

ORAL ARGUMENT NOT YET SCHEDULED

No. 11-7109

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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KAREN HUDES,

*Appellant*

v.

AETNA LIFE INSURANCE COMPANY, et al.,

*Appellees*

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On Appeal from the United States District Court for the District of Columbia

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**BRIEF FOR APPELLEE KPMG LLP**

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September 5, 2012

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES****(A) Parties and Amici**

All parties, intervenors, and amici appearing before the District Court and in this Court are listed in the Brief for Plaintiff-Appellant Karen Hudes.

**(B) Rulings Under Review**

References to the rulings at issue appear in the Brief for Plaintiff-Appellant Karen Hudes.

**(C) Related Cases**

The case on review has not previously been before this Court, and undersigned counsel is unaware of any related cases currently pending in this Court or any other court.

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## GLOSSARY

### Abbreviation

<b>Hudes</b>	Plaintiff-Appellant Karen Hudes
<b>IBRD</b>	Defendant-Appellee International Bank for Reconstruction and Development
<b>KPMG</b>	Defendant-Appellee KPMG LLP
<b>SEC</b>	U. S. Securities and Exchange Commission
<b>Securities Act</b>	Securities Act of 1933, as amended
<b>Exchange Act</b>	Securities Exchange Act of 1934, as amended

## JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal from a final judgment of the District Court pursuant to 28 U.S.C. §1291.

## STATUTES AND REGULATIONS

All statutes and regulations relevant to the issue presented for review are contained in the Addendum to this Brief.

## ISSUE PRESENTED FOR REVIEW

Whether the District Court properly dismissed Plaintiff-Appellant Karen Hudes' Second Amended Complaint as against Defendant-Appellee KPMG LLP.

## STATEMENT OF THE CASE

From 1986 until 2007, Plaintiff-Appellant Karen Hudes (“Hudes”) was employed as an attorney<sup>1</sup> in the legal department of Defendant-Appellee International Bank of Reconstruction and Development (“IBRD”). (See Brief of Plaintiff-Appellant Karen Hudes (“Hudes Br.”) at 14.) Defendant-Appellee KPMG LLP (“KPMG”) has served as the auditor of IBRD’s financial statements for fiscal years ended June 30, 2009, and thereafter. Hudes’ employment as an attorney in IBRD’s legal department thus terminated substantially before KPMG’s engagement as the auditor of IBRD’s financial statements began.

On October 13, 2009, Hudes commenced an administrative proceeding for wrongful termination against IBRD before the Occupational Safety and Health Administration in the U.S. Department of Labor. See 806 F. Supp.2d at 184; J.A. 0040. On February 22, 2010, the administrative law judge dismissed Hudes’ claim. *Hudes v. IBRD*, No. 2010-SOX-2012, 2010 DOLSOX LEXIS 15 (Dep’t of Labor, Feb. 22, 2010). On March 4, 2010, Hudes “informed the Administrative Review Board of the U.S. Department of Labor that she was removing her . . . claim” against the IBRD to federal court. See 806 F. Supp. 2d at 184, J.A. 0040.

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<sup>1</sup> While Hudes appears *pro se*, as the District Court found, Hudes is a practicing attorney with a degree from Yale Law School and many years of experience. Hudes is accordingly not entitled to the relaxed pleading standards and other latitude ordinarily accorded to the typical *pro se* plaintiff. 806 F. Supp. 2d at 192-93; J.A. 0054.

On December 17, 2009, Hudes filed a complaint against Aetna Corp., John and Jane Does 1-100, and Defendant-Appellee Mark Schreiber in the U.S. District Court for the District of Maryland, seeking damages for improper disclosures of Hudes' confidential medical records and defamation. *Id.*; *see also* Hudes Br. at 11. The next day, Hudes amended her complaint to substitute Defendant-Appellee Aetna Life Insurance Co. for Aetna Corp. and to add IBRD as a defendant. *See* 806 F. Supp. 2d at 184, JA. 0040. On August 23, 2010, the U.S. District Court for the District of Maryland transferred the case to the District Court for the District of Columbia. *Id.*

