

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 762/ April 2, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15168

In the Matter of

JOHN J. AESOPH, CPA, and :
DARREN M. BENNETT, CPA : ORDER

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP), pursuant to Section 4C of the Securities Exchange Act of 1934 (Exchange Act) and Rule 102(e)(1)(ii) of the Commission's Rules of Practice (Rule 102(e)(1)(ii)), and the hearing is scheduled to commence on July 15, 2013. Under consideration are Respondents' Joint Motion for a More Definite Statement (Motion), filed February 5, 2013, and responsive pleadings.

The OIP alleges that Respondent CPAs engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule 102(e)(1)(ii) in their 2008 year-end audit of TierOne Corporation, a holding company for TierOne Bank (collectively, TierOne), specifically in reference to the audit procedures that the audit engagement team used concerning TierOne's allowance for loan and lease losses (ALLL) of its so-called FAS 114 loans, which TierOne had valued by using the value of collateral underlying the loans, using stale, dated appraisals.

Respondents argue that the OIP does not state what TierOne's ALLL should have been and why any individual loan's loss estimate was unreasonable. However, as the Division of Enforcement (Division) points out, the OIP concerns Respondents' conduct, not TierOne's conduct and it is not necessary "to show that the accountant's behavior actually caused harm; an accountant can demonstrate a lack of competence even if his conduct did not result in the filing of a false or misleading document. An auditor who fails to audit properly under GAAS – whether recklessly or highly unreasonably – should not be shielded because the audited financial statements fortuitously turn out to be accurate or not materially misleading." Amendment to Rule 102(e) of the Commission's Rules of Practice, 68 SEC Docket 707, 711; 63 Fed. Reg. 57164, 57168 (Oct. 26, 1998). Thus, what TierOne's ALLL should have been or why any individual loan's loss estimate was unreasonable is not relevant in this proceeding.

Respondents argue that the OIP is "vague, ambiguous and generalized," citing Alfred M. Bauer, Administrative Proceedings Rulings Release No. 517 (Sept. 12, 1996), 62 SEC Docket

2415, 2416 (A.L.J. Aug. 27, 1996),¹ which references the factual allegations as to a respondent found at ¶ I.C. of the OIP in that proceeding. However, any comparison of the OIP in the instant proceeding to the Bauer OIP is inapposite – the entirety of the factual allegations as to the Bauer respondent was as follows:

C. From at least June 28, 1991 through at least April 1992, [Respondent] engaged in numerous fraudulent sales practices. [Respondent] made unauthorized purchases and sales, and induced at least one customer to purchase securities by disseminating false account valuations. Specifically:

1. [Respondent] recommended and sold certain securities, including securities purchased on margin, to customers for whom such investments were not suitable in light of their stated age, financial condition and conservative investment objectives;

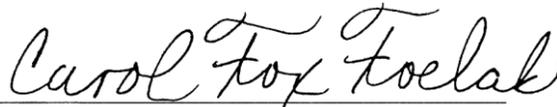
2. [Respondent] prepared and delivered reports to at least one customer that materially overstated the value of the investments he sold. Based at least in part on these false valuations, the customer made subsequent purchases of securities; and

3. [Respondent] made unauthorized purchases of securities, including purchases on margin, in at least one customer's account.

The customers, accounts, and securities were not identified or even hinted at. By contrast, as Respondents recognize, the OIP in the instant proceeding identifies the 178 specific loans at issue in this proceeding. While Respondents argue that these are too numerous, the Commission has long held that a respondent is entitled to be sufficiently informed of the charges against him so that he may adequately prepare his defense, but that he is not entitled in advance of the hearing to a disclosure of the evidence on which the Division intends to rely. Charles M. Weber, Exchange Act Release No. 4830 (Apr. 16, 1953), 35 S.E.C. 79; J. Logan & Co., Exchange Act Release No. 5867 (Feb. 3, 1959), 38 S.E.C. 827; M.J. Reiter Co., Exchange Act Release No. 6108 (Nov. 2, 1959), 39 S.E.C. 484.

Finally, Respondents ask that the Division identify which single specific act by each Respondent was the “single instance of highly unreasonable conduct” referenced in the OIP in paragraph G. 90. The undersigned understands that phrase, quoting Rule 102(e), as charging Respondents with “negligent” rather than “intentional or knowing” conduct and is not intended to indicate any particular specific act.

IT IS ORDERED that the MOTION IS DENIED.



Carol Fox Foelak
Administrative Law Judge

¹ The August 27, 1996, ruling was published (“released”) on September 12, 1996.