

INITIAL DECISION RELEASE NO. 566  
ADMINISTRATIVE PROCEEDING  
FILE NO. 3-15461

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

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In the Matter of	:	INITIAL DECISION MAKING FINDINGS AND
	:	IMPOSING SANCTION BY DEFAULT AS TO
TIMOTHY M. MCGINN and	:	TIMOTHY M. MCGINN
DAVID L. SMITH	:	February 20, 2014

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### SUMMARY

This Initial Decision bars Timothy M. McGinn (McGinn) from the securities industry.<sup>1</sup>

### I. BACKGROUND

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on September 6, 2013, pursuant to Sections 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that McGinn was convicted of mail, wire, and securities fraud and other offenses. McGinn appeared, through counsel, at a December 18, 2013, prehearing conference; counsel advised that McGinn was planning to execute an Offer of Settlement that would resolve the proceeding against him. However, McGinn did not execute an Offer of Settlement;<sup>2</sup> nor has he filed an Answer to the OIP, which was due within twenty days of service of the OIP. See OIP at 3; 17 C.F.R. § 201.220(b). The Division of Enforcement filed a motion for default on January 31, 2014, and McGinn did not respond. Accordingly, McGinn has failed to answer or otherwise to defend the proceeding within the meaning of 17 C.F.R. § 201.155(a)(2). Therefore, McGinn is in default, and the undersigned finds that the allegations in the OIP are true as to him. See OIP at 3; 17 C.F.R. §§ 201.155(a), .220(f).

### II. FINDINGS OF FACT

McGinn was convicted of mail, wire, and securities fraud, conspiracy to commit mail and wire fraud, and filing a false tax return, in violation of 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. §§ 1341, 1343; and 26 U.S.C. § 7206(l). United States v. McGinn, No. 1:12-cr-00028 (N.D.N.Y. Aug.

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<sup>1</sup> The proceeding has been stayed as to David L. Smith, who has executed an Offer of Settlement that will resolve the proceeding as to him. See Timothy M. McGinn, Admin. Proc. Rulings Release No. 1112, 2013 SEC LEXIS (A.L.J. Dec. 18, 2013).

<sup>2</sup> The Division of Enforcement (Division) represents that counsel for McGinn informed the Division on January 9, 2014, that McGinn did not intend to enter an Offer of Settlement.

13, 2013). He was sentenced to 180 months of incarceration and a three-year term of post-release supervision and ordered to pay \$5,992,800 in restitution and a \$100,000 criminal monetary penalty. Id. At the August 7, 2013, sentencing hearing, the court noted the “very seriousness of the crimes” and described McGinn as an “arrogant” man who ran his business for his personal benefit and that of his favorite clients “regardless of the law or the rules.” Transcript (Tr.) at 34, 37. The court further stated, “There is a reasonable foreseeable risk that [McGinn] may engage in criminal conduct similar or related to the present offense or [his] past criminal conduct.” Tr. at 40.

McGinn was a founder and primary owner of McGinn, Smith & Co., Inc., a broker-dealer based in Albany, New York, from 1981 through August 2012. He was also an indirect owner of McGinn Smith Advisors, LLC, which was registered with the Commission as an investment advisor from January 2006 to April 2009. Through various securities offerings from 2006 through 2009, McGinn and another devised schemes to defraud investors, made misrepresentations and omissions in private placement memoranda, and misused investor funds.

### **III. CONCLUSIONS OF LAW**

McGinn has been convicted within ten years of the commencement of this proceeding of a felony that “arises out of the conduct of the business of a broker, dealer, . . . [or] investment adviser” and “involves the violation of section . . . 1341 [and] 1343. . . of title 18, United States Code” within the meaning of Sections 15(b)(4)(B)(ii), (iv) and 15(b)(6) of the Exchange Act and Sections 203(e)(2)(B), (D), and 203(f) of the Advisers Act.

### **IV. SANCTION**

McGinn will be barred from the securities industry. This sanction will serve the public interest and the protection of investors, pursuant to Sections 15(b)(6) of the Exchange Act and 203(f) of the Advisers Act, and accords with Commission precedent and the sanction considerations set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). McGinn’s unlawful conduct was recurring and egregious; extending over a period of several years, McGinn’s scheme resulted in the loss of millions of dollars. There is a reasonable foreseeable risk that, if he were allowed to resume his former business activities, he would engage in similar criminal conduct.

### **V. ORDER**

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), and Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), **TIMOTHY M. MCGINN 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.<sup>3</sup>

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<sup>3</sup> 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).

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.<sup>4</sup>

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Carol Fox Foelak  
Administrative Law Judge

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<sup>4</sup> A respondent may also file a motion to set aside a default pursuant to 17 C.F.R. § 201.155(b). See Alchemy Ventures, Inc., Exchange Act Release No. 70708, 2013 SEC LEXIS 3459, at \*5-6 (Oct. 17, 2013).