On October 15, 2010, Hudes filed her Second Amended Complaint ("Complaint"), inexplicably joining KPMG as a defendant to Hudes' pending action against IBRD and the other Defendant-Appellees. Hudes' sole claim against KPMG is alleged pursuant to Section 11 of the Securities Act of 1933, as amended ("Securities Act"), 15 U.S.C. § 77k.<sup>2</sup> Hudes' allegations regarding KPMG are as follows:

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<sup>2</sup> Hudes states that "Hudes amended the Complaint in October 2010 to join KPMG for violation of Section 11 of the Securities Act of 1933." Hudes Br. at 11. As noted by the District Court, Hudes also cited the Securities Exchange Act of 1934, as amended ("Exchange Act"), as one of the bases for subject matter jurisdiction over her claims, but Hudes conceded below that she had not asserted a claim against KPMG under the Exchange Act. 806 F. Supp. 2d at 194-95; J.A. 0057.

4. Plaintiff is also a holder of IBRD's bonds, purchased from IBRD's dealer in Maryland. After Plaintiff disclosed IBRD's ongoing control lapses to the Chairman of IBRD's Audit Committee on February 27, 2009, Defendant KPMG LLC (hereinafter "KPMG") was hired by IBRD's Audit Committee to conduct an external audit of IBRD's internal control over financial reporting. KPMG's audit of IBRD fails to report that IBRD does not have effective internal controls, because KPMG's audit does not comply with the Public Company Accounting Oversight Board's Auditing Standards Nos. 2 and 5 in violation of Section 11 of the Securities Act, 15 U.S.C. § 77(k)(a)(4). Plaintiff and IBRD's other bondholders are unable to rely upon the effectiveness of KPMG's audit of IBRD's internal controls or the accuracy of IBRD's financial reports. Because KPMG has prevented Plaintiff from contacting KPMG's audit team and from considering Plaintiff's reports to the Audit Committee and the US Congress of IBRD's control lapses, Defendant KPMG is unable to form an opinion on the effectiveness of IBRD's internal control over financial reporting.
  
23. Plaintiff is entitled to prompt judicial resolution in a "forum capable of treating the case coherently" of Defendant IBRD's violations of Sarbanes-Oxley, Defendant Aetna and Schreiber's violations of Plaintiff's federal and state privacy rights, and Defendant KPMG's failure to comply with the Securities Act, Generally Accepted Accounting Principles and Generally Accepted Auditing Standards.
  
29. For these reasons Plaintiff requests the Court to Order:
  - (4). [D]amages in the amount of \$2,000,000 as relief for KPMG's failure in its audit of IBRD's internal control over financial reporting to comply with Generally

Accepted Auditing Standards by KPMG's refusal to apprise KPMG's audit team of the deficiencies Plaintiff reported to IBRD's Audit Committee representing material weaknesses in IBRD's internal controls.

The District Court dismissed the Complaint as against all defendants. With respect to KPMG, the District Court found Hudes' claim "at best ancillary to Plaintiff's central allegations" and "too infirm to survive." 806 F. Supp. 2d at 194; J.A. 0056-57. The District Court held that Section 11 of the Securities Act, 15 U.S.C. §77k, is "inapplicable to the World Bank bonds held by Plaintiff." *Id.* at 195; J.A. 0058. The District Court concluded:

Even were the Court to accept as true the allegation that KPMG "conducted an audit that does not comply with the Public Company Accounting Oversight Board's Auditing Standards Nos. 2 and 5," ***Plaintiff could not state a claim for a violation of §11 of the Securities Act because that section does not apply to bonds issued by the Bank.***

*Id.*; J.A. 0058 (emphasis added).

### SUMMARY OF THE ARGUMENT

While Hudes alleges that she is a "holder" of IBRD's bonds, Hudes has not alleged and cannot allege a claim under Section 11 of the Securities Act against KPMG. As the District Court correctly noted, pursuant to Section 15(a) of the Bretton Woods Agreements Act, 22 U.S.C. § 286k-1, securities issued by the IBRD are "exempt securities" within the meaning of section 3(a)(2) of the

Securities Act, 15 U.S.C. § 77c(a)(2). Accordingly, IBRD's bonds were not and are not subject to registration pursuant to the Securities Act. Since Hudes has not alleged and cannot allege that she purchased IBRD bonds that were the subject of a false or misleading registration statement, Hudes' claim against KPMG is not plausible and was properly dismissed with prejudice by the District Court.

