UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19838

In the Matter of

JOHN CHRISTOPHER POLIT,

Respondent.

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT'S MOTION FOR DISMISSAL WITHOUT PREJUDICE, OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME TO RESPOND TO ORDER INSTITUTING PROCEEDINGS

The Division of Enforcement ("Division") submits its Response to Respondent's Motion for Dismissal Without Prejudice, or, in the Alternative, for Extension of Time to Respond to Order Instituting Proceedings ("Motion").

I. PROCEDURAL HISTORY

The Commission issued the Order Instituting Proceedings ("OIP") on June 29, 2020. This proceeding is a "follow-on" pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") based upon Respondent being "found guilty of being an accomplice to the crime of extortion" pursuant to Article 264, subsection 2, of the Ecuadorian Penal Code, for assisting another defendant, at the time Ecuador's Comptroller General, in "concealing bribes received from a Brazilian construction company in exchange for granting that construction firm Ecuadorian government contracts and favors." OIP, 2, ¶¶ 2-3. Respondent has admitted that, after a trial by a three-judge panel, "a verdict of guilty was rendered by the trial court." Motion, 2, 5. Respondent

appealed the guilty verdict to an intermediate appellate court, but the appeal was denied. *Id.*, 2. Respondent has represented that he has filed or will be filing a further appeal to the Ecuadorian National Court of Justice, which sits as a court of "cassation." *Id.*, 4. As of the date of this filing, the guilty verdict by the Ecuadorian trial court has not been reversed, set aside, or withdrawn.

II. ARGUMENT

A. There Is No Basis To Dismiss The Proceeding

The Commission has jurisdiction over Respondent and properly instituted the OIP because Respondent was "convicted" for being an accomplice to the crime of extortion in Ecuador. The analysis needed to reach this conclusion is straightforward and does not require consideration of Ecuadorian law.

The term "convicted" is defined clearly under U.S. law. Section 202(a)(6) of the Advisers Act provides as follows:

> "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

Although the term "convicted" is not defined in the Exchange Act, the Commission has held that "there is no reason for ascribing a different meaning to the word 'convicted' in the Exchange Act to the meaning given to that term in the Advisers Act." *Gregory Bartko*, Exchange Act Release No. 71666, at 12, 2014 WL 896758 (Mar. 7, 2014) (alteration and footnote omitted), *aff'd in part, rev'd in part on other grounds*, 845 F.3d 1217 (D.C. Cir. 2017). It is unclear why Respondent ignored this definition of "convicted" and instead argued that the term "conviction" is not defined in the Exchange Act or the Advisers Act. To the extent that Respondent relies on the Commission's use of the term "conviction" in the OIP instead of "convicted," the part of speech/tense applied to the infinitive "convict" is a distinction without a difference.

Here, it is clear that there was a verdict or a finding of guilt against Respondent that has not been reversed, set aside, or withdrawn. Respondent has admitted that, after a trial by a three-judge panel in Ecuador, "a verdict of guilty was rendered by the trial court." Motion, 2, 5. It is also undisputed that Respondent appealed the verdict to an intermediate appellate court in Ecuador, and that appeal was denied.[1] *Id.*, 2. Finally, based on Respondent's representations, he has or will be further appealing the verdict of guilty to a higher court. *Id.*, 4. The procedural history of the Ecuadorian proceedings admitted by Respondent plainly demonstrates that his "verdict of guilty" falls squarely under the definition of "convicted."

While Respondent implores the Commission to consider purported nuances of Ecuadorian law that a "finding of guilt does not ripen into a final and effective judgment until all appeals have been exhausted," that request is inapt. The term "convicted" under the Exchange Act and Advisers Act specifically anticipates that a verdict or finding of guilt could be reversed, set aside, or withdrawn in the future, but nonetheless dictates that such contingencies have no impact on whether one is "convicted" unless one of the contingencies occurs. Notably, the definition is not limited to a final judgment of conviction. Moreover, the definition of "convicted" inherently rejects the concept that one is not "convicted" until all appeals have been exhausted, and neither Section 15(b)(6)(A) of the Exchange Act nor Section 203(f) of the Advisers Act limit the Commission's ability to pursue sanctions during the pendency of an appeal. Finally, to the extent that Respondent claims a distinction because a sentence has not been imposed yet by the Ecuadorian courts (as "there is no finality at the trial court stage", Motion, 10), under Exchange Act § 15(b), a conviction occurs "when there has been a verdict or plea of guilt or a plea of nolo

[1] The Division has been advised that the intermediate appellate court in Ecuador entered an opinion affirming and ratifying the trial court's verdict of guilty against Respondent on September 23, 2020.

contendere accepted by the court . . . ." *Alexander Smith*, 22 S.E.C. 13, 1946 WL 24891, *6 (Feb. 5, 1946).

In summary, the Commission need not consider the intricacies of Ecuadorian law as to when one has been "convicted" because U.S. law defines same broadly in a clear and unambiguous manner. Respondent has manufactured an unnecessary foreign law analysis when arguing that the term "conviction" is not a defined term even though "convicted" is. Respondent's own admissions demonstrate that he has been "convicted," thus triggering the Commission's jurisdiction and right to institute the OIP. As such, the request to dismiss this proceeding without prejudice pending the outcome of Respondent's appeal to a higher court should be denied.

