SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 75844 / September 4, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3682 / September 4, 2015

Admin. Proc. File No. 3-15659

In the Matter of

THOMAS D. MELVIN, CPA

OPINION OF THE COMMISSION

RULE 102(e)(3) PROCEEDING

Grounds for Remedial Action

Civil Injunction

Certified public accountant was permanently enjoined from violating antifraud provisions of the federal securities laws. *Held*, it is in the public interest to permanently disqualify respondent from appearing or practicing before the Commission.

APPEARANCES:

C. Brian Jarrard, C. Brian Jarrard, LLC, for Thomas D. Melvin.

Joshua A. Mayes, for the Division of Enforcement.

Appeal filed: October 14, 2014
Last brief received: March 3, 2015

Thomas D. Melvin, a certified public accountant and a principal in the accounting firm of Melvin, Rooks, and Howell in Griffith, Georgia, appeals from an initial decision permanently disqualifying him from practicing before the Commission, based on his having been enjoined from violating antifraud provisions of the federal securities laws and rules thereunder.[1] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

I. BACKGROUND

A. Melvin consented to the entry of an injunction in federal district court.

On April 10, 2013, Melvin settled civil proceedings by consenting to the entry of a final judgment (the "Injunctive Order") that permanently enjoined him from violating Exchange Act Sections 10(b) and 14(e) and Exchange Act Rules 10b-5 and 14e-3.[2] As part of that settlement, he agreed that, "in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Melvin understands that he shall not be permitted to contest the factual allegations of the complaint in this action."

The complaint in the civil proceeding (the "Complaint") alleged that, in December 2009, Melvin learned about a pending tender offer involving the stock of Chattem, Inc., a Tennessee-based distributor of over-the-counter pharmaceutical products. Melvin learned of the tender offer from a longtime accounting client, who was a Chattem director and who consulted Melvin to "mitigat[e] the personal tax liability that would accompany [the] tender offer and forced exchange of" Chattem stock options the director held. But, according to the Complaint, the client "made clear," and Melvin understood, that the tender offer information was confidential and disclosed "solely for the purpose of obtaining tax advice." Nonetheless, within an hour of discussing the tender offer with this client, Melvin called a longstanding client of his accounting practice and told him of the pending offer, including the information that Chattem was to be acquired in the near future and that the purchase price for Chattem would be approximately $90 per share. Over the next few days, Melvin made similar disclosures to two other long-time accounting clients and a partner in his accounting practice.[3] Each of the four tippees who learned of the tender offer from Melvin traded in Chattem stock, the price of which rose

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1 *Thomas D. Melvin, CPA*, Initial Decision Release No. 673, 2014 WL 4678751 (Sept. 22, 2014).

2 15 U.S.C. §§ 78j(b), 78n(e); 17 C.F.R. §§ 240.10b-5, 240.14e-3. Melvin also agreed to disgorge approximately $61,328 in profits and $6,995 in prejudgment interest (for which he was jointly and severally liable with other persons involved in the misconduct), and to pay a civil penalty of $108,930.05.

Melvin signed a second consent on June 28, 2013. There is no material difference between the two consents with respect to the issues on appeal.

3 Two of the accounting clients were also close friends of Melvin.

substantially on the day the tender offer was announced.[4] Moreover, Melvin's four tippees told five other people about the Chattem tender offer; these five tippees also traded in the stock, and one of them tipped two additional people, who also traded. Eventually, according to the Complaint, at least ten individuals (not including Melvin) traded the stock based on inside information obtained directly or indirectly from Melvin, profiting by more than $550,000.[5]

The Georgia Board of Accountancy Code of Professional Conduct (the "Code") expressly provided that a Georgia-licensed CPA, such as Melvin, could not, without the consent of his client, disclose any confidential information pertaining to the client that the CPA obtained in the course of performing professional services. The Complaint alleged that Melvin "[d]isregard[ed] the duty of confidentiality owed to his client and imposed on him by the [Code,] misappropriated the material non-public information . . . and disclosed" that information to others. His misappropriation and disclosures were alleged to have provided him a benefit in the form of furthering his professional and personal relationships.

B. An administrative law judge permanently disqualified Melvin from practicing before the Commission.

On December 20, 2013, we issued an Order Instituting Proceedings ("OIP"), based on the Injunctive Order and pursuant to Rule of Practice 102(e)(3)(i),[6] and temporarily suspended Melvin from appearing or practicing before the Commission.[7] In doing so, we found that suspending Melvin was "appropriate and in the public interest."[8] Melvin filed a timely petition to lift the temporary suspension,[9] which we denied.[10] We also directed that a hearing be held before a law judge to "determine[] what, if any, action may be appropriate to protect the

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4 The acquisition price represented a roughly 33% premium over the closing price for Chattem stock on the day preceding announcement of the merger.

