

INITIAL DECISION RELEASE NO. 1249
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17828

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

In the Matter of :
: INITIAL DECISION
ROSALIND HERMAN : April 17, 2018

APPEARANCES: Kathleen Burdette Shields and Susan Anderson
for the Division of Enforcement,
Securities and Exchange Commission

Rosalind Herman, *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Rosalind Herman from the securities industry. She was previously convicted of securities and wire fraud and other crimes.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on February 7, 2017, pursuant to Section 203(f) of the Investment Advisers Act of 1940. The proceeding is a follow-on proceeding based on *United States v. Herman*, No. 1:12-cr-10015, ECF Nos. 299-300 (D. Mass. Aug. 1, 2016), *aff'd*, 848 F.3d 55 (1st Cir. 2017), *cert. denied*, 137 S. Ct. 1603 (2017), in which Herman was convicted of securities and wire fraud and other crimes. The Division of Enforcement filed a motion for summary disposition on July 20, 2017, pursuant to Commission Rule of Practice 250(b), 17 C.F.R. § 201.250(b) (Rule 250(b)).¹ Herman filed her opposition in three submissions during November and December 2017 in accordance with an extended due date. *See Rosalind Herman*, Admin. Proc. Rulings Release Nos. 4900, 2017 SEC LEXIS 1984 (A.L.J. June 29, 2017) (setting August 25, 2017, due date to allow her “a reasonable amount of time to review the [Division’s] investigative file” in light of her

¹ Herman’s Answer to the OIP, due on May 26, 2017, was received at the Division’s office in Boston on approximately June 1, 2017. *See Prehr’s Tr. 7* (Apr. 27, 2017) (4/27 Tr.); *Prehr’s Tr. 16-20* (June 29, 2017) (6/29 Tr.).

incarceration²); 5038, 2017 SEC LEXIS 2779 (A.L.J. Sept. 8, 2017) (extending the due date for the opposition from August 25 to October 13, 2017, in light of the logistical difficulties she experienced as an inmate at Danbury FCI in reviewing the Division’s investigative file); 5138, 2017 SEC LEXIS 3186 (A.L.J. Oct. 5, 2017) (extending the due date to October 27, 2017, to allow for observance of religious holidays); 5213, 2017 SEC LEXIS 3479 (A.L.J. Nov. 1, 2017) (extending due date to November 17, 2017, in light of lockdowns and unforeseen logistical events); 5239, 2017 SEC LEXIS 3695 (A.L.J. Nov. 27, 2017) (allowing the submission of additional exhibits by December 1, 2017, in light of restrictions on inmates’ copying). Specifically, Herman filed her opposition in three submissions: (1) dated October 27, 2017, received November 6, 2017, and including Exhibits A through L; (2) dated November 15, 2017, received November 21, 2017, and including Exhibits A through HH; and (3) dated December 12 (or 15), 2017, received December 27, 2017, and including Exhibits II through WW. The Division’s reply, dated December 20, 2017, was received December 22, 2017. Thereafter Herman filed a fourth submission, dated February 26, 2018, received April 12, 2018,³ and including Exhibits XX through EEE.

This Initial Decision is based on the pleadings, Herman’s Answer to the OIP, and public official records of which official notice has been taken, pursuant to 17 C.F.R. § 201.323. 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 Herman was convicted were decided against her in the criminal case on which this proceeding is based. 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 Herman was convicted of securities fraud and other crimes in *United States v. Herman*. The Division urges that she be barred from the securities industry.

Herman maintains that her co-defendant Gregg Caplitz, not she, committed the misconduct for which she was convicted.⁴ She maintains that only he dealt with clients and alleges that, among other misdeeds, Caplitz forged signatures, including hers, on numerous relevant documents. She states, in her filing dated November 15 and received November 21, 2017, “I have no license in any aspect of the [SEC]. Therefore, . . . please do not take a license away from me nor stop me from working in this field in an office; I do not have a license for you to take.”

² See *Byron S. Rainer*, Securities Exchange Act of 1934 Release No. 59040, 2008 SEC LEXIS 2840, at *4-7 (Dec. 2, 2008) (incarcerated respondent); *José P. Zollino*, Exchange Act Release No. 51632, 2005 SEC LEXIS 987, at *7-10 (Apr. 29, 2005) (incarcerated respondent). A respondent must have “a reasonable amount of time to review the investigative file before being required to file any pleadings.” *Byron S. Rainer*, 2008 SEC LEXIS 2840, at *7; see *José P. Zollino*, 2005 SEC LEXIS 987, at *10.

