dodd-Frank. In *Landgraf*, the Supreme Court established prospective relief as an exception to impermissible retroactive application of statutes, and it listed an injunction as an example of this exception.[165] The Court reasoned that injunctions look to future behavior, and therefore are prospective.[166] Collateral bars likewise look to future behavior.[167] Caselaw has interpreted *Landgraf*'s prospective relief in two different ways. Some courts find prospective relief permissible only when it attaches new remedies to conduct that was already illegal.[168] Other courts have found prospective relief to always be permissible.[169] Section 925 should be permissible prospective relief under either line of reasoning because it does not make previously legal conduct illegal. Rather, it modifies the remedies available for past illegal conduct.[170] Finally, in *Fehn* and *Platforms Wireless*, federal courts have at least twice used *Landgraf* to apply new securities law to past illegal conduct.[171] Section 925 is similar to the PSLRA and Remedies Act discussed in those cases, and it should likewise be permissible prospective relief.

III. Standards for Implementing Collateral Bars

Prior to the D.C. Circuit's ruling in *Teicher v. SEC*,[172] the Commission implemented collateral bars if "it is contrary to the public interest to allow someone to serve in

165. Landgraf v. USI Film Products, 511 U.S. 244, 273–74 (1994).

166. *See id.* (noting "'relief by injunction operates *in futuro*…'") (quoting Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 210 (1921)).

167. *See* Dodd-Frank Act, Pub. L. No. 111–203, § 925, 124 Stat. 1376, 1850 (2010) (amending 15 U.S.C. § 78o(b)(6)(A)); *see also* Teicher v. S.E.C., 177 F.3d 1016, 1017 (D.C. Cir. 1999) (stating 15 U.S.C. § 78o(b)(6) is prompted by a person's past, current, or future behavior).

168. *See Am. Steel Foundries*, 257 U.S. at 203 (retroactively applying section 20 of the Clayton Act because the statute "introduce[d] no new principle into the equity jurisprudence of [the] courts"); *see also* Circuit City Stores, Inc. v. OfficeMax, Inc., 949 F. Supp. 409, 417 (E.D. Va. 1996) ("In such circumstances, the application of purely prospective injunctive relief raises no retroactivity concerns because where the past conduct is illegal, the enforcement of the intervening statute merely provides a new remedy with respect to that conduct, and does not act to significantly 'sweep away settled expectations.'") (quoting *Landgraf*, 511 U.S. at 266).

169. *See e.g.*, Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117, 128–29 (D. Mass. 1999) (interpreting *Landgraf* to make permissive prospective relief available in all instances, even if the conduct was legal when it first began).

170. *See* Dodd-Frank Act § 925 (adding further restrictions to associations with certain parties like municipal securities agents).

171. *See* S.E.C. v. Fehn, 97 F.3d 1276, 1286 (9th Cir. 1996) (applying "Sections 10(b) and 15(d) of the Securities Exchange Act"); *see also* S.E.C. v. Platforms Wireless Int'l., Corp., No. 04CV2105 JM(AJB), 2007 U.S. Dist. LEXIS 47775, at *9 (S.D. Cal. July 2, 2007) (applying Section 10(b) of the Securities and Exchange Act).

172. *See* 177 F.3d 1016, 1021–22 (D.C. Cir. 1999) (finding that the Commission does not have the authority to implement collateral bars under Section 15(b)(6) of the Exchange Act).

any capacity in the securities industry."[173] This determination was made if the misconduct "flows across" different securities professions *and* "poses a risk of harm to the investing public," and the Commission also considered the egregiousness of the misconduct.[174] Because Dodd-Frank gives the Commission the explicit authority to invoke collateral bars, *Teicher* has effectively been overruled by Congress. To survive further judicial scrutiny, the Commission should implement the same standards for seeking collateral bars that it did prior to *Teicher*, and it should use similar reasoning.[175]

A. *The* Steadman *Factors*

While the Commission developed standards for implementing collateral bars in the 1990s, those standards find their roots in *Steadman v. SEC*.[176] In *Steadman*, the Fifth Circuit considered an investment advisor's appeal from a Commission decision.[177] The Commission found Steadman guilty of violating several provisions of the securities law and had permanently barred him from associating with any investment advisor, prohibited him from affiliating with any registered investment company, and suspended him from associating with any broker or dealer for one year.[178] While the Fifth Circuit found most of Steadman's argument to be without merit, it remanded the case to the Commission for reconsideration of the sanctions it had imposed.[179]

The Fifth Circuit believed the Commission must "specifically articulate[] compelling reasons" for imposing a sanction that permanently excluded someone from a securities industry.[180] The court wanted the Commission to consider six specific factors:

> *At least the Commission specifically ought to consider and discuss with respect to Steadman the factors that have been deemed relevant to the issuance of an injunction: the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the*

173. Blinder, 53 S.E.C. 250, 261 (1997)

174. *Id.*

175. *See Teicher*, 177 F.3d at 1019 (noting the "general principle favoring 'flexibl[e]' construction of the securities laws to effectuate their remedial purposes" (citing *Blinder*, 53 S.E.C. at 260) (citations omitted)).

