

INITIAL DECISION RELEASE NO. 708
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15887

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: INITIAL DECISION
BLAYNE S. DAVIS : November 24, 2014

APPEARANCES: Andrew O. Schiff for the Division of Enforcement,
Securities and Exchange Commission

Respondent Blayne S. Davis, *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Blayne S. Davis (Davis) from the securities industry. He was previously convicted of wire fraud.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on May 27, 2014, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The proceeding is a follow-on proceeding based on *United States v. Davis*, No. 6:10-cr-190 (M.D. Fla. Nov. 30, 2011), *aff'd*, 491 F. Appx. 48 (11th Cir. Sept. 27, 2012) (*Davis I*).¹ The Division of Enforcement (Division) filed a motion for summary disposition, pursuant to 17 C.F.R. § 201.250(a), in accordance with leave granted. *Blayne S. Davis*, Admin. Proc. Rulings Release No. 1603, 2014 SEC LEXIS 2473 (A.L.J. July 11, 2014). The parties timely filed their responsive pleadings and Davis filed a sur-reply.²

¹ Davis has a pending Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. *Davis v. United States*, No. 6:12-cv-1870 (M.D. Fla.).

² Davis was granted permission to file the sur-reply. *Blayne S. Davis*, Admin. Proc. Rulings Release No. 1927, 2014 SEC LEXIS 3946 (A.L.J. Oct. 21, 2014).

This Initial Decision is based on the pleadings and Davis's Answer to the OIP. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Davis was convicted were decided against him in the criminal case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Davis was convicted of three counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2, in *Davis I*. The Division urges that he be barred from the securities industry. Davis opposes this.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the courts' orders in *Davis I*; in *United States v. Davis*, No. 6:14-cr-43 (M.D. Fla.) (*Davis II*), a second conviction; as well as the court's Order and Judgment in a related civil case in which Davis was a defendant, *CFTC v. Capital Blu Mgmt., LLC*, No. 6:09-cv-508 (M.D. Fla. June 9, 2011) (*Capital Blu*), ECF Nos. 323, 323-1.³

2. Collateral Estoppel

It is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See *Ira William Scott*, Investment Advisers Act of 1940 (Advisers Act) Release No. 1752, 1998 SEC LEXIS 1957, at *8-9 (Sept. 15, 1998); *William F. Lincoln*, Exchange Act Release No. 39629, 1998 SEC LEXIS, at *7-8 (Feb. 12, 1998).⁴

³ The facts underlying *Davis II* may be considered in the public interest even though the OIP antedated and did not mention that conviction. See *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *15-17 (Jan. 14, 2011); see also *Toby G. Scammell*, Investment Advisers Act of 1940 (Advisers Act) Release No. 3961, 2014 WL 5493265, at *4 n.22 (Oct. 29, 2014); *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155 (July 26, 2013). Davis referred to the judgment in *Capital Blu* in arguing, *inter alia*, that he "has already been more than adequately punished." Opposition at 3.

⁴ Similarly, the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by consent, by summary judgment, or after a trial. See *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *9-11 (Feb. 4, 2008) (injunction entered by consent), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at *1-2 & n.1, *7 (Jan. 21, 1998) (injunction entered by summary judgment); *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 & nn. 13-14 (Oct. 12, 2007) (injunction entered after trial), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Demitrios Julius Shiva*, 1997

If Davis is successful in overturning his conviction, he can request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending).⁵

II. FINDINGS OF FACT

Davis was convicted after a jury trial in 2011 of three counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2, in *Davis I*. *Davis I*, ECF Nos. 79, 130. The conviction related to a Ponzi scheme in which Davis offered investment opportunities in the foreign exchange market at a guaranteed rate of return. *Id.*, 491 F. Appx. 48, 50. Davis was sentenced to thirty-six months of imprisonment followed by three years of supervised release and ordered to pay \$41,865 in restitution. *Id.*, ECF Nos. 125, 130, 147. The conduct that was the subject of *Davis I* occurred in 2006. *Id.*, ECF No. 41 at 4; ECF Nos. 79, 130, 147.

Davis is currently incarcerated; on completing his sentence in *Davis I*, he was rearrested and held in custody pending his October 8, 2014, sentencing in *Davis II*. Answer at 1, n.1; Opposition at 1; see *Davis II*, ECF No. 25. Davis was convicted on his plea of guilty to one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349 in *Davis II*. He was sentenced to 108 months of imprisonment followed by three years of supervised release and ordered to forfeit \$11,894,776.52 and to pay, jointly and severally with others, \$13,215,874.75 in restitution. *Davis II* at ECF Nos. 89, 95. In addition to an injunction imposed in *Capital Blu*, Davis was ordered to pay a civil money penalty of \$4,927,184.24 plus post-judgment interest and, jointly and severally with others, restitution of \$2,463,592.12 plus post-judgment interest.⁶ *Capital Blu*, ECF Nos. 323, 323-1.