The District Court did an exemplary job in analyzing Hudes' "tangled" allegations. 806 F. Supp.2d at 183; J.A. 0038. The District Court properly determined that Hudes had no Section 11 claim against KPMG, and its judgment dismissing Hudes' Complaint as against KPMG should be affirmed.

## **ARGUMENT**

### **THE DISTRICT COURT PROPERLY DISMISSED HUDES' COMPLAINT AS AGAINST KPMG**

Hudes acknowledged in the District Court that her claim against KPMG is "a private cause of action . . . under Section 11 of the Securities Act, 15 U.S.C. § 77(k)(a)(4)." (Pl's. Mem. of Points and Authorities in J. Opp'n to the Defs.' Mots. to Dismiss and Sever, Docket No. 62-1 at 18 (footnote omitted).) The District Court found that, even accepting as true Hudes' factual allegations, Hudes has

failed to state a claim against KPMG upon which relief may be granted. *See* 806

F. Supp.2d at 195; J.A. 0058.<sup>3</sup>

Section 11(a) of the Securities Act, 15 U.S.C. § 77k(a), provides:

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable.

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or

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<sup>3</sup> This Court reviews de novo the District Court's dismissal of Hudes' Complaint. *See Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004).

valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

In order to allege a Section 11 claim, a plaintiff must allege that she purchased securities that were the subject of a false or misleading registration statement. *See* Louis L. Loss & Joel S. Seligman, *Fundamentals Of Securities Regulation* 1227 (5<sup>th</sup> ed. 2004); *Wachovia Bank & Trust Co. v. Nat'l Student Mktg. Corp.*, 650 F.2d 342, 355-56 (D.C. Cir. 1980). Hudes has not alleged that she purchased IBRD bonds that were the subject of a false or misleading registration statement. Indeed, as Hudes admitted below, pursuant to Section 15(a) of the Bretton Woods Agreements Act, 22 U.S.C. § 286k-1, securities issued by IBRD are “exempted securities” within the meaning of Section 3(a)(2) of the Securities Act, 15 U.S.C. § 77c(a)(2). (*See* Pl’s. Memo. of Points and Authorities in J. Opp’n. to the Defs.’ Mots. to Dismiss and Sever, Docket No. 62-1 at 4 n. 6.) A

registration statement for the sale of securities exempt under the Securities Act is not required. Hudes has not alleged, and cannot allege, that IBRD has ever filed a registration statement to which Section 11 or any other provision of the Securities Act is applicable.

Hudes' argument to this Court that she may nonetheless pursue a Section 11 claim against KPMG based upon Hudes' "entitle[ment] to accurate financial information" (Hudes Br. at 21) or KPMG's alleged failure to observe applicable accounting or auditing standards<sup>4</sup> (Hudes Br. at 6-7) is a non sequitur. IBRD did not file a registration statement to which Section 11 applies. Absent an allegation that Hudes purchased securities that were the subject of a false and misleading registration statement, Hudes' Section 11 claim for relief against KPMG is "not plausible on its face," and was properly dismissed by the District Court. *See*

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<sup>4</sup> As Hudes did below in her Complaint and other pleadings in the District Court, Hudes' Brief to this Court includes only vague and conclusory allegations that "KPMG did not comply with Generally Accepted Auditing Standards" when auditing IBRD's financial statements. *See, e.g.*, Hudes Br. at 7. Hudes has consistently failed to support her conclusory allegations with any specific facts detailing how KPMG's audits of IBRD's financial statements failed to comply in any specific respect with any applicable auditing standard, or how any such deficiency would give rise to a claim by Hudes for damages against KPMG. Additionally, Hudes now contends, "The district court erred in concluding as a matter of law that KPMG was exempt from regulatory oversight." Hudes Br. at 7. The District Court made no such finding. Nor has any party to this proceeding ever previously suggested that KPMG was "exempt from regulatory oversight."

