No. 99-785

In the Supreme Court of the United States

VICTOR TEICHER, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

SUSAN S. MCDONALD
Senior Litigation Counsel

JOHN W. AVERY
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENT

Whether the authority of the Securities and Exchange Commission under Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3(f), to impose disciplinary sanctions on persons associated with investment advisory firms includes the authority to impose sanctions on a person associated with an unregistered firm, and the authority to bar such a person from association with unregistered firms.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 177 F.3d 1016. The opinion of the Securities and Exchange Commission (Pet. App. A14-A27) is reported at 67 S.E.C. Docket 342.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1999. A petition for rehearing was denied on August 5, 1999 (Pet. App. A30). The petition for a writ of certiorari was filed on November 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners participated in an insider trading scheme in 1985 and 1986, and as a result they were convicted in 1990 of conspiracy, securities fraud, mail fraud, and fraud in connection with a tender offer. Pet. App. A17-A18. At the time of the convictions, petitioner Teicher was the sole general partner and 75% owner of petitioner Victor Teicher & Company, L.P. (Teicher & Co.), which was an "investment adviser" within the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(11). Teicher & Co. was not registered with the Securities and Exchange Commission (SEC or the Commission) under Section 203(a) of that Act, 15 U.S.C. 80b-3(a) (1994 & Supp. IV 1998). The SEC commenced the present proceeding against Teicher & Co. under Section 203(e) of the Act, and against Teicher under Section 203(f) of the Act, 15 U.S.C. 80b-3(e)-(f) (1994 & Supp. IV 1998), on the basis of their criminal convictions, and ultimately issued an order barring petitioner Teicher from being "associated" with any unregistered investment adviser.[1] Pet. App. A14-A27 (opinion), A28-A29 (order). The court of appeals affirmed. *Id.* at A1-A13.

1. The Investment Advisers Act is part of a comprehensive statutory scheme enacted by Congress to

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[1] Teicher consented to a bar on association with any registered investment adviser (or with any broker, dealer, municipal securities dealer, or investment company). Pet. App. A16 n.2. Accordingly, the only sanction at issue here is the bar on his association with any unregistered adviser. See *id.* at A23, A29. Although Teicher & Co. is also named as a petitioner, the Commission's order imposes no sanction on the firm to which it had not previously consented, and accordingly the firm as such has no basis for seeking judicial review.

assure that "the highest ethical standards prevail in every facet of the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-187 (1963). Among other things, the Act provides for the registration of certain investment advisers with the SEC. It also gives the Commission broad authority to institute disciplinary proceedings against investment advisers, or persons associated with them, who violate the federal securities laws or engage in other specified misconduct.

a. Section 202(a)(11) of the Act defines the term "investment adviser" broadly to include, subject to exceptions not applicable here, "any person who, for compensation, engages in the business of advising others" about investing in securities. 15 U.S.C. 80b-2(a)(11). The term "person associated with an investment adviser" means any "partner, officer, or director" of the adviser or any person "controlling or controlled by" the adviser, "including any employee." 15 U.S.C. 80b-2(a)(17). Investment advisers are generally required to register with the SEC unless they fall within one of several statutory exemptions, such as the exemption for advisers with fewer than 15 clients. See 15 U.S.C. 80b-3(a)-(b), (b)(3).

In 1996, Congress enacted Section 203A of the Act, 15 U.S.C. 80b-3a (Supp. IV 1998), which in effect divides responsibility for the registration of advisers between the SEC and state securities regulators. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-209, § 303(a), 110 Stat. 3437. Under Section 203A, an adviser generally will not register with the Commission if it manages less than $25 million in client assets and is regulated as an investment adviser by the State in which it maintains its principal office.

b. As it was originally enacted in 1940, what is now Section 203(e) of the Act, 15 U.S.C. 80b-3(e) (1994 & Supp. IV 1998), authorized the Commission to "deny registration to or revoke or suspend the registration of" an adviser if the adviser, or certain affiliated persons, had engaged in specified misconduct. Investment Company Act of 1940, ch. 686, § 203(d), 54 Stat. 851. By their nature, those sanctions could apply only to advisers that were registered or seeking registration. In 1970 and 1975, however, Congress expanded the range of available sanctions by authorizing the Commission to "censure" or "place limitations on the activities" of advisers—sanctions that do not involve registration.[2] Moreover, in 1970, Congress enacted Section 203(f) of the Act, 15 U.S.C. 80b-3(f), which authorizes the Commission to impose sanctions on individuals "associated" with such advisers.[3] In its current form, Section 203(f) provides in relevant part:

