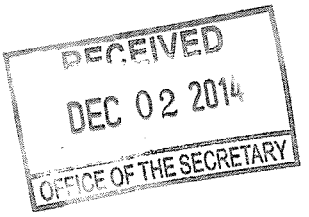
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ADMINISTRATIVE PROCEEDING
File No. 3-16140



In the Matter of

James Prange,

Respondent.

DIVISION OF ENFORCEMENT'S BRIEF IN SUPPORT OF MOTION FOR DEFAULT

Dated: December 1, 2014

Respectfully submitted,

//s// Martin F. Healey

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COUNSEL FOR
DIVISION OF ENFORCEMENT

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The Division of Enforcement ("Division") submits this brief in support of its motion for an initial decision on default as to James Prange as to allegations that he violated Section 10(b) of the Securities Exchange Act ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5(a), thereunder, 17 C.F.R. 240.10b-5. As relief, the Division seeks a) an Order pursuant to Section 21C of the Exchange Act, 15 U.S.C. § 78u-3, that Mr. Prange cease-and-desist from committing or causing violations of and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5, thereunder, and b) an Order pursuant to Section 15(b)(6) of the Exchange Act, 15 U.S.C. § 780(b)(6), barring Mr. Prange from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages 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. The

accompanying Declaration of Martin F. Healey (*"Healey Decl.")* is submitted in support of the facts set out below.

Procedural Background

On September 22, 2014, the Securities and Exchange Commission ("Commission"). issued an Order Instituting Proceedings ("OIP") as to James Prange alleging violations of Section 10(b) of the Securities Exchange Act, and Rule 10b-5(a), thereunder. The Commission instituted those administrative proceedings against Mr. Prange pursuant to Sections 15(b) and 21C of the Exchange Act.

Also on September 22, 2014, the Commission's Office of the Secretary sent by Certified Mail Return Receipt Requested correspondence to Mr. Prange that enclosed the OIP. The Office of the Secretary mailed the correspondence to Mr. Prange at the following address, which is a federal correctional institution where he is incarcerated serving a sentence resulting from his conviction in a parallel criminal case:

James Prange (Inmate #11408-089)
[redacted]

Healey Decl. ¶ *3.* Mr. Prange was found guilty of, among other things, three counts of conspiracy to commit securities fraud after a jury trial in the parallel criminal proceeding in the District of Massachusetts (United States v. James Prange and John C. Jordan, Crim. No. 11-CR-10415-NMG) ("the criminal case"). *Healey Decl.* ¶ *7.*

On October 5, 2014, the Office of the Secretary received a Return Receipt of the September 22 correspondence, signed by "P. Thyen" on September 30, 2014, as agent for Mr. Prange. "P. Thyen" is Patrick Thyen, an employee of FPC Duluth. One of Mr. Thyen's

responsibilities at FPC is to travel to the post office in Duluth and retrieve inmate mail. After picking up mail at the post office, Mr. Thyen returns to FPC Duluth and logs in each item of mail at the prison mail room by its certification number and inmate name. In order to receive any item of mail the inmate is required to sign for it. The log book at FPC Duluth reflects that the September 22, 2014, correspondence from the Office of the Secretary was received at FPC Duluth on September 30, 2014, logged in at the prison mail room that same date, and that Mr. Prange signed for it on September 30, 2014. *Healey Decl. ¶ 4.*

On October 16, 2014, the Court issued an Order setting a prehearing conference for November 6, 2014. The Division forwarded a copy of the Order, by electronic mail, to Mr. Prange's case manager at FPC Duluth, Katy Wild-Olson. The Court also forwarded a copy of the Order to Ms. Wild-Olson. Mr. Prange also received the dial-in information for participation by telephone in the prehearing conference. At the November 6, 2014, prehearing conference, Mr. Prange did not dial-in or otherwise participate or attempt to participate. *Healey Decl. ¶ 6.*

Discussion

A. Mr. Prange's Default

Rule 155 of the Commission's Rules of Practice ("Rule"), 17 C.F.R. § 201.155 provides that:

> (a) A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails:
>
> (1) to appear, in person or through a representative, at a hearing or conference of which that party has been notified;
> (2) to answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or
> (3) to cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to Rule 180(b).

