INITIAL DECISION RELEASE NO. 673
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15659

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

In the Matter of THOMAS D. MELVIN, CPA	INITIAL DECISION September 22, 2014

APPEARANCES: Joshua A. Mayes for the Division of Enforcement, Securities and Exchange Commission

C. Brian Jarrard, for Thomas D. Melvin, CPA

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Background

Securities and Exchange Commission (Commission) Rule of Practice (Rule) 102(e)(3)(i) provides, in relevant part:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, or other professional or expert who has been by name:
>
> (A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

17 C.F.R. § 201.102(e)(3)(i). Thomas D. Melvin, CPA (Melvin), was temporarily suspended from appearing or practicing before the Commission on December 20, 2013, pursuant to Commission Rule 102(e)(3) because he was enjoined from violating Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 10b-5 and by a United States district court in *SEC v. Melvin*, No. 1:12-cv-02984-CAP (N.D. Ga. Aug. 14, 2013) (Injunctive Action). *Thomas D. Melvin, CPA*, Exchange Act Release No. 71161 2013 SEC LEXIS 4049 (Dec. 20, 2013).

Commission Rule 102(e)(3)(ii) provides that a person temporarily suspended may petition the Commission to lift the temporary suspension. 17 C.F.R. § 201.102(e)(ii).

Commission Rule 102(e)(3)(iii) provides that within thirty days after the filing of a petition, the Commission shall "either lift the temporary suspension, or set the matter down for hearing at a time and place designated by the Commission." 17 C.F.R. § 201.102(e)(3)(iii).

Melvin appealed his temporary suspension on February 26, 2014, and on March 20, 2014, the Commission issued an Order Denying Petition to Lift Temporary Suspension and Directing Hearing (Order), pursuant to Commission Rule 102(e)(3)(i). *Thomas D. Melvin, CPA*, Exchange Act Release No. 71761, 2014 SEC LEXIS 996 (Mar. 20, 2014); *see* 17 C.F.R. § 201.102(e)(3)(i). Melvin received the Order on March 24, 2014. *Thomas D. Melvin, Jr.*, Admin. Proc. Rulings Release No. 1532, 2014 SEC LEXIS 2167 (June 17, 2014).

I ordered a public hearing to begin on June 24, 2014. *Thomas D. Melvin, CPA*, Admin. Proc. Rulings Release No. 1518, 2014 SEC LEXIS 2040 (June 12, 2014). On June 13, 2014, the Division of Enforcement (Division) filed a Motion to Convert Hearing Date to Prehearing Conference, to Continue Hearing and for Leave to File a Motion for Summary Disposition Pursuant to Commission Rule 250, and a Motion for Summary Disposition (collectively, Motion). On June 17, 2014, I postponed the hearing and ordered a prehearing conference for July 14, 2014. *Thomas D. Melvin, CPA*, Admin. Proc. Rulings Release No. 1532, 2014 SEC LEXIS 2167.

At the July 14, 2014, prehearing conference, neither party requested an in-person hearing. Tr. 5-6, 8-9. Melvin, through his counsel, does not dispute that an injunction was entered by the United States district court on consent, but argues that the Division should be held to a three-year ban from association because that was "part and parcel" of the negotiations with the Division that led to Melvin's consent injunction in the Injunctive Action. Tr. 6. Division counsel represents that he never agreed that Melvin would receive a three-year bar, rather he expressed no personal disagreement with a three-year bar, represented to opposing counsel that his supervisors in Washington would make the decision, and after checking, informed Melvin's counsel that he could not recommend a three-year bar because a cooperating witness had received a permanent bar. Tr. 7-8.

I granted the Division leave to file the Motion and set a procedural schedule for the filing of briefs.

Positions of the Parties

The Division's Motion for Summary Disposition and Request that Melvin be Barred from Practicing Before the Commission Pursuant to Commission Rule 250

The Division's Motion has an Appendix with three documents from the Injunctive Action: the Complaint for Injunctive Relief (Complaint) filed August 28, 2012; the Consent of Defendant Thomas D. Melvin (Consent) signed April 10, 2013, and filed on August 13, 2013; and the Final Judgment as to Thomas D. Melvin (Final Judgment) filed August 14, 2013. I take official notice of these documents pursuant to Commission Rule 323. 17 C.F.R. § 201.323.

