Shoot First and Ask Questions Later: Financial Regulators' Use of Their Emergency Enforcement Powers

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As the authors explain, counsel representing regulated entities should understand the possibility that regulators will use emergency powers, the pitfalls that these procedures present for emergency litigation, and the opportunities for a successful defense.

In the era of "real-time enforcement," financial regulators repeatedly preach the importance of bringing an alleged malfeasor before a judge as soon as possible.[1] Early action enables regulators to stop the alleged wrongful activity, freeze assets, and prevent the destruction of evidence. Yet the regulators' use of their emergency powers brings its own set of challenges for the regulators.[2] In order to respond quickly and nimbly in the changing climate of financial regulation, practitioners should understand the enforcement tools available to regulators and the defensive opportunities they present.

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Each of the principal federal and private regulators of investment-related activity faces a different calculation in choosing whether and how to pursue emergency relief. The Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") may seek temporary restraining orders and preliminary injunctions in federal court. The SEC and the Financial Industry Regulatory Authority ("FINRA") may seek temporary cease-and-desist orders in their own administrative forums. Different rules govern the procedures for each type of action and for each regulator. As a result, the financial regulators have used their emergency powers to varying degrees and with varying degrees of success.

Indeed, an enforcement culture has evolved at each agency around the use of emergency procedures. The federal agencies have not hesitated to bring swift action in federal court when there is ongoing fraud or a risk that proceeds or evidence will disappear. But regulators rarely use their emergency powers in administrative proceedings, even though administrative forums are designed to give regulators the flexibility to bring enforcement actions quickly and efficiently.[3] In many cases, the procedural morass created by the rules governing emergency administrative proceedings outweighs the expedition gained from bringing agency actions while the abusive conduct is ongoing.

The historical reluctance to use emergency enforcement powers in administrative proceedings might soon change. FINRA is increasing its responsiveness to ongoing fraud and is considering the use of its emergency enforcement powers in more instances.[4] Counsel representing regulated entities should understand the possibility that the regulators will use these emergency powers, the pitfalls that these procedures present for emergency litigation, and the opportunities for a successful defense.

THE REGULATORY ADVANTAGES OF EMERGENCY ACTIONS

The "Regular Way" Cases

The major financial regulators follow a similar model of enforcement, beginning with an investigation and abetted by some form of compulsory authority.[5] The typical agency investigation of financial-related violations can last anywhere from several months to two years and often will involve extensive document review, trading analysis, and investigative testimony. At

the end of an investigation, an agency may decide to proceed with a formal civil or administrative action (called "formal disciplinary action" in FINRA's case) and seek relief in the form of a court injunction or a cease-and-desist order. Relief may also include an order requiring the malfeasor to disgorge unjust enrichment, provide restitution to make the victims of the misconduct whole, pay a monetary fine, or adopt new procedures or make other changes designed to ensure that the misconduct does not recur.

In some cases, however, the relief will not achieve its desired result if it is not ordered until the end of a full investigation and any related litigation (whether contested or settled). While regulators gather evidence and prepare the case for approval by supervising authorities,[6] the malfeasors may continue to commit the misconduct at issue. Victims may continue to lose money because of continuing misconduct or the failure to correct procedural deficiencies. Funds that would otherwise be disgorged by the malfeasor or restored to victims through restitution could disappear as a result of expenses incurred by the malfeasor, business losses, or steps taken to put the funds out of the regulators' reach. In addition, as the investigation proceeds, the malfeasor will have opportunities to destroy, hide, or alter evidence that is necessary to prove the case.

When there is reason to believe that "regular way" investigation and formal enforcement action will not achieve complete justice, the regulator will consider whether to use the emergency powers available to it. Two features typically distinguish emergency actions from "regular way" proceedings. First, regulators will bring the enforcement action on a record that is not as fully developed as it would be in a complete investigation. Second, regulators typically will seek interim relief that stops the allegedly illegal conduct in its tracks and prevents the alleged wrongdoer from dissipating the funds.[7] When deciding whether to initiate emergency action, every regulator must ask whether the benefits of obtaining such interim relief outweigh the risk of proceeding on an incomplete record.