The Respondent here, James Prange, is an individual currently incarcerated at the Federal Prison Camp in Duluth MN (FPC Duluth). Pursuant to Rule 141(a)(2)(i), 17 C.F.R. § 201.141(a)(2)(i), service of an OIP on an individual may be made by delivering a copy of the OIP to the individual or to an agent authorized by appointment or by law to receive such notice. Here, the Office of the Secretary sent by Certified Mail Return Receipt Requested correspondence to Mr. Prange that enclosed the OIP. The Office of the Secretary mailed that correspondence to Mr. Prange on or about September 22, 2014 at his current place of abode, which is a federal correctional institution where he is incarcerated serving a sentence resulting from his conviction in a criminal proceeding in the criminal case. The criminal case arose from the same facts and circumstances that resulted in this administrative proceeding. *Healey Decl.* ¶¶ *2-3.*

The Office of the Secretary subsequently received a Return Receipt of the September 22 correspondence, signed by "P. Thyen" on September 30, 2014, as agent for Mr. Prange. *Healey Decl.* ¶ *4.* Through normal processes at FPC Duluth Mr. Prange received and signed for the September 22 correspondence, with the OIP, on September 30, 2014. *Healey Decl.* ¶ *4.* Therefore, Mr. Prange was served with the OIP as of September 30, 2014. Rule 220, 17 C.F.R. § 201.220 requires that a respondent file an answer within twenty (20) days of service unless otherwise ordered. Here, the OIP specifically required that an answer be filed within twenty days of service as contemplated in the rule. Mr. Prange has not filed an answer and, therefore, entry of an initial decision on default is appropriate.

B. Mr. Prange Violated Section 10(b) of the Exchange Act and Rule 10b-5(a), Thereunder

1. Elements of the Alleged Offenses

The OIP alleges violations of the federal securities laws as to Mr. Prange for his actions pursuant to the theory of "scheme liability" created by Section 10(b) of the Exchange Act and Rule 10b-5(a) thereunder. Exchange Act Rule 10b-5(a) states that it is unlawful for any person "[t]o employ any device, scheme, or artifice to defraud" in connection with the purchase or sale of a security. To establish scheme liability, courts generally require that the defendant commit a deceptive or fraudulent act or orchestrate a fraudulent scheme. *See, e.g., SEC v. Collins & Aikman Corp.,* 524 F.Supp.2d 477, 485-86 (S.D.N.Y. 2007). *See also, SEC v. Kearns*, 691 F.Supp.2d 601, 618 (D.N.J. 2010) (recognizing a claim for scheme liability where SEC alleged "(1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter,") (*quoting SEC v. Lucent Technologies, Inc.*, 610 F.Supp.2d 342 at 350 (D.N.J. 2009)).

To demonstrate violations of the antifraud provisions of the federal securities laws, including Rule 10b-5(a) of the Exchange Act, the Commission must show that a party acted with scienter. *Aaron v. SEC*, 446 U.S. 680, 691 (1980). *See also SEC v. Hasho*, 784 F.Supp. 1059, 1106 (S.D.N.Y. 1992). Scienter is a mental state embracing intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976). Circuit courts have concluded that scienter may also be established by a showing that a defendant acted with recklessness or sometimes "extreme recklessness," both of which are characterized by an "extreme departure from the standards of ordinary care." *See, e.g., SEC v. Infinity Group Company,* 212 F.3d 180, 192 (3d Cir. 2000) (requiring showing of conscious misbehavior or recklessness); *Dolphin &*

Bradbury, Inc. v. SEC, 512 F.3d 634, 639 (D.C. Cir. 2007) (showing of extreme recklessness can satisfy scienter requirement).

2. The Allegations of the OIP Establish Mr. Prange's Violations

Pursuant to Rule 155(a), because of Mr. Prange's failure to answer the OIP or to otherwise defend this proceeding, he may be deemed in default. As a result, the allegations of the OIP may be deemed to be true. A summary of those allegations follows.