The Final Judgment: (1) permanently restrained and enjoined Melvin from violating Sections 10(b) and 14(e) of the Exchange Act and Exchange Act Rules 10b-5 and 14e-3; (2) ordered Melvin to disgorge $36,991.20, plus prejudgment interest of $4,181.37, jointly and

severally with Michael S. Cain, and $24,840.75, plus prejudgment interest of $2,813.22, jointly and severally with Joel C. Links; and (4) ordered Melvin to pay a civil money penalty of $108,930.05, pursuant to Section 21A of the Exchange Act. Final Judgment at 2-3, 5.

Melvin consented to entry of the Final Judgment without admitting or denying the allegations in the Complaint except for personal and subject matter jurisdiction. *Id.*; Consent at 1. In his Consent,

> Melvin further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. . . . In addition, in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Melvin understands that he shall not be permitted to contest the factual allegations of the complaint in this action. . . . Melvin understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Melvin agrees: (i) not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis.

Consent at 5.

In its Motion, the Division cites to Commission Rule 102(e)(3)(iv), which provides:

> In any hearing held on a petition filed in accordance with paragraph (e)(3)(ii) of this rule, the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (e)(3)(i)(A) of this rule or that the petitioner has been found to have committed or aided and abetted violations as described in paragraph (e)(3)(i)(B) of this rule and that showing, without more, may be the basis for censure or disqualification. Once that showing has been made, the burden shall be upon the petitioner to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing, the petitioner may not contest any finding made against him or her or fact admitted by him or her in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated. A person who has consented to the entry of a permanent injunction as described in paragraph (e)(3)(i)(A) of this rule without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (e)(3) to have been enjoined by reason of the misconduct alleged in the complaint.

17 C.F.R. § 201.102(e)(3)(iv); *see* Motion at 7.

The Division cites to the Complaint to establish that Melvin is a certified public accountant who in December 2009, misappropriated material inside information from a client who was on the board of a company involved in an upcoming merger. Motion at 2-3; Complaint

at 3, 9-11. While seeking professional advice, the client disclosed confidential information to Melvin on the expectation that Melvin would keep the information confidential; nonetheless, Melvin disclosed the confidential client information to four persons who then disclosed it to others. Complaint at 11-12. At least ten persons acted on the material non-public information to purchase securities and realize financial rewards based on the non-public information that Melvin's misappropriated. Complaint at 12-13.

Respondent's Opposition to the Motion

Melvin filed his Opposition to Summary Disposition (Opposition) with two attachments: the Consent of Defendant Thomas D. Melvin signed June 28, 2013 (Second Consent)[1] and the Affidavit of Brian Jarrard (Jarrard Affidavit) on August 4, 2014. The Opposition argues that the Motion should be denied because (1) the Commission was untimely in instituting the proceeding; and (2) the Division entered into a binding agreement that Melvin not be suspended from practicing before the Commission in excess of three years, thus raising a dispute of material fact about the Division's agreement to a three-year ban.

Argument that proceeding was untimely instituted

The Opposition argues that summary disposition is untimely because Commission Rule 102(e)(3) states

> No order of temporary suspension shall be entered by the Commission pursuant to paragraph (e)(3)(i) of this rule more than 90 days after the date on which the final judgment or order entered in a judicial or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

17 C.F.R. § 201.102(e)(3).

The Final Judgment was entered on August 14, 2013, and Melvin had no right to appeal under the terms of the Consent, and the Commission's Order Instituting Proceedings (OIP) temporarily suspending Melvin from appearing or practicing before the Commission was issued December 20, 2013. On these facts, Melvin contends that the OIP was beyond the 90-day limit established by Commission Rule 102(e)(3). Opposition 1-2. According to Melvin, the 90 days expired on November 12, 2013. *Id* at 1.