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[2] Investment Company Amendments Act of 1970 (1970 Amendments), Pub. L. No. 91-547, § 24(d), 84 Stat. 1431 (censure); Securities Acts Amendments of 1975 (1975 Amendments), Pub. L. No. 94-29, § 29(2), 89 Stat. 167 (limitations on activities).

[3] 1970 Amendments, § 24(f), 84 Stat. 1432. As originally enacted, Section 203(f) authorized the Commission to censure, or to suspend or bar from association with an investment adviser, "any person" who had, for example, been convicted of certain crimes. *Ibid.* In 1975, Congress narrowed the class of persons against whom proceedings could be brought by changing "any person" to "any person associated or seeking to become associated with an investment adviser." 1975 Amendments, § 29(3), 89 Stat. 168. The provision was later amended to refer to "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." Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181, § 702, 101 Stat. 1263.

> 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 * * * that such censure, placing of limitations, suspension, or bar is in the public interest and that such person [has been convicted of specified offenses, including those committed by petitioner Teicher]. * * *

15 U.S.C. 80b-3(f).

2. Petitioner Teicher & Co. is an "investment adviser," and petitioner Teicher is a "person associated with an investment adviser," within the meaning of the Investment Advisers Act. Pet. App. A19-A20. Teicher & Co. has not registered with the SEC, and for present purposes the Commission does not dispute that the firm is exempt from registration. See *id.* at A16 & n.1.

In 1985 and 1986, petitioner Teicher purchased or sold securities of a number of takeover candidates while in possession of material, nonpublic information that he knew had been misappropriated. Pet. App. A17-A18. In 1990, a jury found Teicher guilty of conspiracy, nine counts of securities fraud, two counts of fraud in connection with a tender offer, and two counts of mail fraud. *Id.* at A18; see *United States* v. *Teicher*, 987 F.2d 112, 114 (2d Cir.), cert. denied, 510 U.S. 976 (1993). He was sentenced to 18 months' imprisonment, placed on probation for five years, and fined $200,000. Pet. App. A18 n.4. Teicher & Co. was also convicted of various offenses and fined $600,000. *Id.* at A18 & n.4.

After petitioners' criminal convictions became final, the Commission instituted this administrative proceeding against Teicher under Section 203(f) of the Act, 15 U.S.C. 80b-3(f), and against Teicher & Co. under Section 203(e), 15 U.S.C. 80b-3(e). Teicher consented to the entry of an order barring him from association with any broker, dealer, investment company, municipal securities dealer, or registered investment adviser, but he challenged the Commission's authority to bar him from association with an *unregistered* adviser such as Teicher & Co. See Pet. 7-8; Pet. App. A2, A16-A17. An administrative law judge rejected that argument and entered an order barring Teicher from association with, among others, any investment adviser, whether or not registered with the SEC. Pet. 8; Pet. App. A16-A17, A29. Teicher appealed the portion of the order dealing with unregistered advisers to the Commission, which unanimously sustained that aspect of the order. Pet. App. A19-A23, A26-A27, A29.[4]

3. The court of appeals affirmed in relevant part. Pet. App. A1-A6, A13. Addressing the claim that the Commission's authority under Section 203(f) is limited to persons associated, or seeking to become associated, with registered investment advisers, the court observed that "[n]o language in the cited provision remotely suggests that its application is [so] limited." *Id.* at A4. It pointed out that the Act provides a broad definition of "investment adviser," not dependent on

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[4] Although petitioners seek to portray the Commission's opinion as "split" (Pet. 2, 8), the short dissenting statement filed by one Commissioner addressed an issue not relevant here, involving a different respondent and a different statute. See Pet. App. A26-A27; see also *id.* at A23 n.17. The dissenter stressed that in all other respects he "join[ed] [his] colleagues in th[eir] fine opinion." *Id.* at A26.

