

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1633/July 21, 2014

ADMINISTRATIVE PROCEEDING  
File No. 3-15168

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In the Matter of

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

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Under consideration is Respondents' Joint Rule 111(h) Motion to Correct Manifest Errors of Fact (Motion to Correct), filed on July 7, 2014, pursuant to 17 C.F.R. § 201.111(h) (Rule 111(h)). The filing relates to the June 27, 2014, Initial Decision (ID) in this proceeding and is thus timely.<sup>1</sup> However, it does not identify a patent misstatement of fact in the ID. Thus, it must be denied.

**BACKGROUND**

The Securities and Exchange Commission's (Commission) January 9, 2013, Order Instituting Proceedings charged Respondents, CPAs, with improper professional conduct, within the meaning of Section 4C of the Securities Exchange Act of 1934, 15 U.S.C. § 78d-3, and Rule 102(e) of the Commission's Rules of Practice, 17 C.F.R. § 201.102(e) (Rule 102(e)), in connection with their roles as engagement partner and manager of the audit of the 2008 financial statements of TierOne Corporation, a holding company for TierOne Bank (collectively, TierOne). The ID concluded that Respondents' course of conduct related to the audit, taken as a whole, constituted "a single instance of highly unreasonable conduct" within the meaning of Rule 102(e)(1)(iv)(B)(1) and denied John J. Aesoph, CPA (Aesoph), the privilege of appearing or practicing before the Commission for one year, and Darren M. Bennett, CPA (Bennett), for six months. John J. Aesoph, CPA, Initial Decision Release No. 624, 2014 SEC LEXIS 2300 (A.L.J. June 27, 2014) (Aesoph).

**MOTION TO CORRECT**

The Motion to Correct has been considered in light of the limited purpose of Rule 111(h) – to correct "a patent misstatement of fact." The Commission has stated, "[M]otions to correct

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<sup>1</sup> The Division of Enforcement timely filed an opposition to the Motion to Correct on July 14, 2014.

manifest error are properly filed under this Rule only if they contest a patent misstatement of fact in the initial decision. Motions purporting to contest the substantive merits of the initial decision will be treated as a petition for review [by the Commission, pursuant to 17 C.F.R. § 201.410].” 70 Fed. Reg. 72566, 72567 (Dec. 5, 2005).

1. Respondents note that the first sentence of the ID references “the audit of the 2008 financial statements of TierOne Corporation, a holding company for TierOne Bank (collectively, TierOne).” See Aesoph at 1, 2014 SEC LEXIS 2300, at \*1. They state that the ID incorrectly uses “TierOne” instead of “TierOne Bank” in two instances. It is unclear why this is incorrect, and, in any event, the parties referred to the bank as well as to the holding company as “TierOne.” Accordingly, this is not a misstatement, much less a patent misstatement, of fact.

2. Respondents reference the discussion of certain due process defenses initially asserted in Bennett’s Answer and ascribed to Bennett. See Aesoph at 3-4, 2014 SEC LEXIS 2300, at \*5-8. Respondents state that Aesoph raised these defenses also, so that the discussion should ascribe them to “Respondents,” not “Bennett.” The complained of text, however, is in the “Procedural Issues” section of the ID, not the “Findings of Fact.” While Respondents may urge that the due process arguments should be ascribed to both Respondents, ascribing them to “Bennett” is not a statement, or misstatement, of fact.

3. A third misstatement, found in the analysis of the Steadman factors<sup>2</sup> in the Sanctions section, is said to be “Each continues to audit U.S. public companies as an auditor with KPMG, so the occupation of each will present opportunities for future violations.” See Aesoph at 37, 2014 SEC LEXIS 2300, at \*97-98. Respondents say that neither has been involved in the audit of a public company since early 2013, while acknowledging that this is not in the record of evidence. The statement that each continues to audit U.S. public companies is a fair inference from the evidence of record of their continued employment with KPMG and their past work as auditors, which the Motion to Correct does not dispute. Further, whether or not either is currently auditing public companies, it cannot be controverted that the occupation of each will present opportunities for future violations within the context of the Steadman factors. Accordingly, this statement cannot be characterized as a patent misstatement of fact.

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<sup>2</sup> The Steadman factors, according to which the Commission determines sanctions in a Rule 102(e) proceeding, are:

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), aff’d on other grounds, 450 U.S. 91 (1981).

4. A fourth misstatement is said to be that Office of Thrift Supervision (OTS) field manager Douglas Pittman “conducted” the 2008 OTS examination of the bank, in that his role in the examination was to supervise the work of bank examiners. See Aesoph at 12, 2014 SEC LEXIS 2300, at \*32. “Conducted” is not a misstatement, much less a patent misstatement.

5. A fifth misstatement is said to arise from “conflat[ing]” the hearing testimony of Bennett and of Pittman to support a particular finding of fact. See Aesoph at 12-13, 2014 SEC LEXIS 2300, at \*32. In other words, the facts found are based on the evidence of two witnesses, rather than one. Rather than a patent misstatement of fact, Respondents are urging a different conclusion to be drawn from the evidence, which is properly made in a petition for review.

In light of the above, the Motion to Correct must be denied.

IT IS SO ORDERED.

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