The issue of whether the Division agreed to a maximum three-year bar is a material dispute

The Jarrard Affidavit states that in connection with the Second Consent signed by Melvin on June 28, 2013, Jarrard reached "an agreement" with Division counsel "that Mr. Melvin, in

[1] Respondent notes that the Second Consent was signed by Melvin in conjunction with additional negotiations with Division counsel, but that the Second Consent contained the same pertinent provisions regarding entry of a final judgment and an agreement not to appeal. Opposition at 2 n.1.

conjunction with his settlement in the civil enforcement action, not be banned from practicing in front of the Commission for any period in excess of three years." Jarrard Affidavit at 1. According to Jarrard, on July 2, 2013, Division counsel consented to this agreement and Jarrard informed Melvin of the agreement. *Id.* Also according to Jarrard, Division counsel first informed Jarrard that he was not honoring the agreement on January 15, 2014. *Id. at 2.*

Division's Reply in Support of the Motion

The Division filed its Reply in Support of the Motion (Reply) on August 18, 2014. The Division contends that the Commission's OIP was timely issued because Federal Rule of Appellate Procedure 4(a)(1)(B) provides 60 days to appeal from the Final Judgment. Reply at 2. According to the Division, the 90 days provided for in Commission Rule 102(e)(3) began to run on the expiration of 60 days from the Final Judgment, or on October 13, 2013. *Id.*

The Division denies Melvin's counsel's recollection that he had a "binding agreement" with the Commission that Melvin's bar would not exceed three years, and, in any event, cites case law for the proposition that the acts of its agents does not prevent a government agency from carrying out its mission. *Id.* at 3-5.

Findings of Fact

In 2012, Melvin was approximately forty-five-years old and a certified public accountant (CPA) and a principal in the accounting firm of Melvin, Rooks, and Howell PC (MRH), in Griffin, Georgia, a city with a population of approximately 23,640, in which Melvin resided. Complaint at 5; *Griffin (city) QuickFacts from the US Census Bureau*.[2] Melvin has been a licensed CPA in the state of Georgia since 1993. *Id.* at 5. In December 2009, a client who was a member of the board of a public company revealed to Melvin that the company was to be the subject of a tender offer. Complaint at 9-10. Melvin understood that this material, non-public information was confidential. *Id.* at 10.

Melvin misappropriated this material non-public information by disclosing it to Michael S. Cain (Cain), Joel C. Jinks (Jinks), R. Jeffrey Rooks (Rooks), and C. Roan Berry (Berry), thus breaching the duty of confidentiality he owed to his client under Georgia State Board of Accountancy's Code of Professional Conduct.[3] *Id.* at 12. In 2012, Cain had been a client of

[2] In administrative proceedings based on a consent injunction, the Commission considers the allegations in the complaint in determining whether a remedial, disciplinary sanction is in the public interest. *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-9, 22-30 (July 25, 2003). A respondent who has consented to an injunction is not permitted to contest the factual allegations of the injunctive complaint. *Id.* at *27.

[3] The Commission entered an Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions that suspended Rooks from appearing or practicing before the Commission as an accountant based on the Final Judgment entered in *SEC v. Rooks*, 1:12-cv-2988-CAP (N.D. Ga. Sept. 5, 2012). The Commission's Order also permanently enjoined Rooks from future violations of Sections 10(b) and 14(e) of the Exchange Act and Exchange Act Rules 10b-5 and 14e-3, ordered Rooks to disgorge $18,482.12, plus prejudgment interest of $1,432.68, and to pay

Melvin's for over fifteen years. *Id. at 5*. Jinks was Melvin's client and close friend. *Id.* at 5, 18. Rooks, a CPA, is a principal with Melvin in MRH. *Id.* at 7. Berry was Melvin's client and a friend. *Id*. Cain, Jinks, Rooks, and Berry shared the material non-public information with others and they used it to execute transactions and make money. *Id.* at 12-13, 15-27. Melvin was ultimately responsible for the trading of at least ten individuals on material non-public information. *Id.* at 13. There is no evidence that Melvin received, or made arrangements to receive, any financial or material benefit from his disclosures.

In the Injunctive Action, Melvin consented to entry of an injunction that permanently enjoined him for violations Sections 10(b) and 14(e) of the Exchange Act and Exchange Act Rules 10b-5 and 14e-3; he agreed to disgorge, jointly and severally, about $61,328 and about $6,995 in interest; and he agreed to pay a civil money penalty of $108,930.05.