B. This Proceeding Should Not Be Stayed

As argued above, Respondent was "convicted" of a crime in Ecuador because of the guilty verdict rendered by the Ecuadorian trial court. The issuance of the OIP after Respondent was convicted of being an accomplice to the crime of extortion in Ecuador is indistinguishable from the same occurring in the U.S. and would not operate to "short-circuit" Respondent's rights of appeal in Ecuador or to defend these proceedings. The Division does not dispute that Respondent has the right to pursue his appellate rights in Ecuador, as he would if the criminal case was pending in the U.S. As such, the Commission should decline an indefinite stay of this proceeding pending the outcome of Respondent's appeal to a higher court in Ecuador.

The Commission has consistently moved forward with follow-on proceedings notwithstanding the pendency of appellate proceedings in the underlying criminal case. Section 15(b)(6) of the Exchange Act permits the Commission to impose sanctions on the basis of a qualifying conviction without regard to whether that conviction is on appeal. *See* 15 U.S.C. § 78o(b)(6); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 WL 258850, at *3 (Sept.

17, 1992) (follow-on proceedings are "concerned with the factual existence of [respondent's] conviction and its public interest implications," and these warranted a bar under Exchange Act Section 15(b)(6) even though respondent's "conviction is currently on appeal"), *aff'd*, 36 F.3d 86, 87 (11th Cir. 1994) ("Nothing in [Section 15(b)(6)'s] language prevents a bar to be entered if a criminal conviction is on appeal."). The pendency of an appeal is generally an insufficient basis upon which to prolong a Commission proceeding. *See Paul Free, CPA*, Exchange Act Release No. 66260, 2012 WL 266986, at *2 (Jan. 26, 2012). An additional consideration is that a postponement could delay the proceeding significantly. *Id.*; *William F. Lincoln*, Exchange Act Release No. 39629, 1998 WL 80228, at *3 (Feb. 9, 1998) (rejecting argument that follow-on proceeding was "premature" and that the "Commission should wait" until the resolution of a pending appeal of a conviction). As a result, once a conviction has been entered, further "challenges in the criminal case do not bear on" follow-on administrative proceedings unless and until those challenges are successful. *David G. Ghysels*, Exchange Act Release No. 62937, 2010 WL 3637005, at *5 n.32 (Sept. 20, 2010), *bars vacated by Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 WL 6608201 (Dec. 18, 2012).

The Commission has similarly held that a pending postconviction motion is not a basis to postpone an administrative proceeding. *See, e.g., Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 658791, at *2 n.8 (Sept. 15, 1998) ("We need not await the outcome of any postconviction proceeding in order to proceed."). The "public interest demands prompt enforcement of the securities laws, even while other government proceedings are under way." *Jon Edelman*, Exchange Act Release No. 30096, 1996 SEC LEXIS 3560, at *2-3 (May 6, 1996) (denying a petition for an emergency stay of a follow-on proceeding while the respondent pursued postconviction relief from his underlying conviction).

Respondent has failed to demonstrate why the Commission should deviate from its consistent practice. First, the co-existence of the OIP and the Ecuadorian appeal does not diminish Respondent's ability to fully defend/prosecute his positions in either matter. Second, if Respondent's appeal is successful, he may petition the Commission for reconsideration of any remedial action imposed in this proceeding and/or apply to be readmitted to the securities industry. *Linus N. Nwaigwe*, Exchange Act Release No. 69967, 2013 WL 3477085 (July 11, 2013); *Jimmy Dale Swink, Jr.*, Exchange Act Release No. 36042, 1995 WL 467600 (Aug. 1, 1995). Third, staying these proceedings indefinitely to await the outcome of the further appeal in Ecuador could delay the proceedings significantly and is contrary to the public interest demand for prompt enforcement of the securities laws. Fourth, the Commission's 1989 Memorandum to Congress—which recognizes a respondent's ability to attempt to demonstrate that a foreign judgment should not be accorded collateral estoppel effect—does not weigh in favor of a stay. Respondent does not explain how further proceedings in Ecuador would make it more or less likely that the Commission would give preclusive effect to the conviction. Fifth, Respondent has already lost his initial appeal in Ecuador, thus diminishing his objections concerning the alleged "problems" with the prosecution and trial court conviction due to purported corruption by the Ecuadorian Attorney General. Finally, the Commission should reject Respondent's argument that an extension/stay would not prejudice the public interest because he is not currently associated with any broker-dealer or investment adviser. Accepting this reasoning would reward Respondent for his misconduct and otherwise contravene the public policy reasons for prompt enforcement of securities laws.

III. CONCLUSION

For the reasons stated above, the Division requests that the Commission deny Respondent's request for a dismissal without prejudice and his alternative request for a stay of the proceedings pending the outcome of the appeal in Ecuador.

Dated: October 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served on this 23rd day of October 2020, on the following persons entitled to notice:

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/s/ Alice K. Sum
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