During the relevant time frame, Mr. Prange operated Northern Equity, Inc. and was in the business of assisting public companies in finding sources of funding. He participated in offerings of the stock of China Wi-Max Communications, Inc. ("China Wi-Max"), the Small Business Company, Inc. ("SBCO"), and Vida-Life International, Ltd. ("Vida-Life"), which are penny stocks. On May 3, 2013, after a jury trial, Prange was convicted of three counts of conspiracy to commit securities fraud and eight counts of wire fraud in the criminal case. On September 25, 2013, Prange was sentenced to 30 months' imprisonment to be followed by 24 months' supervised release. He was also ordered to pay a fine of $15,250 and to forfeit $4,750. *OIP ¶ 1.*

The enforcement action against Mr. Prange closely tracks the criminal charges for which he was convicted. Both the criminal and civil charges arise out of a fraudulent scheme in which insiders of publicly-traded penny stock companies paid secret kickbacks to a purported corrupt hedge fund manager, who was in fact an undercover agent with the FBI ("Fund Manager"), in exchange for the Fund Manager's purchase of restricted stock of the penny stock companies on behalf of his purported hedge fund ("the Fund"), which did not actually exist. *OIP ¶ C.1.a.* China Wi-Max, SBCO, and Vida-Life were three companies used by Mr. Prange in the scheme.

As part of the scheme, Mr. Prange was told that the Fund Manager was willing to invest Fund monies in the stock of companies in exchange for a secret fifty percent kickback that would go to the Fund Manager, personally. *OIP ¶ C.1.b.* The Fund Manager told Prange that the Fund knew nothing about the kickbacks. *OIP ¶ C.1.c.* The Fund Manager and Prange entered into an agreement for Prange to steer companies to the Fund Manager for potential investment of Fund monies. In exchange, the Fund Manager and Prange agreed that Prange would receive approximately ten percent of the monies those companies kicked back to the Fund Manager. *OIP ¶ C.1.d.*

In accordance with his arrangement with the Fund Manager, Mr. Prange introduced individuals affiliated with China Wi-Max, SBCO and Vida-Life to the Fund Manager. Executives from each of the three companies who Prange referred to the Fund Manager ultimately agreed to, and did, pay a kickback to the Fund Manager in exchange for the Fund Manager's share purchases purportedly on the Fund's behalf. In connection with the investments, each of the executives also caused stock certificates to be issued representing the purchase by the Fund of shares in their respective companies. *OIP ¶ C.1.e.*

Finally, the kickback payments from the various companies Mr. Prange referred to the Fund Manager were made by wire transfers from the various companies to a Citizens Bank account held in the name of one of the Fund Manager's nominee companies in Massachusetts. Based on his agreement with the Fund Manager, on various dates between August 2011 and September 2011, Prange received a portion of the kickbacks paid by company executives he had referred to the Fund Manager. Prange's shares of the kickbacks were paid by wire transfer from a Citizens Bank account held in the name of one of the Fund Manager's nominee companies in

Massachusetts to Community Bank & Trust account number **0231, a bank account controlled by Prange. *OIP* ¶¶ *C.1.f, g.*

3. Mr. Prange's Criminal Convictions Collaterally Estop Him From Relitigating the Facts and Claims On Which the Convictions Were Based

In addition to the facts pleaded in the OIP being deemed to be true, the facts and elements of the claims proved against Mr. Prange in the criminal case have been established for purposes of this proceeding. It is well-settled that a criminal conviction constitutes estoppel in favor of the United States in a subsequent civil proceeding arising out of the same underlying conduct. *SEC v. Bilzerian,* 29 F.3d 689, 693 (D.C. Cir. 1994), *cert denied,* 514 U.S. 1011 (1995); *United States v. Bejar-Matrecios,* 618 F.2d 81, 83 (9th Cir. 1980); *Ivers v. United States,* 581 F.2d 1362, 1367 (9th Cir. 1978). The doctrine of collateral estoppel applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea. *Bejar-Matrecios,* 618 F.2d at 83. As the Court said in *U.S. v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978):

> "It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case."