³ The February 26 submission was mailed on February 26, 2018. On April 6, 2018, the torn and empty envelope was returned to Herman along with a letter from the U.S. Postal Service stating “We sincerely regret the damage to your mail during handling by the Postal Service.” She then caused a second copy of the submission to be filed.

⁴ See 4/27 Tr. 4-6; 6/29 Tr. 20-28; Opp. and Exs., *passim*.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 (Rule 323) is taken of the Commission's public official records and of the docket report and the court's orders in *United States v. Herman*. Selected materials from the docket in that case are attached to the Division's Motion for Summary Disposition as Exhibits C-G, I-J (Div. Exs. C-G, I-J), and official notice pursuant to Rule 323 is taken of each of them.

2. Collateral Estoppel

In arguing that this proceeding should be dismissed, Herman submitted a large quantity of evidence (Exhibits A through EEE), with her opposition and following the Division's reply, to show Caplitz's culpability in support of her argument that Caplitz, not she, committed the misconduct for which she was convicted. However, as the undersigned explained repeatedly to her, this proceeding is based on her conviction and is not an opportunity to retry the facts on which the conviction was based.⁵ 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*, Securities Exchange Act Release No. 39629, 1998 SEC LEXIS 193, at *7-8 (Feb. 12, 1998).⁶

Nor does the pendency of an appeal or other post-conviction proceeding preclude the Commission from action based on a conviction.⁷ *See Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 SEC LEXIS 3423, at *10 n.21 (Aug. 23, 2002); *Ira William Scott*, 1998 SEC LEXIS 1957, at *7 n.8; *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS

⁵ *See* Prehr's Tr. 4 (Mar. 9, 2017) (3/9 Tr.) 4; 4/27 Tr. 5-6; 6/29 Tr. 15-16, 29.

⁶ 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 *5, 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*, Exchange Act Release No. 38389, 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).

⁷ Herman referred to filing a motion under 28 U.S.C. § 2255 (habeas corpus petition). *See* 4/27 Tr. 5; Herman filing dated December 12, received December 27, 2017, at cover letter p. 3. She has not filed the motion, as yet, but has corresponded with the U.S. District Court for the District of Massachusetts concerning records that she requires in support of the motion. *United States v. Herman*, ECF Nos. 332-33.

2334, at *11 (Sept. 17, 1992). If Herman is successful in overturning her conviction, she can request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending).⁸

3. Ratification and Respondent's 2018 Extension Requests to Submit More Evidence

On December 19, 2017, the undersigned invited the parties to submit, by January 5, 2018, “any new evidence [they deem] relevant to the [undersigned’s] reexamination of the record,” as required by the Commission’s November 30, 2017, order concerning administrative proceedings, *Pending Administrative Proceedings*, Securities Act of 1933 Release No. 10440, 2017 SEC LEXIS 3724 (Remand Order).⁹ *Rosalind Herman*, Admin. Proc. Rulings Release No. 5410, 2017 SEC LEXIS 4157 (A.L.J. Dec. 19, 2017) (December 19 Order). On February 15, 2018, the undersigned issued an order advising that she had completed the reexamination of the record as required by the Remand Order and determined to ratify “all prior actions” prior to November 30, 2017. *Rosalind Herman*, Admin. Proc. Rulings Release No. 5602, 2018 SEC LEXIS 476 (A.L.J.) (February 15 Order).

The January 5 date for the submission of “new evidence” relevant to the reexamination was extended to February 2, 2018, at Herman’s request. *Rosalind Herman*, Admin. Proc. Rulings Release No. 5537, 2018 SEC LEXIS 276 (A.L.J. Jan. 26, 2018) (January 26 Order). She was reminded that she had been invited to submit “new evidence” relevant to the undersigned’s reexamination of “all substantive and procedural actions taken by an administrative law judge” in this proceeding and that, as of November 30, 2017, and, as of that date, only procedural actions – setting and postponing dates for filing motions and responsive pleadings – had been taken. *Id.* In letters dated February 20, 21, and March 5, 2018 (titled “Motion to Dismiss,” “Addendum to Motion to Dismiss,” and “Rebuttal to the Division of Enforcement’s Opposition,” respectively) that refer to letters dated January 31 and February 9, 2018, Herman requested additional time to “submit more evidence,” citing logistical difficulties. Although the December 19, January 26, and February 15 Orders stated, “The motion for summary disposition is now fully briefed in accordance with an extended briefing

⁸ 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).