registration, and "establishes some rules applying to unregistered investment advisers, some applying to registered ones, and some, such as § 203(f), that give every appearance of applying to both." *Id.* at A4-A5. The court considered petitioners' contrary arguments based on the legislative history of Section 203, but it found them unpersuasive. *Id.* at A5-A6. The court concluded that the statutory language was "emphatically against" petitioner Teicher's claim, and that he had "present[ed] nothing adequate to overcome that language, assuming anything could be adequate." *Id.* at A2. Accordingly, "[r]eviewing the Commission's statutory interpretation under the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), [the court found] that [petitioner] ha[d] not effectively challenged the Commission's reading of the Act's unambiguous language." *Id.* at A6.

ARGUMENT

The court of appeals held that the unambiguous language of Section 203(f), 15 U.S.C. 80b-3(f) (1994 & Supp. IV 1998), authorizes the Securities and Exchange Commission's order barring petitioner Teicher from further association with any investment adviser, whether or not the adviser itself is required to register with the Commission. That decision is correct, and does not conflict with the decision of any other court of appeals. Nor does it present any question concerning the deference due to an agency's construction of ambiguous statutory provisions.

1. Petitioners argue that the court of appeals misinterpreted the scope of the Commission's authority under Section 203(f) because it "felt inhibited by the language of the [statutory] sections in question" and

thus "disregarded the voluminous legislative history" that should have led it to a contrary conclusion. Pet. 5; see Pet. 3-6, 9-23. That argument does not warrant further review.

a. Perhaps because the statutory language is "emphatically against" their claim (Pet. App. A2), petitioners argue principally (Pet. 5-6, 10-19) that the legislative history of Section 203(f) reveals a congressional intent to limit the Commission's disciplinary jurisdiction to persons associated with registered advisers. There is, of course, little reason to refer to legislative history "when the statute itself offers no apparent ambiguity" for it to resolve. Pet. App. A6; see, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). Even considering that history, however, the court of appeals correctly found petitioners' argument unpersuasive. See Pet. App. A5-A6.

As the court recognized (Pet. App. A5-A6), while the history of Section 203(f) refers at times to "registered investment advisers," it also refers to the authorization of sanctions against persons associated with "investment adviser[s]," without any reference to registration. S. Rep. No. 184, 91st Cong., 1st Sess. 46-47 (1969); see also H.R. Rep. No. 1382, 91st Cong., 2d Sess. 41 (1970). At most, the statements petitioners cite suggest that Congress was most concerned about those persons associated with the sort of advisers whose size and activities made them subject to the Act's registration requirements. Such a focus would not be surprising, but it would hardly demonstrate that Congress intended to *limit* the application of Section 203(f) to persons associated with registered advisers.

b. In any event, as the court of appeals emphasized (Pet. App. A2-A4), Section 203(f) by its terms authorizes the Commission, under specified circumstances, to impose appropriate sanctions on "any person" who is or seeks to be "associated" with an "investment adviser," including "bar[ring] any such person from being associated with an investment adviser." 15 U.S.C. 80b-3(f) (1994 & Supp. IV 1998). Nothing in the language of the provision limits its application to persons associated with "registered" advisers, or limits the bar the Commission may impose to association with a "registered" adviser. Indeed, the word "registered" does not appear in Section 203(f). Nor does it appear anywhere in the Act's definitions of the terms "investment adviser" and "person associated with an investment adviser." 15 U.S.C. 80b-2(a)(11) and (17). Because it is clear (indeed, uncontested) that petitioner Teicher & Co. is an "investment adviser"—albeit one exempt from registration with the Commission—and that petitioner Teicher is a person associated with such an adviser, the court of appeals correctly held that Teicher is subject to the Commission's disciplinary authority under Section 203(f). See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'Judicial inquiry is complete.'" (citations omitted)); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

