INITIAL DECISION RELEASE NO. 1362
ADMINISTRATIVE PROCEEDING
FILE NO. 3-18271

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

In the Matter of	:	
	:	
JEFFREY D. SMITH,	:	INITIAL DECISION MAKING FINDINGS
JOSEPH CARSWELL, and	:	AND IMPOSING SANCTION BY DEFAULT
MICHAEL W. FULLARD	:	March 5, 2019

APPEARANCE: Robert F. Schroeder for the Division of Enforcement, Securities and Exchange Commission

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Jeffrey D. Smith, Joseph Carswell, and Michael W. Fullard (Respondents) from the securities industry. They previously were enjoined against violations of various provisions of the federal securities laws.

I. INTRODUCTION

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on October 31, 2017, pursuant to Section 15(b) of the Securities Exchange Act of 1934. The proceeding is a follow-on proceeding based on the default judgment in *SEC v. Smith*, No. 1:16-cv-4171 (N.D. Ga. Oct. 11, 2017) enjoining all Respondents against violating Section 15(a) of the Exchange Act and enjoining Smith and Carswell against violating Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Each Respondent's Answer was due within twenty days of service of the OIP on him. *See* OIP at 3; 17 C.F.R. § 201.220(b). Each was served with the OIP by February 5, 2018,[1] in

[1] Michael W. Fullard was served by personal service on November 26, 2017; Joseph Carswell was served by personal service on December 13, 2017; and Jeffrey D. Smith was served by "leaving a copy at [his] . . . usual place of abode with [a] person of suitable age and discretion residing therein" on February 5, 2018. 17 C.F.R. § 201.141(a)(2)(i).

accordance with 17 C.F.R. § 201.141(a)(2)(i), and failed to file an Answer. On June 19, 2018, an Initial Decision of Default imposed associational bars on all three Respondents. *Jeffrey D. Smith*, Initial Decision Release No. 1256, 2018 SEC LEXIS 1445 (A.L.J.).

In view of the reassignment of the proceeding, Respondents were afforded a new opportunity to file Answers, which were due by October 19, 2018. *Jeffrey D. Smith*, Admin. Proc. Rulings Release No. 6117, 2018 SEC LEXIS 2689 (A.L.J. Sept. 28, 2018). None filed an Answer, and each was ordered to show cause by November 9, 2018, why he should not be deemed to be in default and be 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. *Jeffrey D. Smith*, Admin. Proc. Rulings Release No. 6269, 2018 SEC LEXIS 3006 (A.L.J. Oct. 30, 2018). To date, none filed an Answer to the OIP or responded to the order to show cause. Additionally, the Division of Enforcement filed a motion for default on October 24, 2018, requesting that Respondents be barred from the securities industry, and no Respondent filed an opposition. Thus, each has failed to answer or otherwise to defend the proceeding within the meaning of 17 C.F.R. § 201.155(a)(2). Accordingly, Respondents are in default, and the undersigned finds that the allegations in the OIP are true as to them. *See* OIP at 3; 17 C.F.R. §§ 201.155(a), .220(f). Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the court's orders in *SEC v. Smith*, of the public official records of the Commission, and of Financial Industry Regulatory Authority, Inc. (FINRA), records cited herein. *See Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. denied*, 575 F. App'x 1 (D.C. Cir. 2014).

II. FINDINGS OF FACT

Smith and Carswell were enjoined, by default, from violating Exchange Act Section 10(b)(5) and Rule 10b-5 and Securities Act Section 17(a), and Smith, Carswell, and Fullard were enjoined, by default, from violating Exchange Act Section 15(a). *SEC v. Smith*, ECF Nos. 13, 15.[2] Also, Smith was ordered to pay disgorgement of $355,520 plus prejudgment interest of $59,995.31 and a civil penalty of $100,000; Carswell was ordered to pay disgorgement of $132,570 plus prejudgment interest of $22,388.69 and a civil penalty of $100,000; and Fullard was ordered to pay disgorgement of $23,000 plus prejudgment interest of $3,884.27 and a civil penalty of $5,000. *Id*.