The Risks and Rewards of Emergency Action

Emergency action brings several advantages. First, regulators often may obtain emergency relief by satisfying a lower standard than that required to win a final judgment (but see the discussion of FINRA's TCDO powers, be-

low). This permits the regulator to act quickly without the need to establish a full evidentiary record. In addition, regulators sometimes may proceed on an ex parte basis so that the target of the enforcement action does not become aware of the existence of the investigation. This reduces the likelihood that the alleged malfeasor will dissipate, hide, or expatriate the proceeds of the misconduct, or destroy evidence, before an order is in place that forbids such conduct (and backs up that prohibition with the court's contempt powers or the administrative body's analogous authority). Finally, the initiation of emergency proceedings may expedite the full proceeding and therefore allow regulators and respondents to reach an earlier final resolution.

Emergency action also brings risks. First, the regulator cannot test the evidence through a full investigation before initiating the action. A full investigation provides an opportunity to obtain the alleged wrongdoer's side of the story through testimony, dialogue with counsel, and the "Wells" process for obtaining a pre-litigation response to the allegations.[8] In emergency actions, these procedures are curtailed, if not eliminated. If the action proceeds on an ex parte basis, then the regulator will not learn of any explanations of the conduct or possible defenses from the respondents before submitting its request for relief. On the other hand, in actions where the regulator has to present its best case early in the litigation, the regulator will fully expose its evidence to the respondents before building its entire case. This will give the respondents the ability to develop their cases in a way that confounds the regulator's litigation approach.

The classic examples of an agency's use of emergency action are in its responses to Ponzi schemes, insider trading, or other types of fraud or deceit. These cases typically involve ongoing conduct or potential dissipation of assets that poses significant risks to investors. The deceitful nature of the schemes also increases the risks that wrongdoers will conceal evidence or funds if the regulator provides notice to the respondents or pursues a full investigation without interim relief. In most of these cases, the balance tips in favor of emergency action even if the regulator has not developed a full investigative record.

THE SEC, CFTC, AND FINRA'S EMERGENCY POWERS

The following section provides a practical overview of the emergency tools available to three major regulators of financial institutions.

Securities and Exchange Commission

The Securities and Exchange Commission ("SEC") may bring enforcement actions in federal court or through its own administrative procedures. In both types of actions, the SEC can seek emergency relief.[9] Nevertheless, when the SEC seeks emergency relief, it is almost always in federal court. Ever since Congress granted the SEC temporary cease-and-desist authority in 1990,[10] the Division of Enforcement has sought, and the SEC has granted, emergency administrative relief only once.[11]

The Securities Exchange Act of 1934 grants the SEC the ability to seek emergency relief from federal courts under Federal Rule of Civil Procedure 65, which authorizes temporary restraining orders ("TROs") and preliminary injunctions.[12] The SEC may seek a TRO on an ex parte basis if the SEC makes a prima facie showing that immediate and irreparable injury, loss, or damage will result before the adverse party can be heard in opposition.[13] On the other hand, the SEC must provide notice to the adverse party when seeking a preliminary injunction.[14] Once the SEC provides notice of a TRO or a motion for a preliminary injunction to a suspected wrongdoer, the Commission bears the risk that the court may not grant further injunctive relief. For example, in *SEC v. Healthsouth Corp.*, the Commission failed to show need for a preliminary injunction following the entry of a TRO against the respondent Richard Scrushy.[15] In so doing, the SEC tipped its hand to its investigation of Scrushy, who allegedly participated in a $1.4 billion accounting fraud.[16] The SEC eventually resolved the case through a settlement that included an order for injunctive relief and payment of $81 million in disgorgement and civil penalties.[17] However, its failed attempt to obtain interim relief created the risk that the funds would be unavailable when final judgment was granted.

