

DISSENTING STATEMENT REGARDING CERTAIN WAIVERS GRANTED BY THE COMMISSION FOR CERTAIN ENTITIES PLEADING GUILTY TO CRIMINAL CHARGES INVOLVING MANIPULATION OF FOREIGN EXCHANGE RATES

May 21, 2015

Commissioner Kara M. Stein

I dissent from the Commission's Orders, issued on May 20, 2015, that granted the following waivers from an array of disqualifications required by federal securities regulations:¹

1) UBS AG, Barclays Plc, Citigroup Inc., JPMorgan Chase & Co. ("JPMC"), and the Royal Bank of Scotland Group plc ("RBSG"), waivers from the provisions under Commission rules that automatically make them ineligible for well-known seasoned issuer ("WKSI") status;²

¹ *In the Matter of UBS AG*, Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer, available at <https://www.sec.gov/rules/other/2015/33-9782.pdf>; *In the Matter of Barclays Plc*, Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer, available at <https://www.sec.gov/rules/other/2015/33-9778.pdf>; *In the Matter of Citigroup Inc.*, Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer, available at <https://www.sec.gov/rules/other/2015/33-9779.pdf>; *In the Matter of JPMorgan Chase & Co.*, Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer, available at <https://www.sec.gov/rules/other/2015/33-9780.pdf>; *In the Matter of The Royal Bank of Scotland Group Plc*, Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer, available at <https://www.sec.gov/rules/other/2015/33-9781.pdf>; *In the Matter of UBS AG*, Order Under Section 27A(b) of the Securities Act of 1933 and Section 21E(b) of the Securities Exchange Act of 1934, Granting Waivers of the Disqualification Provisions of Section 27A(b)(1)(A)(i) of the Securities Act of 1933 and Section 21E(b)(1)(A)(i) of the Securities Exchange Act of 1934 as to UBS AG, available at <https://www.sec.gov/rules/other/2015/33-9784.pdf>; *In the Matter of Barclays Plc*, Order Under Section 27A(b) of the Securities Act of 1933 and Section 21E(b) of the Securities Exchange Act of 1934, Granting Waivers of the Disqualification Provisions of Section 27A(b)(1)(A)(i) of the Securities Act of 1933 and Section 21E(b)(1)(A)(i) of the Securities Exchange Act of 1934 as to Barclays Plc, available at <https://www.sec.gov/rules/other/2015/33-9783.pdf>; *In the Matter of JPMorgan Chase & Co.*, Order Under Section 27A(b) of the Securities Act of 1933 and Section 21E(b) of the Securities Exchange Act of 1934, Granting Waivers of the Disqualification Provisions of Section 27A(b)(1)(A)(i) of the Securities Act of 1933 and Section 21E(b)(1)(A)(i) of the Securities Exchange Act of 1934 as to JPMorgan Chase & Co., available at <https://www.sec.gov/rules/other/2015/33-9785.pdf>; *In the Matter of UBS AG*, Order Under Rule 506(d) of the Securities Act of 1933 Granting a Waiver of the Rule 506(d)(1)(i) Disqualification Provision, available at <https://www.sec.gov/rules/other/2015/33-9787.pdf>; *In the Matter of Barclays Plc, Barclays Bank Plc, and Barclays Capital, Inc.*, Order Under Rule 506(d) of the Securities Act of 1933 Granting a Waiver of the Rule 506(d)(1)(iii) Disqualification Provision, available at <https://www.sec.gov/rules/other/2015/33-9786.pdf>.

² Created by the Commission as part of the Securities Offering Reforms of 2005, WKSI, or well-known seasoned issuer, status is available "for the most widely followed issuers representing the most significant amount of capital raised and traded in the United States." See Division of Corporation Finance's Revised Statement on Well-Known Seasoned Issuer Waivers (Apr. 24, 2014), available at <http://www.sec.gov/divisions/corpfina/guidance/wksi-waivers-interp-031214.htm>. This status confers on the largest companies certain advantages over smaller companies. For example, WSIs are granted nearly instant access to investors through the capital markets. In addition, WSIs enjoy greater flexibility in their public communications and a streamlined registration process with less oversight than smaller businesses.