5 The Complaint alleges that Melvin's four tippees "and six others" traded in the securities of Chattem based on the material non-public information that Melvin disclosed, but it enumerates a total of eleven traders: Melvin's four tippees, their five tippees, and two more remote tippees. Our determination that Melvin's permanent disqualification from appearing or practicing before the Commission is an appropriate sanction would be the same whether there were ten or eleven tippees.

6 17 C.F.R. § 201.102(e)(3)(i).

7 *Thomas D. Melvin, CPA*, Exchange Act Release No. 71161, 2013 WL 6705182 (Dec. 20, 2013).

8 *Id.* at *1.

9 *See* Rule of Practice 102(e)(3)(ii), 17 C.F.R. § 201.102(e)(3)(ii) (providing that a temporary suspension imposed under Rule 102(e)(3)(i) will become permanent unless a petition to lift it is filed within thirty days after service of the order imposing the temporary suspension).

10 *Thomas D. Melvin, CPA*, Exchange Act Release No. 71761, 2014 WL 1091679, at *2 (Mar. 20, 2014).

Commission's processes" in light of the Injunctive Order.[11] On September 22, 2014, the law judge issued an initial decision permanently disqualifying Melvin from practicing before the Commission.[12] This appeal followed.[13]

II. Analysis

A. Burden of Proof and Standard of Review

The Division introduced evidence, and it is undisputed, that Melvin was permanently enjoined from violating "provision[s] of the Federal securities laws."[14] As a result, under our rules, "the burden" passed to Melvin "to show cause" why he should not be censured or disqualified from appearing and practicing before us. In determining whether that burden has been met and assessing an appropriate sanction, we are guided by the strong and clear public interest in ensuring the integrity of our processes.[15] That assessment is, in turn, informed by our consideration of public interest factors we traditionally consider in other types of administrative proceedings, including the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood of future violations.[16] Our application of these factors is flexible

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[11] *Id*. at *2. *See* Rule 102(e)(3)(iii), 17 C.F.R. § 201.102(e)(3)(iii) (providing for Commission action in response to petition filed pursuant to Rule 102(e)(3)(ii)).

[12] *Thomas D. Melvin, CPA*, 2014 WL 4678751, at *9.

[13] The Initial Decision allowed twenty-one days after service of the Initial Decision for filing petitions of review, citing Rule of Practice 360, 17 C.F.R. § 201.360. But Rule of Practice 540, 17 C.F.R. § 201.540, requires that a petition for review of an initial decision as to whether a temporary sanction shall be made permanent must be filed within ten days after service of the initial decision. The Initial Decision was served on Melvin on September 22, 2014, and Melvin filed his petition for review of October 14, 2014. Although the petition was not timely filed in accordance with Rule 540, we have determined, in an exercise of our discretion, to grant review in this instance given the longer period specified in the Initial Decision.

[14] Rules 102(e)(3)(i)(A), 102(e)(3)(iv); 17 C.F.R. §§ 201.102(e)(3)(i)(A), 102(e)(3)(iv).

[15] *See, e.g., Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 WL 4320146, at *5 (Sept. 20, 2012) ("Rule of Practice 102(e) has been the primary tool available to the Commission to preserve the integrity of its processes . . . .") (citing additional authority).

[16] *See, e.g., id*. at *8 (102(e)(3) proceeding; citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)); *Chris G. Gunderson, Esq.*, Exchange Act Release No. 61234, 2009 WL 4981617, at *5 (Dec. 23, 2009) (same).

and no single factor is dispositive.[17] We also consider the extent to which a sanction may have a deterrent effect.[18]

Applying these factors, and based on our consideration of all the circumstances surrounding Melvin's misconduct, we find that he represents such a significant threat to the integrity of our processes that he must be permanently disqualified from appearing or practicing before us. Beginning almost immediately after receiving what he understood to be confidential information, Melvin, acting with scienter,[19] directly tipped three clients and his partner in separate conversations, abusing his position of trust to enhance professional relationships that could yield him pecuniary gain. By misappropriating the information and disclosing it for personal benefit, Melvin defrauded the client whose information he misused, "feigning fidelity to the source of [the misappropriated] information" and thus engaging in "fraud akin to embezzlement."[20] Melvin's four tippees continued to pass along the misappropriated information, such that Melvin's misconduct ultimately led to trading by at least ten individuals. Moreover, Melvin's disclosures were particularly serious because the non-public information related to a tender offer,[21] and the specific details he passed along about the imminence of the tender offer and the anticipated share price enhanced the tippees' ability to profit from the misappropriated information. We have stated that conduct that violates the antifraud provisions of the federal securities laws, including insider trading, is "especially serious"[22] and warrants "'the severest of sanctions.'"[23] And we have held that "'[f]idelity to the public interest' requires a severe sanction when a respondent's misconduct involves fraud because the 'securities business is

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17 *Pattison*, 2012 WL 4320146, at *8 (citing *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *4 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009)).

18 *Id*. (citing additional authority).

19 "Scienter is a mental state consisting of an intent to deceive, manipulate, or defraud, and includes recklessness, commonly defined as 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it." *Toby G. Scammell*, Investment Advisers Act Release No. 3961, 2014 WL 5493265, at *6 n.41 (Oct. 29, 2014) (quoting *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *10 n.67) (July 12, 2013)).

20 *See United States v. O'Hagan*, 521 U.S. 642, 654-55 (1997) (finding such deception "essential to the misappropriation theory" of insider trading).

21 *See Tender Offers*, Exchange Act Release No. 17120, 1980 WL 20869, at *4-5 (Sept. 4, 1980) ("The abuses which result from trading in securities by persons in possession of material, nonpublic information are particularly troublesome in the context of tender offers. . . . This practice results in unfair disparities in market information and market disruption.").

22 *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at * 6 (Dec. 12, 2013) (quoting *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *5 (Apr. 20, 2012)), *petition denied*, 773 F.3d 89 (D.C. Cir. 2014).

23 *Toby G. Scammell*, 2014 WL 5493265, at *5 (quoting *Gunderson*, 2009 WL 4981617, at *5).

one in which opportunities for dishonesty recur constantly.'"[24] Further, we have recognized the applicability in disciplinary proceedings under Rule 102(e) of the general rule that "an antifraud injunction 'ordinarily' warrants barring participation in the securities industry."[25]

Melvin violated explicit professional conduct standards and betrayed the trust placed in him by a longtime client seeking tax accounting advice. As we previously stated in the analogous context of an investment banker who disclosed a client's confidential information in order to favor his own interest in establishing a collegial relationship,

> [t]he ability to credibly assure a client that [obviously confidential] information will be used solely to advance the client's own interests is central to any securities professional's ability to provide informed advice to clients. Disclosure of such information jeopardizes the foundation of trust and confidence crucial to any professional advising relationship.[26]

Melvin's unethical and illegal actions were, in our view, clearly egregious. The betrayal of trust, the rapidity with which he shared the confidential information, the details he passed on about the tender offer, and the tipping of multiple business associates all contribute to our assessment of the gravity of his misconduct. Although Melvin's violation involved one misappropriation of client information, it was not an 'isolated' infraction, as he passed the information along to four people at four different times. Thus, Melvin chose to breach his client's trust on four different occasions, each giving him a chance to reflect on his actions. We see little recognition by Melvin of the wrongfulness of his actions and find that, given those actions, he constitutes an unacceptable threat to our processes. We further find that Melvin's permanent disqualification serves important deterrent objectives, both for him and other securities industry professionals.[27]

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[24] *Id*. (quoting *Gunderson*, 2009 WL 4981617, at *5).

[25] *Gunderson*, 2009 WL 4981617, at *5 (quoting *Justin F. Ficken*, Investment Advisers Act Release No. 2803, 2008 WL 4610345, at *3 (Oct. 17, 2008)).

[26] *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 WL 56755, at *10 (Jan. 9, 2009), *petition denied*, 586 F.3d 122 (2d Cir. 2009).

[27] *Cf. Steadman*, 603 F.2d at 1140 (stating that a compelling reason supporting a bar would be that "the nature of the conduct mandates permanent debarment as a deterrent to others in the industry").

Melvin does not dispute the allegations that form the basis for the Injunctive Order,[28] but argues that they do not justify his permanent disqualification. In support, he asserts that he did not personally trade on the information or benefit financially from his actions. According to Melvin, the misappropriation was an "isolated event in an otherwise law-abiding and productive life." He further claims that he has recognized his misconduct by agreeing to settle the matter and timely pay the amounts agreed to in the settlement. Rather than permanent disqualification, Melvin argues that "[i]t is appropriate to impose a three year bar" which is consistent, he asserts, with settlement discussions he had with Division counsel.[29] Although he acknowledges that the Commission is not bound by such discussions, he asserts that it should nevertheless consider what "the SEC employee most familiar with" the case believes would be "appropriate given all that [the employee] knew of the case."

We are unpersuaded by Melvin's effort to minimize the seriousness of his misconduct. His argument that his conduct was not so bad because he was "only a tipper" fails to acknowledge how destructive that conduct was. Melvin's misconduct created substantial losses, or the risk of substantial losses, to other persons: he defrauded Chattem of the exclusive use of the tender offer information, conduct that the Supreme Court has likened to embezzlement,[30] and he undermined the integrity of the negotiating process for the tender offer, thus creating the risk of substantial losses to both the target company and the potential acquirer.[31] Moreover, the

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[28] As noted, Melvin agreed that he would not challenge allegations supporting the Injunctive Order in a related Commission disciplinary proceeding. *See* Rule of Practice 101(a)(3), 17 C.F.R. § 201.101(a)(3) (defining "disciplinary proceeding" to mean "an action pursuant to Rule 102(e)"). Melvin is therefore precluded from contesting the Complaint's allegations here, and we may consider them in determining an appropriate sanction. *See, e.g.*, *Siris v. SEC*, 773 F.3d 89, 96 (D.C. Cir. 2014) (holding that the Commission "was entitled to rely on the allegations of the complaint" in deciding whether to impose a permanent bar in a follow-on proceeding based on a consent judgment, where the terms of the consent judgment "unambiguously barred Siris from making any future challenge to the allegations in the complaint") (citations omitted); *Toby G. Scammell*, 2014 WL 5493265, at *3, 7 (refusing to consider "claims that impermissibly contradict the allegations of the complaint" in determining sanctions in follow-on proceeding based on injunction entered by consent, where Scammell had "specifically agreed [in the consent agreement] that he would not contest the factual allegations of the complaint in any administrative proceeding before the Commission").

[29] Melvin asserts in his pleadings that he and Division staff agreed, in connection with discussions regarding settlement of the civil proceedings, that he also would "not be banned from practicing before the Commission . . . in excess of three years." He further asserts that he first learned that the Commission was "not honoring the agreement" several months later, after the OIP was issued. Nevertheless, Melvin concedes in his brief that "the Commission itself is not bound by the commitments of its [D]ivision counsel."

[30] *See O'Hagan*, 521 U.S. at 652-54.

[31] *See Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742, 747-51 (2d Cir. 1992) (finding that insider trading in advance of a tender offer can artificially inflate the price the acquirer must pay for the acquisition, resulting in overpayment by the acquirer and its

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substantial gains by all of the tippees who benefited from the confidential information passed along by Melvin are attributable to Melvin, even if Melvin did not personally trade.[32] Melvin's tipping his clients and partner in the expectation that they would trade is equivalent to Melvin's trading himself and then giving the trading profits to those individuals.[33] Had Melvin not misappropriated the confidential client information and passed it along, the ensuing improper trading, which resulted in illegal profits of more than half a million dollars, would not have happened, making Melvin's conduct in some respects more "directly culpable" than that of the tippees who personally traded.[34] And, as discussed above, Melvin is not permitted to contest the fact that he personally benefitted from his unlawful disclosures by furthering personal and professional relationships.[35] Despite Melvin's attempt to minimize the benefits he received, they apparently were sufficient to motivate the multiple instances of misconduct at issue here, providing reason to believe that they could do so again. His actions reveal a highly troubling willingness to ignore a fundamental professional obligation to respect and protect client confidence along with a willingness to instigate and facilitate fraudulent stock trading activity.[36] As we have held,

> [t]he prohibitions against insider trading [in our securities laws] play an essential role in maintaining the fairness, health, and integrity of our markets. We have long recognized that the fundamental unfairness of insider trading harms not only

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shareholders); *SEC v. Gaspar*, No. 83 Civ. 3037, 1985 WL 521, at *15-17 (S.D.N.Y. Apr. 16, 1985) (escalation in share price resulting from insider trading decreased attractiveness of premium offered, contributing to collapse of tender offer).

[32] *See, e.g.*, *SEC v. Warde*, 151 F.3d 42, 49-50 (2d Cir. 1998) ("A tippee's gains are attributable to the tipper, regardless [of] whether benefit accrues to the tipper.").

[33] *See Dirks v. SEC*, 463 U.S. 646, 659, 663-64 (1983) (citing Exchange Act Section 20(b), 15 U.S.C. § 78t(b), which "mak[es] it unlawful to do indirectly 'by means of any other person' any act made unlawful by the federal securities laws," and finding that when a person "makes a gift of confidential information to a trading relative or friend," that is equivalent to "trading by the [person] himself followed by a gift of the proceeds to the recipient").

[34] *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 312-13 & n.23 (1985).

[35] *See Dirks*, 463 U.S. at 663-64 (recognizing that a breach of fiduciary duty and exploitation of nonpublic information for insider trading purposes may be shown when a tipper receives a "direct or indirect personal benefit from the disclosure," such as when the tipper "makes a gift of confidential information to a trading relative or friend").

[36] *See, e.g., Thomas W. Heath, III*, 2009 WL 56755, at *4 (finding that investment banker who disclosed confidential client information "violated one of the most fundamental ethical standards in the securities industry").

