

INITIAL DECISION RELEASE NO. 959  
ADMINISTRATIVE PROCEEDING  
FILE NO. 3-16668

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

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In the Matter of :  
: INITIAL DECISION  
JONATHAN D. DAVEY, CPA : February 11, 2016

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APPEARANCES: Edward G. Sullivan for the Division of Enforcement,  
Securities and Exchange Commission

Jonathan D. Davey, CPA, *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

## SUMMARY

This Initial Decision bars Jonathan D. Davey, CPA, from the securities industry. He was previously convicted of tax evasion and of conspiracy to commit securities fraud, wire fraud, and money laundering.

## I. INTRODUCTION

### A. Procedural Background

The Securities and Exchange Commission instituted this proceeding, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act), with an Order Instituting Proceedings (OIP) on June 30, 2015. The proceeding is a follow-on proceeding based on *United States v. Davey*, No. 3:12-cr-68 (W.D.N.C.), *appeal docketed*, No. 15-4097 (4th Cir. Feb. 23, 2015), in which Davey was convicted of tax evasion and of conspiracy to commit securities fraud, wire fraud, and money laundering, in violation of 18 U.S.C. §§ 371, 1349, and 1956(h) and 26 U.S.C. § 7201.<sup>1</sup> The Division of Enforcement (Division) timely filed a motion for summary disposition on September 18, 2015, pursuant to Commission Rule of Practice 250(a), 17 C.F.R. § 201.250(a) (Rule 250(a)), in accordance with leave granted. *Jonathan D. Davey, CPA*, Admin. Proc. Rulings Release No. 3044, 2015 SEC LEXIS 3374 (A.L.J. Aug. 17, 2015). To date, Davey has not filed an opposition, which was due on October 16, 2015. *Id.*

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<sup>1</sup> Davey has also been suspended from appearing or practicing before the Commission pursuant to 17 C.F.R. § 201.102(e)(2), based on *United States v. Davey. Jonathan D. Davey, CPA*, Securities and Exchange Act of 1934 Release No. 75337, 2015 SEC LEXIS 2688 (June 30, 2015).

This Initial Decision is based on the pleadings and Davey'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 Davey was convicted were decided against him in the criminal case on which this proceeding is based. Any other facts in his filing 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 Davey was convicted of tax evasion and of conspiracy to commit securities fraud, wire fraud, and money laundering in *United States v. Davey*. The Division urges that he be barred from the securities industry. At the August 14, 2015, prehearing conference Davey opposed this, indicating that he was willing to accept something less than a permanent bar but opining that it was useless to try to oppose the Division. He also indicated concern that agreeing to a settlement might adversely impact the appeal of his conviction, which is pending before the U.S. Court of Appeals for the Fourth Circuit. He also urged that no sanctions be imposed on him in this proceeding because the criminal penalties are sufficient.

## **C. Procedural Issues**

### **1. Official Notice**

Official notice pursuant to Rule 323, 17 C.F.R. § 201.323, is taken of the Commission's public official records and of the docket report and the court's orders in *United States v. Davey*, and from Financial Industry Regulatory Authority, Inc. (FINRA), records as well. See *Joseph S. Amundsen*, Securities Exchange of 1934 Act Release No. 69406, 2013 SEC LEXIS 1148, at \*1 n.1 (Apr. 18, 2013), *pet. for review denied*, 575 F. App'x 1 (D.C. Cir. 2014). FINRA Investment Adviser Registration Depository Reports concerning investment advisers with which Davey was associated are attached to the Division's Motion for Summary Disposition as Exhibit D(1)-(13).