*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Because Hudes' Section 11 claim against KPMG is not plausible, the District Court was not "required to conduct discovery into whether the SEC revoked IBRD's exemption under the securities laws" as Hudes now argues. (*See* Hudes Br. at 24-27.) Even in the unlikely event the SEC were to suspend or revoke IBRD's exemptions under the securities laws,<sup>5</sup> Hudes would still not have purchased securities that were the subject of a false or misleading registration statement, and Hudes would still have no Section 11 claim against KPMG. Hudes was also not entitled to discovery "to ascertain whether the SEC agreed with Hudes that KPMG could not issue an unqualified opinion on IBRD's internal control over financial information." (*See* Hudes Br. at 7.) Whatever the SEC's opinion of Hudes' allegations against KPMG might be, absent a formal SEC adjudication or

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<sup>5</sup> There is no evidence in the record that the SEC has taken any steps to suspend IBRD's exemptions under the federal securities laws pursuant to 22 U.S.C. § 286k-2. While Hudes contends that "the SEC informed Hudes twice that the SEC was considering whether to revoke IBRD's exemption. J.A. 96 and 181," (Hudes Br. at 8), the documents Hudes included in the Joint Appendix at 96 and 181 demonstrate only that the SEC has acknowledged the receipt of Hudes' correspondence, not that the SEC is "considering" acting in response to Hudes' inquiries. Indeed, as Hudes herself admits (Hudes Br. at 24), "The SEC ... did not answer Hudes' queries whether IBRD's temporary exemption from the securities laws is still in effect or whether KPMG must comply with Auditing Standards and Section 11 of the Securities Act." The SEC is not obligated to respond to Hudes' inquiries, and evidently has not done so.

rule-making, the District Court and this Court would owe the SEC's views no deference. *See Gryl ex rel. Shire Pharms. Group PLC v. Shire Pharms. Group PLC*, 298 F.3d 136, 145 (2d Cir. 2002); *see also SEC v. Sloan*, 436 U.S. 103, 118 (1978)(courts, not SEC, are final authorities on issues of interpretation and construction of federal securities laws).

Permitting Hudes to amend her Complaint against KPMG would have been futile. The District Court properly dismissed Hudes' claim against KPMG with prejudice. *See Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) (dismissal of patently insubstantial claims appropriate); *Anderson v. Fed. Bureau of Prisons*, No. CIV-A. 10-0413 (PLF), 2011 U.S. Dist. LEXIS 10406 (D.D.C. Feb. 23, 2011) (no need to permit futile amendments of pleadings).

A lawsuit naming KPMG as a defendant is not a proper vehicle for Hudes to air her grievances. Insofar as Hudes seeks to change the applicable law and expand the scope of private rights of action under the federal securities laws, she should address her concerns to Congress, not this Court. Her claim against KPMG was properly dismissed by the District Court.

## CONCLUSION

For the foregoing reasons, the District Court's judgment dismissing Hudes' Second Amended Complaint as against KPMG should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief for Appellee KPMG LLP complies with the type-volume limitation set forth in the Court's June 6, 2012 order in this matter as it contains 2,207 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/Marc B. Dorfman

Marc B. Dorfman

*Counsel for Appellee KPMG LLP*

**ADDENDUM**

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*Section 3(a)(2) of the Securities Act of 1933, as amended, 15 U.S.C. §  
77c(a)(2)*

§ 77c. Classes of securities under this title

(a) Exempted securities. Except as hereinafter expressly provided, the provisions of this *title* [15 USCS §§ 77a et seq.] shall not apply to any of the following classes of securities:

(2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940 [15 USCS § 80a-3(c)(3)]; or any security which is an industrial development bond (as defined in *section 103(c)(2) of the Internal Revenue Code of 1954* [26 USCS § 103(c)(2)]) the interest on which is excludable from gross income under section 103(a)(1) of such Code [26 USCS § 103(a)(1)] if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code [26 USCS § 103(c)(4) or (6)] (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)) [26 USCS § 103(c)], paragraph (1) of such section 103(c) [26 USCS § 103(c)(1)] does not apply to such security; or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under *section 401 of the Internal Revenue Code of 1954* [26 USCS § 401], (B) an annuity plan which meets the requirements for the deduction of the employer's contributions under section 404(a)(2) of such Code [26 USCS § 404(a)(2)], (C) a governmental plan as defined in section 414(d) of such Code [26 USCS § 414(d)] which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the

funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, or (D) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 USCS § 80a-3(c)(14)], other than any plan described in subparagraph (A), (B), (C), or (D) of this paragraph (i) the contributions under which are held in a single trust fund or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code [26 USCS § 401(c)(1)] (other than a person participating in a church plan who is described in *section 414(e)(3)(B) of the Internal Revenue Code of 1986* [26 USCS § 414(e)(3)(B)]), or (iii) which is a plan funded by an annuity contract described in section 403(b) of such Code [26 USCS § 403(b)] (other than a retirement income account described in *section 403(b)(9) of the Internal Revenue Code of 1986* [26 USCS § 403(b)(9)]), to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of such Code [26 USCS § 414(e)(3)(A)] establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account). The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this *title* [15 USCS § 77e] any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of *section 401(c)(1) of the Internal Revenue Code of 1954* [26 USCS § 401(c)(1)], if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this *title* [15 USCS §§ 77a et seq]. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except

that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940;

*Section 11 of the Securities Act of 1933, as amended, 15 U.S.C. § 77k*

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable. In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement, in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues. Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof--

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or

valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness. In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters. If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs. The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit,

directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this *title* [15 USCS §§ 77a et seq.] the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director.

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2) (A) The liability of an outside director under subsection (e) shall be determined in accordance with section 21D(f) of the Securities Exchange Act of 1934 [15 USCS § 78u-4(f)].

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission .

(g) Offering price to public as maximum amount recoverable. In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

#### **HISTORY:**

(May 27, 1933, ch 38, Title I, § 11, 48 Stat. 82; June 6, 1934, ch 404, Title II, § 206, 48 Stat. 907; Dec. 22, 1995, P.L. 104-67, Title II, § 201(b), 109 Stat. 762; Nov. 3, 1998, P.L. 105-353, Title III, § 301(a)(2), 112 Stat. 3235.)

*Section 15(a) of the Bretton Woods Agreements Act, 22 U.S.C. § 286k-1*

§ 286k-1. Securities issued by Bank as exempt securities; reports filed with Security and Exchange Commission; additional data for report of National Advisory Council

[(a)] Any securities issued by International Bank for Reconstruction and Development (including any guaranty by the bank, whether or not limited in scope), and any securities guaranteed by the bank as to both principal and interest, shall be deemed to be exempted securities within the meaning of paragraph (a)(2) of section 3 of the Act of May 27, 1933, as amended (*U.S.C., title 15, sec. 77c*) [*15 USCS § 77c(a)(2)*], and paragraph (a)(12) of section 3 of the Act of June 6, 1934, as amended (*U.S.C., title 15, sec. 78c*) [*15 USCS § 78c(a)(12)*]. The bank shall file with the Securities and Exchange Commission such annual and other reports with regard to such securities as the Commission shall determine to be appropriate in view of the special character of the bank and its operations and necessary in the public interest or for the protection of investors.

**HISTORY:**

(July 31, 1945, ch 339, § 15, as added June 29, 1949, ch 276, § 2, 63 Stat. 298; Dec. 19, 1989, P.L. 101-240, Title V, Subtitle E, § 541(d)(1), 103 Stat. 2518.)

*22 U.S.C. § 286k-2*

§ 286k-2. Suspension of right of International Bank to issue securities under 22 USCS § 286k-1; report of Securities and Exchange Commission

The Securities and Exchange Commission acting in consultation with the National Advisory Council on International Monetary and Financial Problems is authorized to suspend the provisions of section 15(a) of the Bretton Woods Agreements Act [*22 USCS § 286k-1(a)*] at any time as to any or all securities issued or guaranteed by the bank during the period of such suspension. The Commission shall include in its annual reports to Congress such information as it shall deem advisable with regard to the operations and effect of this Act and in connection therewith shall include any views submitted for such purpose by any association of dealers registered with the Commission.

**HISTORY:**

(June 29, 1949, ch 276, § 3, 63 Stat. 299.)

**CERTIFICATE OF FILING AND SERVICE**

I HEREBY CERTIFY that on the 5<sup>th</sup> day of September, 2012, the foregoing Brief for Appellee KPMG LLP was filed electronically with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following parties and counsel of record:

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I FURTHER CERTIFY that on this 5<sup>th</sup> day of September 2011, 8 copies of the foregoing Brief for Appellee were delivered to the Clerk of the Court.

/s/Marc B. Dorfman  
\_\_\_\_\_  
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