The Court in *Gelb v. Royal Globe Insurance Co.,* 798 F.2d 38 (2d Cir. 1986), *cert denied,* 480 U.S. 948 (1987) explained:

> "The Government bears a higher burden of proof in the criminal than in the civil context and consequently may rely on the collateral estoppel effect of a criminal conviction in a subsequent civil case."

798 F. 2d at 43; a*ccord SEC v. Grossman,* 887 F. Supp. 649, 659 (S.D.N.Y. 1995), *aff'd,* 101 F.3d 109 (2d Cir. 1996); *SEC v. Dimensional Entertainment Corp.,* 493 F. Supp. 1270, 1274 (S.D.N.Y. 1980). *See also Bilzerian*, 29 F.3d at 693.

The criminal case against Mr. Prange stemmed from a superseding indictment returned against him and four others by a federal grand jury in Boston. Among other things, the

superseding indictment charged Prange with three separate counts of Conspiracy to Commit Securities Fraud (18 U.S.C. § 1349). The criminal case against Prange went to trial in April and May, 2013. After a ten day trial the jury returned guilty verdicts as to Prange for each of the three counts of Conspiracy to Commit Securities Fraud. *Healey Decl.* ¶ *7.*

The criminal conspiracies of which Mr. Prange was convicted were described in the indictment and specified in the verdict form as schemes and artifices involving 1) China Wi-Max 2) SBCO, and 3) Vida-Life. As discussed above, the OIP in this matter charges Mr. Prange with civil violations of the federal securities laws for those very same schemes involving the same companies. The related criminal and civil charges grew out of parallel investigations conducted by the federal criminal authorities and the Commission. *Healey Decl.* ¶ *8.*

On day eight of Mr. Prange's jury trial the trial judge instructed the jury prior to its deliberations. Among others things, the Court instructed as to the elements of conspiracy to commit securities fraud. The Court instructed that in order for the jury to find Prange guilty of one or more of the charged conspiracies the jury had to find 1) that an agreement existed between at least two people to commit the alleged securities fraud, and 2) that Prange willfully joined in that agreement. The Court further instructed that in order to conclude that one or more of the conspiracies to commit securities fraud existed the jury had to find 1) that there was a scheme to defraud or to obtain money or property by means of materially false or fraudulent pretenses, 2) that Prange knowingly and willfully participated in that scheme with the intent to defraud, and 3) that the scheme to defraud was executed in connection with the purchase or sale of securities of a company a) with a class of securities issued under Section 12 of the Exchange Act, 15 U.S.C. § 78l, or b) that is required to file reports with the Commission

under Section 15(d) of the Exchange Act, 15 U.S.C. § 78o(d). The Court then gave expanded instruction as to each of those elements. The jury returned guilty verdicts as to each of the charged conspiracies. *Healey Decl. ¶ 9.*

As discussed above, in order for the Division to establish the sort of scheme liability alleged against Mr. Prange in this proceeding, courts generally require that the defendant commit a deceptive or fraudulent act or orchestrate a fraudulent scheme. *See, e.g., SEC v. Collins & Aikman Corp.,* 524 F.Supp.2d at 485-86. *See also, SEC v. Kearns*, 691 F.Supp.2d at 618 (recognizing a claim for scheme liability where SEC alleged "(1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter,") (*quoting SEC v. Lucent Technologies, Inc.*, 610 F.Supp.2d 342 at 350 (D.N.J. 2009)). In other words, the elements of the offenses proved against Prange at trial, for each of the three conspiracies, are identical to the elements of the civil violations alleged against him here.

