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The SEC and the Extent of Its Power to Sanction: 
An Analysis of Teicher v. Securities And Exchange Commission - Did the Court Correctly Apply 
Chevron v. Natural Resources Defense Council to a 
Matter of Agency Interpretation?

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NOTE

THE SEC AND THE EXTENT OF ITS POWER TO SANCTION: AN ANALYSIS OF TEICHER v. SECURITIES AND EXCHANGE COMMISSION – DID THE COURT CORRECTLY APPLY CHEVRON v. NATURAL RESOURCES DEFENSE COUNCIL TO A MATTER OF AGENCY INTERPRETATION?

I. INTRODUCTION

On June 1, 1999, the United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part a May 20, 1998 final order by the Securities and Exchange Commission ("SEC" or "Commission"), barring petitioners Victor Teicher ("Teicher") and Ross S. Frankel ("Frankel") from associating with any registered or unregistered investment adviser.\(^1\) The court imposed these sanctions as a result of Teicher's and Frankel's criminal convictions for participating

\(^1\) See Teicher v. Securities and Exchange Commission, 177 F.3d 1016 (D.C. Cir. 1999). Victor Teicher & Co. was also convicted and barred along with the individual Victor Teicher; to simplify, both are referred to as Teicher. See id. at 1017.
in an insider trading scheme in the late 1980's. The bar against Teicher, who was at all relevant times associated with an unregistered investment adviser, was entered pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"). The same bar against Frankel, who was at all relevant times associated with a broker-dealer, was entered pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act").

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3 An unregistered investment adviser is an investment adviser who is not registered with the SEC. See generally K. FRED SKOUSEN, AN INTRODUCTION TO THE SEC 37 (4th ed. 1987).


   The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds . . . that such censure, placing of limitations, suspension, or bar is in the public interest and that such person [has been convicted of securities fraud or enjoined against conduct in violation of the securities laws].

   Id. at 4. See also Brief of Petitioners Victor Teicher and Victor Teicher & Company, L.P. at 8, n. 3, Teicher v. S.E.C., 177 F.3d 1016 (D.C. Cir. 1999) (No. 98-1287, Consolidated with 98-1414) [hereinafter Petitioners' Brief]. Concluding that Teicher & Co. was simply Mr. Teicher's alter ego, the SEC determined that it did not have to address the issues raised with respect to Teicher & Co. under Section 203(e), which deals with the Commission's jurisdiction over registered investment advisers rather than persons associated with such advisers. See id.

6 Whether or not a broker-dealer is registered with the SEC is not an issue with respect to Frankel's case. See Memorandum of Law of Petitioner Ross S. Frankel, Teicher v. Securities and Exchange Commission, 177 F.3d 1016 (D.C. Cir. 1999) (No. 98-1297, Consolidated with 98-1414) [hereinafter Petitioner's Memo].


   With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, . . . the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a broker or dealer, . . . if the Commission finds . . . that such censure, placing of limitations, suspension, or bar is in the public interest and that such person [has been convicted of securities fraud or enjoined against conduct in violation of the securities laws]. Id.
This note will address two primary issues in analyzing Teicher. The first is whether the SEC has the authority within its sanctioning power, specifically under Section 15(b)(6) of the Exchange Act, to impose collateral limitations on a person who violates the Exchange Act, such as preventing that person from utilizing his or her license in another branch of the securities industry. The second is whether the SEC has the authority within its sanctioning power, specifically under Section 203(f) of the Advisers Act, to bar a person who violates the Adviser’s Act from associating or seeking to become associated with an unregistered investment adviser.

To place these two issues in context, this note will first discuss the SEC and its sanctioning authority within federal securities law enforcement. Second, this note will discuss the Chevron U.S.A., Inc. v. Natural Resources Defense Counsel deference standard that courts must use in reviewing agencies’ statutory interpretations when administering sanctions. Finally, this note will present the facts, procedural history and court’s analysis of Teicher, and will conclude with a critique of the court’s determination deferring to the SEC’s interpretation of Section 203(f) of the Advisers Act, but overruling the SEC’s interpretation of Section 15(b)(6) of the Exchange Act.

II. BACKGROUND

A. THE SECURITIES AND EXCHANGE COMMISSION AND ITS STATUTORY POWER TO SANCTION

During the latter part of the nineteenth century, continual widespread abuses in the securities markets led many concerned investors to seek federal securities legislation to provide investor protection.8 Such abuses included price manipulation, the excessive use of credit to finance speculative activities, and the misuse of corporate information by corporate offi-

8 See Skousen, supra note 3, at 2-3.
Accordingly, the birth of securities regulation in the United States ("U.S.") did not result solely from the stock market crash in 1929 or the ensuing years of financial stagnation as the popular misconception holds. Nevertheless, in an effort to limit these abuses and advance honest and open securities markets, Congress created the SEC.

The SEC is an independent, nonpartisan, quasi-judicial regulatory agency of the U.S. government. It is directed by five commissioners, each of whom is appointed by the U.S. President with approval of the Senate. One commissioner sits as Chairman. The SEC is administered from its Washington, D.C. headquarters, but has regional and district branch offices in the major financial centers of the U.S. The Commission carries out its work primarily through its staff, which is organized into divisions and offices each with specific areas of responsibility. The Division of Enforcement is one such divi-

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9 See id at 4.
10 See id at 3.
11 See id. The Securities and Exchange Act of 1934 authorized the creation of the SEC on June 6, 1934. See id. at 23.
13 See Skousen, supra note 3, at 9. No more than three of the commissioners can be from the same political party and each commissioner is appointed for a five-year term with one member's term expiring on June 5 of each year. See id.
14 See id. The Chairman is designated solely by the U.S. President. See id.
15 See Skousen, supra note 3, at 11. Regional office locations include: Atlanta, Boston, Chicago, Denver, Fort Worth, Los Angeles, New York, Seattle and Washington. District Branch office locations include: Cleveland, Detroit, Houston, Miami, Philadelphia, Salt Lake City, San Francisco and St. Louis. See id.
16 See Work of the SEC, supra note 12, at 27. Divisions serving under the Commission include: Division of Corporate Finance, Division of Market Regulation, Division of Investment Management and Division of Enforcement. Major offices serving under the Commission include: the Office of General Counsel, the Office of Compliance Inspections and Examinations, the Office of Municipal Securities, and the Office of Investor Education and Assistance. See id.
sion, and is responsible for the review and direction of all en-
forcement activities. 17

1. Governing Legislation

Congress provided the SEC with broad powers to regulate
securities and their markets through a series of primary18 and
secondary19 Acts. 20 Of concern to this note is one primary act,
the Exchange Act21 and one secondary act, the Advisers Act. 22
Both Acts are defined and discussed below.

a. The Exchange Act

In 1934, Congress enacted the Exchange Act to regulate the
trading of securities on secondary markets through brokers,
dealers and exchanges as well as to eliminate abuses in the trading of securities after their initial distribution.\footnote{See id. at 23. In addition to the abuses mentioned supra, other abuses in the trading of securities may include: "wash sales and matched orders (in which buy and sell orders are made in rapid succession in order to give the impression of active trading), induced trading by false statements, misuse of pro forma financial statements, and certain other practices such price stabilization and short sales." Id. at 25.} The Exchange Act is comprised of many different sections.\footnote{15 U.S.C. § 78a (1994).} Of particular importance to this note are parts (a) and (b) of Section 15. Part (a) requires broker-dealers to register with the SEC, but allows the Commission to provide exemptions from registration.\footnote{See Respondent's Brief at 15-16.} Part (b) authorizes the Commission to discipline broker-dealers.\footnote{See id. at 16.} For example, Section 15(b)(4)\footnote{Section 15(b)(4) of the Exchange Act was designated Section 15(b)(5) prior to 1964 amendments. See id.} authorizes the Commission to deny, revoke or suspend the registration of any broker-dealer firm. These sanctions can only be imposed for specific acts committed by the broker-dealer itself or those associated with it, and only where it is in the public's interest.\footnote{See id.} Congress amended the Exchange Act in 1964 to permit the lesser sanctions of censure and suspension of registration\footnote{See Respondent's Brief at 16.} and to add Section 15(b)(6),\footnote{Section 15(b)(6) of the Exchange Act was then designated Section 15(b)(7). See id.} authorizing the Commission to impose sanctions on individual brokers or dealers, not just the broker-dealer firms.\footnote{See id.} Grounds for imposing such sanctions included violations of not only the Exchange Act, but also the Advisers Act and other statutes administered by the Commission.\footnote{See Respondent's Brief at 17.}
In 1975, Congress narrowed the class of persons against whom proceedings under Section 15(b)(6) could be brought by changing “any person” to “any persons associated with a broker or dealer.” Thus, not only could the SEC sanction broker-dealer firms and individual brokers and dealers, but also those persons associated with each. “At the same time, Congress expanded the sanctions contained in Sections 15(b)(4) and (6) to provide that the Commission could ‘place limitations on the activities’ of the broker-dealer firms and their associated persons.”

b. The Advisers Act

In 1940, Congress enacted the Advisers Act to regulate investment advisers. One most notable reason for the enactment was to prohibit fraudulent conduct, such as violations of the fiduciary duties that investment advisers owe to their clients. To this end, Section 203(a) of the Act, requires persons, or firms that are compensated for providing security investment advice to register with the SEC unless they are exempt from registration under 203(b) or prohibited from registration.