The Exchange Act also grants the SEC the ability to issue a temporary cease-and-desist order ("TCDO") under its administrative authority.[18] Congress added this power in 1990 to provide the SEC with an additional weapon in its enforcement arsenal. The Act authorizes the Commission to issue a TCDO if it determines that the alleged violation "is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest…prior to the completion of the proceedings [on the permanent cease-and-desist order]."[19] The statute requires the

SEC to give notice to respondents and opportunity for a hearing, "unless the Commission determines that notice and hearing prior to entry would be impracticable or contrary to the public interest."[20] If the Commission grants the order without notice to the alleged wrongdoer and opportunity for a hearing, the respondent can request that a Commission hearing be held at the earliest possible time to determine the merits of the application for the TCDO.[21] Respondents must request the hearing within 10 days of the issuance of the TCDO and may also seek review in federal court.[22] If the Commission approves the TCDO, it is effective for the duration of the proceeding on the permanent cease-and-desist order, analogous in that respect to a preliminary injunction entered under the Federal Rules of Civil Procedure.[23]

The SEC has issued a TCDO only once in its history. In the 1996 case of A.R. Baron & Co., Inc., the SEC entered a TCDO against a New York broker-dealer and two of its principals for engaging in fraudulent sales practices and unauthorized trades in customer accounts.[24] The fraud involved nearly $17 million in sales of securities and, pursuant to the TCDO, the respondents were barred from soliciting or effecting transactions for A.R. Baron or any customer in any security, pending final relief in the case.[25] The TCDO also required the respondents to employ a full-time "special compliance agent" and to record all incoming and outgoing telephone calls.[26] Although the SEC succeeded in obtaining the order and in reaching favorable final settlements with the respondents, which included disgorgement of assets, revocation of registration and bans on further trading,[27] the SEC has not sought a TCDO since. One reason that the SEC believed that a TCDO was "especially appropriate for this case" was that A.R. Baron committed violations "under heightened regulatory scrutiny…. Both the S.E.C. and the National Association of Securities Dealers were investigating the company right when they were defrauding their clients on a large scale."[28] Since A.R. Baron, however, the SEC has chosen to seek emergency relief solely in federal courts, which hold broad equitable power to craft relief appropriate for the specific needs of a case.[29]

Commodity Futures Trading Commission

Similar to the SEC, the Commodity Futures Trading Commission ("CFTC") may bring enforcement actions in federal court or through its own administrative procedures.[30] Emergency relief, however, is available only by

seeking a restraining order or temporary injunction in federal court.[31] Many of the CFTC's cases involve ongoing conduct and therefore clearly implicate the principles behind emergency action. For example, the CFTC protects against solicitation fraud such as misappropriation of customer funds,[32] Ponzi schemes,[33] precious metals fraud,[34] or forex fraud,[35] where the CFTC's immediate concern is to stop ongoing conduct and prevent the flight of assets.

As a result, the CFTC brings a relatively large share of its cases in federal court and seeks statutory restraining orders in many cases.[36] In fiscal year 2010, the CFTC initiated 36 civil actions in federal court, and it sought and obtained statutory restraining orders in approximately 22, or 61 percent of those matters. In fiscal year 2011, the CFTC initiated 77 civil actions in federal court, and it sought and obtained statutory restraining orders in approximately 26, or 34 percent, of those matters.[37] Through the end of July of its 2012 fiscal year, the CFTC had initiated 45 civil actions, and it sought and obtained statutory restraining orders in 19, or 42 percent of those matters. In contrast, the SEC sought emergency relief from federal courts at a significantly lower rate.[38]

The CFTC's authority derives from the Commodity Exchange Act, which grants the agency the ability to seek emergency relief in federal courts in the form of a restraining order or temporary injunction.[39] In the CFTC's case, the restraining order is called a "statutory restraining order"[40] and differs from a TRO entered under the FRCP because there is no time limitation on its imposition; in contrast, under the federal rules a TRO only lasts for 14 days.[41] The CFTC can seek the restraining order on an ex parte basis only if the CFTC seeks the appointment of a temporary receiver or a prohibition against tampering with evidence or moving assets.[42] The CFTC must provide notice to the defendant when seeking other forms of temporary relief or permanent injunctions.[43]