176. 603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

177. *Id.* at 1128.

178. *Id.* at 1128–29.

179. *Id.* at 1129.

180. *Id.* at 1140.

> *likelihood that the defendant's occupation will present opportunities for future violations.*[181]

The Fifth Circuit required the Commission to enumerate the factors that merited Steadman's permanent exclusion from parts of the securities industry.[182] While *Steadman* dealt with a direct bar whose implementation was specifically condoned in the federal securities law, the six factors it laid out for consideration of such a bar were eventually used by the Commission to develop standards to apply to the implementation of collateral bars not specifically authorized by the law, presumably in an attempt to survive judicial scrutiny.[183]

B. Development of the Standards for Collateral Bars

From 1994 to 1999, the Commission developed standards for imposing collateral bars based on section 15(b)(6) of the Exchange Act ("15(b)(6)").[184] This development culminated in the Commission's opinion in *In re Blinder*, which laid out both the standards for applying collateral bars and the reasoning behind the bars.[185] There are a handful of administrative proceedings that build up to and apply *Blinder* before the D.C. Circuit ended collateral bars in *Teicher v. SEC* in 1999.[186] As outlined in *Blinder*, collateral bars were to be imposed to protect the public interest if the misconduct 1) "flows across" the securities professions, 2) "poses a risk of harm to the investing public," and 3) is egregious enough to need a comprehensive response to protect the public interest.[187]

In 1994, an administrative court reasoned that sanctions for violations of 15(b)(6) are intended to protect the public rather than punish the offender, and should be considered on a case-by-case basis.[188] The court applied the six factors established by *Steadman v. SEC* in determining whether to apply collateral bars.[189] Prior to the administrative court's decision, the federal courts believed that the

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181. *Id.* (quoting S.E.C. v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)).

182. *Id.* at 1140.

183. *See* Blinder, 53 S.E.C. 250, 261–62 (1997) (discussing factors supporting the application of a collateral bar, focusing on Blinder's egregious conduct); *see also* Consol. Inv. Servs., Inc., No. 3-8312, 1994 S.E.C. LEXIS 4045, at *50–*51 (1994) (discussing the six *Steadman* factors) .

184. *See* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1850, § 925(a)(1) (2010) (updating the collateral bars for Section 15(b)(6)(A)).

185. *Blinder*, 53 S.E.C. at 261–62.

186. *See, e.g.*, Calise, Exchange Act Release No. 40862, 1998 SEC LEXIS 2868, at *7 (ALJ Dec. 30, 1998) (applying the *Blinder* factors to bar the defendant from any association with brokers or dealers); *see also Teichner*, 177 F.3d at 1019, 1021 (examining collateral bars through the lens of the factors laid out in *Blinder* and refusing to apply collateral bars).

187. *Blinder*, 53 S.E.C. at 261.

188. Consol. Inv. Servs., S.E.C. Initial Decision No. 59, at 33 (ALJ Dec. 12, 1994), *available at* http://www.sec.gov/litigation/aljdec/1994/id19941208grl.pdf.

189. *Id.* (quoting Steadman v. S.E.C., 603 F.2d 1126, 1140 (5th Cir. 1979)).

Commission should consider these factors when determining whether to seek injunctions.[190] However, through the course of administrative proceedings rather than federal litigation, the Commission refined these factors as applied to collateral bars. In 1995, the Commission's Enforcement Division ("Enforcement") argued for a collateral bar based on a defendant's lack of contrition, recklessness, and employment in the securities industry.[191] That argument was ultimately unsuccessful, and the administrative court found no legal basis for a collateral bar.[192] The following year, Enforcement again argued for a collateral bar based on the defendant's "high degree of scienter" and likelihood of future securities law violations.[193] While the administrative court applied the six factors and granted a broker-dealer bar, it declined to impose a collateral bar.[194] The court determined that 15(b)(6) did not provide a basis for granting a collateral bar, and it pointed out that "[t]he issue of whether a collateral bar can be imposed is presently before the Commission."[195] After these cases, the Commission issued its *Blinder* opinion, claiming that it had the authority to issue collateral bars and setting forth the standards for imposing them.[196]

Following *In re Blinder*, at least one administrative court upheld a collateral bar when the defendant's misconduct "flow[ed] across various securities professions," was egregious, and harmed public interest.[197] However, when the defendant's conduct did not pose a threat to the investing public, administrative courts did not uphold collateral bars.[198] The Commission intervened in one of these cases, issuing a 1999 opinion that reiterated the *Blinder* decision.[199]

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190. *See Steadman*, 603 F.2d at 1140 (explaining that the Commission should consider the six factors); *see also* S.E.C. v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978) (citing S.E.C. v. Universal Major Indus. Corp., 546 F.2d 1044, 1048 (2d Cir. 1976); S.E.C. v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100–01 (2d Cir. 1972) (applying factors to determine whether the district court abused its discretion in granting permanent injunctive relief).