2) UBS AG, Barclays, and JPMC waivers from automatic disqualification provisions related to the safe harbor for forward-looking statements under Section 27A of the Securities Act and Section 21E of the Securities Exchange Act of 1934; and

3) UBS AG and three Barclays entities³ waivers from the automatic Bad Actor disqualification provided under Rule 506.⁴

The disqualifications were triggered for generally the same behavior: a criminal conspiracy to manipulate exchange rates in the foreign currency exchange spot market (“FX Spot Market”), a global market for buying and selling currencies. Traders at these firms “entered into and engaged in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for,” the euro-dollar foreign currency exchange (“FX”).⁵ To carry out their scheme, the conspirators communicated and coordinated trading almost daily in an exclusive online chat room that the traders referred to as “The Cartel” or “The Mafia.”⁶ Additionally, salespeople and traders lied to customers in order to collect undisclosed markups in certain transactions.⁷ This criminal behavior went on for years, unchecked and undeterred.⁸

³ Based on a loophole contained in Rule 506(d)(2)(iii), the CFTC is allowed to opine on the Commission’s Rule 506 jurisprudence. In Orders dated November 11, 2014, the CFTC determined RBSG, Citibank, N.A., and JPMorgan Chase Bank, N.A., should receive a waiver from automatic disqualification under SEC rules. *See In the Matter of the Royal Bank of Scotland plc*, Order Instituting Proceedings Pursuant to Sections 6(c)(4)(A) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 15-05, at 15-16 (Nov. 11, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfroyalbankorder111114.pdf>; *In the Matter of Citibank, N.A.*, Order Instituting Proceedings Pursuant to Sections 6(c)(4)(A) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 15-03, at 17 (Nov. 11, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcitibankorder111114.pdf>; *In the Matter of JPMorgan Chase Bank, N.A.*, Order Instituting Proceedings Pursuant to Sections 6(c)(4)(A) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 15-04, at 17 (Nov. 11, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfjpmorganorder111114.pdf>.

⁴ Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Dodd-Frank Act”) required the Commission to adopt rules that disqualify certain securities offerings from reliance on Rule 506 of Regulation D. The Commission adopted final rules disqualifying felons and other “Bad Actors” from Rule 506 offerings on July 10, 2013. *See* SEC Release No. 33-9414, available at <http://www.sec.gov/rules/final/2013/33-9414.pdf>.

⁵ *See e.g.*, U.S. v. Barclays Plc, Plea Agreement, ¶ 2 (May 20, 2015), available at <http://www.justice.gov/file/440481/download>.

⁶ *Id.* ¶ 4(h).

⁷ *See, e.g., id.* Attachment C, Disclosure Notice.

⁸ “Citicorp, which was involved from as early as December 2007 until at least January 2013, has agreed to pay a fine of \$925 million; Barclays, which was involved from as early as December 2007 until July 2011, and then from December 2011 until August 2012, has agreed to pay a fine of \$650 million; JPMorgan, which was involved from at least as early as July 2010 until January 2013, has agreed to pay a fine of \$550 million; RBS, which was involved from at least as early as December 2007 until at least April 2010, has agreed to pay a fine of \$395 million.... UBS participated in this collusive conduct from October 2011 to at least January 2013” and “UBS agreed to pay a criminal penalty of \$203 million.” *See* Press Release, Five Major Banks Agree to Parent-Level Guilty Pleas, U.S. Department of Justice (May 20, 2015), available at <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

There are compelling reasons to reject these requests to waive the automatic disqualifications required by statute or rule. Chief among them, however, is the recidivism of these institutions. For example, in the face of the FX criminal action, a majority of the Commission has determined to grant Citigroup yet another WKSI waiver, its fourth since 2006. It is worth noting that Citigroup was automatically disqualified from WKSI status between 2010 and 2013 for unrelated misconduct, meaning that it has effectively now triggered WKSI disqualifications five times in roughly nine years. Further, through this latest round of Orders, the Commission has granted:

- Barclays its third WKSI waiver since 2007;
- UBS its seventh WKSI waiver since 2008;
- JPMC its sixth WKSI waiver since 2008; and
- RBSG its third WKSI waiver since 2013.