Practitioners should be aware of the prevalence of the CFTC's use of emergency actions in federal court and prepare to respond accordingly. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") expanded the CFTC's regulatory authority by authorizing the CFTC to regulate the swaps and derivatives markets.[44] In so doing, the Act opened up a new area in which the CFTC can bring emergency actions. Moreover, Dodd-Frank eased the level of scienter that the CFTC must demonstrate in order to prove a manipulation.[45] Given the CFTC's increasing activity in in-

vestigating and pursuing manipulations of the energy markets and reference interest rates, it is conceivable that the agency will consider using emergency federal powers to cease manipulations in progress.

Financial Industry Regulatory Authority

The Financial Industry Regulatory Authority ("FINRA") may bring enforcement actions only under its administrative powers.[46] Because FINRA is a self-regulatory organization instead of a federal agency, it is not authorized to seek relief in federal court.[47] Instead, FINRA pursues violations under its oversight by sanctioning registered broker-dealers and their associated persons using its administrative authority and referring cases to other enforcement agencies that can seek emergency relief in federal court.[48]

FINRA Rules of Procedure 9800 et seq. (the "9800 series") permit FINRA to issue a TCDO and thereby expedite disciplinary proceedings.[49] These rules enable FINRA's Department of Enforcement and Department of Market Regulation to respond to ongoing violations more quickly than in typical disciplinary proceedings brought under FINRA Rules 9200 et seq. (the "9200 series").[50] The 9800 series was added in 2003 and made permanent in 2009 in order to allow FINRA to respond quickly to continuing violations.

The 9800 series rules limit FINRA's ability to seek TCDOs in several respects.[51] First, FINRA may bring a TCDO proceeding only in actions alleging violations of certain SEC and FINRA rules relating to fraud and misuse of customer assets.[52] Thus, while emergency relief is available for responding to the most urgent violations, it is still more limited than the emergency powers of the SEC and CFTC, which may bring actions for any violation within their respective jurisdictions.[53] Second, FINRA enforcement or market regulation staff must obtain prior written authorization from FINRA's CEO or other designated senior officer before initiating a TCDO proceeding.[54] Third, FINRA must provide notice to the member or associated person, thus eliminating any element of surprise that might be available in an ex parte federal court TRO action.[55] Finally, FINRA must hold a hearing within 15 days after the service of notice to determine whether a TCDO should be issued.[56]

Perhaps most inhibiting to the regulator's prospects is the requirement that, in order to issue a TCDO, the hearing panel must find that a preponderance of the evidence supports a finding that the alleged violation occurred;

and that the violation is likely to result in significant dissipation or conversion of assets or other significant harm to investors prior to the completion of the underlying disciplinary proceeding.[57] This standard is higher than the standard for emergency federal civil actions by both the SEC and CFTC, which only need to establish a prima facie case that a violation occurred; indeed, the FINRA standard of proof for imposition of an emergency interim order is the same as that for ultimate final relief. A high burden of proof may help respondents defeat an application for emergency relief; at the same time, the 15-day period limits the ability of respondents to develop a strong defense.

Once FINRA issues a TCDO, Rule 9290 requires that the underlying disciplinary proceeding be expedited and that "hearings shall be held and decisions shall be rendered at the earliest possible time."[58] This limits the ability of both FINRA and respondents to prepare a strong case. These complex procedures require a respondent to be prepared to develop a defense quickly and potentially overcome a prior finding by the hearing panel that the preponderance of the evidence shows that a violation occurred.