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33 Id.
34 Id.
35 See WORK OF THE SEC, supra note 12, at 24. This Act also regulates advisers to investment companies, private money managers, and most financial planners. See id.
36 See id.
37 See id.
38 To qualify for a Section 203(b) exemption from registration an investment adviser must be:

   (1) any investment adviser all of whose clients are residents of the State within which such investment advisor maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange; (2) any investment adviser whose only clients are insurance companies; or (3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under Title 1 of this Act, or a company which has elected to be a business development company pursuant to Section 54 of Title 1 of this Act and has not withdrawn its election.

Petitioners' Brief at 12-13.
under Section 203A.39 This Act also requires persons or firms to comply with statutory requirements, which are designed to protect their clients.40 Such requirements mandate “proper and complete” disclosure of information about investment advisers including their backgrounds, business affiliations, and grounds for compensation.41 When any of these requirements are violated, Sections 203(e) and (f) authorize the Commission to discipline the investment advisers and their associated persons.42

As originally enacted in 1940, Section 203(e) of the Advisers Act43 authorized the Commission to deny, revoke or suspend an applicant, if the applicant, whether an investment adviser firm or persons associated with one, committed certain acts, including any violation of the Exchange Act.44 Such denial, revocation, or suspension, however, must be made in the public’s interest.45 In 1970, Congress amended this section to include the sanction of censure.46 Congress also added Section 203(f)47 to parallel the amendments made in 1964 to Section 15(b) of the Exchange Act.48 Thus, like Section 15(b)(6) of the Exchange Act, Section 203(f) allowed the Commission to impose sanctions on individuals associated with an investment adviser, in

39 See Respondent’s Brief at 17-18. Section 203A of the Advisers Act disallows registration with the Commission of any investment adviser that has less than $25 million under management. See id. at 18 n.18.
40 See id.
41 See SKOUSEN, supra note 3, at 31.
42 See Respondent’s Brief at 18.
43 Section 203(e) of the Advisers Act was then designated Section 203(d). See id. at 18-19.
44 This also includes any violation of the Securities Act of 1933 (“Securities Act”). See id. at 19.
45 See Respondent’s Brief at 19.
46 See id.
47 See id. at 19. Section 203(f) of the Advisers Act allows “the Commission to ‘censure any person or bar or suspend for a period not exceeding twelve months any person from being associated with an investment adviser’ if the person engaged in certain conduct and it was in the public interest to do so.” Id.
48 See id.
addition to sanctioning the investment adviser, whether a person or firm.49

In 1975, Congress made additional changes to Sections 203(e) and (f) of the Advisers Act.50 Like the changes made to Section 15(b)(6) of the Exchange Act, "Congress narrowed the class of persons against whom proceedings under Section 203(f) could be brought by changing 'any person' to 'any persons associated [with] or seeking to become associated with an investment adviser.' "51 Thus, the SEC could sanction only those persons associated with both investment adviser firms and individual investment advisers. Congress also expanded the sanctions provided in Sections 203(e) and (f) to provide that the Commission could "place limitations on the activities" of advisers and their associated persons.52 Finally, Congress changed Section 203(e) to provide that the SEC could impose sanctions on "any" investment adviser rather than on "an" investment adviser.53

2. Sanctioning Powers under The Exchange and Advisers Acts

Through the Exchange and Advisers Acts, the SEC uses its statutory powers granted to it by Congress to impose remedies in its administrative, quasi-judicial capacity.54 For example, provisions in the Exchange and Advisers Acts authorize the Commission's Division of Enforcement ("Division") to institute administrative proceedings and impose sanctions against persons associated with broker-dealers, municipal securities dealers, investment advisers, or investment companies.55 The ap-

49 See Respondent's Brief at 19-20.
50 See id. at 20.
51 Id.
52 Id.
53 See Respondent's Brief at 20. The section change from "an" to "any" investment adviser is used by the Commission to support its argument that unregistered investment advisers are within its sanctioning jurisdiction. See id. at 29.
54 See SKOUSEN, supra note 3, at 1.
plication of these Acts' remedial measures, however, depends upon the interpretation of their respective sanctioning provisions and the context of the situation in which they are applied. Thus, the appropriateness of an administrative sanction depends primarily on the facts of each case.

Mindful of its statutory authority to ensure investor protection, the SEC, primarily through its Division, typically begins each case by investigating complaints and other indicators of possible securities transaction violations. The Commission then evaluates the information obtained by such an investigation to determine whether evidence of a violation exists, whether further investigation is necessary, and whether it should impose sanctions. When the facts show possible fraud or other similar violations, the Commission may, in addition to pursuing an administrative remedy, pursue a civil action in a U.S. District Court.

In the case of an administrative proceeding, the Commission typically issues an order specifying the illegal acts or practices allegedly committed and then directs that a hearing, before an administrative law judge ("ALJ"), be held for the purpose of obtaining evidence. At this hearing, the counsel for

56 See generally Respondent's Brief.
57 See Arnold S. Jacobs, Litigation and Practice Under Rule 10b-5, SECLITPRAC § 261.05 (1997-1999 West Group) [hereinafter Jacobs, Litigation and Practice Under Rule 10b-5]. The Commission has eight choices when it discovers a violation by a broker-dealer or investment adviser, by a person who is associated with them, or by a person who is seeking to become so associated: It can (1) convince the Department of Justice to institute a criminal action; (2) commence a court proceeding seeking to enjoin further violations; (3) discipline the broker, dealer, or person administratively at that time; (4) discipline him in an administrative proceeding after he has been convicted or enjoined; (5) issue an order to comply with Section 12, 13, 14, or 15(d) of the Exchange Act; (6) issue a permanent or temporary cease-and-desist order; (7) assess a civil monetary penalty; or (8) order an accounting and disgorgement. See id.
58 See WORK OF THE SEC, supra note 12, at 33.
59 See id. at 34.
60 See id. In a "civil action, the Commission may apply to a U.S. District Court for an order prohibiting the acts or practices alleged to violate the law or Commissions rules, or request court ordered remedies such as disgorgement or civil money penalties." Id.
61 See id. at 35.
the Division presents those facts supporting the charge. 62 Respondents then have an opportunity to cross-examine witnesses and to defend with their own evidence. 63 If the ALJ finds that the respondents have violated the law, it may impose statutory sanctions as discussed above. 64

The ALJ's decision may be appealed directly to the five Commissioners, 65 which have the power to change the sanction. 66 If the Commission does so to the detriment of the respondent, the respondent may bring his or her case before an appropriate U.S. Court of Appeals. 67 The appellate court, however, may grant relief only if the Commission's findings of fact are not supported by substantial evidence or if the imposed sanctions are an abuse of the Commission's discretion. 68

The two provisions at issue in this note, which authorize the Division to institute administrative proceedings and to impose sanctions, are Sections 15(b)(6) 69 of the Exchange Act and 203(f) 70 of the Advisers Act.

a. Sanctioning Under Section 15(b)(6) of The Exchange Act and The "Collateral Bar" Issue

Section 15(b)(6) 71 permits the Commission, after giving notice and an opportunity for a hearing before an ALJ, to censure

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62 See WORK OF THE SEC, supra note 12, at 35.
63 See id.
64 See id.
65 See Jacobs, Litigation and Practice Under Rule 10b-5, supra note 57.
66 See id. See also Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1102 (D.C. Cir. 1988).
67 See Jacobs, Litigation and Practice Under Rule 10b-5, supra note 57.
68 See id. (citing Kane v. SEC, 842 F.2d 194 (8th Cir. 1988)).
69 15 U.S.C. § 780(b)(6). The SEC uses Section 15(b)(6) to sanction a person associated or seeking to become associated with a broker or dealer. See id.
70 15 U.S.C. § 80b-3(f). The SEC uses Section 203(f) to sanction a person associated or seeking to become associated with investment advisers. See id.
71 15 U.S.C. § 780(b)(6). This section of the Exchange Act provides:

The Commission, by order shall censure or place limitations on the activities or functions of any person associated, or seeking to become
a respondent, place limitations on his activities, suspend him for up to one year, or bar him from associating with a broker-dealer, even after he has already been permanently or temporarily enjoined from further violating federal securities laws. Of these options, a bar order and a place limitations order are the most comprehensive. While a bar order precludes association with all brokers-dealers, whether or not they are required to register with the Commission under Section 15(a) of the Exchange Act, the phrase “place limitations on the activities or functions of any person associated, or seeking to become associated with a broker-dealer” is construed by the Commission to allow it to bar Exchange Act violators, or those associated with Exchange Act violators, indefinitely from the securities industry as a whole.