4. The Facts Proved Against Mr. Prange in the Criminal Trial Establish His Liability for the Securities Violations Alleged Against Him in the OIP

Mr. Prange appealed his conviction. On November 5, 2014, the First Circuit affirmed Prange's convictions on the three conspiracies as well as other charges. The First Circuit opinion sets out testimony adduced at the criminal trial that supports the criminal convictions for, among other things, the three conspiracies to commit securities fraud. The evidence introduced at the criminal trial, which consisted primarily of 1) the testimony of an undercover agent of the FBI, 2) video and audio recordings of meetings of meetings and/or telephone calls involving the undercover FBI agent and/or one or more individuals cooperating with the FBI in its investigation ("CI"), and Prange and/or one or more of his confederates, and 3) documentary evidence. The Division would rely on the same testimonial and documentary

evidence, as well as the video and audio recordings, at any hearing in this matter. *Healey Decl. ¶ 10.*

The trial evidence relied upon by the First Circuit in affirming Mr. Prange's conviction mirrors evidence the Division would rely on to establish his violations of Section 10(b) of the Exchange Act and Rule 10b-5, thereunder, as alleged in the OIP, to wit:

a. Penny stocks are stocks issued by small companies that trade at less than $5 per share. These stocks, generally speaking, are thinly traded and not listed on organized securities exchanges. As a result, their prices are often volatile and subject to manipulation.

b. To investigate fraud in the penny stock market, the FBI launched "Operation Penny Pincher." This sting operation posed an FBI agent as a corrupt hedge fund manager named "John Kelly" from a fictitious fund called "Seafin Capital." In this role, the agent proposed a particular investment deal to the executives of companies with low market capitalization. The agent offered to use up to five million dollars of his clients' money to overpay for restricted shares of the executives' companies in return for a fifty percent kickback disguised as a consulting fee to one of the agent's nominee companies.

c. The FBI created a New York address, website, and business cards, and rented a Massachusetts office for Seafin Capital. It also used a former stock broker as a cooperating witness (the CI) willing to speak to executives interested in the kickback arrangement. The CI had previously been convicted of wire fraud through this same operation and was seeking a lenient sentence.

d. Mr. Prange was a self-described financial consultant. A mutual acquaintance introduced a CI and Prange over the phone in early 2011. In June 2011, Prange called the CI asking for details about the kickback program. The CI explained the program as a "program of last resort" where fifty percent would go right back to the agent-manager "and basically it's a kickback to him." The CI also emphasized that the executives had to "fully understand the program" and that those who were uncomfortable could "just walk away." When Prange asked whether the manager had "a little one page term sheet" documenting the kickback arrangement, the CI responded "no, no . . . he would never put anything in writing." Prange then replied "Exactly. Right."

e. Mr. Prange recommended a number of executives as participants in this scheme and later participated in conference calls where the CI explained to these executives that the hedge fund did not know about the kickback because the

manager "slip[ped] this money in" with his "legitimate business" deals. He also explained that the manager used "seven or eight different nominee names" to receive the consulting fee even though there was "no consulting work being done for the company." With Prange on the call, the CI told one of these executives that the arrangement was "inappropriate . . . definitely inappropriate . . . in my mind illegal."

f. Prange met the undercover agent in Massachusetts on July 22, 2011. The agent explained that his fund's typical investments involved a great deal of due diligence. But alongside these "legitimate deals," the agent said he invested in longshot corporations in a way that made it look like he had done due diligence when, instead, he would simply "paper the file in order to get it through, and have the hedge fund, make the capital investment." The catch? He took "a fifty percent kickback, right off the top." The agent then offered Prange a choice: "if at the end of today . . . there's something about me you don't like, then, we decide to part ways." But if Prange decided to participate he would receive ten percent of each kickback, "so if . . . we do five million, I get two and a half, I can give you ten percent."

g. The agent then explained logistics. He would fund the companies "in tranches . . . just to make sure all the mechanics. . . work out." Each tranche would "overpay" for restricted shares of the company's stock. As for the kickback, the agent explained, "it's me, personally, and through my nominee company, that gets the money . . . so the fund doesn't know, they don't need to know." To "mask the payment," the agent would "execute a consulting agreement" with one of his nominee companies, but he made clear that "[the] consulting agreement . . . is in paper only, there's no consulting." The agent then told Prange "the ball is in your court . . . if you wanna continue these meetings." Prange responded, "[a]bsolutely . . . it's excellent." Prange then sat through two meetings where the agent repeated the kickback pitch to two of the executives Prange had recommended for participation in the scheme.

h. The two executives were representatives of China Wi-Max and SBCO, respectively.