⁹ The Remand Order ratified the appointment of the undersigned as an Administrative Law Judge and directed her to “[r]econsider the record, including all substantive and procedural actions taken by an administrative law judge” and “[d]etermine . . . whether to ratify or revise . . . all prior actions” in pending proceedings. Remand Order at *3; see December 19 Order.

schedule arising from logistical difficulties associated with Respondent Herman's incarceration," it appears that she misinterpreted the extended February 2, 2018, date as inviting her to submit more evidence in conjunction with her opposition to the motion for summary disposition. However, as the January 26 Order made clear, the date applied to "new evidence" relevant to the undersigned's reexamination of pre-November 30, 2017, procedural actions, which consisted only of setting and postponing dates for filing motions and responsive pleadings.¹⁰ As stated in the February 15 Order ratifying "all prior actions," neither party submitted such "new evidence," and the process required by the Commission's order had been completed. *Rosalind Herman*, 2018 SEC LEXIS 476, at *3-4.

4. Respondent's Motion to Dismiss the Division's Reply

The due date for the Division's reply was December 15, 2017. *Rosalind Herman*, 2017 SEC LEXIS 3695. In fact, the reply, dated December 20, was received December 22, 2017.¹¹ Herman's Motion to Dismiss the reply and Addendum to Motion to Dismiss, dated February 20 and 21, 2018, respectively, urge that the reply be dismissed as untimely (as well as arguing that the proceeding against her be dismissed as based on the fraudulent activity of Caplitz). Considering due process and fairness for Herman in light of the Division's burden of proof and burden of persuasion, the seven-day late filing did not affect her ability to present her case. The reply will not be dismissed.

II. FINDINGS OF FACT

Herman was convicted after a seven-day jury trial held from March 28 to April 5, 2016, of conspiracy, investment adviser securities fraud, wire fraud, and corrupt endeavor to impede administration of internal revenue laws, in violation of 18 U.S.C. § 371, 15 U.S.C. § 80b-6(1), 18 U.S.C. § 1343, and 26 U.S.C. § 7212(a), respectively; she was sentenced to eighty-four months of imprisonment, followed by thirty-six months of supervised release, and ordered to pay \$1,819,391.87 in restitution, jointly and severally with co-defendant Gregg Caplitz. *United States v. Herman*, ECF Nos. 299-300.¹² Caplitz had been convicted, on his plea of guilty, of conspiracy, securities fraud, mail fraud, and other violations; he was sentenced to forty-two months of imprisonment, followed by thirty-six months of supervised release, and ordered to pay \$1,899,203 in restitution. *United States v. Caplitz*, No. 1:12-cr-10015, ECF No. 269 (D. Mass. May 24, 2016). The securities fraud conduct underlying *United States v. Herman* ended in March 2013; the other offenses ended on various dates in 2012 and 2013. *United States v. Herman*, ECF No. 299; Div. Ex. C at 1-2.

Herman is president and chief executive officer of Financial Resources Network d/b/a Insight Onsite Financial Solutions (Insight Onsite). Answer at 1. Insight Onsite was a Commission-registered investment adviser; its registration terminated as of April 17, 2012. See

¹⁰ Nonetheless, to ensure fairness, the undersigned has considered Herman's February 26, 2018, submission along with her three timely 2017 submissions as part of her opposition to the motion for summary disposition.

¹¹ The Division stated that the tardiness arose from its misunderstanding of the effect of the Remand Order. Reply Br. at 1.

¹² ECF No. 299 is Division Exhibit C.

https://www.adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=107651 (Insight Onsite's Investment Adviser Public Disclosure, last viewed April 16, 2018); *see also* https://www.adviserinfo.sec.gov/IAPD/content/viewform/adv112010/Sections/iapd_AdvScheduleA_Section.aspx?ORG_PK=107651&FLNG_PK=00DB9CB400080156051DA9700327B60D056C8C_C0 (Insight Onsite's March 12, 2011, Uniform Application for Investment Adviser Registration (Form ADV) at Schedule A, last viewed April 16, 2018). The form reports Rosalind Deborah Herman as President/CEO and Gregg Darrell Caplitz as Chief Compliance Officer. Somewhat inconsistently with her statement that she "is president and chief executive officer" of Insight Onsite, Herman states that the form was "fraudulently e-filed" by Caplitz. *Compare* Answer at 1 *with* Opp. at 2 and Ex. Q.