The conduct that was the subject of *Davis I*, *Davis II*, and *Capital Blu* involved Capital Blu Management, LLC (Capital Blu). *Davis I*, ECF Nos. 165, 169; 491 F. Appx. 48; *Davis II*, ECF No. 64-1; *Capital Blu*, ECF No. 323. Neither Capital Blu nor Davis was registered with the

SEC LEXIS 561, at *5-6 & nn.6-7 (Mar. 12, 1997). See also *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *2-10, 22-30 (July 25, 2003).

⁵ See *Jilaine H. Bauer, Esq.*, Securities Act of 1933 (Securities Act) Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, reversed and remanded district court's judgment that was basis for OIP); *Richard L. Goble*, Exchange Act Release No. 68651, 2013 SEC LEXIS 129 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that was basis for OIP); *Evelyn Litwok*, Advisers Act Release No. 3438, 2012 SEC LEXIS 2328 (July 25, 2012) (dismissing follow-on proceeding after court of appeals, while petition for review was pending before Commission, reversed certain convictions and vacated and remanded other convictions, all of which were basis for OIP), *Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 SEC LEXIS 4020 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals, after Commission had issued bar order, vacated criminal conviction that was basis for proceeding).

⁶ Davis defaulted in *Capital Blu*. *Capital Blu*, ECF No. 323 at 2.

Commission and Davis was not associated with a registrant.⁷ Capital Blu acted as a commodity pool operator and purported to offer investment and managed account services in the off-exchange foreign currency (forex) market place. *Davis II*, ECF No. 64-1 at 1. Capital Blu earned commissions and fees based on the volume of trades it made. *Id.* at 2. Davis and another formed Capital Blu, and Davis and two others solicited potential investors. *Id.* at 2-3, 6-7. In or about September 2007, Davis and two others formed a forex investment fund limited partnership, the CBM FX Fund, LP (the Fund), with Capital Blu acting as the general partner of the Fund; investors became limited partners. *Id.* at 3. Davis was aware of the Fund's trading performance and knew Capital Blu reported false statements to the Fund's investors. *Id.* at 3-5. From in or about January 2008 through in or about August 2008, Davis and others had Capital Blu send investors account statements that falsely reported gains when the Fund actually had losses. *Id.* at 4-9. Davis and others continued to solicit investors using false representations. *Id.* at 6-7. Davis knew the representations were false. *Id.* at 7. Davis and others used new investments to pay redemptions to other investors. *Id.* at 11. They also diverted money from the Fund's accounts to pay Capital Blu's operating expenses and their personal expenses. *Id.* at 10. Fund investors sustained losses of approximately \$11,894,776.52. *Id.* at 12.

Davis was approximately twenty-four at the time of the misconduct that was the subject of *Davis I*; now thirty-three, he has matured, is responsible, and is married with two children. Opposition at 4.

III. CONCLUSIONS OF LAW

Davis has been convicted "within 10 years of the commencement of [this proceeding]" of a felony or misdemeanor that "involves the violation of section . . . 1343 . . . of title 18, United States Code" within the meaning of Sections 15(b)(4)(B)(iv) and 15(b)(6)(A)(ii) of the Exchange Act.

Davis argues that the proceeding is barred by the statute of limitations because the conduct underlying *Davis I* occurred "more than nine years" ago. Answer at 1. This argument is unavailing. The Exchange Act authorizes a proceeding like this one within ten years of the date of a respondent's conviction. The date of Davis's conviction was in 2011, and this proceeding was instituted in 2014, within ten years.

Davis also argues that the Commission lacks jurisdiction over commodities trading, in which Capital Blu engaged. This argument is unavailing. The Commission has the authority to bar individuals based on convictions involving dishonesty that are not even securities-related. See *Kornman v. SEC*, 592 F.3d 173, 180 (D.C. Cir. 2010) (citing with approval the Commission's policy that "the importance of honesty for a securities professional is so paramount that [the Commission has] barred individuals even when [a respondent's] conviction was based on dishonest conduct unrelated to securities transactions or securities business") (quoting *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *23 (Feb. 13, 2009)); *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *20-21 & n.27 (Jan. 14, 2011) (holding conviction for tax violation relevant to determine whether an individual is fit to

⁷ Official notice, pursuant to 17 C.F.R. § 201.323, is taken of the Commission's public official records.