i. Mr. Prange later suggested the that the undercover agent invest in Vida-Life International. On August 22, 2011, the agent met with Prange and Vida-Life's president, CEO, and CFO. The agent had a two-hour, face-to-face conversation with the CEO/CFO, during which he explained the kickback scheme. He told the CEO/CFO "the decision now is yours whether you want . . . to continue." The CEO/CFO asked if Vida-Life would need to report the kickback on "a 1099" tax form; the agent said no, because they would "mask[the] payment through a consulting agreement" even though no one would ever perform any consulting. The agent then told the CEO/CFO, "my biggest concern . . . is your ability to . . . feel comfortable and . . . cover or hide the

payment that you're making back to me." The CEO/CFO responded, "I have no issues." The agent also told the CEO/CFO , "I'm screwing my investors on the hedge fund side," but qualified that, "They have done so well in the past that anything I do like this is . . . not gonna really hurt them." He then asked if the CEO/CFO "had any pangs . . . of consc[ience] with that." the CEO/CFO responded simply: "No." Jordan then gave the agent materials the agent could use to "mislead" his partners on the nature of the investment. The CEO/CFO also pledged to make Vida-Life's press releases say the cash was coming from the sale of fishmeal, and not from Seafin.

j. Once the executives finalized the stock purchase agreements and the consulting agreements, which listed "Waters Edge" as the nominee corporation to receive the kickback, the FBI (posing as Seafin) wired the first tranche of approximately $30,000 to each company. Of the $32,000 Vida Life received, it sent $16,000 to Waters Edge. Vida Life then disbursed the remainder to the CEO/CFO, his credit card, his niece, his attorney, and his business partner. In anticipation of the next tranche, the CEO/CFO fabricated an invoice, dated September 8, 2011, justifying a $50,000 payment by Vida-Life to Waters Edge for purported consulting services, technology assessments, travel expenses, and conference fees. Neither Waters Edge nor the agent ever provided these services.

k. The FBI stopped the investments in September 2011, adopting a cover story that Seafin had transferred John Kelly to its London office where he could no longer execute these fraudulent investments.

Healey Decl. ¶ 11.

Mr. Prange is, and would be, collaterally estopped from relitigating these factual determinations that, as held by the First Circuit, were necessary to his criminal convictions. As a result, the Division is able to establish all of its claims because of the collateral estoppel effect of Prange's criminal convictions on conspiracy to commit securities fraud. Very simply, Prange's convictions on three counts of conspiracy to commit securities fraud collaterally estops him from relitigating the facts on which his convictions were based and contesting liability on claims based on that same conduct, and the criminal convictions establish all the necessary elements of the causes of action for violations of Section 10(b) and Rule 10b-5, thereunder.

C. Sanctions

1. A Cease-and-Desist Order Should be Issued as to Mr. Prange

Under Section 21C(a) of the Exchange Act, the Commission is authorized to issue an order requiring a person who has violated a relevant statute, regulation or rule under its jurisdiction to cease and desist from committing or causing such a violation or any future violation of such statute, regulation or rule. Entry of a cease-and-desist order is not "automatic" upon proof of a past violation. *See KPMG, LLP v. SEC*, 289 F.3d 109, 124-25 (D.C. Cir. 2002). The Commission has concluded that there must be evidence of "some risk" of future violation before a cease-and-desist order is appropriate. *See KPMG Peat Marwick, LLP*, File No. 3-9500, Release No. 43862, 54 SEC 1135, 1185 (2001), (Opinion of the Commission), *recon. denied*, 2001 WL 223378 (March 8, 2001), *petition for review denied*, 289 F.3d 109 (D.C. Cir. 2002). The risk need not be very great, however, to warrant issuing a cease-and-desist order and is less onerous than the "likelihood of future violations" standard for obtaining injunctive relief. *Id.* However, courts have held that the "some risk" standard still requires more proof than just that the respondent committed a prior violation. *See WHX Corp. v. SEC*, 362 F.3d 854, 859 (D.C. Cir. 2004).