Petitioners argue (Pet. 19-23) that the court of appeals read the language of Section 203(f) out of context. Pointing out that Section 203 is captioned "Registration of Investment Advisers," they contend that the Section as a whole is "nearly entirely focussed on registration,"

and that subsection (f) should be read to apply only to advisers that are required to register. Pet. 21. As the Commission recognized (Pet. App. A20-A21) in rejecting petitioners' position, however, while a section heading is certainly relevant to statutory interpretation, it "cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). Moreover, whereas in 1940, when it was first enacted, Section 203 addressed only registration issues, it has since been amended to cover other matters. Congress added subsection (f) in 1970 (see pp. 4-5, *supra*), and in 1990 it added paragraph (k)(1), which deals with the Commission's cease-and-desist authority. Petitioners concede that subsection (k)(1) covers "any person," without regard to registration (Pet. 16-17 n.8); and there is no more reason to conclude that paragraph (f) was intended to apply only to registered "investment adviser[s]." Compare *Brotherhood of R.R. Trainmen*, 331 U.S. at 527-529 (declining to read section heading enacted in original statute as a limitation on language of provisions added later).

In any event, the fact that Section 203 initially dealt only with registration does not mean that the term "investment adviser," when used in that Section, was or is limited to registered advisers. To the contrary, Section 203(a) establishes the basic registration requirement for "any investment adviser," *except* for those advisers referred to in Section 203(b) (or, since 1996, those covered by Section 203A). 15 U.S.C. 80b-3(a)-(b). In both those subsections (and in Section 203A), the term "investment adviser" must refer to *all* advisers, whether or not registered or required to register with the Commission. See also 15 U.S.C. 80b-3(c)(1) (specifying how "an investment adviser, or any

person who presently contemplates becoming an investment adviser," may apply for registration).[5]

Petitioners' argument (Pet. 22) that Section 203(e) originally provided only for denial, revocation, or suspension of registration is similarly unavailing. Although the Commission's authority to act against "any investment adviser" under Section 203(e) was initially circumscribed by the nature of the authorized sanctions, Congress later provided new disciplinary tools, including censure and activity limitations, that the Commission could use in cases involving either registered or unregistered advisers. That progression suggests an incremental legislative response to the needs of effective regulation in light of experience, not some "radical expansion of the statute" (Pet. 13).

Even if Section 203(e) were limited to registered advisers, there would be no reason to conclude that Congress intended to impose a similar limitation on the separate authority conferred by Section 203(f), which authorizes the Commission to sanction "any person associated * * * with an investment adviser." 15 U.S.C. 80b-3(f) (1994 & Supp. IV 1998). As the court of appeals noted (Pet. App. A4), nothing in subsection (f) "remotely suggests that its application is limited to 'registered' investment advisers." Indeed, as originally

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[5] The reference in subsection (c)(1) is not limited to advisers that are required to register. See, *e.g.*, *Ahmed Mohamed Soliman*, 52 S.E.C. 227, 229 n.7 (1995) (holding that adviser who had voluntarily registered was subject to the requirements of the Act even if he would have qualified for an exemption from registration); Release No. IA-870, 28 S.E.C. Docket 464 (July 14, 1983) ("Persons who voluntarily register under the Advisers Act, in circumstances where their registration may not be required, are, of course, subject to all the provisions and rules under the Advisers Act applicable to persons required to register.").

enacted in 1970, Section 203(f) authorized proceedings against "any person" who, like petitioner Teicher, was convicted of specified crimes. See p. 4 & note 3, *supra*. When Congress decided, in 1975, to narrow the class of persons subject to such proceedings, it added only the limitation to persons "associated" with "an investment adviser," without any reference to whether that adviser was or was not registered with the Commission.

That Congress understood the term "investment adviser," as used in the Act, to include *all* advisers is also reflected in the antifraud provision of Section 206, 15 U.S.C. 80b-6. Petitioners do not dispute (Pet. 14) that Section 206 applies to all who meet the definition of "investment adviser," not only those that are registered or required to register. Cf. 15 U.S.C. 80b-3(d) (differentiating between registered and unregistered advisers only with respect to applicability of the interstate commerce element of provisions, such as Section 206, that prohibit specified conduct by advisers regardless of registration). As they recognize, Congress amended Section 206, which originally referred to "any investment adviser registered under section 203," to refer to "any investment adviser," specifically in order to make the section applicable to advisers that are *not* registered, either because they failed to comply with the Act's registration requirements, or because they are exempt from registration. See S. Rep. No. 1760, 86th Cong., 2d Sess. 7 (1960).