Between 1996 and 1999, in administrative litigation the SEC has sought these suspensions and “collateral bars” with greater frequency using Section 15(b)(6) as its weapon. This has been met, however, without much success. The SEC imposes a collateral bar or suspension when it sanctions someone under one of the federal securities acts, such as the Exchange Act, but suspends or bars that person from associating with professionals governed by other acts, such as the Advisers associated with a broker-dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a broker-dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has been convicted of certain specified offenses.  

72 See Respondent’s Brief. The Commission interprets the “associated or seeking to become associated” language of Section 15(b)(6) to require such actual and anticipated association either at the time the administrative proceedings are instituted or at the time the alleged misconduct occurred. Thus, a person cannot evade the Commission’s administrative jurisdiction by severing his association with a regulated entity prior to the institution of administrative proceedings. See id.

73 See Jacobs, Litigation and Practice Under Rule 10b-5, supra note 57.

74 See id.

75 See In the Matter of Meyer Blinder, 65 S.E.C 1378, 1389 (1997) (see Commissioner Hunt’s opinion, concurring in part and dissenting in part).

76 See id.
Many ALJs have refused to impose such collateral bars, most notably because they perceive that the SEC lacks the statutory authority to impose them.78

One such administrative proceeding in which an ALJ denied the Commission's request for a collateral bar was in In re James Robert Voigtsberger, and Peter Chase Advisors, Inc.79 In this case, the Division brought a proceeding under both the Exchange and Advisers Acts following Voigtsberger's conviction on charges that he had engaged in a twelve-year scheme to defraud his clients.80 The ALJ barred Voigtsberger from associating with any broker-dealer or investment adviser, but refused to bar him from associating with any investment company or municipal securities dealer as the Division requested.81

Similarly, in In re Martin B. Sloate,82 an ALJ prohibited Sloate, who had consented to a federal court injunction for insider trading, from associating with broker-dealers with a right to reapply in one year.83 The ALJ, however, refused the Division's request to impose a collateral bar prohibiting Sloate from associating with investment advisers or investment companies.84

Even more recently, in In re James A. Sehn and Samuel O. Forson,85 an ALJ held that the industry-wide bar sought by the Commission against Forson was beyond the authority of Sec-

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77 See Inside the SEC, 11 No. 12 Insights 33 (Dec. 1997) [hereinafter Inside the SEC].
78 See id.
80 See id
81 See id.
82 See id. (citing Admin. Proc. File No. 3-8232, Initial Decision Rel. No. 50 (June 6, 1994)).
83 See id.
84 See Pitt, SEC Suspensions and Bars, supra note 79, at 265.
85 See id. (citing Admin. Proc. File No. 308234, Initial Decision No. 99 (November 4, 1996)).
tion 15(b) of the Exchange Act. The ALJ, instead, only barred Forson from associating with broker-dealers despite finding that Forson's conduct evidenced a degree of scienter "close to malice" and that Forson would likely continue to work in the securities industry after his prison term.

Despite these administrative decisions, the Commission firmly pronounced its authority to impose "collateral bars" in In the Matter of Meyer Blinder. In this case, Blinder was the president of Blinder, Robinson & Co., Inc. ("Blinder Robinson"), a broker-dealer formerly registered with the SEC pursuant to Section 15(a) of the Exchange Act. In Blinder's criminal proceeding, the court convicted him of violating the prospectus delivery and antifraud requirements of both the federal securities laws and the federal anti-racketeering laws. He was later permanently enjoined from violations and aiding and abetting violations of the antifraud, anti-manipulation, and recordkeeping provisions of the federal securities laws. In Blinder's subsequent administrative proceeding, the central issue was whether, under the authority of Section 15(b)(6), the Division had the power to seek a remedy extending beyond the broker-dealer industry. The ALJ found that it could not and declined to bar Blinder from activities other than those associated with broker-dealers. The Division appealed to the Commission who ultimately found that the "place limitations" lan-

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86 See id. Citations were specifically to Sections 15(b) and 19(h) of the Exchange Act. See id.
88 65 S.E.C. 1387.
89 See id.
90 See id.
91 See id.
93 See Blinder, 65 S.E.C. at 1389.
guage contained within Section 15(b)(6) was sufficiently broad to allow for the collateral bar.94

In determining that the statutory language of Section 15(b)(6) of the Exchange Act allowed for a collateral bar, the Commission analogized to United States v. O'Hagan.95 In O'Hagan, the U.S. Supreme Court upheld a theory of misappropriation with respect to an insider trading scheme after expressing its view that "securities laws should be interpreted broadly in a manner that is consistent with the statutory language and furthers the purpose of the statute."96 Accordingly, the Court found that it would have made "scant sense" to hold O'Hagan liable only if he had misappropriated nonpublic information from a target, but not from a bidder.97 Similarly, the Commission in Blinder reasoned that it would make "scant sense" to exclude Blinder from one portion of the securities industry but not from others.98 Even if the statute did not explicitly confer such authority, the SEC reasoned that its power to bar Blinder's entry into another area of the securities industry99 gave it the power to collateraly bar his entry into those other areas prospectively.100

Although the SEC announced its seemingly broad collateral bar authority, it also set a standard to limit its power. It noted that such bars would be justified only in cases in which "it [would be] contrary to the public interest to allow someone to serve in [a harmful] capacity in the securities industry."101 For

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94 See Annual Review, supra note 92, at 930.
95 117 S. Ct. 2199 (1997). See also Annual Review, supra note 92, at 930.
96 Id. See also Blinder, 65 S.E.C. at 1379, 1382.
97 See id. In other words, the O'Hagan court observed that it made "scant sense" to suggest that O'Hagan should be liable only if he had misappropriated nonpublic information from the target but not the bidder. The court concluded, "the test of [Section 10(b)] required no such result." Blinder, 65 S.E.C. at 1382.
98 See Annual Review, supra note 92, at 930.
99 For example, the SEC may bar Blinder's application for registration as an investment adviser. See id.
100 See id.
101 See id.
example, any conduct which "flows across" various securities professions and poses a risk of harm to the investing public in any such profession would qualify for a collateral bar. Moreover, in making its determination, the Commission held that it would consider the egregiousness of the defendant's conduct in imposing such a broad ban. In regard to Blinder, the SEC reviewed his conduct, which included making threats and maintaining a "hit list" of enemies, and determined that it was sufficiently egregious and in the public's interest to bar him from associating with all other securities industries. Thus, in Blinder, the SEC had spoken its final word on the collateral bar issue. It declared that it had the power to impose collateral bars and sanctions on individuals, even where the individuals were found to have violated only one act of the federal securities laws.

b. Sanctioning Under Section 203(f) of The Advisers Act

Similar to Section 15(b)(6) of the Exchange Act, Section 203(f) of the Advisers Act permits the Commission, after giving notice to a respondent and providing him with the opportunity for a hearing before an ALJ, to censure him, to place limitations on his activities, to suspend him for up to one year, or to bar him from being associated with an investment ad-

102 See id.
103 See Annual Review, supra note 92, at 930.
104 See id. Other industries include those dealing with broker-dealers, municipal securities dealers, investment advisers, investment companies, or members of a national securities exchange or registered securities association. See id.
105 See id.
106 See Inside the SEC, supra note 77, at 33.
107 Section 203(f) of the Advisers Act provides:

The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser if . . . [the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person . . . has been convicted of certain specified offenses.] Respondent's Brief at 4.
viser, even after he has already been permanently or temporarily enjoined from further violating federal securities laws.\textsuperscript{108} However, whether a bar order precludes association with all investment advisers, registered or not, is an unresolved issue that is crucial to this note. Nevertheless, Sections 203(e) and (f) of the Advisers Act does allow the Commission to discipline an investment adviser on the same grounds as Sections 15(b)(4) and (6) permit the Commission to sanction a broker-dealer.\textsuperscript{109}

B. CHEVRON DEFERENCE: THE SEC’S ROLE IN INTERPRETING THE SANCTIONING LANGUAGE OF SECTIONS 15(B)(6) OF THE EXCHANGE ACT AND 203(F) OF THE ADVISERS ACT

In general, the Commission must administer the federal securities laws under the direction and intent of Congress.\textsuperscript{110} Congress’ discretion, however, can sometimes be ambiguous, forcing the Commission to make their own determinations regarding Congress’ intent.\textsuperscript{111} These determinations, particularly those used to impose sanctions, are often challenged. When this occurs, courts must follow the standard set forth in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council}\textsuperscript{112} to evaluate the validity of the challenged interpretation.\textsuperscript{113}

In \textit{Chevron}, environmental groups filed a lawsuit challenging the Environmental Protection Agency’s (“the EPA”) Clean Air Act regulations that allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased in a single “bubble.”\textsuperscript{114} Under the

\textsuperscript{108} See Jacobs, \textit{Litigation and Practice Under Rule 10b-5, supra note 57.}

\textsuperscript{109} See id.

\textsuperscript{110} See SKOUSEN, supra note 3, at 6.

\textsuperscript{111} See id.

\textsuperscript{112} 467 U.S. 837 (1984).

\textsuperscript{113} See id. at 837-38.