In addition to risk of future violations, the Commission also considers the following factors to determine whether a cease-and-desist order is appropriate, with no one factor being dispositive: a) the seriousness of the violation; b) the isolated or recurrent nature of the violation; c) the violator's state of mind; d) the sincerity of any assurances against future violations; e) the recognition by the violator of the wrongful nature of his conduct; and f) the opportunity to commit future violations. *In the Matter of Maria T. Giesige,* SEC Release No. ID-359, 2008 WL 4489677 (Oct. 7, 2008) (citing *KPMG Peat Marwick, LLP*, 54 SEC 1135, 1192 (2001).

Here, each of the above factors weighs in favor of issuance of a cease-and-desist order as to Mr. Prange. The violations of the securities laws were egregious; egregious enough to warrant both criminal and civil prosecution, with the imposition of a thirty-month prison sentence in the criminal case. The violations were not isolated. Prange brought three different companies and related individuals into the criminal scheme. Had the FBI not pulled the plug on the undercover operation there is no reason to believe Prange would not have continued to recruit other companies into it. Prange's state of mind reflects a high degree of scienter. He acted repeatedly, with full disclosure and understanding of the illegal nature of the conduct, and the clear intention to illegally enrich himself. As to assurances against future violations, Prange has offered none. In fact, this default is premised on Prange's failure to answer or otherwise defend the allegations brought by the Division, punctuated by his failure to appear at the prehearing conference scheduled and noticed by the Court. In that same vein, nothing before, during or since his trial and conviction on the related criminal charges indicates any recognition or acknowledgment by Prange of the wrongful nature of his conduct.

Finally, the violations alleged against Mr. Prange, and for which he already has been convicted in the criminal case, involve companies that trade in the relatively unregulated over-the-counter stock market. Those markets are easily accessible, offering ample opportunity for Prange to commit future violations of the federal securities laws relating to trading in penny stocks. The cumulative weight of these factors easily meets the standard for "some risk" of future violations discussed above. Therefore, the issuance of a cease-and-desist order is both appropriate and necessary to ensure the highest possible barriers to a recurrence of these sorts of violations by Prange.

2. A Permanent Penny Stock Bar Should Be Imposed as to Mr. Prange

Pursuant to Section 15(b)(6) of the Exchange Act, penny stock bars may be imposed in Commission actions "against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock." This definition includes "any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock." Mr. Prange acted to induce the purchase of securities by the undercover FBI agent as part of a fraudulent scheme, and the securities at issue in this matter qualified as "penny stocks" because they did not meet any of the exceptions from the definition of a "penny stock," as defined by Section 3(a)(51) of the Exchange Act, 15 U.S.C. § 78c(a)(51), and Rule 3a51-1 thereunder, 17 C.F.R. 240.3a51-1. Among other things, the securities were equity securities: (1) that were not an "NMS stock," as defined in Exchange Act Rule 600(b)(47), 17 C.F.R. 242.600(b)(47); (2) that traded below five dollars per share during the relevant period; (3) whose issuer had net tangible assets and average revenue below the thresholds of Exchange Act Rule 3a51-1(g)(1); and (4) did not meet any of the other exceptions from the definition of "penny stock" contained in Rule 3a51-1 of the Exchange Act. *Healey Decl. ¶ 12.*

Section 15(b)(6)(A) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(A), authorizes the Commission to impose penny stock bars in administrative proceedings. Like the statutory authority for federal courts, section 15(b)(6)(A) authorizes the Commission to impose the bar on "any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock." The Commission may do so if it finds that the bar is in the "public interest" and the person has violated, or has aided and abetted the violation of, the federal securities laws. 15 U.S.C. § 78o(b)(6)(A)(i) (referring to 15 U.S.C. § 78o(b)(4)(A),(D),(E)).

When deciding whether to impose a penny stock bar, federal courts and administrative judges generally consider factors that were first outlined in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) as:

> a) the egregiousness of the defendant's actions, b) the isolated or recurrent nature of the infraction, c) the degree of scienter involved, d) the sincerity of the defendant's assurances against future violations, e) the defendant's recognition of the wrongful nature of his conduct, and f) the likelihood that the defendant's occupation will present opportunities for future violations.