191. Graham, S.E.C. Initial Decision No. 82, at 59–60 (ALJ Dec. 28, 1995), http://www.sec.gov/litigation/aljdec/id82grl.txt.

192. *Id.* at 60.

193. Sehn, S.E.C. Initial Decision Release No. 99, at 7 (ALJ Nov. 4, 1996), http://www.sec.gov/litigation/aljdec/id99lam.txt.

194. *Id.* at 11–14.

195. *Id.* at 13.

196. Blinder, 53 S.E.C. 250, 254, 261 (1997).

197. Fox, Exchange Act Release No. 39229, 1997 SEC LEXIS 2216, at *6–*8 (ALJ Oct. 10, 1997).

198. *See* Westerfield, S.E.C. Initial Decision Release No. 120, at 7 (ALJ Feb. 9, 1998), http://www.sec.gov/litigation/aljdec/id120gmb.txt (finding the public interest did not require a collateral bar at this time, but could be reevaluated if the defendants' apply to become registered securities professionals in the future); *see also Sayegh*, S.E.C. Initial Release No. 118, at 7 (ALJ Oct. 10, 1997), http://www.sec.gov/litigation/aljdec/id118bpm.txt (finding the defendants "have not been found guilty of criminal conduct, do not have records of prior securities law violations, did not substantially enrich themselves by their activities, and did not threaten[] judicial and regulatory officers who dealt with them); *cf.* Kaiden, S.E.C. Initial Decisions Release No. 487, at 6 (ALJ Mar. 24, 1998), *available at* http://www.sec.gov/litigation/aljdec/id124rgm.txt (barring the defendant from associating with any broker or dealer due to his lack of honesty in securities activities).

199. Sayegh, 54 S.E.C. 46, 51, 54–55 (1999), *reconsideration granted*, 54 S.E.C. 289 (1999).

C. *Application of the Standards for Collateral Bars*

In *Blinder*, the Commission laid out three prongs to determine if a collateral bar is necessary to protect the public interest.[200] The misconduct must 1) flow across securities professions, *and* 2) pose a risk of harm to the investing public.[201] Moreover, 3) the egregiousness of the conduct is also a factor.[202]

The Commission's opinion did not substantially explain how all three prongs were to be satisfied, instead treating them as considerations to apply to the facts of the case:

> *Blinder repeatedly violated the federal securities laws and, in the process, caused great harm to investors . . . . Among other things, Blinder used Blinder Robinson to orchestrate major frauds and manipulations, as well as registration, disclosure, and pricing violations. He lashed out – both figuratively and literally – against those who sought to bring him to justice. His schemes resulted in substantial enrichment to Blinder at the expense of the investing public. The record also suggests that Blinder made attempts to move funds overseas to foreign business operations. The sum of Blinder's actions, and his fundamental lack of appreciation of the seriousness of his misconduct, persuade us that it is likely that Blinder will continue, if allowed, to commit further securities law violations.*[203]

In *Sayeh*, the Commission confirmed the factors from *Blinder*, and offered a bit more explanation.[204] First, the Commission found Sayeh's conduct to be egregious because he generated and participated in a scheme to keep the price of depository receipts artificially high for seventeen months, and he refused to acknowledge the significance of his misconduct.[205] Second, the Commission found that a seventeen-month manipulation of securities "envince[s] the type of conduct that 'flows across' the securities industry."[206] Finally, the Commission found that, as a securities professional, Sayeh's disregard for the securities law can inflict harm on investors and poses a risk no matter what sector of the industry he practices.[207]

The opinions in *Blinder* and *Sayeh* provide the best guidance so far articulated by the Commission as to how to apply the three prongs to different facts. In both cases, though, the three prongs seem to be used as guidance as to whether collateral bars are necessary to protect the public interest.

