

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 94208 / February 9, 2022

Admin. Proc. File No. 3-20305

In the Matter of

CLINTON MAURICE TUCKER II

ORDER REQUESTING ADDITIONAL BRIEFING AND MATERIALS

On May 13, 2021, the Securities and Exchange Commission issued an order instituting administrative proceedings (“OIP”) against Clinton Maurice Tucker II pursuant to Section 15(b) of the Securities Exchange Act of 1934.¹ Tucker was subsequently served with the OIP but failed to file an answer to it. On August 10, 2021, after Tucker failed to answer the OIP, the Division filed a motion for default and imposition of sanctions against Tucker.

On October 25, 2021, the Commission issued an order requiring Tucker to show cause by November 8, 2021, why he should not be deemed to be in default and why this proceeding should not be determined against him due to his failure to file an answer, respond to the Division’s motion, or to otherwise defend the proceeding.² Tucker failed to respond.

The Division’s motion for default requested that the Commission bar Tucker from the securities industry and from participating in any offering of penny stock based on the record and the allegations in the OIP. The motion recited that on November 16, 2020, a final judgment was entered against Tucker permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Exchange Act Section 10(b), and Exchange Act Rule 10b-5.³ To support its motion, the Division relied on materials attached as exhibits to the motion: the complaint in the underlying civil action, the district court’s final judgment granting the Commission’s motion for default judgment and enjoining Tucker, and proof of service of the OIP.

¹ *Clinton Maurice Tucker II*, Exchange Act Release No. 91888, 2021 WL 1931209 (May 13, 2021).

² *Clinton Maurice Tucker II*, Exchange Act Release No. 93417, 2021 WL 4974904 (Oct. 25, 2021).

³ *SEC v. Tucker*, Civ. A. No. 8:20-cv-00875-DOC-DFM (C.D. Cal. Nov. 16, 2019), ECF No. 30; *see also Tucker*, 2021 WL 1931209, at *1 (referencing same).

When determining whether remedial action, such as an industry bar, is in the public interest under Exchange Act Section 15(b), the Commission must consider the question with reference to the underlying facts and circumstances of the case.⁴ The factors that the Commission considers are: 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 that the respondent's occupation will present opportunities for future violations.⁵ Such analysis must do more than "recite[], in general terms, the reasons why [a respondent's] conduct is illegal," but rather "devote individual attention to the unique facts and circumstances of th[e] case."⁶

The Division relies in part on the allegations of the OIP with respect to the injunctive action against Tucker to support its request for sanctions. When a respondent defaults, the Commission may deem an OIP's allegations to be true.⁷ But the OIP here recounts the allegations of the Commission's complaint; it does not independently allege that Tucker engaged in particular misconduct.⁸ Entering Tucker's default would not appear to permit the Commission to deem true the allegations of the Commission's complaint in the injunctive action.

The Division also relies on the final judgment enjoining Tucker from certain violations of the securities laws. But because that injunction was entered by default, it does not have preclusive effect as to facts alleged in the Commission's complaint.⁹

⁴ See *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

⁵ See *id.*; see also *Lawrence Allen Deshetler*, Advisers Act Release No. 5411, 2019 WL 6221492, at *2-3 (Nov. 21, 2019) (applying Steadman factors in follow-on proceeding).

⁶ See *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (vacating and remanding suspension for failing to meet this standard).

⁷ See Commission Rules of Practice 155(a), 220(f), 17 C.F.R. §§ 201.155(a), 201.220(f).

⁸ *Tucker*, 2021 WL 1931209, at *1 (stating that the "Commission's complaint alleged that, from at least 2014 to 2019, [Tucker] misappropriated investor funds and otherwise engaged in a variety of conduct that operated as a fraud and deceit on investors. The complaint also alleged that [Tucker], using the mails or other means or instrumentalities of interstate commerce, effected transactions in, or induced or attempted to induce the purchase and sale of, securities and received commissions while he was not registered with the Commission as a broker or dealer nor while he was associated with an entity registered with the Commission as a broker or dealer").

⁹ See *Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 WL 421305, at *4 (Feb. 4, 2010); see also *Jaswant Gill*, Advisers Act Release No. 5858, 2021 WL 4131427, at *2 n.7 (Sept. 10, 2021) ("Because Gill's injunction in the civil action was entered by default, we do not rely on any findings made in that action in determining whether Gill's conduct warrants remedial sanctions.").

Under the circumstances, the Commission would benefit from further development of the evidentiary record and additional briefing addressing the Division's arguments as to why industry and penny stock bars are warranted. The Division should address each statutory element of the relevant provisions of Section 15(b) of the Exchange Act.¹⁰ The Division's brief should discuss relevant authority relating to the legal basis for and the appropriateness of the requested sanctions and include evidentiary support sufficient to make an individualized assessment of whether those sanctions are in the public interest.¹¹

Accordingly, it is ORDERED that the Division of Enforcement shall submit, as it deems necessary, any additional evidentiary materials that are relevant to its motion and determination of the public interest by March 11, 2022, as well as a brief not to exceed 5000 words, explaining the relevance of those materials to its request and the public interest and containing specific citations to the evidence relied upon.

It is further ORDERED that Tucker may file a brief by April 11, 2022, not to exceed 5000 words, addressing the same matters to be addressed by the Division. Tucker's brief should also address why he has failed to file an answer previously or to otherwise defend this proceeding, and why the Commission should not find him in default as a result.¹² Tucker is reminded that when a party defaults, the allegations in the OIP will be deemed to be true and the Commission may determine the proceeding against that party upon consideration of the record without holding a public hearing.¹³ If Tucker files a response to this order, the Division may file a reply within 14 days after its service.

¹⁰ See, e.g., *Shawn K. Dicken*, Exchange Act Release No. 89526, 2020 WL 4678066, at *2 (Aug. 12, 2020) (requesting additional information from the Division "regarding the factual predicate for Dicken's convictions" and "why these facts establish" the need for remedial sanctions); see also *Shawn K. Dicken*, Exchange Act Release No. 90215, 2020 WL 6117716, at *1 (Oct. 16, 2020) (clarifying the additional information needed from the Division).

¹¹ See generally *Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012) (requiring "meaningful explanation for imposing sanctions"); *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (stating that "each case must be considered on its own facts"); *Gary McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *1, *3 (Apr. 23, 2015); *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016); *Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 WL 421305, at *3-4 (Feb. 4, 2010), *appeal after remand*, Exchange Act Release No. 63720, 2011 WL 121451, at *5-8 (Jan. 14, 2011).

¹² See *supra* note 2 (show cause order warning Tucker that failure to respond may cause the Commission to find him in default, and noting that the OIP did the same).

¹³ Rules of Practice 155, 180, 17 C.F.R. § 201.155, .180.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary