

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21239

<p>In the Matter of</p> <p>ANDY CHIN FONG CHEN,</p> <p>Respondent.</p>

**THE DIVISION OF ENFORCEMENT’S RESPONSE TO
RESPONDENT’S MOTION FOR DISMISSAL OF SUSPENSION PROCEEDINGS**

Pursuant to the Commission’s Order of March 7, 2023,¹ the Division of Enforcement (“the Division”) hereby responds to Respondent Andy Chin Fong Chen’s (“Respondent” or “Chen”) March 28, 2023, Motion for Dismissal of Suspension Proceedings (“Chen’s Motion”).

I. INTRODUCTION

As demonstrated in the Division’s summary disposition motion, Chen should be permanently disqualified from appearing or practicing before the Commission because, as he stipulates, the United States District Court for the Western District of Washington found that he engaged in a fraud and permanently enjoined him from committing violations of the antifraud provisions of the federal securities laws.² Not only does he persist with arguments that the Commission already rejected in its denial of Chen’s petition to lift the temporary suspension (“Chen’s Petition”),³ he fails to recognize that he – not the Division – has the burden to show why

¹ *Andy Chin Fong Chen*, Exchange Act Release No. 4387, 2023 WL 2392849, at *1 (March 7, 2023).

² See March 16, 2023, Stipulation of Facts (“Stipulation”) at ¶¶ 11 and 12.

³ *Andy Chin Fong Chen, CPA*, Exchange Act Release No. 4371, 2023 WL 345030 (Jan. 19, 2023).

he should not be so disqualified. Chen also fails to address the six factors to be considered by the Commission when deciding whether to disqualify him: (1) the egregiousness of his actions; (2) the isolated or recurrent nature of his infraction; (3) the degree of scienter involved; (4) the sincerity of Chen's assurances against future violations; (5) his recognition of the wrongful nature of his conduct; and (6) the likelihood that Chen's occupation will afford him opportunities for future violations. *See Thomas D. Melvin, CPA*, SEC Release No. 673, 2015 WL 5172974, at *2, n.16 (Sept. 4, 2015) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)) (the *Steadman* factors).

II. THE COMMISSION HAS THE AUTHORITY TO DISQUALIFY CHEN

Repeating unpersuasive arguments from his Petition,⁴ Chen again challenges the Commission's authority, claiming he should not be disqualified because he is not a licensed accountant⁵ and does not practice before the Commission.⁶ As shown below, not only does the Commission have the authority to disqualify unlicensed accountants like Chen, who have never practiced before it, the Commission has done so.

A. Chen Stipulates that He Was Permanently Enjoined from Violating the Antifraud Provisions of the Federal Securities Laws

There being no dispute that a U.S. District Court permanently enjoined Chen from committing violations of the antifraud provisions of the federal securities laws, the burden

⁴ Chen's Petition at 1 and 3 (December 20, 2022).

⁵ Chen does not deny that he is an accountant; only that he has not "practiced" as one. Chen was trained as an accountant, and he held a Washington State Certified Public Accountant-inactive certificate until January 27, 2023. Stipulation of Facts ("Stipulation") ¶¶ 2 and 3.

⁶ Chen's Motion at 1; *see also* Declaration of Andy Chin Fong Chen ("Chen's Declr.") at ¶¶ 1 and 2.

shifted to him “to show cause why he . . . should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission.” Rule 102(e)(3)(iv) of the Commission’s Rules of Practice (“Rule 102(e)”).⁷ Chen has not met his burden, and for the reasons described more fully at pages 7-10 of our opening brief and below, he should be permanently disqualified from appearing or practicing before the Commission.