> individual investors, but also the very foundations of our markets, by undermining investor confidence in the integrity of our markets.[37]

Our view that conduct like Melvin's merits significant sanctions is evident from a similar case in which we found that a bar was an appropriate sanction for insider trading even though the tipper was not charged with trading and received no direct economic benefit for the tip he provided.[38]

Nor do we consider it significant that, as Melvin claims, he discussed a possible settlement with our staff that would have resulted in his disqualification for a number of years

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[37] *Toby G. Scammell*, 2014 WL 5493265, at *6 (quoting *Selective Disclosure & Insider Trading*, Exchange Act Release No. 42259, 1999 WL 1217849, at *17 (Dec. 20, 1999), and citing H.R. Rep. No. 98-355, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2274, 2275, 1983 WL 25397, at *2 (finding that insider trading destroys the integrity of the marketplace "by undermining the public's expectations of honest and fair securities markets where all participants play by the same rules")).

[38] *See Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 WL 21468604, at *4-5 (June 26, 2003). *Cf. SEC v. Gupta*, No. 11 Civ. 7566, 2013 WL 3784138, at *4 (S.D.N.Y. July 17, 2013) (permanently enjoining Gupta from further violations of the securities laws and imposing officer-director and associational bars "notwithstanding the fact that Gupta's long-term pecuniary gain from the insider trading conspiracy was speculative").

Melvin does not raise any argument challenging the factual premises that underlie his liability as a tipper under Exchange Act Section 10(b) or 14(e) and Exchange Act Rules 10b-5 and 14e-3. Nor can he, because as part of settling the civil proceeding he agreed not to contest the factual allegations of the Complaint in this disciplinary proceeding. Accordingly, we understand Melvin's argument that he did not personally trade as an attempt to establish a mitigating factor regarding relief, not as a challenge to his underlying liability. In any event, there would be no merit to such a challenge to his liability. The Complaint alleged that Melvin's misappropriation and disclosures were alleged to have provided him a benefit in the form of furthering both his personal and professional relationships. *See Dirks*, 463 U.S. at 663-64 ("reputational benefit that will translate into future earnings" is sufficient); *SEC v. Yun*, 327 F.3d 1263, 1280 (11th Cir. 2003) (sufficient personal benefit where tipper and tippee worked closely together and were frequently partners in real estate deals); *SEC v. Sergeant*, 229 F.3d 68, 77 (1st Cir. 2000) (tipping "to maintain a useful networking contact" is sufficient personal benefit); *United States v. Newman*, 773 F.3d 438, 452-53 (2d Cir. 2014) (tipping that "could yield future pecuniary gain," including a "referr[al]" or monetary "commission," is sufficient). The allegation that Melvin had a close personal relationship with his tippees independently supports the sufficiency of his personal benefit. *See Dirks*, 463 U.S. at 663-64; *Lohmann*, 2003 WL 21468604, at *4; *Yun*, 327 F.3d at 1275; *Sargent*, 229 F.3d at 77; *SEC v. Obus*, 693 F.3d 276, 285 (2d Cir. 2012). Finally, a breach of fiduciary duty for personal benefit is not an element of liability under Exchange Act Section 14(e) and Rule 14e-3. *See O'Hagan*, 521 U.S. at 676; *Tender Offers*, 1980 WL 20869, at *5-13 (Sept. 4, 1980).

rather than permanently. As he acknowledges, we are not bound by such discussions,[39] and we have repeatedly held that sanctions imposed in connection with settlements are frequently less severe than those that result from litigation.[40] There is no suggestion that Melvin was in any way prevented from identifying the circumstances that, according to him, led a member of our staff to conclude (or that otherwise support his position) that disqualification for a term of years is sufficient.[41] We have carefully considered the evidence he has presented and his arguments in mitigation, but conclude that they do not justify any leniency.

Although Melvin asserts that he "has recognized the wrongful nature of what transpired," his arguments on appeal support a contrary conclusion. His contention that although his conduct was bad, the conduct of his partner, who also engaged in fraudulent misconduct related to the Chattem tender offer, was worse, indicates that he does not appreciate the seriousness of his misconduct.[42]

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[39] *See, e.g.*, *CFTC v. Field*, 249 F.3d 592, 594 (7th Cir. 2001) ("[A] settlement on behalf of the United States may be enforced only if the person who entered into the settlement had actual authority to settle the litigation."). *See also* SEC Division of Enforcement, Enforcement Manual, available at http://www.sec.gov/divisions/enforce/enforcementmanual.pdf, Section 2.5.1 (noting that "most settlements of previously authorized enforcement actions . . . require Commission authorization" and describing procedure for obtaining such authorization); *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *19 & n.67 (Feb. 27, 2012) ("[O]ur rules are clear on this point: an offer to settle is binding only if formally submitted to, and approved by, the Commission . . . ." (citing Rule of Practice 240, 17 C.F.R. § 201.240 ("Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Commission.")), *aff'd on other grounds sub nom.*, *Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

[40] *See, e.g.*, *Pattison*, 2012 WL 4320146, at *11 ("[R]espondents who offer to settle may properly receive lesser sanctions than they otherwise might have," because in settling cases "'we take into account pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings.'") (quoting *Nassar & Co.*, 47 S.E.C. 20, 26 & n.3 (1978), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979)).

[41] *Cf., e.g., Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at *4 (Jan. 16, 2007) (although respondent in a follow-on proceeding may not challenge the allegations that provide the basis for the underlying injunctive order, he or she is "free to introduce evidence regarding the 'circumstances surrounding those allegations as a means of addressing 'whether sanctions should be imposed in the public interest'") (quoting *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *6 (Jan. 31, 2006)).

[42] Melvin asserts that his partner "admitted to misappropriating" confidential information about the Chattem tender offer, but cites nothing to support this assertion. We are unaware of any allegations that the partner misappropriated confidential information, as opposed to trading on the basis of confidential information that Melvin disclosed to him. Based on the premise that the partner's conduct was worse than his, Melvin argues that any sanction imposed on him should be less serious than the permanent suspension from appearing or practicing as an accountant imposed on his partner.

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C. The proceeding was timely instituted.

Melvin also challenges his disqualification on procedural grounds, arguing that "these proceedings were untimely under clearly established federal law," because the order of temporary suspension (which was included in the OIP) was not issued until December 20, 2013, more than 90 days after entry of the Injunctive Order. Under Rule of Practice 102(e)(3), the temporary suspension order had to be issued no "more than 90 days after the date on which the final judgment has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available."[43] Melvin does not dispute that, under the Federal Rules of Appellate Procedure, he had 60 days to file a notice of appeal of the Injunctive Order, but he contends that because he waived his right to appeal the Injunctive Order, "appeal procedures [were] no longer available" within the terms of Rule 102(e)(3) from the time the Injunctive Order was entered, and that Rule 102(e)(3)'s 90-day limit therefore expired on November 12, 2013. The Division responds that, though "he was almost certain to fail, Melvin was free to file a notice of appeal and challenge the judgment" and that, therefore, the temporary suspension order was timely because it was issued within 90 days of when Melvin's period for filing an appeal expired on October 13, 2013.

The parties cite to no authority interpreting this aspect of the Rule. The relevant statutory language does not address the issue, nor do the related proposing or adopting releases.[44] Thus, we must interpret the language without any such guidance.

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We reject this argument. Both the partner and Melvin were enjoined from antifraud violations, which, as we noted above, ordinarily warrants permanent exclusion from participation in the securities industry. Their misconduct was serious for many of the same reasons, and the fact that some particulars differed—Melvin misappropriated but didn't trade, his partner traded but didn't misappropriate, Melvin tipped four people, his partner tipped one person—does not mean that the public interest would mandate that they receive different sanctions.

We further find that Melvin deserves no special credit for making the payments he agreed to. *Cf., e.g.*, *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *7 (Feb. 24, 2012) (for those who agreed to abide by FINRA's rules, compliance with obligations under those rules is not a mitigating factor in determining sanctions); *Kevin M. Glodek*, Exchange Act Release No. 80937, 2009 WL 3652429, at *8 (Nov. 4, 2009) (same), *petition denied*, 416 F. App'x 95 (2d Cir. 2011).

[43] 17 C.F.R. § 201.102(e)(3).

[44] When the Commission adopted the amendment to then-Rule 2(e) that made "a permanent injunction against securities-laws violations or a finding of securities-laws violations . . . a basis upon which the Commission may initiate proceedings to censure or temporarily or permanently disqualify an attorney, accountant, engineer, or other professional or expert from appearing and practicing before the Commission," the amendment contained the language currently found in Rule 102(e)(3) that looks to whether "further review or appeal procedures are no longer available," among other factors, in determining whether the Commission's entry of an order of temporary suspension was timely. *Suspension or Disbarment*

(continued…)

For purposes of Rule 102(e)(3), we interpret the phrase "further review or appeal procedures are no longer available" to mean that the party is foreclosed from pursuing further review or appeal of his or her case because the time for appeal has expired. We recognize that the application of the language of the rule may be ambiguous where, as here, a party has waived the right to an appeal. Review is arguably "no longer available" in light of a waiver. But we believe the phrase "appeal procedures are no longer available" is better interpreted to refer to the procedural availability of the means for bringing an appeal under the federal rules, rather than to the viability of any substantive claim that is brought.