Conclusions of Law

It has been shown that Melvin has been enjoined by a Unites States district court by reason of his misconduct in an action brought by the Commission so that the burden has shifted to Melvin to show that he should not be censured or temporarily or permanently disqualified from appearing or practicing before the Commission. *See* 17 C.F.R. § 201.102(e)(3)(iv).

As an initial matter, I reject Melvin's argument that the proceeding was not timely filed. The Commission's temporary suspension of Melvin was timely because it was issued within 90 days following the 60-day appeal period allowed by the Federal Rules of Appellate Procedure for an appeal of a final judgment. *See* 17 C.F.R. § 201.102(e)(3). The Federal Rules of Appellate Procedure do not mention accelerating the limitations period if the right to appeal is waived. *See* Fed. R. App. P. 4. Judge Magill's decision for the majority in *Gibraltar Cas. Co. v. Walters*, 185 F.3d 1103, 1105-06 (10th Cir. 1999), cited by the Division, supports the Division's position that Melvin's waiver of his right to appeal did not eliminate the time granted for an appeal of the Final Judgment under Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure:

> The statute says nothing about accelerating the limitations period if the right to appeal is waived or extinguished prematurely by conduct of the parties. Thus, we interpret the Colorado statute as permitting a contribution action within one year of the underlying judgment becoming final by lapse of the time for appeal, regardless of whether the parties have agreed to forego appellate proceedings. Because we conclude that the Warrant of Satisfaction had no effect on the otherwise applicable statute of limitations for this contribution action, we hold that the Appellants filed their complaint within the limitations period contemplated by the Colorado contribution statute.

Melvin did not provide any case law to support his position.

After listening to, and reading the positions of, opposing counsel on whether there was an agreement for a three-year bar, I conclude that the dispute is one of misunderstanding, not

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a $4,620.54 civil money penalty. *R. Jeffrey Rooks, CPA*, Exchange Act Release No. 67856, 2012 SEC LEXIS 2899 (Sept. 13, 2012).

duplicity. However, even if Melvin's position was in fact what occurred, he would not prevail for the following reasons.

First, there is no executed agreement between Melvin and the Commission for a three-year suspension of Melvin, and there is nothing that indicates the Division made such a recommendation to the Commission. The Division's Enforcement Manual dated October 9, 2013, which is available on the Internet, describes a tightly held delegation of authority on the initiation and disposition of enforcement actions. Section 2.5.1 of the Enforcement Manual provides:

> The filing or institution of any enforcement action must be authorized by the Commission. In addition, while the Commission has delegated certain authority to the Division Director or the Secretary, most settlements of previously authorized enforcement actions, as well as certain other aspects of civil litigation, among other things, require Commission authorization. Staff should consult with senior managers, [Division's Office of Chief Counsel], and, if appropriate, [Office of the General Counsel], before taking action to ensure that proper authorization is requested.
>
> Commission authorization is sought by submitting an action memorandum to the Commission that sets forth a Division recommendation and provides a comprehensive explanation of the recommendation's factual and legal foundation. All action memoranda submitted to the Commission must be authorized by the Director or a Deputy Director, with a few exceptions. For example, memoranda seeking authorization to seek a specific penalty in previously filed civil litigation, and memoranda seeking the termination or discharge of debts may be submitted to the Commission upon the authorization of an Associate Director or Regional Director, provided that they do not present significant issues that merit higher-level authorization. Staff should consult with senior managers to ensure that appropriate authorization within the Division is obtained before submitting any recommendation.

See http://www.sec.gov/divisions/enforce/enforcementmanual.pdf, Section 2.5.1

Second, "[i]t is well settled that a settlement on behalf of the United States may be enforced only if the person who entered into the settlement had actual authority to settle the litigation. That stands in contrast to settlement of cases by private parties, where apparent authority may be sufficient to bind a litigant." *Commodity Futures Trading Comm'n v. Field*, 249 F.3d 592, 594 (7th Cir. 2001) (internal citations omitted). Division counsel had no actual authority to enter into a binding settlement agreement with Melvin; thus, there is no factual dispute on this issue that is material to the outcome of this proceeding. Even assuming Division counsel made representations to Melvin's counsel about a term of suspension, which Melvin's counsel's believed to be true, such representations are unenforceable without Commission approval.