FINRA and its predecessor, the National Association of Securities Dealers ("NASD"), have used the TCDO sparingly since the SEC approved the new power in 2003.[59] FINRA has only sought a TCDO twice, once in 2004 and once in 2010.[60] Both actions involved allegations of widespread fraud and material omissions of fact. For example, in the 2010 case of *Department of Enforcement v. Pinnacle Partners Financial Corp.*, the respondents allegedly engaged in fraudulent sales of securities and misused more than $10 million of customer funds.[61] FINRA obtained a TCDO against the respondents, who proceeded to violate the TCDO's requirements to record telephone conversations and refrain from making fraudulent representations.[62] As a result, the respondents were suspended from FINRA membership and a final determination found that they violated the law.[63] FINRA expelled the respondents and ordered them to provide rescission to defrauded customers.[64]

Although FINRA was eventually successful in obtaining interim and final relief, the Pinnacle Partners case was not a complete success from an efficiency standpoint; final relief was not granted until almost a year and a half after the matter was initiated, and the respondents violated the initial consent TCDO almost as soon as the ink was dry on their signature. FINRA likely will consider using its TCDO power in more cases. It cannot seek relief in

federal court, and so it must use the tools at its disposal. As real-time enforcement becomes more important and as FINRA increases its enforcement activity, the TCDO authority will continue to be an attractive option for FINRA to pursue.

RECOMMENDATIONS

In most cases when the SEC or CFTC seeks emergency relief in federal court, the one-sided nature of the evidence at their disposal makes the grant of a TRO a foregone conclusion. However, in some of those cases, the uncertainty about the necessity of the relief — particularly in the face of a hastily-developed factual record — and the unpredictability of federal judges might provide an opportunity for practitioners to take pro-active steps to avoid emergency relief. Moreover, the unwieldiness of the administrative processes discussed above also allows defense counsel to take measures to preserve a client's business in the face of a regulatory juggernaut.

Financial services entities facing the possibility or actuality of emergency action should consider an approach that will limit any damage to their ongoing concern that would result from the negative publicity or restraining provisions that would grow out of an emergency action. A firm that learns that a regulator is considering emergency action is in a good position to change its practices in an attempt to obviate such action. For example, a firm can purge itself of any wrongdoers, hire or promote effective supervisors and compliance personnel, revise its procedures, and put in place targeted compliance procedures. It can also propose to the regulators a set of interim protective measures that it could cite to undercut any argument that there is a need for emergency action. For example, the firm could agree to make regular reports to the regulator about its capital position and communications with customers, or agree to escrow funds to mollify a regulator's concern that the money will be dissipated. Such measures would have the combined effect of demonstrating the firm's good faith, while sapping the regulator of the equities needed to show a court that interim relief is justified.

Once an enforcement agency files an action seeking emergency relief, a defendant or respondent will still have the ability to affect the nature of the interim relief that is entered, with the goal of avoiding the consequences that

would be harshest to the company's survival. For example, instead of suffering an order that freezes the firm's funds, the firm could agree to limit its expenses to certain amounts and categories, and create a means of monitoring those expenses and reporting them to the regulator. Such an agreed order, if acceptable to the regulator, will save resources on both sides and hold out some hope that the firm will survive the regulatory action.

Of course, when the regulator is unwilling to forego filing emergency action, or unwilling to negotiate a resolution that enables the firm's business to continue, the only remaining option for a firm's survival might be to litigate. In those cases when the investigation is still in its infancy, a firm might have the opportunity to argue that the facts concerning the alleged underlying violation as well as those indicating the need for emergency interim relief are insufficiently developed and do not justify taking emergency action. In any event, if a firm chooses to fight a TCDO, early preparation for the expedited hearing — well before the TCDO proceeding is filed, and beginning once the firm gets some sense that emergency action is a possibility — will help level the playing field with the regulator.

NOTES

[1] Former SEC Chairman Harvey Pitt popularized the term "real-time enforcement." *See* Remarks at the PLI 33rd Annual Institute on Securities Regulation, *available at* http://www.sec.gov/news/speech/spch520.htm.