### **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*, 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 193, at \*7-8 (Feb. 12, 1998).<sup>2</sup> Nor does the pendency of an

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<sup>2</sup> Nor does the Commission 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 \*10 (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 SEC LEXIS 561, at \*5-6 & nn.6-7 (Mar. 12, 1997); see also *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at \*2-10, \*22-30 (July 25, 2003).

appeal preclude the Commission from action based on a conviction. See *Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 SEC LEXIS 3423, at \*10 n.21 (Aug. 23, 2002); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS 2334, at \*11 (Sept. 17, 1992). If Davey 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).<sup>3</sup>

## II. FINDINGS OF FACT

Davey was convicted of tax evasion and of conspiracy to commit securities fraud, wire fraud, and money laundering, in violation of 18 U.S.C. §§ 371, 1349, and 1956(h) and 26 U.S.C. § 7201; he was sentenced to 252 months of incarceration and a three-year term of post-release supervision and ordered to pay \$21,815,407.44 in restitution. *United States v. Davey*, ECF No. 263.

The conduct underlying *United States v. Davey* started in or about October 2007 and ended by April 2010.<sup>4</sup> *United States v. Davey*, ECF No. 1 at 20-23; ECF No. 174. During that time, from about 2001 to 2007 Davey was associated with state-registered investment advisers Safe Harbor Wealth Investments, Inc. (from about 2001 to 2007), and Divine Stewardship LLC (during 2009 and 2010). Answer; Division Exhibit D(1)-(13). The conduct underlying *United States v. Davey* involved an investment entity known as Black Diamond, in which Davey's clients invested funds. Answer at 2. The court in *United States v. Davey* considered Davey as second only to Keith Simmons, the kingpin of the Black Diamond fraud, in knowledge of the nature and extent of the fraud and in successful exploitation of the victims. *United States v. Davey*, ECF No. 278 at 15-16. Davey solicited money from investors, made false statements with respect to the level of diligence he had undertaken prior to the solicitation, and became a pivotal person in the criminal activity, at one point being the administrator of the pool of funds that came into the organization. *Id.* at 13. Despite Davey's good qualities, "he appeared to be driven by a greed that the Court rarely sees." *Id.* at 38, 60-61.

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<sup>3</sup> See *Jilaine H. Bauer, Esq.*, Securities Act of 1933 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).

<sup>4</sup> The indictment alleges tax evasion pertaining to the year 2008; it alleges that the tax evasion that ended in February 2011, the date when Davey filed a tax return for 2009 that declared the previously undeclared 2008 income. *United States v. Davey*, ECF No. 1 at 19, 23. However, the jury reached a general verdict, and it is not possible to determine from the verdict form or from any other document in the docket the date when the tax evasion ended. *United States v. Davey*, ECF No. 174 at 2.

### III. CONCLUSIONS OF LAW

Davey 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[n] . . . investment adviser” within the meaning of Sections 203(e)(2)(B) and 203(f) of the Advisers Act.

### IV. SANCTION

Davey will be barred from association with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent.<sup>5</sup>

#### A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. § 80b-3(f). 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)), *aff’d on other grounds*, 450 U.S. 91 (1981). 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*, 2003 SEC LEXIS 1767, at \*5. 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 (Jan. 31, 2006). 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 detail in the Findings of Fact, Davey’s conduct was egregious and recurrent, and involved a high degree of scienter, as shown by his conviction for multiple counts relating to fraud and tax evasion, as well as the fact that he acted with a high degree of greed. His previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, he could re-enter the securities industry. The violations are neither recent

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<sup>5</sup> The sanction will not include a bar from association with a municipal advisor or nationally recognized statistical rating organization in light of *Koch v. SEC*, 793 F.3d 147, 157-68 (D.C. Cir. 2015), and the date of Davey’s violative conduct.

nor distant in time. There is an absence of recognition by Davey of the wrongful nature of his conduct. There is a reasonable foreseeable risk that, if he were allowed to resume his former business activities, he would engage in similar criminal conduct. The degree of direct financial harm to investors is quantified in the \$21,815,407.44 in 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. Concerning Davey's argument that the sanctions imposed on him in *United States v. Davey* are sufficient, Advisers Act Section 203(e)(2) and (f) specifically authorizes administrative sanctions against a respondent who has been convicted within the past ten years of a felony.

## V. ORDER

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), JONATHAN D. DAVEY, CPA, IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

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 a 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.

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Carol Fox Foelak  
Administrative Law Judge