\textsuperscript{114} See id. at 837. The EPA promulgated these regulations pursuant to Section 172(b)(6) of the Clean Air Act Amendments of 1977. This section requires states, which have not achieved national air quality standards, to establish a permit program
bubble concept, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting permit conditions if the alteration will not increase the total emissions from the plant. After a district court and appellate court ruling against the regulations, the U.S. Supreme Court reversed. In a unanimous opinion, the Court set forth a method for analyzing challenges made to an agency's decision. First, when a court reviews an agency's construction of a statute where congressional intent is clear, the agency must follow that intent. However, if congressional intent is ambiguous or if Congress is silent on the issue, a court must give substantial deference to the agency's interpretation to the extent that it is a reasonable construction of the statute and fills in any gaps left by Congress.

Turning to the EPA's bubble regulations and the underlying Section 172(b)(6) of the Clean Air Act, the Court found that Congress was silent on the applicability of the bubble concept to the term "stationary source." Given this ambiguity, the Court found the EPA to have been reasonable in defining "stationary source." The Court also found that the EPA's interpretation represented a reasonable accommodation of manifestly competing interests and was entitled to deference. This same deference standard was applied in Teicher v. Securities and Exchange Commission to determine whether the Commission's interpretations of Sections 15(b)(6) of the Exchange Act and 203(f) of the Advisers Act were reasonable and filled in any gaps within the meaning of Chevron.

See also Chevron, 467 U.S. at 837.
III. FACTS

Beginning in 1985, Teicher was employed as a registered representative with Edward A. Viner & Co., a broker-dealer registered with the Commission under the Exchange Act. In January 1986, while still associated with Viner & Co., Teicher formed Victor Teicher & Co., L.P. Teicher & Co. invested in securities and, for compensation, advised others regarding similar investments. The act of advising others for money made Teicher & Co. an “investment adviser,” as defined in Section 202(a)(11) of the Advisers Act and made Teicher a “person associated with an investment adviser” as defined in Section 202(a)(17) of the Advisers Act. Teicher & Co., however, did not register with the Commission under the Advisers Act, claiming it was exempt from registration under Section 203(b)(3) of the Advisers Act.

From December 1985 until March 1986, Teicher received confidential information about possible corporate takeovers from Michael David ("David"), an associate with the law firm of Paul, Weiss, Rifkind, Warton & Garrison ("Paul Weiss"). Teicher also received confidential information from Robert Salsbury ("Salsbury"), a research analyst in the domestic arbitrage department of Drexel Burnham Lambert, Inc.

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124 See Respondent's Brief at 7.
125 See id. Teicher, the sole general partner, was a seventy five percent owner of this limited partnership. See id.
126 See id.
127 15 U.S.C. § 80b-2(a)(11). See also Respondent's Brief at 25. Section 202(a)(11) defines “investment adviser” to mean “any person who, for compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities.” Id.
128 15 U.S.C. § 80b-2(a)(17). See also Respondent's Brief at 7. Section 202(a)(17) states “a person associated with an investment adviser” is defined as “any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser.” Id. at 25.
129 See 15 U.S.C. § 80b-3(b). See also Respondent's Brief at 8, 17-18. Section 203(b)(3) sets out an exemption from registration under the Advisers Act for advisers with less than fifteen clients. See id.
130 See id. at 8.
While Salsbury provided Teicher with the confidential names of companies that were subject to mergers or takeovers by Drexel clients, David provided both Teicher and Salsbury with information he learned concerning possible acquisitions by Paul Weiss clients. With this material, nonpublic information, Teicher, from January through March 1986, purchased and sold the securities of a number of these acquisition candidates knowing that the information had been misappropriated.

During this same period, Drexel, a registered broker-dealer, employed Frankel as the vice president in charge of the research department. Frankel was, therefore, a “person associated with a broker-dealer,” as defined in Section 3(a)(18) of the Exchange Act. Frankel was also Salsbury’s supervisor, thus when Salsbury received information from David, he passed it on to Frankel. Frankel would then either purchase or sell the securities of the acquisition candidates. Like Teicher, Frankel did so knowing he was using material, nonpublic information that had been misappropriated.

Shortly after learning of Teicher’s and Frankel’s alleged participation in a conspiracy to trade in securities while in the possession of material nonpublic information, the Division began an investigation. After two years of investigating, which concluded in 1988, Teicher and Frankel were indicted for these dealings.

\[131\] See id.
\[132\] See id.
\[133\] See Respondent’s Brief at 9.
\[134\] See id. at 8.
\[135\] See 15 U.S.C. § 78c(a)(18). See supra note 128 and accompanying text for a definition similar to that of “a person associated with a broker or dealer.”
\[136\] See Respondent’s Brief at 8.
\[137\] See id.
\[138\] See id. at 9.
\[139\] See Petitioners’ Brief at 5-6.
\[140\] See id. at 6.
IV. PROCEDURAL HISTORY

A. Teicher’s and Frankel’s Criminal Convictions For Participating in an Insider Trading Scheme

On April 6, 1990, a jury found both Teicher and Frankel guilty of numerous felonies.\textsuperscript{141} Teicher’s crimes included one count of conspiracy, nine counts of securities fraud, two counts of fraud in connection with a tender offer, and two counts of mail fraud.\textsuperscript{142} Teicher was subsequently sentenced to 18 months’ imprisonment, placed on probation for five years, and fined $200,000.\textsuperscript{143} Frankel’s crimes included one count of conspiracy, one count of securities fraud, one count of mail fraud, one count of perjury, and two counts of obstruction of justice.\textsuperscript{144} Frankel was subsequently sentenced to 18 months’ imprisonment and fined $10,000.\textsuperscript{145} Both Teicher’s and Frankel’s convictions were affirmed on appeal.\textsuperscript{146}

B. Civil Actions Brought Against Teicher and Frankel Seeking Injunctive Relief and Disgorgement of Profits

While the criminal action was proceeding, the Division, seeking injunctive relief and disgorgement, brought civil actions against both Teicher and Frankel in 1991.\textsuperscript{147} The court entered judgment against Frankel, by consent, on May 18, 1994.\textsuperscript{148} In settlement, Frankel paid a disgorge-

\textsuperscript{141} See Respondent’s Brief at 9.
\textsuperscript{142} See id.
\textsuperscript{143} See id.
\textsuperscript{144} See id.
\textsuperscript{145} See id.
\textsuperscript{146} See Respondent’s Brief at 9 (citing United States v. Teicher, 987 F.2d 112 (2d Cir.), cert. denied, 114 S. Ct. 467 (1993)).
\textsuperscript{147} See Petitioners’ Brief at 4.
\textsuperscript{148} See Respondent’s Brief at 10.
ment, prejudgment interest and penalty amount.\textsuperscript{149} Approximately three years later, on December 11, 1997, the court entered judgment against Teicher, also by consent.\textsuperscript{150} As a part of his settlement, Teicher\textsuperscript{151} paid approximately $982,000 in disgorgement, prejudgment interest and penalties.\textsuperscript{152} He also agreed to be enjoined from violating Sections 10(b) and 14(e) of the Exchange Act.\textsuperscript{153}

C. ADMINISTRATIVE PROCEEDING TO SANCTION TEICHER AND FRANKEL UNDER THE STATUTORY POWERS OF SECTIONS 15(b)(6) OF THE EXCHANGE ACT AND 203(f) OF THE ADVISERS ACT

In addition to the civil actions, the Division instituted an administrative proceeding on June 20, 1994, based on Teicher's and Frankel's criminal convictions.\textsuperscript{154} In this proceeding, the Division sought, pursuant to Section 203(e) and (f) of the Advisers Act and Sections 15(b) and 19(h) of the Exchange Act, to bar Teicher and Frankel for life from the securities industry.\textsuperscript{155} On November 11, 1994, as a partial settlement of this proceeding, Teicher consented to be barred permanently from associating with any broker-dealer, investment company, municipal securities dealer and registered investment adviser.\textsuperscript{156} "He also agreed to be permanently barred from associating

\textsuperscript{149} See id. Unlike in Teicher's case, the Commission relied on Frankel's permanent injunction as a basis for bringing an administrative proceeding. See id.

\textsuperscript{150} See id.

\textsuperscript{151} Teicher, along with Teicher & Co. and Carmel Partners, L.P., participated in the settlement. See Petitioner's Brief at 6.

\textsuperscript{152} See id.

\textsuperscript{153} See id.

\textsuperscript{154} See Respondent's Brief at 10. This administrative proceeding was the subject of Teicher's and Frankel's appeal and the subject of this Note. See Teicher, 177 F.3d at 1016.

\textsuperscript{155} See Petitioners' Brief at 7.

\textsuperscript{156} See id.
with any unregistered investment adviser, but 'only if and when there [was] a final, unappealable order and only to the extent that such order determine[d] that the Commission ha[d] authority . . . under Section 203(f) of the Advisers Act . . . to impose such a sanction against [him].'”