[2] For an excellent discussion of the practical implications of NASD's (now FINRA's) TCDO powers, *see* Stephen J. Crimmins and David A. Thompson, Will NASD's New TCDO Power Put Its Enforcement Cases on a Fast Track?, 36 Securities Regulation & Law Report 1539 (2004).

[3] Jacob A. Stein, Glenn A. Mitchell, Basil J. Mezines, Administrative Law § 1.01[2] (Matthew Bender & Co., 2012) (listing efficiency and speed as justifications given in support of the modern administrative process).

[4] Bressler, Amery & Ross, Securities Law Alert: ABA SRO SubCommittee of Securities Litigation Committee Sponsors Presentation Featuring New FINRA Enforcement Management, p. 4 (Mar. 2011) (discussing FINRA Executive Vice President of Enforcement Brad Bennett's stated intentions of placing continuing emphasis on and providing support for handling enforcement actions expeditiously and using FINRA's TCDO authority in appropriate cases), *available*

at http://www.bressler.com/news/publications/Securities_March2011_CS2.pdf.

[5] *See* SEC Enforcement Manual, Securities and Exchange Commission, Division of Enforcement, Office of Chief Counsel (March 9, 2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf; FINRA Rules, Financial Industry Regulatory Authority (2012), *available at* http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=607; CFTC Regulations, 17 C.F.R. §§ 1-190 (2011).

[6] At the SEC and CFTC, the five member Commissions must approve the proposed enforcement action. At FINRA, the Office of Disciplinary Affairs, subject to oversight by the FINRA Regulation Board and the FINRA Board, must approve all proposed disciplinary proceedings. FINRA Rule 9211.

[7] Even if the improper conduct — such as insider trading, or a fraudulent offering of securities — appears to have ceased, the conduct can be defined as "ongoing" as long as the alleged wrongdoer still possesses the improperly obtained funds.

[8] The "Wells" process provides the respondent an opportunity to answer the anticipated charges before the staff presents to the Commission a recommendation for the commencement of an administrative or injunctive proceeding. *See* SEC Rules on Informal and Other Procedures, 17 C.F.R. § 202.5(c). *See also* Informal Procedure Relating to the Recommendation of Enforcement Proceedings, 17 C.F.R. Appendix A to Part 11 (authorizing the CFTC Division of Enforcement to use informal procedures to obtain a written statement from respondent prior to issuing its recommendation to commence enforcement proceedings).

[9] *See* 15 U.S.C. § 78u(d) (authorizing temporary injunctive relief); 15 U.S.C. § 78u-3(c) (authorizing temporary cease-and-desist order).

[10] Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (codified in scattered sections of 15 U.S.C.).

[11] *In re A.R. Baron & Co., Inc.*, Sec. Exch. Act Release No. 37248, 1996 SEC LEXIS 3543 (May 29, 1996).

[12] 15 U.S.C. § 78u(d); Fed. R. Civ. P. 65.

[13] Fed. R. Civ. P. 65(b)(1); *See SEC v. Unifund SAL*, 910 F.2d 1028, 1036-37 (2d Cir. 1990); *SEC v. Mgmt. Dynamics Inc.*, 515 F.2d 801, 807 (2d Cir. 1975).

[14] Fed. R. Civ. P. 65(a)(1).

[15] *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298 (N.D. Ala. 2003).

[16] *SEC v. Healthsouth Corp.*, SEC Litigation Release No. 18044, 2003 SEC LEXIS 656 (Mar. 20, 2003).

[17] *SEC v. Scrushy*, SEC Litigation Release No. 20084, 2007 SEC LEXIS 779

(Apr. 23, 2007).

[18] 15 U.S.C. § 78u-3(c); *see also* 17 C.F.R. §§ 201.500, 201.510-514.

[19] 15 U.S.C. § 78u-3(c)(1).

[20] *Id.*

[21] 15 U.S.C. § 78u-3(d)(1).

[22] *Id.*

[23] 15 U.S.C. § 78u-3(c)(1).