Conversely, as the court of appeals recognized (Pet. App. A4-A5), Congress knew how to distinguish between registered advisers and unregistered advisers when it wished to do so. Provisions of the Act expressly limited to registered advisers include Section 204, which provides for recordkeeping and reporting by every adviser "other than one specifically exempted

from registration," and Section 205, which provides certain terms for investment advisory contracts for advisers "unless exempt from registration." 15 U.S.C. 80b-4, 80b-5; see also 15 U.S.C. 80b-3(d) ("any investment adviser registered pursuant to this section"), 80b-8(a) ("any person registered under section 80b-3"). Section 203(f), by contrast, contains no such limiting language, and the natural inference is that Congress intended in that provision to refer to all "investment advisers" as that term is defined in Section 202(a)(11). See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it from another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Finally, petitioners repeatedly suggest (Pet. 9, 11, 17-19) that the enactment of Section 203A of the Act, 15 U.S.C. 80b-3a (Supp. IV 1998), in 1996 somehow confirms a limitation on the otherwise plain language of Section 203(f). Section 203A(a) effects a division of routine supervisory jurisdiction between state and federal regulators by prohibiting most advisers with less than $25 million under management from registering with the SEC, if they are already regulated (or required to be regulated) by the States in which they have their principal offices.[6] The new provision does not, however, divest the Commission of its authority to

[6] The record does not reveal whether Section 203A would preclude petitioner Teicher & Co. from registering with the Commission.

impose sanctions on any adviser, registered or not, for misconduct.[7]

As we have explained, some provisions of the Act apply by their terms only to advisers that are registered with the Commission, while others apply to all advisers, whether they are registered with the Commission, exempt from registration under Section 203(b), or precluded from federal registration under Section 203A(a). In 1960, for example, Congress amended Section 206, the Act's antifraud provision, to cover *any* investment adviser, explaining that while it was reasonable to exempt some advisers from registration, the reasons for exemption from routine regulatory burdens did not extend to exemption from prohibitions on fraud. See S. Rep. No. 1760, *supra*, at 7. Like Section 206, Section 203(f) was enacted to protect the public, by keeping persons who have engaged in securities fraud and other wrongdoing out of the business of providing investment advice. Accordingly, nothing in Section 203A, or in any provision dealing with exemption from registration, suggests any concomitant restriction on the Commission's disciplinary jurisdiction over investment advisers and their associated persons under Sections 203(e) and (f).

2. Petitioners also argue (Pet. 6, 23-26) that the present petition should be granted or held because the court of appeals "inappropriately deferred," under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "to the SEC's unilat-

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[7] Compare 15 U.S.C. 80b-3a(b)(2) (Supp. IV 1998) (saving from preemption the States' power to "investigat[e] and bring[] enforcement actions with respect to fraud or deceit against an investment adviser or person associated with an investment adviser," even if the adviser is registered with the Commission or exempted from registration by federal law).

eral determination that it had jurisdiction" over petitioners. Pet. 23 (emphasis omitted). The short answer to that argument is that the court of appeals plainly did not decide this case on the basis of *Chevron* deference to the administrative construction of an ambiguous statute.

The opinion below does not cite *Chevron* until the court has already made clear its own view that "the language of the statute is emphatically against" petitioners' claim (Pet. App. A2), that "[n]o language in the cited [statutory] provision remotely" supports their argument (*id.* at A4), and that the statute "offers no apparent ambiguity" (*id.* at A6). In concluding its discussion of petitioners' claims, the court then holds that, "[r]eviewing the Commission's statutory interpretation under the principles of [*Chevron*]," petitioners "[have] not effectively challenged the Commission's reading of the Act's *unambiguous* language." *Ibid.* (emphasis added). Read in context, these statements can only refer to the first step of the familiar *Chevron* analysis:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. at 842-843. In this case, the court of appeals made as clear as possible its conclusion that Congress "unambiguously expressed [its] intent" in the language of Section 203(f). It accordingly agreed with, rather than deferred to, the Commission's interpretation of that language. That decision raises none of the "deference" questions discussed in the petition (at 23-26).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

SUSAN S. MCDONALD
Senior Litigation Counsel

JOHN W. AVERY
Senior Counsel
Securities and Exchange Commission

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