B. Rule 102(e)(3) Does Not Require that Chen be a Licensed Accountant Practicing Before the Commission to be Disqualified

Chen argues here (as in his Petition) that the Commission lacks jurisdiction under Rule 102(e), because he is not a licensed accountant and that he never “practiced” before the Commission.⁸ Under Rule 102(e)(3), the Commission may suspend “‘*any* . . . accountant,’ not only those accountants currently licensed to practice as certified public accountants.”⁹ Moreover, the Commission already determined that “nothing in the text of Rule 102(e)(3) requires that an accountant have practiced before the Commission for the Commission to suspend the accountant,” and Chen does not cite any authority (nor is the Division aware of any) imposing such a requirement.¹⁰

III. The Commission Has Disqualified Persons Who Were Not Licensed Accountants and Did Not “Practice” Before It

Rule 102(e)(1)(iii) authorizes the Commission to “censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter . . . [t]o have

⁷ 17 C.F.R. § 201.102(e)(3)(iv).

⁸ Chen’s Motion at 2; Chen’s Petition at 1.

⁹ *Andy Chin Fong Chen, CPA*, 2023 WL 345030, at *3 (Jan. 19, 2023).

¹⁰ *Id.*

willfully violated . . . any provision of the Federal securities laws or the rules and regulations thereunder.”¹¹ As noted above, “[t]he Rule does not limit the definition of ‘any person’ to a person licensed to practice accounting” and the Rule “contains no requirement that a person must be appearing and practicing before the Commission at the time of the conduct on which the Commission’s findings are based.” *Robert W. Armstrong, III*, Release No. 2264, 2005 WL 1498425, at *12 (June 24, 2005).¹²

Nevertheless, Chen asserts that there is no case “where an accountant, bookkeeper or other person,” who had not “practiced” before the Commission, was disqualified.¹³ Chen is wrong. The Commission has disqualified persons who were not licensed accountants and who were not appearing or practicing before it, including at least one accountant who held the very same Washington State Certified Public Accountant (“CPA”) Inactive certificate as Chen.

For example, the Commission disqualified Robert A. Ness, Jr., from appearing or practicing before it as an accountant. *Robert A. Ness, Jr.*, Release No. 2566, 2007 WL 1260795, at *2 (Feb. 27, 2007). Like Chen, Ness was named as a defendant in a securities fraud case filed by the Commission in the U.S. District Court for the District of Washington¹⁴ and, as with Chen, Ness was permanently enjoined from future violations of the securities laws. *Id.* at *1. Like Chen, Ness had passed Washington State’s CPA examination and, again like Chen, Ness was never licensed as a CPA; rather, Ness received a CPA-Inactive certificate; just as Chen did. *Id.* at

¹¹ 17 C.F.R. § 201.102(e)(1)(iii).

¹² *Cited with approval in Andy Chin Fong Chen, CPA*, 2023 WL 345030, at *3 n.32 (Jan. 19, 2023).

¹³ Chen’s Motion at 2.

¹⁴ *SEC v. Ness, et al.*, No. 2:05-CV-1631, 2005 WL 2889582 (W.D.Wash. Sept. 22, 2005).

*1. Ness was suspended from appearing or practicing before the Commission, even though he was not a licensed accountant. *Id* at 2.

The Commission also suspended John M. Williams, a Deloitte tax manager who, like Chen, had passed the CPA examination but did not hold a CPA license. *John M. Williams*, Release No. 3377, 2012 WL 1119223, at *1, ¶ 1. (April 4, 2012). Williams was named as a defendant by the Commission in a civil action filed in the U.S. District Court for the Eastern District of Pennsylvania, *id* at ¶ 3, for insider trading¹⁵ and was permanently enjoined from future violations of the securities laws.¹⁶ *Id*. There is no indication that Williams was practicing before the Commission at the time he engaged in insider trading, yet Williams was nevertheless disqualified from appearing or practicing before the Commission as an accountant.¹⁷ *Id*.

IV. Permanently Disqualifying Chen Serves an Important Remedial Purpose

The overall purpose of Rule 102(e) “is to prevent situations in which the investing public places its trust in, or reliance upon, attorneys, accountants, engineers, and other professionals or experts who have demonstrated an unwillingness or inability to comply with the requirements of the Federal securities laws,” *Suspension or Disbarment From Appearance or Practice Before the Commission*, Release No. 285, 1971 WL 126066, at *2 (May 10, 1971), and to protect the integrity of the Commission’s processes. *Andy Chin Fong Chen, CPA*, 2023 WL 345030, at *2 (Jan. 19, 2023). Through his fraudulent misconduct, and after considering the five *Steadman*

¹⁵ See *SEC v. Williams*, No. 2:12-cv-01126-PBT, 2012 WL 680502 (E.D.Pa. March 1, 2012)(Complaint).

¹⁶ See *SEC v. Williams*, No. 2:12-cv-01126-PBT, at 1-2 (E.D.Pa. March 26, 2012)(Final Judgment).

¹⁷ Williams was later reinstated to appear or practice before the Commission. *John M. Williams*, Release No. 4254, 2021 WL 4242610 (Sept. 16, 2021).

factors, it is clear that Chen has demonstrated his unfitness to appear or practice before the Commission as an accountant, and the Commission should permanently disqualify him from doing so to protect the integrity of its processes.¹⁸

As set forth in the Division's initial brief, the first two *Steadman* factors weigh in favor of permanent disqualification because Chen's conduct was egregious and recurrent. He was permanently enjoined for violating the antifraud provisions of the securities laws over more than a five year period,¹⁹ during which time he made material misrepresentations to investors that their funds would be used in accordance with EB-5 program requirements and they would be eligible to obtain permanent U.S. residency.²⁰ Instead, Chen misappropriated at least \$6.5 million of investor funds for his and his family's benefit,²¹ including use of investor funds to refinance a personal home and to cover Chen's BMW payments.²²

The third *Steadman* factor also supports a permanent disqualification because Chen violated the securities laws with a high degree of scienter. The district court found that Chen was consciously reckless in his disregard for providing truthful offering documents to investors²³

¹⁸ "Rule 102(e)(3) thus reflects our determination that a finding by a court of competent jurisdiction that a respondent has violated securities laws, or that an injunction against future violations is warranted, is a sufficient standard of unfitness for practice before the Commission that we "will afford a hearing only to consider mitigating or other factors why neither censure nor temporary or permanent disqualification should be imposed." *In the Matter of Michael C. Pattison, CPA*, Release No. 3407 (Sept. 20, 2012) (Footnote omitted.) (quoting 1971 adopting release).

¹⁹ *SEC v. Chen*, 2019 WL 652360, at *5 (Feb. 15, 2019) ("The SEC's expert witness . . . a forensic accountant, traced the path of 'all monies transferred in and out of [EDC III's] bank accounts' between May 17, 2011, and September 30, 2016.") (emphasis added).

²⁰ *Id.* at *15.

²¹ *Id.* at *11.

²² *Id.* at *6, *11, *17.

²³ *Id.* at *17, *18.

and that he was aware he was falsifying representations in offering documents provided to foreign investors.²⁴

Because a Rule 102(e)(3) suspension is remedial and designed to protect the Commission's processes in the future, Chen's future conduct is of paramount importance. Yet neither Chen's Petition nor Chen's Motion provide any assurances that he recognizes his wrongdoing and will not engage in future violations of the federal securities laws, *i.e.*, the fourth *Steadman* factor. Instead, citing *Kokesh v. SEC*, 581 U.S. 455 (2017), Chen argues that his current suspension is "punishment designed to embarrass [him] with the intent to inflict adverse consequences on his business, banking and social relationships."²⁵

Kokesh is inapplicable to these proceedings. The Supreme Court expressly limited its holding to the sole question of "whether disgorgement, as applied in SEC enforcement actions, is subject to [28 U.S.C.] § 2462's limitations period." 581 U.S. 4612 n.3. In other words, *Kokesh* did not establish a new standard for distinguishing "punitive" and "remedial" sanctions; "the section 2462 inquiry does not automatically extend to other legal contexts." *Saad v. SEC*, 980 F.3d 103, 107 (D.C. Cir. 2020) (finding that Commission approval of FINRA's expulsion of a broker-dealer was not a penalty, but rather a means of protecting investors); *see also Springsteen-Abbott v. SEC*, 989 F.3d 4, 6 (D.C. Cir. 2021) (application of *Kokesh* "squarely rejected" in *Saad*).