work in an industry where honesty and rectitude concerning financial matters is critical); *Ahmed Mohamed Soliman*, Exchange Act Release No. 35609, 1995 SEC LEXIS 968 (Apr. 17, 1995) (revoking registration and imposing broker-dealer and investment adviser bars based on a misdemeanor conviction for submitting false documents to the Internal Revenue Service); *Bruce Paul*, Exchange Act Release No. 21789, 1985 SEC LEXIS 2094 (Feb. 26, 1985) (imposing broker-dealer bar with right to reapply for conviction of making false statements on income tax returns); *Benjamin Levy Sec., Inc.*, Exchange Act Release No. 14368, 1978 SEC LEXIS 2430 (Jan. 12, 1978) (imposing broker-dealer and investment adviser bars and other sanctions based on conviction for making false statements in a loan application). The securities business is “a field where opportunities for dishonesty recur constantly.” *Soliman*, 1995 SEC LEXIS 968, at *10.

Additionally, Davis’s conviction arose “out of the conduct of the business of a broker” within the meaning of Exchange Act Sections 15(b)(4)(B)(ii) and 15(b)(6)(A)(ii). Although Davis was not a registrant or associated with a registrant, the Commission has authority to bar persons from the securities industry based on their association with unregistered brokers. *See Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *32 (July 26, 2013) (“It is well established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding.”); *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 SEC LEXIS 3125 (Dec. 2, 2005), *recons. denied*, Exchange Act Release No. 53651, 2006 SEC LEXIS 861 (Apr. 13, 2006) (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer). “Broker” is defined in Section 3(a)(4) of the Exchange Act as “any person engaged in the business of effecting transactions in securities for the account of others.” “Transaction-based compensation” is “one of the hallmarks of being a broker-dealer.” *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. Apr. 1, 2011) (quoting *Cornhusker Energy Lexington, LLC v. Prospect Street Ventures*, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006)). Davis was associated with Capital Blu, which acted as a broker in that it effected transactions in securities – investments in the Fund – and received fees and commissions based on the volume of trades. Despite the fact that the Fund purported to invest in commodities, investments in the Fund were securities within the meaning of the Exchange Act for the purpose of enforcing the antifraud provisions. *See SEC v. Unique Fin. Concepts, Inc.*, 196 F. 3d 1195, 1203 (11th Cir.1999) (commodities pools are within concurrent jurisdiction of the Commission and the Commodities Futures Trading Commission).

Davis also argues, in essence, that the Division’s request for sanctions in this proceeding in addition to other sanctions, including imprisonment, imposed on him constitute unfair “piling on.” His argument is without merit because Section 15(b)(6) of the Exchange Act specifically authorizes an administrative proceeding such as this one based on a respondent’s conviction.⁸

IV. SANCTION

⁸ Nor can it be argued that imposing administrative sanctions following a conviction is Double Jeopardy. *See Gary M. Kornman*, 2009 SEC LEXIS 367, at *50-52 (citing *Hudson v. United States*, 522 U.S. 93, 98-99 (1997)); *William F. Lincoln*, Exchange Act Release No. 39629, 1998 SEC LEXIS 193, at *15-21 (Feb. 9, 1998) (citing *Hudson*).

As the Division requests, a collateral bar will be ordered.⁹

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. § 78o(b)(6). The Commission considers factors including:

the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schild Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46. The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. *See Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

B. Sanction

As described in the Findings of Fact, Davis's conduct was egregious and recurrent and involved a high degree of scienter. Additionally, he is a recidivist, with two criminal convictions. His lack of recognition of the wrongful nature of his conduct goes beyond a vigorous defense of the charges. As he points out, he was young at the time of the misconduct underlying *Davis I*. Although he is now more mature, he has many decades ahead of him, and his previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, Davis could re-enter the securities industry. The violations are neither recent nor distant in time. The degree of direct financial harm to investors is quantified in the considerable

⁹ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became effective on July 22, 2010, provided collateral bars in each of the several statutes regulating different aspects of the securities industry. Davis's conviction in *Davis I* occurred after July 22, 2010. Additionally, even considering that his underlying wrongdoing occurred before that date, the Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank Act wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. *John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855 (Dec. 13, 2012); *see also Tzemach David Netzer Korem*, 2013 SEC LEXIS 2155; *Johnny Clifton*, Securities Act Release No. 9417, 2013 SEC LEXIS 2022 (July 12, 2013); *Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC LEXIS 2024 (July 11, 2013).

restitution he was ordered to pay, and, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See *Christopher A. Lowry*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975). A conviction involving dishonesty requires a bar, and because of the Commission's obligation to ensure honest securities markets, an industry-wide bar is appropriate.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, **BLAYNE S. DAVIS IS BARRED** from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.¹⁰

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge

¹⁰ Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, pursuant to Exchange Act Section 15(b)(6)(A), (C).