We do not believe it is correct to say that "appeal procedures are no longer available" simply because a person has waived the right to appeal in a consent agreement. Even where such a waiver is enforced and an appellate court dismisses the appeal because of the waiver, "appeal *procedures*" are still "available" in the sense that a person is entitled to file the appeal within the time provided by the federal rules and to obtain a ruling of some kind from the appellate court. Moreover, there are some very limited instances in which an appellate court may decide to reject a waiver and hear an appeal on the merits.[45] For these reasons, we construe the phrase "appeal procedures are no longer available" to mean that the period allotted by rule for filing a notice of appeal has expired, without regard to whether the right to appeal has been waived in a particular case or to the validity of any such waiver. Applying this interpretation, we find that Federal Rule of Appellate Procedure 4(a)(1)(B) allows 60 days for filing an appeal from a district court's final judgment in which the United States or an agency is a party, and therefore, for purposes of Rule 102(e)(3), appeal procedures were "available" to Melvin with respect to the Injunctive Order within the terms of the rule until that period ended.[46]

(…continued)
from Appearance or Practice Before the Commission, Securities Act Release No. 5147, 1971 WL 126066, at *2, 4 (May 10, 1971). There is no discussion of the phrase, "no longer available," and subsequent amendments to Rule 102(e) have not clarified the meaning of that language.

[45] Appeal waivers will generally be enforced, absent exceptional circumstances such as the lack of actual consent, fraud in obtaining consent, or mistake. *See, e.g., Van v. Barnhart*, 483 F.3d 600, 609 & n.5 (9th Cir. 2007) (noting general rule and citing cases that recognize exceptions); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 526-27 (10th Cir. 1992) (affirming judgments of district court in favor of defendants where plaintiffs consented to judgment and did not reserve the right to appeal). Where a party has consented to a valid settlement, as Melvin did here, courts do not hesitate to enforce provisions expressly waiving the right to appeal. *E.g.*, *SEC v. Adair*, 549 F. App'x 699 (9th Cir. 2013) (dismissing appeal where litigant had expressly, voluntarily, and knowingly waived the right to appeal the district court's order); *cf. Throne v. Citicorp Inv. Servs., Inc.*, 378 F. App'x 629, 631-32 (9th Cir. 2010) (affirming district court awarding attorneys' fees and costs for appeal where appeal was filed in contravention of express waiver).

[46] While this interpretation works to Melvin's detriment in that it allows the proceeding against him to continue, Melvin cannot credibly argue that his conduct would have been any different if he had known when he consented to the settlement of the civil proceeding that we

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Melvin argues that the majority of federal courts do not generally consider the merits of appeals from consent judgments, and that no applicable exception to this general rule applies in this case. We agree with both of those assertions.[47] But, as explained above, this does not mean that "appeal procedures [were] no longer available" to Melvin; it simply means that the use of those procedures would very likely have proved unsuccessful.

Our interpretation of Rule 102(e)(3) is also supported by policy considerations. We find it preferable for reasons of efficiency, clarity, and ease of administration, to adopt a bright-line rule that bases the timeliness of temporary suspension orders in Rule 102(e)(3) disciplinary proceedings on the time for filing a notice of appeal. Federal Rule of Appellate Procedure 4(a)(1)(B) clearly sets forth such a deadline, making it easy to determine when a disciplinary proceeding must be brought. By contrast, Melvin's proposed interpretation of the phrase "no longer available" would require a case-by-case analysis as to whether a particular appeal or review proceeding would be futile or unsuccessful for reasons other than lack of timeliness. That approach would create uncertainty over the application of our deadlines in particular cases. The time for filing an appeal is a more certain and uniform starting point to gauge the running of our 90-day period.

Our approach is also supported by the approach taken by the United States Court of Appeals for the District of Columbia Circuit in *Adams v. SEC*.[48] The court there adopted a similar bright-line rule that a final disposition of an administrative proceeding became "unappealable" for the purpose of determining the timeliness of fee applications under the Equal Access to Justice Act only when the statutory period allowed for appeals from such dispositions had expired. The court rejected a rule like the one advanced by Melvin here that would have

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(…continued)
would apply Rule 102(e)(3) in this way. The consent Melvin signed specifically alluded to the possibility of a "disciplinary proceeding before the Commission based on the entry" of the Injunctive Order. Moreover, his argument that Division counsel had discussed the possibility of a three-year suspension from practice with him demonstrates that he understood that a 102(e) proceeding could follow. Thus, this is not a situation where a respondent was deprived of fair notice of our interpretation of a rule governing the respondent's conduct in a way that impacts the fairness of a proceeding. *See, e.g.*, *Marrie v. SEC*, 374 F.3d 1196, 1208 (D.C. Cir. 2004) (finding that Commission impermissibly applied interpretation to Rule 102(e) retroactively, in part because accountants "did not have fair notice [when they engaged in conduct at issue] that they could be sanctioned for improper professional conduct even if they had been acting in good faith); *KPMG, LLC v. SEC*, 289 F.3d 109, 116, 126 (D.C. Cir. 2002) (reversing finding that "success" fee/royalty arrangement violated AICPA Rule 302 because KPMG "lacked fair notice" that the Commission would interpret the rule so as to deem that arrangement to be a prohibited contingent fee). To the contrary, adopting the interpretation Melvin urges would effectively give him a windfall, by relieving him of the need to participate in a proceeding that he knew to be a likely outcome of his actions.