The misconduct on which the injunctions were based occurred in 2012 and 2013. OIP at 2. Smith, Carswell, and Fullard acted as unregistered broker-dealers in connection with soliciting, offering, and selling interests in a fraudulent prime bank scheme. *Id*. Using two fictitious companies (Atlanta Capital LLC and Capital Funding, LLC), their activities defrauded at least four known investors out of at least $775,000. *Id*. Smith and Carswell promised investors returns of as much as 35% per week and assured them that the transactions were risk-free. *Id*. Fullard acted as a finder for them and referred at least one victim investor to them. *Id*.

[2] A Corrected Final Judgment, dated December 20, 2017, is ECF No. 15. ECF Nos. 13 and 15 are attached to the Division's motion as Exhibits J and K, respectively.

After investment proceeds came in, they were disbursed to Smith, Carswell, and Fullard, in some cases just hours after the funds were received. *Id*.

III. CONCLUSIONS OF LAW

Smith, Carswell, and Fullard have each been enjoined "from engaging in or continuing any conduct or practice in connection with . . . the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act.

IV. SANCTION

Collateral bars will be ordered.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. §§ 78*o*(b)(6). 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. *Schield 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, the conduct of Smith, Carswell, and Fullard was egregious and recurrent. Over a period of two years, each participated in a prime bank fraud scheme that defrauded at least four known investors out of at least $775,000. Scienter is an element of the antifraud violations against which Smith and Carswell were enjoined. Smith's ill-gotten gains from the scheme amounted to $355,520; Carswell's, $132,570; and Fullard's, $23,000. None has made assurances against future violations, acknowledged the wrongful nature of his conduct, or even responded to the charges in *SEC v. Smith* or this proceeding. Each one's occupation, if he were allowed to continue it in the future, would present opportunities for

future violations. Absent a bar, each could engage in the securities industry. The violations are relatively recent. The $775,000 of which four investors were defrauded is a measure of the direct harm caused by their business to the marketplace. Further, 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 violation involving dishonesty requires a bar, and because of the Commission's obligation to maintain honest securities markets, an industry-wide bar is appropriate.

The Commission considers fraud to be especially serious and to subject a respondent to the severest of sanctions. *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *29-30. Indeed, from 1995 to the present, there have been over fifty litigated follow-on proceedings based on antifraud injunctions or convictions in which the Commission issued opinions, and all of the respondents were barred[3] – at least fifty unqualified bars and three bars with the right to reapply after five years.[4] Further, in every such case that followed the statutory provision of collateral bars, the Commission imposed a collateral bar rather than an industry specific bar, reasoning that the antifraud provisions of the securities laws apply broadly to all securities-related professionals and violations demonstrate unfitness for future participation in the securities industry, even if the disqualifying conduct is not related to the professional capacity in which the respondent was acting when he or she engaged in the misconduct underlying the proceeding. *See John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *42-43 (Dec. 13, 2012), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 SEC LEXIS 1926 (May 27, 2016). While Smith and Carswell were enjoined against fraud, Fullard was enjoined only against violation of the registration provisions. However, by acting as finder for, and unregistered broker-dealer with, Smith and Carswell, Fullard was an integral part of the prime bank fraud scheme.

The time period – in 2012 and 2013 – of Respondents' 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

[3] In the cases authorized before the effective date of the Dodd-Frank Act, which authorized collateral bars, the Commission imposed industry-specific bars, such as a bar from association with an investment adviser on a respondent who had been associated with an investment adviser at the time of his violation.

[4] Those three were *Richard J. Puccio*, Exchange Act Release No. 37849, 1996 SEC LEXIS 2987 (Oct. 22, 1996), *Martin B. Sloate*, Exchange Act Release No. 38373, 1997 SEC LEXIS 524 (Mar. 7, 1997), and *Robert Radano*, Advisers Act Release No. 2750, 2008 SEC LEXIS 1504 (June 30, 2008). The Commission's opinions do not make clear the factors that distinguished these cases from those in which unqualified bars were imposed, but there is little difference between a "bar" and a "bar with the right to reapply in five years."

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 15(b) of the Securities Exchange Act of 1934:

Jeffrey D. Smith 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;[5]

Joseph Carswell 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; and

Michael W. Fullard 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.

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.[6]

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

[5] A respondent subject to a penny stock bar is 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).

[6] 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 *13 & n.28 (Oct. 17, 2013); *see also David Mura*, Exchange Act Release No. 72080, 2014 SEC LEXIS 1530 (May 2, 2014).