Id. at 1140 (*citing SEC v. Blatt*, 583 F. 2d 1325, 1334 n.29 (5th Cir. 1978); *see also SEC v. Patel*, 61 F.3d 137, 141 (2d Cir.1995) (listing same factors for office and director bar) (citation omitted); *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998) (same); *see also Clawson v. SEC*, 2005 WL 2174637, at *2 (9th Cir. Sept. 8, 2005) (applying *Steadman* factors and denying petition seeking review of Commission decision imposing permanent penny stock bar); *SEC v. Indigenous Global Development Corp.*, 2008 WL 8853722, at *18 (N.D. Cal. June 30, 2008) (applying *Steadman* factors and imposing permanent penny stock bar); *SEC v. Blackout Media Corp.*, 2012 WL 4051951, at *3 (S.D.N.Y. Sept. 14, 2012) (applying *Patel* factors and imposing permanent penny stock bar); *SEC v. Boock*, 2012 WL 3133638, at *2-3 (S.D.N.Y. Aug. 2, 2012) (applying *Patel* factors and imposing permanent penny stock bar); *In the Matter of Vladimir Bugarski et al.*, Admin. Proceeding File No. 3-14496 (Initial Decisions Release No. 66842 (April 20, 2012)) (applying *Steadman* factors and affirming initial decision imposing permanent penny stock bar, among other relief); *In the Matter of Peter Siris*, Admin. Proceeding File No. 3-15057 (Initial Decisions Release No. 477 (Dec. 31, 2012)) (applying *Steadman* factors and imposing permanent penny stock bar); *In the Matter of Stanley Brooks and Brookstreet Securities Corp.*, Admin. Proceeding File No. 3-14983 (Initial Decisions Release

No. 475 (Dec. 11, 2012) (same); *In the Matter of Robert Pribilski*, Admin. Proceeding File 3-14875 (Securities Exchange Act of 1934 Release No. 67915 (Sept. 24, 2012)) (same).

Obviously the *Steadman* factors track closely the factors looked to for determining the appropriateness of issuing a cease-and-desist order, discussed above. As with the above analysis relating to a cease-and-desist order, each of the above factors weighs in favor of issuance of a penny stock bar as to Mr. Prange. The violations of the securities laws were egregious. The violations were not isolated. Prange's state of mind reflects a high degree of scienter. He acted repeatedly, with full disclosure and understanding of the illegal nature of the conduct, and with the clear intention to illegally enrich himself. As to assurances against future violations, Prange has offered none, and nothing before, during or since his trial and conviction of the related criminal charges indicates any recognition or acknowledgment by Prange of the wrongful nature of his conduct. Finally, the violations alleged against Mr. Prange, and for which he already has been convicted in the criminal case, involve companies that trade in the relatively unregulated over-the-counter stock market. Those markets are easily accessible, offering ample opportunity for Prange to commit future violations of the federal securities laws relating to trading in penny stocks. The fact that he currently is incarcerated does not militate against the penny stock bar as his release date is November 2015. The cumulative weight of these factors easily meets the standard for imposition of a penny stock bar against Prange.

Conclusion

For the reasons discussed above, the Division submits that the evidence supports issuance of an initial decision on default as to Mr. Prange, finding that he violated Section 10(b) of the Exchange Act and Rule 10b-5(a), thereunder. The Division further submits that based on the

evidence and legal standards referenced above, issuance by the Court of a cease-and-desist order and a penny stock bar as to Mr. Prange are both well-founded and appropriate.

Dated: December 1, 2014

Respectfully submitted,

//s// Martin F. Healey
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COUNSEL FOR
DIVISION OF ENFORCEMENT

CERTIFICATE OF SERVICE

I hereby certify that true copies of the Division of Enforcement's 1) Motion for Default and, and 2) Brief in Support of Motion for Default, were served on the following on this 1st day of December, 2014, in the manner indicated below:

By Electronic Mail and Overnight Delivery:
The Honorable Jason S. Patil
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

By Overnight Delivery:
James Prange
[redacted]

//s// Martin F. Healey
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