47 *See supra* note 45.

48 287 F.3d 183, 184, 191 (D.C. Cir. 2002).

analyzed whether a particular disposition was specifically appealable based on the standing or lack of standing of the litigant. The court recognized that adopting this bright-line rule, which was "discernible by looking at the category of order in question," "eliminate[d] the high potential for confusion" that would have resulted from determining appealability on a case-by-case basis.[49]

Melvin also argues that most federal courts hold that a consent judgment is "effective" immediately upon entry, and that we should interpret Rule 102(e)(3) the same way.[50] We understand him to be using "effective" here to mean something like "binding on the party subject to the judgment." Indeed, "effective" is used that way elsewhere in Rule 102(e)(3), when the rule states that "[a]n order of temporary suspension shall become effective upon service on the respondent."[51] In the case before us, though, the question is not whether Melvin was bound by the injunction as soon as it was entered, but rather when the time for entering an order of temporary suspension started to run. The Rule 102(e)(3) language we must interpret measures the time for entering an order of temporary suspension from "the date on which the final judgment or order entered in a judicial or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) of this section has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available." In this context, "effective" means that review or appeal procedures have been completed or that further review or appeal procedures are no longer available.[52]

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[49] *Id*. Several other federal courts of appeals have also adopted a bright-line rule in similar circumstances. *See, e.g.*, *Impresa v. Construzioni Geom. Domenica Garufi v. United States*, 531 F.3d 1367, 1372 (Fed. Cir. 2008) (adopting a uniform rule for EAJA petitions in the Court of Federal Claims in holding that the period for filing an EAJA application started on expiration of the period for filing a petition for certiorari from the final judgment of the Federal Circuit because "a clear rule better serves the interests of litigants and the court"); *Van*, 483 F.3d at 612 (adopting bright-line rule whereby "EAJA's 30-day filing period does not begin to run until after the 60-day appeal period in Rule 4(a) has expired," even when a claimant has obtained a judgment as to which the Commissioner of the Social Security Administration has consented, in part because the possibility that consent judgments can be appealed otherwise could create uncertainty and confusion).

[50] Melvin cites no authority to support this contention.

[51] 17 C.F.R. § 201.102(e)(3).

[52] This does not mean, however, that an order or judgment is not effective or binding until all appeals have been resolved or the period for filing appeals has run. As we have repeatedly held, for example, the pendency of an appeal of a civil or criminal proceeding does not justify any delay in related "follow-on" administrative proceedings. *See, e.g.*, *Ran H. Furman*, Exchange Act Release No. 65680, 2011 WL 5231425, at *2 (Nov. 3, 2011) ("Although Furman is entitled to appeal the underlying case against him, the possibility of an appeal to the court of appeals 'does not alter the effect' of the jury's finding of securities law violations or the court's imposition of an injunction here.") (quoting *Daniel S. Lezak*, Exchange Act Release No. 50729, 2004 WL 2721400, at *2 & n.16 (Nov. 23, 2004)); *Gunderson*, 2009 WL 4981617, at *4 ("'[I]t is well established that the existence of an appeal of the district court's decision does not affect the [permanent] injunction's status as a basis for administrative action.'") (quoting *Conrad P.*

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* * *

Melvin engaged in serious misconduct. He betrayed a longtime client by misappropriating sensitive and valuable information that he knew was confidential and sharing it with business associates. Although he did not personally trade on the information, his disclosures furthered his professional and personal relationships and led to fraudulent and profitable insider trading by at least ten individuals. Moreover, Melvin does not appear fully to appreciate the wrongfulness of his actions, which heightens our concerns about the possibility of future misconduct. In sum, Melvin's actions demonstrate that he poses a threat to the integrity of our processes and amply justify his permanent disqualification from appearing or practicing before us.

An appropriate order will issue.[53]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN, and PIWOWAR).

Brent J. Fields
Secretary

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Seghers, Investment Advisers Act Release No. 2656, 2007 WL 2790633, at *3 & n.12 (Sept. 26, 2007), and citing additional authority).

[53] We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75844 / September 4, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 3682 / September 4, 2015

Admin. Proc. File No. 3-15659

In the Matter of

THOMAS D. MELVIN, CPA

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's Opinion issued this day, it is

ORDERED that Thomas D. Melvin, CPA, is hereby permanently disqualified from appearing or practicing before the Commission.

By the Commission.

Brent J. Fields
Secretary