The indictment pursuant to which Herman was found guilty alleged, *inter alia*, that: Caplitz fraudulently induced clients to entrust their funds to him, to Herman, and to their businesses by falsely representing that the funds would be managed for the benefit of the clients; Caplitz and Herman diverted client funds to their own uses including personal expenses; when clients inquired as to the status of their investments, Caplitz and Herman told them a variety of lies, provided false documents and partial payments to some, and made false promises of payments to others. *United States v. Herman*, ECF No. 104 (Oct. 22, 2013), Div. Ex. D (Third Superseding Indictment) at 1-6.

Herman has consistently maintained that she is innocent of the charges of which she was convicted and that she is a victim of Caplitz, the real culprit. *See* Answer at 1-2; *see also United States v. Herman*, ECF No. 314, Div. Ex. J (July 27, 2016, sentencing hearing) at 29: "to all the victims, I am extremely sorry As I sat through this trial, I was in shock and disbelief at all the events Caplitz repeated here I hope everyone believes how sorry I am for what Mr. Caplitz did." The court, however, imposed the sentence described above, stating: "I don't doubt that Mr. Caplitz was the brains here, . . . but . . . you knew what was going on was criminal from the get-go, and you knew that you were stealing people's money, for years and years you were stealing people's money." *Id.* at 32. In remanding her immediately, the court continued: "[Y]ou are in such denial here . . . that the interests of justice are best served if you are taken into custody right away." *Id.* at 32.

III. CONCLUSIONS OF LAW

Herman 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" and that "involves the violation of section . . . 1343 . . . of title 18, United States Code" within the meaning of Sections 203(e)(2)(B), (D) and 203(f) of the Advisers Act. Whether registered or unregistered, she was acting as an investment adviser or was a person associated with an investment advisor. Although she argues in this proceeding that she was not an investment adviser, she was convicted of violating Section 206(1) of the Advisers Act, 15 U.S.C. § 80b-6(1), which provides, "It shall be unlawful for any *investment adviser* [by jurisdictional means] (1) to employ any device, scheme, or artifice to defraud any client or prospective client." (emphasis added). The court specifically instructed the jury that to find Herman guilty of investment adviser fraud, the government must prove that she was an investment adviser or a person associated with an investment adviser, defined as any partner, officer, director of such investment advisor, or any person performing similar functions, or any person directly or indirectly controlling or controlled by such investment advisor,

including any employee of such investment adviser.¹³ *United States v. Herman*, ECF No. 312 at 99-100.¹⁴ It cannot be questioned that the Commission has authority to bar persons from association with investment advisers, whether registered or unregistered, or otherwise sanction them under Section 203 of the Advisers Act. *Teicher v. SEC*, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

IV. SANCTION

As the Division requests, an industry bar will be ordered.

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*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *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 (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 the Findings of Fact, Herman's conduct was egregious and recurrent, and involved a high degree of scienter, as shown by her conviction for multiple counts of conspiracy, fraud, and corrupt endeavor to impede administration of internal revenue laws. Her previous

¹³ "Investment adviser" is defined in Advisers Act Section 202(11): "any person who, for compensation, engages in the business of advising others, . . . as to the advisability of investing in, purchasing, or selling securities." "Person associated with an investment adviser" is defined in Advisers Act Section 202(17) as "any partner, officer, or director of such investment adviser . . . or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser."

¹⁴ The pages of ECF No. 312 that are jury instructions are Division Exhibit G.

occupation, if she were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, she could re-enter the securities industry – she specifically asks, “please do not . . . stop me from working in this field in an office.” The violations are recent, having ended in 2013. She has consistently affirmatively rejected recognition of the wrongful nature of her conduct, placing 100% of the blame for wrongdoing on Caplitz. This bodes ill for future compliance with legal requirements. There is a reasonable foreseeable risk that, if allowed to resume her former business activities, she would engage in similar criminal conduct. The degree of direct financial harm to investors is quantified in the \$1,819,391.87 in restitution she was ordered to pay jointly and severally with Caplitz. Moreover, 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.

The time period – ending in 2013 – of Herman’s violative conduct does not run afoul of the court’s ruling in *Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017), that a collateral bar cannot be imposed when the violative conduct on which a follow-on proceeding was based ended before the July 22, 2010, effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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), ROSALIND HERMAN IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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.

Carol Fox Foelak
Administrative Law Judge