[24] *In re A.R. Baron & Co., Inc.*, Sec. Exch. Act Release No. 37248, 1996 SEC LEXIS 3543 (May 29, 1996).

[25] *Id.*

[26] *Id.*

[27] *In re A.R. Baron & Co., Inc.,* Sec. Exch. Act Release No. 37831, 1996 SEC LEXIS 2924 (Oct. 17, 1996); *In re Weissman*, Sec. Exch. Act. Release No. 37661, 1996 SEC 2382 (Sept. 9 1996).

[28] David J. Morrow, New York Brokerage Is Accused of Fraud, *N.Y. Times*, May 24, 1996 (quoting Mark Kreitman, a lawyer with the Commission).

[29] The SEC has other emergency enforcement powers, such as the ability to suspend trading in any security for a temporary period. The Commission may exercise this power as long as it finds that "the public interest and the protection of investors" requires suspension of trading. Emergency suspension normally is limited to 10 business days. 15 U.S.C. § 78l(k)(1).

[30] *See* 7 U.S.C. §§ 13a, 13a-1.

[31] Although the CFTC Rules of Practice allow for suspension of some rules, 17 C.F.R. § 10.3, and shortened procedures, 17 C.F.R. § 10.92, the rules do not allow the agency to seek emergency relief such as a temporary cease-and-desist order to stop ongoing violations. Suspension of the rules under § 10.3 requires notification from the Commission, and shortened procedures under § 10.92 requires consent from both parties. *See In re Saberi*, 2005 CFTC LEXIS 8 at *6 (Mar. 5, 2005) as an example where shortened procedures were used.

[32] *CFTC v. Peregrine Fin. Grp., Inc.*, No. 1:12-cv-05383 (N.D. Ill. Jul. 10, 2012) (granting statutory restraining order to appoint temporary receiver in case alleging misappropriation of funds).

[33] *CFTC v. GID Grp., Inc.*, No. 3:11-cv-3068 (N.D. Tex. Nov. 8, 2011) (granting statutory restraining order to freeze assets and preserve records in case alleging operation of a fraudulent off-exchange forex Ponzi scheme).

[34] *CFTC v. 20/20 Trading Co., Inc.*, No. SA CV11-643-JST(FMOx) (C.D. Cal. Apr. 27, 2011) (granting statutory restraining order to freeze assets and preserve

records in case alleging fraudulent solicitation of customers to purchase physical metals on a leveraged basis).

[35] *CFTC v. Flint McClung Capital LLC*, No. 11-cv-01644-CMA-BNB, 2012 U.S. Dist. LEXIS 25127 (D. Colo. Feb. 28, 2012) (granting permanent injunction against respondents for engaging in forex fraud after granting an SRO and preliminary injunction).

[36] These statistics were compiled from official CFTC press releases for the period of October 1, 2010 to July 30, 2012, counting all newly-initiated federal court actions and omitting all administrative proceedings. Incidental to this discussion, the analysis reveals that all administrative proceedings instituted by the CFTC during the covered period were simultaneously filed and settled, with the exception of proceedings to revoke registrations. When the CFTC initiated contested actions during this period, it filed them in federal court.

[37] If one excludes 24 sweep cases involving forex violations — in all of which the CFTC sought a preliminary injunction but not a statutory restraining order — then the percentage of FY 2011 civil actions seeking emergency relief climbs to 50 percent.