On February 27, 1995, the ALJ barred Teicher from associating with the entities as to which he had consented and barred him from associating with any unregistered investment adviser.158

Frankel similarly consented to be barred from associating with any broker-dealer, investment company, or municipal securities dealer.159 However, he claimed that the Commission lacked authority to bar him from associating with an investment adviser because he had not been associated with an investment adviser during his wrongdoing or during the Commission's proceeding.160 Accordingly, the ALJ ordered Frankel barred from associating with the various firms as to which he had consented, but did not bar him from associating with investment advisers.161

157  Respondent's Brief at 10-11.

158  See id. at 11. See also Petitioner's Brief at 8, 10-11. Teicher noted that the ALJ made this finding notwithstanding the Court's decision in Wallach v. SEC, 202 F.2d 462 (D.C. Cir. 1953), and notwithstanding the extensive legislative history clearly indicating that Congress had a contrary intent. In Wallach, the court examined an analogous provision of the Exchange Act whose language was virtually identical to the applicable provision of Section 203, and determined that Congress did not confer upon the SEC jurisdiction to regulate unregistered entities. See id.

159  See Respondent's Brief at 11.

160  See id. Frankel believed that the SEC could not use Section 203(f) to prevent him from associating with investment advisers unless he was associating or seeking to become associated with investment advisers. See id.

161  See Petitioner's Memo at 3. The ALJ also held that this administrative proceeding did not provide Frankel with the requisite notice that a bar against association with investment advisers would be sought. See id.
1. Teicher’s and The Division of Enforcement’s Appeal to The Commission from The Administrative Law Judge’s Decision

On March 10, 1995, Teicher appealed to the Commission from the ALJ’s decision to bar him from associating with any unregistered adviser. The Division also appealed, based on the ALJ’s decision not to bar Frankel from associating with any investment adviser. On May 20, 1998, the Commission affirmed in part and reversed in part the ALJ’s ruling.

In affirming the ALJ’s decision, the Commission disagreed with Teicher’s argument that Section 203(f) authorized the SEC to take action only against persons associated with registered investment advisers and concluded that, pursuant to the section’s unambiguous language defining “investment adviser” and “person associated with an investment adviser,” the SEC had the authority to discipline persons associated with both registered and unregistered advisers. In reversing the ALJ’s

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162 See Petitioner’s Brief at 8. See also Respondent’s Brief at 12.

163 See id. See also Petitioner’s Memo at 3. While the Division’s appeal in Frankel’s case was pending, the Commission found that the “collateral bar” issue under Section 15(b)(6) in another pending Commission case, In the Matter of Meyer Blinder, 65 S.E.C. 1378 (1997). In Blinder the Commission, by a divided vote, held that the portion of Section 15(b)(6) which authorizes the Commission “to place limitations on the activities or functions” of a broker-dealer should be interpreted to authorize the Commission to bar a person associated with a broker-dealer from association with entities regulated under all other securities statutes, for example, to authorize the imposition of an industry wide bar. Commissioner Hunt, in dissent, found that Section 15(b)(6) provides for a sliding scale of sanctions and observed that the second sanction of “placing limitations” could not be read to authorize collateral bars without doing violence to the plain meaning of the statute. Hunt noted that the Commission was seeking to read the “place limitations” language as having the same meaning as that of the word “bar” elsewhere in the statute. See id. at 3-4.

164 See Respondent’s Brief at 12-14.

165 See id. at 12. It also stated that Section 203(f) authorized the Commission to take disciplinary action against any person associated with “an investment adviser” without limitation. Furthermore, the Commission concluded that, in light of the “extremely serious misconduct in which Teicher engaged,” public interest required that he be barred from associating with any unregistered investment adviser, as well as
ruling, however, the Commission agreed with the Division that, following its decision in Blinder, the SEC had the authority under Section 15(b)(6) of the Exchange Act to collaterally bar Frankel from associating with an investment adviser or any other industry.

2. Teicher's and Frankel's Appeal to The District of Columbia Circuit Court of Appeals

On June 22, 1998, Teicher and Frankel appealed the Commission's final order to the U.S. Court of Appeals for the District of Columbia Circuit. For the same reasons he advanced before the ALJ, Teicher once again argued that the Commission exceeded its authority to bar him from associating with an investment adviser because the term "investment adviser" in Section 203(f) of the Advis-

166 See supra note 163 and accompanying text for discussion of Blinder. In Blinder, the Commission concluded that both the relevant legislative history and the purposes of the securities laws, including investor protection and regulatory efficiency, demonstrated Congress' intent that the provisions of Section 15(b)(6) allowing the Commission to place limitations on the activities of a person associated with a broker-dealer authorized the Commission to impose a collateral bar from Meyer's association with an investment adviser. See id.

167 See Respondent's Brief at 13. The Commission found in the present case that, in determining whether to impose a collateral bar on Frankel, it considered "whether the misconduct is of the type that, by its nature, 'flows across' various securities professions and poses a risk of harm to the investing public in any such profession," and "whether the egregiousness of the misconduct shows the need for such a bar in order to protect the public." Moreover, the Commission found that "Frankel's egregious misconduct demonstrated ethical lapses that disqualified him from assuming any post involving fiduciary responsibilities," and that the public interest required that he be barred from associating with an investment adviser. Id.

168 See Petitioners' Brief at 1. See also Petitioner's Memo at 4 n.2. Frankel filed his petition for review in the U.S. Court of Appeals for the Second Circuit under 15 U.S.C. § 78y(a)(1). The Commission moved in that Court for transfer of Frankel's appeal to the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 2112(a) because of the appeal of petitioners Victor Teicher and Victor Teicher & Company, L.P. Ignoring the fact that the Commission had entered separate and distinct orders for Frankel and for the Teicher petitions, the Second Circuit transferred the Frankel appeal so that it may be consolidated. See id.
ers Act was limited to registered investment advisers.\textsuperscript{169} Following this logic, because Teicher was associated with an investment adviser that was exempt from registration, he could not be sanctioned under Section 203(f).\textsuperscript{170} Frankel, in his appeal, argued that, contrary to Blinder, the “place limitations” language in Section 15(b)(6) of the Exchange Act, which the SEC had used to bar him from associating with an investment adviser, allowed the Commission to bar a person associated with a broker-dealer only from associating with another broker-dealer, not another entity.\textsuperscript{171}

V. THE COURT’S ANALYSIS

The U.S. Court of Appeals for the District of Columbia Circuit heard \textit{Teicher v. Securities and Exchange Commission}\textsuperscript{172} on April 30, 1999 and handed down its decision on June 1, 1999.\textsuperscript{173} The court commenced its analysis of \textit{Teicher} by introducing petitioners Teicher and Frankel, briefly discussing their insider trading crimes and describing the procedural posture of the case.\textsuperscript{174} After stating the issue as whether the portions of the SEC’s final order barring petitioners from associating with any investment adviser was “beyond the Commission’s author-

\begin{small}
\textsuperscript{169} \textit{See} Respondent’s Brief at 4.

\textsuperscript{170} \textit{See} Teicher, 177 F.3d at 1017-18.

\textsuperscript{171} \textit{See id.} at 5.

\textsuperscript{172} 177 F.3d 1016 (D.C. Cir. 1999).

\textsuperscript{173} \textit{See id.} Circuit Judge Williams authored the opinion deciding this case, which was heard by himself along with Circuit Judges Silberman and Tatel. \textit{See id.} at 1017.

\textsuperscript{174} \textit{See id.} at 1017. As already explained in the Facts and Procedural History portions of this note, the court proceeded by stating that Petitioners Teicher and Frankel were convicted of various charges of securities fraud, conspiracy and mail fraud for their participation in an insider trading scheme. Thereafter, in a later administrative proceeding, the SEC issued an order barring both petitioners from various branches of the securities industry, specifically, association with registered and unregistered investment advisers. \textit{See id.}
\end{small}
ity," the court proceeded to address each of Teicher's and Frankel's claims.175

A. THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS
REJECTS THE MERITS OF TEICHER'S Claim

The court made several findings in response to Teicher's claim that the term "investment adviser" covered only registered ones. These findings specifically refute Teicher's claim that the SEC lacks authority under Section 203(f) to sanction him because he was not associated with a registered investment adviser at the time of his wrongdoing or at the time of the Commission's administrative proceeding.176 The court found, first, that the language in Section 203(f) was not limited to "registered" investment advisers.177 In support of this finding, the court noted that "the [Advisers] Act explicitly defines an investment adviser as 'any person who, for compensation, engages in the business of advising others [without any mention of registration] as to the advisability of investing in, purchasing, or selling securities.' "178 The court further supported its finding by reasoning that since the term "registered" is specified in various places in the Advisers Act, it is logical to assume that when the Advisers Act uses the unmodified term "investment adviser," it means both registered and unregistered.179

In its second finding, the court distinguished its earlier decision in Wallach v. Securities and Exchange Commis-

175 See id. at 1017.
176 See Teicher, 177 F.3d at 1017-18.
177 See id. 1018.
179 See id. at 1017. The court noted as examples §§ 203(d) and 208, 15 U.S.C. §§80b-3(d) and 80b-8; and §§ 204 and 205, 15 U.S.C. §§ 80b-4 and 80b-5 which exempt advisers from registration. See id. at 1018.
sion from Teicher's situation. In Wallach, the D.C. Circuit court construed the phrase "any broker dealer" in the Exchange Act to mean only "registered" broker-dealers. Teicher insisted that the analogous provision of Section 203(f) in the Advisers Act should be similarly construed. The court, however, disagreed. The statute at issue in Wallach dealt only with the denial or revocation of registration as a broker-dealer; the case was therefore limited to a person seeking or already holding a registration. Teicher, on the other hand, was neither registered nor seeking to become so. The court thus narrowed Wallach's holding by limiting it to its facts and found that Wallach was inapposite to Teicher's claim.