²⁴ *Id.* at *17.

²⁵ Chen's Motion at 2. *See also* Chen Declr. at ¶ 6 (The current suspension "is a meaningless act intended to embarrass [him] and provide a press release for the SEC.").

The fifth *Steadman* factor further supports a permanent disqualification for Chen. He has never recognized the wrongful nature of his conduct. Instead, he has consistently attempted to downplay the fact that the Commission prevailed in its enforcement action against him district court. Most tellingly, even though the district court found Chen committed fraud with scienter, ordered him to pay a \$75,000 civil penalty, and enjoined him from committing future violations of the antifraud provisions of both the Securities Act and Exchange Act, Chen speciously argues that “this disciplinary proceeding is blatantly retaliatory because the Commission was largely unsuccessful in its securities action in federal court.”²⁶

Finally, as previously established, Chen’s occupation and training afford him opportunities for future violations, the sixth and final *Steadman* factor. He holds a bachelor’s degree in accounting,²⁷ and he was originally issued a CPA-Inactive certificate by the Washington State Board of Accountancy in 1990 that he maintained until January 27, 2023.²⁸ On that date in January 2023 – after the OIP was instituted and after the Commission denied Chen’s Petition – in an apparent attempt to improve his argument in this proceeding, Chen changed his status with the Washington State Board of Accountancy from “CPA-Inactive” to “Retired Certificate Holder.”²⁹ But, for the reasons explained, *supra*, Chen does not need to be licensed for the Commission to permanently disqualify him under Rule 102(e)(3). Moreover, despite his retired certificate holder

²⁶ Chen’s Petition at 3; *see also* March 24, 2023 Declaration of Andy Chin Fong Chen (“Chen Declr.” at ¶ 6 (This action “is a meaningless act intended to embarrass me....”).

²⁷ Stipulation ¶ 2; March 28, 2023, Chen Declr. at ¶ 2.

²⁸ *See* the Division’s summary disposition motion at footnote 32.

²⁹ Stipulation ¶ 4; March 28, 2023, Chen Declaration at ¶ 4; A March 30, 2023.

status, Washington State law allows Chen to use the title “accountant.”³⁰ In short, Chen does not need an active CPA license to commit future violations of the federal securities laws, and, absent the relief sought in this proceeding, there is nothing preventing Chen from working as an accountant in the future in ways that could jeopardize the Commission’s processes.

Chen’s misconduct, and consideration of the other *Steadman* factors, makes clear that Chen fails to meet his burden to show cause that he should not be permanently disqualified from appearing and practicing before the Commission. He continues to work in the same business he used to commit the fraud that resulted in the district court’s final judgment against him. He was previously a bank director,³¹ and named in the bank’s public Commission filings.³² All of these factors demonstrate the ease with which Chen could be involved with Commission processes in the future.³³ In sum, a review of the *Steadman* factors justify imposition of a remedial sanction on Chen – permanent disqualification.

Respectfully submitted this 1st day of May, 2023.

³⁰ Wash. Rev. Code Ann. § 18.04.350(10) (West 2023); *Amendment to Rule 102(e) of the Commission’s Rules of Practice*, Exchange Act Release No. 40567 (Oct. 19, 1998), 63 Fed. Reg. 57,164, 57,164 (Oct. 26, 1998) (stating that “both the Commission and the investing public rely heavily on accountants to assure corporate compliance with federal securities law requirements and disclosure of accurate and reliable financial information”).

³¹ Stipulation ¶ 5.

³² *Id.* ¶ 7.

³³ See Washington State Board of Accountancy, <https://acb.wa.gov/individual-licensing/retirement> (last visited March 30, 2023).

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, I caused the Division's Response to Respondent's Motion for Dismissal of Suspension Proceedings to be served in the manner set forth below:

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