The Commission has thus granted at least 23 WKSI waivers to these five institutions in the past nine years. The number climbs higher if you include Bad Actor and other waivers.

This latest round of criminal charges also comes on the heels of the Department of Justice's actions against UBS, Barclays, and RBSG for their collusive manipulation of the London Interbank Offered Rate ("LIBOR"), a benchmark used in financial products and transactions around the world. The manipulation of LIBOR was flagrant and "impact[ed] financial products the world over, and erode[d] the integrity of the financial markets."⁹ As part of the settlements in the LIBOR matters, UBS, Barclays, and RBSG each entered into agreements with the Department of Justice in which they undertook not to commit additional crimes during the term of the agreements.¹⁰

Allowing these institutions to continue business as usual, after multiple and serious regulatory and criminal violations, poses risks to investors and the American public that are being ignored. It is not sufficient to look at each waiver request in a vacuum.

⁹ Press Release, Department of Justice, RBS Securities Japan Ltd Sentenced for Manipulation of Yen LIBOR (Jan. 6, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/302785.htm.

¹⁰ See U.S. Department of Justice Letter Re: UBS AG (Dec. 18, 2012), *available at* <http://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf>; U.S. Department of Justice Letter Re: Barclays Bank PLC (June 26, 2012), *available at* <http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf>; United States of America v. the Royal Bank of Scotland plc, Deferred Prosecution Agreement (Feb. 5, 2013), *available at* <http://www.justice.gov/iso/opa/resources/28201326133127414481.pdf>. As part of this package of plea agreements, rather than pleading to the deceptive FX trading and sales practices in which it engaged, UBS AG agreed to "plead guilty to manipulating the London Interbank Offered Rate ("LIBOR") and other benchmark interest rates and pay a \$203 million criminal penalty, after breaching its December 2012 non-prosecution agreement resolving the LIBOR investigation." Moreover, "Barclays has ... agreed that its FX trading and sales practices and its FX collusive conduct constitute federal crimes that violated a principal term of its June 2012 non-prosecution agreement resolving [DOJ's] investigation of the manipulation of LIBOR and other benchmark interest rates." Press Release, Five Major Banks Agree to Parent-Level Guilty Pleas, U.S. Department of Justice (May 20, 2015), *available at* <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

And today the Commission heads further down this path. After the LIBOR guilty pleas, UBS was granted a WKSI waiver that was explicitly conditioned on compliance with the judgment in the LIBOR-related matter.¹¹ That explicit condition has now been violated. Yet, the Commission has just issued UBS a new WKSI waiver.

It is troubling enough to consistently grant waivers for criminal misconduct. It is an order of magnitude more troubling to refuse to enforce our own explicit requirements for such waivers. This type of recidivism and repeated criminal misconduct should lead to revocations of prior waivers, not the granting of a whole new set of waivers. We have the tools, and with the tools the responsibility, to empower those at the top of these institutions to create meaningful cultural shifts, yet we refuse to use them.

In conclusion, I am troubled by repeated instances of noncompliance at these global financial institutions, which may be indicative of a continuing culture that does not adequately support legal and ethical behavior. Further, I am concerned that the latest series of actions has effectively rendered criminal convictions of financial institutions largely symbolic. Firms and institutions increasingly rely on the Commission's repeated issuance of waivers to remove the consequences of a criminal conviction, consequences that may actually positively contribute to a firm's compliance and conduct going forward.

¹¹ See Letter from the Division of Corporation Finance Re: United States of America v. UBS Securities Japan Co., Ltd., UBS AG – Waiver Request of Ineligible Issuer Status under Rule 405 of the Securities Act (Sep. 19, 2013), available at <https://www.sec.gov/divisions/corpfin/cf-noaction/2013/ubs-ag-091913-405.pdf>) (finding good cause to waive ineligibility for WKSI status “[b]ased on the facts and representations in your letter, and assuming [UBS AG] and UBS Japan comply with the Judgment”).