Third, the court found inconclusive Teicher's argument that Section 203, as originally enacted in 1940, applied only to registered investment advisers. The court's perspective stems from the fact that "since 1940 Congress has amended the Advisers Act and expanded the array of sanctions far beyond the early focus on registration." This has resulted in Section 203 no longer applying solely to registered investment advisers. At present, "the

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180 202 F.2d 462 (D.C. Cir. 1953).
181 See Teicher, 177 F.3d at 1018-19.
182 See id. at 1018.
183 See id.
184 See id.
185 See id.
186 See Teicher, 177 F.3d at 1018. In Wallach, the SEC tried to force the joinder of a broker-dealer's employee-salesman as a party in disciplinary proceedings against the broker-dealer. The Wallach court rejected the SEC's argument that the statute, which focused on broker-dealers, would apply to their employees. See id.
187 See id. In 1940, Section 203 originally provided only for the denial, revocation or suspension of a registration as an investment adviser. At that time, to be sanctioned the investment adviser must have been registered. Thus, Section 203 must have only applied to registered investment advisers. See id.
188 Id.
189 See Teicher, 177 F.3d at 1018.
SEC's sanction power – even looking only at that granted by Section 203(f) – explicitly covers persons merely associated with or seeking association with investment advisers and ranges from censure to an outright ban on association with an investment adviser. Thus, because of the expansion in sanctions since Section 203's enactment, the court held that unregistered investment advisers, as well as those associated with them, fall within the SEC's jurisdiction.

In its fourth finding, the court rejected Teicher's argument that a statement from the 1970 amendments, which created Section 203(f), indicated that the section was intended to cover only "registered" investment advisers and that the statement suggested that Section 203(f) should parallel Section 15(b)'s sanctioning provision under the Exchange Act. The court explained that "such a use of the adjective 'registered' in a Senate report [wa]s not of much help, especially when the statute itself offer[ed] no apparent ambiguity." Moreover, the SEC "point[ed] to references in the same Senate report that describe[d] the addition [of Section 203(f)] with no mention of 'registered.'" Thus, Teicher's reference to the Senate report did not establish a clear intent by Congress to limit Section 203(f) to registered investment advisers alone. Nor did the court find Teicher's references to several other items of legislative history, not pertaining to the enactment of Section 203, any more persuasive.

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190 Id.
191 See id.
192 See id.
193 Id. (citing Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994)).
194 Teicher, 177 F.3d at 1019.
195 See id.
196 See id.
Finally, after reviewing the Commission's statutory interpretation under the principles of *Chevron*, the court found that "Teicher ha[d] not effectively challenged the Commission's reading of the [Advisers] Act's unambiguous language." The court made clear that even if the Act was to be found ambiguous, under *Chevron*, the SEC's interpretation of it was reasonable and had been correctly accorded deference by the lower courts.

B. THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS APPROVES THE MERITS OF FRANKEL'S CLAIM

The court similarly made several findings in response to Frankel's claim that Section 15(b)(6) of the Exchange Act, which is triggered by a person's past, present or future association with a broker-dealer, did not supply the Commission with the authority to exclude persons from the investment adviser industry. Frankel made two primary assertions with respect to his claim: first, that the term "limitation" and the term "bar" are different and second, that if the two terms could be used interchangeably under Section 15(b)(6), Congress would not have provided the progression of penalties. With both assertions, Frankel essentially argued that the SEC's interpretation "flout[ed] the [statutory] progression."

First and foremost, the court noted that it need not decide whether Frankel's assertions were correct because it found that the SEC's interpretation of Section 15(b)(6) suffered from "fatal structural difficulties." In support of its finding, the court reasoned that the "place limitations" language required

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198 *Teicher*, 177 F.3d at 1019.  
199 See *id.* at 1018-19.  
200 See *id.* at 1017.  
201 See *id.* at 1019.  
202 *Id.*  
203 *Teicher*, 177 F.3d at 1019.
some concept of "relevant domain." For example, a relevant domain exists where the context in which the statutory language is placed coincides with the meaning of the statutory language. The Commission's reading of the "place limitations" language, however, did not fit the context in which Congress had placed the language. The court interpreted that "the context - a rather elaborate structure of separate provisions with distinct threshold requirements - suggest[ed] that Congress meant the SEC would make those threshold finding before administering the corresponding sanctions." Thus, the Commission should have considered the context in which Congress created the phrase "place limitations" when it evaluated the phrase's significance and meaning. As a result, Frankel's claim initially won the court's approval merely on the SEC's unbounded interpretation.

Frankel's claim secured the court's approval when the court found that the SEC's expanded interpretation of the "place limitations" language was unreasonably broad. The SEC posited that once a threshold requirement of "association" is satisfied, it should be able to use the "place limitations" language to move freely from one licensing regime to another. The court disagreed, finding a threshold nexus requirement under each sanctioning provision of each Act. In discussing the nexus requirement, the court observed three systems of occupational licensing to be administered by the SEC: investment advisers and their associated persons, as regulated under the Advisers Act; broker-dealers and their associated persons, as regulated under the Exchange Act; and municipal securities dealers and

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204 Id.
205 See id. at 1021 (citing Bailey v. United States, 516 U.S. 137 (1995)).
206 See id. at 1021.
207 Id.
208 See Teicher, 177 F.3d at 1019. In concluding its point, the court mockingly commented that, "even the Commission did not suggest that the phrase allows it to bar one of the offending parties from being a retail shoe salesman, or to exclude him from the Borough of Manhattan." Id.
209 See id. at 1020.
210 See id.
their associated persons, also governed by the Exchange Act. 211

"In each regime," the court explained, "there is, as to associated persons, an almost identically worded threshold nexus requirement." 212 Using Frankel's situation as an example, the court observed that the Commission sanctioned Frankel under Section 15(b)(6), which applied "to any person who is associated, who is seeking to become associated, or at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker-dealer." 213 The nexus was thus an "association" within a specific licensing industry. The court then noted that the section under which Teicher was sanctioned required a similar nexus, but to investment advisers. 214 Likewise, the provision for municipal securities dealers "follow[ed] precisely the structure of the investment adviser provision" and thus required a nexus to municipal securities dealers. 215

With this nexus requirement in mind, the court discussed the origins and history of the SEC's self-bestowed power to impose "collateral bars" as sanctions under Section 15(b)(6) of the Exchange Act. 216 The court focused on the most recent administrative proceeding, In the Matter of Meyer Blinder, 217 where the Commission relied on "a general principle favoring 'flexible' construction of the securities laws to effectuate their remedial purposes," 218 in resolutely initiating its claim to effect a "collateral bar." 219 In reference to Blinder, the court addressed three points made by the SEC: first, that the "collateral bar" concept enables the SEC to do in one proceeding what would otherwise require two; second, that the "collateral bar" prevents the risk

211 See id.
212 Teicher, 177 F.3d at 1020.
213 Id.
214 See id.
215 Id.
216 See id. at 1019.
218 Id. (citing Blinder, 65 S.E.C. at 1381 (citing Central Bank of Denver, N.A. v. First Interstate Bank, 511 U.S. 164, 185-86 (1994))).
219 See Teicher, 177 F.3d at 1019.
of a regulatory "gap" or loophole through which a securities law violator could, for a period of time, participate in the securities industry without the knowledge of the Commission; and third, that the legislative history of a subsequent provision shows that the Commission's reading of the statute is on point with congressional intent. 220

Addressing the SEC's first objection that it would be forced to do in two proceedings what would otherwise be more convenient to do in one, the court did not find "especially vexing" the SEC's objection that the SEC must wait, perhaps an indefinite amount of time before obtaining a securities law violator within its jurisdiction to deny registration. 221 Furthermore, the court concluded that the statutes at issue "simply do not permit the Commission to impose sanctions in any specific branch until it can show the nexus matching that branch." 222 "Congress's thrice repeated use of a nexus requirement [each centered] on a single branch of the [securities] industry [underscores] a congressional determination to create separate sets of sanctions, each triggered by an individual's satisfying the industry-specific nexus." 223 The court, thus concluded that its own interpretation "seem[ed] entirely consonant with Congress's [act of establishing] three separate systems for denying the benefits of 'association' with licensed entities in the several systems." 224

Second, the court addressed the Commission's point regarding the regulatory gap. While the court acknowledged the SEC's concern that "a branch-by-branch reading of the statutes" would create a risk to investors and that the SEC would receive no notice to initiate a proceeding if Frankel sought to associate with an unregistered investment advisor, the court presumed that Congress must have meant for the gap to

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220 See id. See also Blinder, 65 S.E.C. at 1381-83.
221 See id. The SEC has the power to ultimately deny registration under Commission's Rule of Practice 193. See Respondent's Brief at 39.
222 Teicher, 177 F.3d at 1020.
223 Id.
224 Id. at 1020-21.
exist.225 Such a loophole may have been allowed by Congress to curtail the SEC's jurisdiction so that such concerns could be left to the states.226 The court made clear, however, that, "a congressional discount of peril is hardly the strongest argument why [it] should see [the gap] as urgent."227 Thus, the regulatory gap argument was unpersuasive in rationalizing the existence of a collateral bar.