The remaining question is whether Melvin, after an opportunity for hearing, should be censured or disqualified from appearing or practicing before the Commission for a period of time or permanently. *See* 17 C.F.R. § 201.102(e)(3)(iii). In determining the appropriate remedial

sanction, the Commission requires that the decision be made with "due regard to the public interest," the standards for which are laid out in *Steadman v. SEC* as:

> 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.

603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 540 U.S. 91 (1981) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978); *see Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 SEC LEXIS 2973, at *23-24 (Sept. 20, 2012). Deterrence should also be considered. *Id.* at *30.

The Commission has consistently treated insider trading as an egregious violation. The Commission held in *Robert Bruce Lohmann*, that "[i]nsider trading constitutes clear defiance and betrayal of basic responsibilities of honesty and fairness to the investing public." Exchange Act Release No. 48092, 2003 SEC LEXIS 3171, at *16 (June 26, 2003) (quoting *Sidney C. Eng*, Exchange Act Release No. 40297, 1998 SEC LEXIS 1633, at *26 (Aug. 3, 1998)); *accord Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013) ("conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions."). Melvin's Consent to an injunction against violations of Exchange Act Sections 10(b) and 14(e) and Rules 10b-5 and 14e-3 thereunder and the allegations of insider trading in the Complaint, show that Melvin acted with scienter. *See United States v. Vilar*, 729 F.3d 62, 88-89 (2d Cir. 2013) (scienter is an element of securities fraud under Exchange Act Section 10(b)); *SEC v. Ginsburg*, 362 F.3d 1292, 1297-98 (11th Cir. 2004) (scienter is an element of Exchange Act Sections 10(b) and 14(e) and Rules 10b-5 and 14e-3).

Aside from the arguments regarding timeliness and prior agreement with the Commission, Melvin offered no arguments why he should not be censured or temporarily or permanently disqualified. Melvin has not provided any evidence recognizing his wrongdoing, nor has he provided any assurances against future violations. As a CPA with public-company clients, Melvin, will be vested with confidential, inside information so that Melvin's occupation will present opportunity for future violations.

Melvin's motivation for misappropriating the material non-public information is unknown. The Complaint does not allege that Melvin traded on the material non-public information or that he shared in the financial gain of the four individuals with whom he shared the information. It appears that the disclosure of the material non-public information allowed Melvin to further his personal and/or professional relationship in a small town with the four individuals. Complaint at 14, 19, 21, 23. The court in *Lohmann*, 2003 SEC LEXIS 3171, at *13-16, however, rejected the notion that the lack of economic benefit to the person making the disclosure is a mitigating factor in an insider trading situation.

Melvin has agreed to pay a civil penalty of over $100,000 when his accounting partner who traded on the information and also accepted a permanent bar agreed to pay a civil penalty of $4,620. Also, apparently believing that he had a binding commitment to receive a three-year bar, Melvin has lived in an unresolved status for a considerable period. The misappropriation of

private, non-public information occurred almost four years ago. The public became aware when the Complaint was filed in the Injunctive Action over two years ago, and Melvin has been temporarily suspended from appearing or practicing before the Commission for almost nine months.

Despite consideration of mitigating factors, based on consideration of the *Steadman* factors, the interest of deterrence, and the existing case law, I find it necessary to protect the public interest to permanently disqualify Melvin from practicing before the Commission, pursuant to Commission Rule 102(e)(3)(iii).[4]

Order

It is ORDERED that Thomas D. Melvin, CPA, be permanently disqualified from practice before the Securities and Exchange Commission pursuant to Rule 102(e)(3)(iii) of the Commission's Rules of Practice.

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.

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Brenda P. Murray
Chief Administrative Law Judge

[4] I note that Commission Rule 102(e)(5)(i) provides:

> An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown.

17 C.F.R. § 201.102(e)(5)(i); *see, e.g.*, *Richard R. Hylland, CPA*, Exchange Act Release No. 72363, 2014 SEC LEXIS 2030 (June 11, 2014); *Clinton Ronald Greenman, CPA*, Exchange Act Release. No. 71174, 2013 SEC LEXIS 4079 (Dec. 23, 2013).