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200. *In re* Blinder, 53 S.E.C. 250, 261 (1997).
201. *Id.*
202. *Id.*
203. *Id.* at 262.
204. *Sayegh*, 54 S.E.C. at 49 (1999).
205. *Id.*
206. *Id.* at 55.
207. *Id.*

D. *Justification for Authority to Invoke Collateral Bars*

In *Blinder*, the Commission reasoned why it had the authority to invoke collateral bars.[208] First, it looked at the wording of 15(b)(6) and concluded that the "place limitations" phrase gave it "additional flexibility to impose sanctions."[209] Second, the Commission concluded that collateral bars comported with Congress's intent in adding "place limitations" to 15(b)(6).[210] Third, imposing collateral bars based on the "place limitations" language furthers the purposes of the securities law and is supported by the Supreme Court's observation that securities laws should be construed flexibly to effectuate their purpose.[211] Finally, the Commission justified collateral bars as precluding "the creation of a serious regulatory gap."[212] The Commission reasoned that investors would not be protected if it had to wait until someone with a broker-dealer bar applied to be an investment advisor before the Commission could determine if that activity would be in the public interest.[213] Such a person could lawfully act as an investment advisor in certain circumstances without registering or notifying the Commission.[214]

Prior to the D.C. Circuit's decision in *Teicher v. SEC*, the Commission had developed and utilized a set of standards to guide the imposition of collateral bars.[215] Collateral bars could be imposed to protect the public interest.[216] To determine if this interest needed to be protected through the use of collateral bars, the Commission evaluated whether the misconduct 1) "flows across" the securities professions, 2) "poses a risk of harm to the investing public," and 3) is egregious enough to need a comprehensive response to protect the public interest.[217]

Conclusion

On February 4, 2011, Securities and Exchange Commissioner Kathleen L. Casey addressed the Practising Law Institute and spoke at length about the collateral bars of section 925 of Dodd-Frank.[218] Less then two months later, the Commission's Director of Enforcement, Robert Khuzami, specifically highlighted the new collateral bar authority for the impact it would have on Enforcement's program.[219] As both of these speeches indicated, the collateral bars authorized by Dodd-Frank

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208. Blinder, 53 S.E.C. 250, 260–61 (1997).

209. *Id.* at 255.

210. *Id.* at 256–57.

211. *Id.* at 257.

212. *Id.* at 258.

213. *Id.* at 258–59.

214. *Id.* at 258.

215. *See id.* at 261 (explaining situations when collateral bars should be imposed).

216. *Id.*

217. *Id.*

218. *See generally* Casey, *supra* note 3, at 1.

219. Robert Khuzami, *Remarks at SIFMA's Compliance and Legal Society Annual Seminar*, at 5 (Mar. 23, 2011), http://www.sec.gov/news/speech/2011/spch032311rk.htm (last visited Feb. 16, 2012).

provide a powerful new weapon for the Commission, but also come with high litigation risk as the Commission begins to implement them.[220] The Commission will soon face three main issues involving these bars: 1) whether to implement the newly authorized bars as one, all-encompassing bar or as selected individual bars, 2) whether the collateral bars can be applied to past securities law violations, and 3) what standards to use when determining to implement the collateral bars.

Because section 925 of Dodd-Frank uses an "or" when codifying these new collateral bars, the Commission should have the ability to pick and choose which bars to implement depending on individual cases.[221] The ability to pick and choose which bars to implement would give Enforcement lawyers more chips with which to negotiate a settlement. However, implementing section 925 as one all-encompassing bar will provide bright-line guidance to both Enforcement lawyers and potential violators of securities law as to what the consequences of such violations will be. Based on the text of section 925, it is up to the Commission to determine how to best implement these collateral bars.

Regardless of the Commission's policy, it should be able to successfully apply these bars to past bad acts by arguing that such bars are prospective relief and not impermissibly retroactive. Courts have established two lines of reasoning based on *Landgraf v. USI Film Products* about whether certain statutes constitute permissible prospective relief: 1) limited prospective relief, and 2) permissive prospective relief.[222] Under both lines of reasoning, section 925 of Dodd-Frank qualifies as prospective relief and therefore, should be applicable to past conduct.

Finally, in *Steadman v. SEC*, the Fifth Circuit laid out six factors it used to determine whether a sanction was intended to protect the public rather than punish the offender.[223] The Commission subsequently established three main considerations to determine whether to implement collateral bars prior to the passage of Dodd-Frank: whether the misconduct 1) "flows across" the securities professions, 2) poses a risk of harm to the investing public, and 3) is egregious enough to need a comprehensive response to protect the public interest.[224] If the Commission continues to use this test in determining whether it should implement the collateral bars of section 925, it will have succeeded in creating a policy on which Enforcement lawyers and professionals in the regulated securities industries can rely. This policy will greatly reduce the litigation risk the Commission would otherwise face when these collateral bars are challenged in federal court, which they inevitably will be.

220. *Id.*; *see also* Casey, *supra* note 3, at 1–3.

221. *See supra* Part I.D.

222. *See supra* Part II.A.

223. Steadman v. S.E.C., 603 F.2d 1126, 1140 (5th Cir. 1979).

224. Blinder, 53 S.E.C. 250, 261 (1997).