Third, in determining the need for a collateral bar, the court examined the legislative history of the 1987 amendments, which the SEC set forth in support of its final point.228 Specifically, the SEC asserted that the 1987 amendments added the "place limitations" language to the sanctioning provision for municipal securities dealers, and, therefore, made the provision parallel to that of the investment advisers' and broker-dealers' sanctioning provisions.229 The court recognized that the Senate report accompanying the change in the 1987 amendments discussed what the "place limitations" language was meant to cover, but did not agree with the SEC's interpretations of what that was.230 The SEC argued that the Senate report offered choices of sanctions indisputably added by inserting the "place limitations" language and that the passage appeared to conform to the Commission's understanding.231 The SEC also argued that, although the Senate report was a

225 Id. at 1021.
226 See Teicher, 177 F.3d at 1021. The court confidently stated, "assuming the Commission cannot remedy [the gap] by an equivalent notice provision for such advisers, that gap can only be because Congress withheld the authority — presumably for good reason, perhaps relating to [the SEC's] limited scale or regulation by other jurisdictions." Id.
227 Id.
228 See id. at 1021.
229 See id.
230 See Teicher, 177 F.3d at 1021. The report read:

'The Commission regards this as a desirable change in the law because the limitations authority is an important recognition by Congress of the need for flexibility to fashion sanctions that fit the offense and situation presented. For example, the Commission may use its 'limitations' authority . . . to bar persons formerly associated with broker-dealers from entering other securities professions where they might continue to perpetrate frauds upon unsuspecting investors. Id.
231 See id.
post-enactment type of legislative history, which purportedly described an earlier enactment or a parallel provision, it was relevant in establishing ambiguity in the phrase commented upon.\textsuperscript{232} The court dismissed all of this, however, by stating, "at most, then, all the legislative history can do is to buttress the Commission's claim that the 'place limitations' language is ambiguous, and [that] its interpretation is entitled to \textit{Chevron} deference if it is reasonable and consistent with statutory purpose."\textsuperscript{233} The court then concluded that even if it accepts the assumption of ambiguity, \textit{Chevron}'s criterion of reasonableness was not satisfied.\textsuperscript{234}

While reviewing \textit{Blinder} and restating that the individual threshold requirement must be met under each Act, the court further noted that neither in its brief nor in \textit{Blinder} did the SEC ever articulate an explicit limiting principle other than that of barring the offender from engaging in "activities in other securities professions."\textsuperscript{235} The court suggested that "such a [broad principle], if lawful, would allow the Commission to bar Frankel from becoming a commercial banker or a mergers-and-acquisitions attorney, activities linked to the securities industry but not under the Commission's jurisdiction."\textsuperscript{236} The court, however, acknowledged that because the Commission set forth a regulatory "gap" claim, the SEC was only seriously claiming that the "place limitations" power enabled it to bar an offender from a branch of the securities industry from which it might later have had explicit authority to exclude him.\textsuperscript{237} Nevertheless, under this reading, the court still found that the SEC's holding "contradicted the way in which Congress has

\textsuperscript{232} See id. at 1021 (citing McCreary v. Offner, 172 F.3d 76 (D.C. Cir. 1999); but cf. United States ex re. Long. v. SCS Business & Technical Institute, Inc., 173 F.3d 870 (D.C. Cir. 1999) (declaring post-enactment legislative history as having "only marginal, if any, value").

\textsuperscript{233} \textit{Teicher}, 177 F.3d at 1021 (citing Troy Corp. v. Browner, 120 F. 3d 277 (D.C. Cir. 1997) (citing \textit{Chevron}, 467 U.S. at 843)).

\textsuperscript{234} See id.

\textsuperscript{235} See id. at 1019 (citing \textit{Blinder}, 65 S.E.C. at 1383).

\textsuperscript{236} \textit{Teicher}, 177 F.3d at 1020.

\textsuperscript{237} See id. at 1020.
structured the relevant occupational license regimes and related sanctions.238

In conclusion, the court affirmed the SEC's order barring Teicher from associating with any investment adviser, registered or unregistered, but found the order barring Frankel from associating with an investment adviser in excess of the Commission's sanctioning powers.239

VI. CRITIQUE

A. THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS BLINDLY FAVORED THE SEC'S JURISDICTION OVER UNREGISTERED INVESTMENT ADVISORS TO TEICHER'S DETRIMENT

During its discussion of Teicher's claim, the court essentially found that whenever the Advisers Act specifies "registered," it applies solely to registered investment advisers; where the Advisers Act is silent on registration, however, the Act applies to all investment advisers, registered and unregistered. This is a valid conclusion if all other interpretations have been ruled out. The court, however, does not support its interpretation with evidence of Congress' intent, or lack thereof. The court should have first thoroughly addressed Congress' intent for incorporating or eliminating the term "registered" within the Advisers Act. If Congress intended the absence of the word "registered" to mean that the provision applied to all investment advisers, the court's interpretation would have been correct. Only after it found that Congress was silent or ambiguous on the issue, could the court, according to Chevron, affirm the SEC's interpretation. The interpretation, of course, must also be reasonable.

Sources such as the Report of the Task Force on SEC Settlements of the Subcommittee on Civil Litigation and SEC En-
enforcement Matters of the Federal Securities Law Committee of the American Bar Association Section of Business Law, suggest that the court may have taken the wrong position in upholding the SEC's interpretation. In so concluding, the Task Force noted that:

The SEC has taken the position that it has the authority, under Section 203(f) of the Advisers Act, to bar individuals from associating with any investment adviser, including an adviser whose activities do not require it to register under Section 203. This position, however, is not supported by the legislative history of the Advisers Act. The plain language and structure of Section 203, the legislative history, and certain of the SEC's own statements in proposing and adopting Rule 29 of its Rules of Practice, all lead to the conclusion that the SEC does not have the [administrative] power to bar an individual from [associating] with an investment adviser that is not required to register under Section 203.

Thus, according to the Task Force, the court's position on Teicher's matter is incorrect.

The court may have confused its reasoning by accepting the Commission's logic without scrutinizing the Commission's argument. For instance, when the court discussed the expansion of the possible sanctions since 1940, the court could not have realistically been stating that the extension equals the ability to sanction unregistered investment advisers and those associated with them. An expansion of sanctions does not equal an expansion of jurisdiction. Had the court scrutinized the Com-

241 The Commission's Rule of Practice 29, which is now Rule 193, 17 CFR 201.29, "applies to applications by persons who have previously been barred by the Commission from association with registered entities to become so associated." Respondent's Brief at 39 n.40.
243 See supra notes 187-191 and accompanying text.
mission's logic, it should have noted this legal inconsistency. Moreover, "anyone" can associate, even an unregistered investment adviser; it is with whom one associate's that triggers the sanction. Thus, Teicher legitimately argued that unregistered investment advisers or their associates are not automatically within the SEC's jurisdiction solely because the range of sanctions has expanded to include those who merely associate. Only those associating with register investment advisers, and the registered investment advisers themselves, are logically within the SEC's jurisdiction. Therefore, because the original sanction was meant only to apply to registered investment advisers, the court improperly linked the SEC's ability to sanction anyone who is or associates with an investment adviser and the ability to sanction anyone who is or associates with an unregistered investment adviser.

Additionally, the court gave too much weight to the Senate report from the 1970 Amendments, which added Section 203(f). In the Senate report, the term "registered" appeared inconsistently throughout the report, thus modifying some provisions and not others. This inconsistency should not result in the strict meaning that all of Section 203(f) applied to both registered and unregistered investment advisers. According to the court's own logic, when the term "registered" appears in a provision, that provision applies only to registered investment advisers because the term "registered" is specified. Conversely, when a provision does not use the term "registered," the court reads that provision as covering both registered and unregistered investment advisers. The court found this interpretation not ambiguous in any respect. The court, however, failed to use its own logic when reading the Senate report and holding it to be ambiguous. If it had, it would have realized that the Senate report covered registered investment advisers when it said "registered" and both registered and unregistered when it did not. Thus, the report would have been clear. Nevertheless, the court ultimately disregarded the report, deeming it unnecessary for interpreting "an otherwise clear statute."