[38] For example, out of 266 civil actions initiated by the SEC in federal court in fiscal year 2011, the SEC sought TROs to halt ongoing conduct in 39 actions and to freeze assets in 42 actions, roughly 15 percent in both cases. "Table 1 Enforcement Milestones Fiscal 2011" and "Table 2 Enforcement Action Summary Chart For Fiscal Year 2011 By Primary Classification," Select SEC and Market Data Fiscal 2011, Securities and Exchange Commission, p. 2-3, *available at* http://www.sec.gov/about/secstats2011.pdf. In 2010, out of 252 civil actions commenced, the SEC sought TROs in 15 percent of the actions, and asset freezes in 23 percent, and in 2009, out of 312 civil actions commenced, the figures were 23 percent and 26 percent, respectively. "Table 1 Enforcement Milestones Fiscal 2010" and "Table 2 Enforcement Action Summary Chart For Fiscal Year 2010 By Primary Classification," Select SEC and Market Data Fiscal 2010, Securities and Exchange Commission, p. 2-3, *available at* http://www.sec.gov/about/secstats2010.pdf; "Table 1 Enforcement Milestones Fiscal 2009" and "Table 2 Enforcement Action Summary Chart For Fiscal Year 2009 By Primary Classification," Select SEC and Market Data Fiscal 2009, Securities and Exchange Commission, p. 2-3, *available at* http://www.sec.gov/about/secstats2009.pdf.

[39] 7 U.S.C. § 13a-1.

[40] *See CFTC v. Peregrine Fin. Grp., Inc.*, No. 1:12-cv-05383 (N.D. Ill. Jul. 10, 2012).

[41] Fed. R. Civ. P. 65(b)(2).
[42] 7 U.S.C. § 13a-1.
[43] *Id.*
[44] Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376.
[45] *See* 76 Fed. Reg. 41398 (July 14, 2011) (adopting final rule 180.1, pursuant to section 753 of the Dodd-Frank Act, to prohibit reckless employment of manipulative and deceptive devices).
[46] FINRA Rule 9200 et seq and FINRA Rule 9800 et seq.
[47] *See* 15 U.S.C. § 78s.
[48] *See* "Strengthening Enforcement and Fraud Detection," FINRA 2011 Year in Review and Annual Financial Report, p. 2 (2011), *available at* http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p127312.pdf.
[49] FINRA Rule 9800.
[50] In a few limited situations, FINRA may summarily suspend a member or associated person for violations of certain rules. *See* FINRA Rule 9550 et seq.
[51] *See* Stephen J. Crimmins and David A. Thompson, Will NASD's New TCDO Power Put Its Enforcement Cases on a Fast Track?, 36 Securities Regulation & Law Report 1539 (2004).
[52] FINRA Rule 9810(a) authorizes FINRA to seek a TCDO in actions alleging violation of:

(1) Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder;
(2) SEC Rules 15g-1 through 15g-9 (relating to penny stocks);
(3) FINRA Rule 2010, if the alleged violation is unauthorized trading, or misuse or conversion of customer assets, or based on violations of Section 17(a) of the Securities Act;
(4) FINRA Rule 2020 (FINRA's antifraud provision); or
(5) NASD Rule 2330, if the alleged violation is misuse or conversion of customer assets.

[53] *See* 15 U.S.C. § 78u(d); 15 U.S.C. § 78u-3(c); 7 U.S.C. § 13a-1.
[54] FINRA Rule 9810(a).
[55] FINRA Rule 9810(a)-(c).
[56] FINRA Rule 9830.
[57] FINRA Rule 9840(a).
[58] FINRA Rule 9290.
[59] *See* Notice of Filing of Proposed Rule Change to Adopt a Temporary and

Permanent Cease and Desist Authority Pilot Program on a Permanent Basis, 74 Fed. Reg. 109 (June 2, 2009) ("When it first sought cease and desist authority, FINRA stated that it would use the authority sparingly. That has been the case.").

[60] *Department of Enforcement v. L.H. Ross & Co., Inc.*, NASD Office of Hearing Officers, Disciplinary Hearing No. CAF040056 (Aug. 30, 2004); *Department of Enforcement v. Pinnacle Partners Fin. Corp.*, FINRA Office of Hearing Officers, Disciplinary Hearing No. 2010021324501 (Dec. 3, 2011).

[61] *Department of Enforcement v. Pinnacle Partners Fin. Corp.*, FINRA Office of Hearing Officers, Disciplinary Hearing No. 2010021324501 (Apr. 25, 2012).

[62] *Id.*

[63] *Id.*

[64] *Id.*