244 See Teicher, 177 F.3d at 1019.
B. THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS DID NOT CORRECTLY APPLY CHEVRON BECAUSE NO BENCHMARK FOR REASONABILITY EXISTED AS TO THE COLLATERAL BAR

In reviewing Frankel's claim, the court need not have drawn such an absurd comparison when it stated "even the Commission doesn't suggest that the 'place limitations' phrase allows it to bar one of the offending parties from being a retail shoe salesman" in order to make its point. This interpretation is obviously one that the SEC would not have reached. The central issue was whether the SEC's construction of the "place limitation" language was reasonable, not whether the SEC would agree to the fact that a reasonable interpretation of the language must be evaluated within a relevant domain. Nevertheless, how the SEC arrived at its interpretation was a factor in the court's determination of the SEC's reasonableness.

The court also made an unfair comment in stating that the SEC lacked an "explicit limiting principle other than the idea of a bar of the offender from engaging in 'activities in other securities professions.'" In Blinder, the SEC made clear that the "place limitations" provision "[would] not make superfluous the authority to suspend or bar a person from association with a broker-dealer." The SEC emphasized that it was determined to use the "collateral bar" remedy on a case-by-case basis and only for sufficiently egregious conduct. In addition, the SEC explained that in some cases, it would determine not to impose a collateral bar at all, but rather use provisions authorizing it to consider a subsequent request to reenter the securities industry in another capacity.

In support of its case-by-case approach, the Commission articulated criteria for imposing a collateral bar, which may be

245 See id.
246 Id.
247 Blinder, 65 S.E.C. at 1384.
248 See supra notes 71-106 and accompanying text.
249 See Blinder, 65 S.E.C. at 1384.
viewed not only as a limiting principle, but as guide. In determining whether to impose a collateral bar, the SEC indicated that it would consider whether an act of misconduct is of the sort that, by its nature, "flows across various securities professions and poses a risk of harm to the investing public in any such profession." The Commission would also consider whether "the egregiousness of the respondent's misconduct demonstrates the need for a comprehensive response in order to protect the public." Although to the court this criteria may not be a sufficiently "explicit" limiting principle for the SEC's imposition of collateral bars, the SEC recognized that it may only impose a collateral bar "where warranted." This suggests that the SEC recognized that it would be improper to impose such a remedy arbitrarily.

In continuing to denounce the Commission's use of collateral bars, the court presented another extreme scenario by suggesting that if the court followed the Commission's interpretation of the "place limitations" language, the Commission could then bar Frankel from becoming a commercial banker or a mergers-and-acquisitions attorney, activities outside the Commission's jurisdiction. However, not all activities linked to the securities industry could reasonably be admitted under the Commission's jurisdiction. Most, if not all, of the Commission's sanctions dealing with imposing a collateral bar have been confined to barring the defendant from associating with broker-dealers, investment advisers and municipal securities

250 See Teicher, 177 F.3d at 1019.
251 Id. See also Blinder, 65 S.E.C. at 1379.
252 See Anne E. Chafer et al., 1997 In Review: Opinions Issued by the Securities and Exchange Commission Resolving Administrative Appeals, 1038 PLI/CORP 7 (1998). See also Annual Review, supra note 92, at 930. In other words, the SEC placed limitations on its power to impose such a collateral bar by noting that it would be justified only in cases in which "it [would be] contrary to the public interest to allow someone to serve in any capacity in the securities industry, as where such conduct 'flows across' various securities professions and poses a risk of harm to the investing public in any such profession." Id. In addition, the SEC held that it would consider whether the defendant's conduct was egregious enough to justify limited the defendant's conduct across the securities industry generally. See id.
253 See Respondent's Brief at 45.
254 See Teicher, 117 F.3d at 1020.
dealers, which are licensed entities falling under the Exchange and Advisers Acts.255

On a more supportive note, the court made a valid point in stating that to give the SEC an industry-wide sanctioning power under one Act negates any reason for a "thrice repeated use of a nexus requirement." In other words, no reason exists for three separate rules if Congress had intended that one apply to all. The only logical conclusion from observing the way Congress structured the three regimes is that each one has its own requirements and respective sanctions, which may be applied only in their respective securities industries. This was Frankel's strongest point and tipped the scale in his favor.

The court, however, did not rely on this point because it was already convinced that Congress must have intended to create a regulatory gap, a problem of concern to the SEC. At this point in its opinion, the court headed downward when it concluded that a threshold nexus requirement exists under each Act, but presented no tangible evidence to support this interpretation. This non-existent evidence, however, was sufficient to rebut the SEC's evidence of the Act's purpose and its standard of decisionmaking, all of which supported the Commission's concern regarding the regulatory loophole and the need to fill it with a "collateral bar." The court's lack of evidence also overpowered the Supreme Court's holding in Chevron, which required the court to defer to an agency's reasonable interpretation. The court, here, probably refused to defer to the SEC's interpretation on the basis that it did not find the SEC's interpretation "reasonable enough," even though its own interpretation may not be any more reasonable than the SEC's.

Unsupported reasoning was not the only flaw in the court's analysis. The court's comment that "a congressional discount of peril is hardly the strongest argument" for why it should view both the Commission's concern about the risk to investors and its inability to reach securities laws violators who associ-

255 See Respondent's Brief at 31-32.
ate with unregistered investment advisers as urgent, is not a sound standard for precedent in this area of the law. The whole purpose for creating the SEC was to regulate the securities markets and protect the investing public. To discount this peril thwarts the purposes of the Acts. The court should not have been so confident in believing that Congress intentionally created the regulatory gap. Congress may have merely overlooked such a risk when drafting the Act, or maybe even intended that the SEC fill the gap. Thus, the court’s claim that its reading is the only explanation for the regulatory gap is questionable. The SEC’s interpretation on the other hand takes Congress’ imperfection into account and makes a reasonable interpretation in the best interest of the public.

The court’s analysis is most damaged, however, when the Senate report introduced by the SEC explicitly mentions the purpose for the “place limitations” language in the municipal securities dealers sanctioning provision, which is essentially identical to the provision at issue. It is true that it does not make sense that Congress would create three similar provisions under two different acts covering three different licenses if it meant for one provision to give the SEC the power to sanction solely under that one provision. However, it is also true that it does not make sense that Congress would explain the reason for the “place limitations” language under one provision of one Act and not explain the reason for the “place limitations” language in the provision at issue. The court should either follow that which is explicit, rather than implicit, or it should view these two conflicting arguments as creating ambiguity for Chevron purposes.

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256 See SKOUSEN, supra note 3, at 1. See also supra notes 8-123 and accompanying text for background on the SEC.

257 This could be a possibility, especially in light of other ambiguous areas in the past having been addressed later on by amendments and newly created Acts correcting or clarifying those areas. See generally Respondent’s Brief.

258 This is referring to the Senate report discussing the 1987 Amendments, which does give the SEC the power to impose a bar from any securities profession if a securities dealer violates the law. See supra notes 172-239 and accompanying text.
VII. CONCLUSION

Apart from the language of the statutes themselves, little guidance exists in the Exchange and Advisers Acts, or even in court or SEC decisions, about what constitutes a sufficient sanction for a particular kind of conduct.259 The Commission has, until this case, confidently relied on its own interpretation of the Acts to address enforcement concerns and pursue violations. For instance, as a part of following the sanctioning provision requirements of the Exchange and Advisers Acts, the Commission must affirmatively determine that a particular sanction is "in the public interest." This, however, may be difficult to do in contested cases, such as Teicher, where the meaning of "in the public interest" is rarely specified.260 From the court's perspective, the Commission may be using its public interest guide to read its statutory authority too broadly, perhaps to its own detriment.

The purpose of this note in analyzing Teicher v. Securities and Exchange Commission was to bring to light the issue of the Commission's power to sanction and two of the various problems that may be encountered as a result of its enforcement authority. As a consequence of this case, the results of prior SEC administrative orders may be revisited.261 Thus, persons or entities, who previously have agreed to sanctions precluding them from associating with certain securities industries, as in Frankel's case, but whose underlying conduct was not challenged through an administrative proceeding, may decide to apply for removal of their suspensions or bars on the ground that the Commission had no jurisdiction.262 Moreover, until a contrary decision is issued, those prohibited from associating with investment advisers, as in Teicher's case, will probably avoid enforcement repercussions if they interpret

260 See id.
261 See Pitt, SEC Suspensions and Bars, supra note 79, at 267.
262 See id.
their prohibition to include associations with unregistered, as well as registered, investment advisers.\footnote{See id.}

A contrary decision may or may not be issued from the Supreme Court as a result of Teicher filing for petition for certiorari on November 3, 1999.\footnote{See Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Petitioners at 28, Teicher v. Securities and Exchange Commission, 177 F.3d 1016 (D.C. Cir. 1999) (No. 98-1287, Consolidated with 98-1414) (filed Nov. 3, 1999) [hereinafter Petition for Writ of Certiorari].} Among the issues brought to light by the brief, the most important one deals with the SEC’s unilateral determination that it had jurisdiction over Teicher.\footnote{See Petition For Writ of Certiorari at 23-24.} Essentially, Teicher’s brief asserted that Chevron’s deference standard should not have been applied to his case because the SEC had decided the scope of its own jurisdiction, an issue yet to be resolved by the Court in a pending case.\footnote{See id. See also Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, cert. granted, 119 S.Ct. 1495 (1999).}

The outcome of this petition is yet to be decided by the Court.

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