

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 11148 / January 19, 2023

SECURITIES EXCHANGE ACT OF 1934
Release No. 96710 / January 19, 2023

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4371 / January 19, 2023

Admin. Proc. File No. 3-21239

In the Matter of
ANDY CHIN FONG CHEN, CPA

ORDER DENYING PETITION TO LIFT TEMPORARY SUSPENSION AND DIRECTING
HEARING

On November 10, 2022, we issued an order instituting proceedings (“OIP”) against Andy Chin Fong Chen, pursuant to Commission Rule of Practice 102(e)(3),¹ based on Chen’s having been permanently enjoined from violating antifraud provisions of the securities laws.² The OIP further temporarily suspended Chen from appearing or practicing before the Commission.³ According to the OIP, Chen was licensed in the State of Washington as a Certified Public Accountant in 1990 and currently holds a valid CPA-inactive certificate in the state that expires in 2025.⁴

¹ 17 C.F.R. § 201.102(e)(3).

² Final Judgment, *SEC v. Chen*, Case No. 2:17-cv-00405-JLR (W.D. Wash. Aug. 16, 2022), ECF No. 181.

³ *Andy Chin Fong Chen, CPA*, Exchange Act Release No. 96299, 2022 WL 16900142 (Nov. 10, 2022). Commission Rule of Practice 102(e)(3)(i)(A) authorizes us to temporarily suspend an accountant subject to such an injunction from appearing or practicing before the Commission. 17 C.F.R. § 201.102(e)(3)(i)(A).

⁴ We also take official notice of the results of a search for Chen’s name on the CPA Search page of the Washington Board of Accountancy, which show that, as alleged, Chen holds a valid CPA-inactive certificate that expires on June 30, 2025, but also reflect that he is not now licensed to practice as a CPA. See *CPA Search - Board of Accountancy*, <https://data.wa.gov/Consumer-Protection/CPA-Search-Board-of-Accountancy/pqu3-uhwj>; *Karen Bruton*, Exchange Act Release No. 84627, 2018 WL 6061351, at *1 n.2 (Nov. 19, 2018) (taking official notice pursuant

On December 20, 2022, Chen filed a petition to lift his temporary suspension and dismiss this administrative proceeding. For the reasons below, we deny the request to lift the temporary suspension and set the matter down for a hearing in accordance with Commission Rule of Practice 102(e)(3).⁵

Background

On May 15, 2017, the Commission filed a civil complaint (the “Complaint”) against Chen; the company of which he served as president, Aero Space Port International Group, Inc. (“ASPI”); and others.⁶ As alleged in the Complaint, Chen and ASPI fraudulently raised over \$14.5 million from investors in exchange for membership interests in a limited liability company, falsely representing that investor funds would be used to finance the development of real property in Washington State. According to the Complaint, Chen instead misappropriated virtually all of the investor funds and used them for other purposes. The Complaint also alleged that Chen and ASPI misrepresented to investors, all of whom were foreign nationals, that their investment would enable them to participate in the Employment-Based Immigration Fifth Preference Program (“EB-5 program”). This program provides a means for foreign nationals to obtain lawful permanent residency in the United States.

On February 15, 2019, the court granted summary judgment in favor of the Commission against Chen and ASPI on the Commission’s claims that they violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(b) thereunder,⁷ and Section 17(a)(2) of the Securities Act of 1933,⁸ by falsely promising that Chen and ASPI would use investors’ capital to finance the real estate project in accordance with EB-5 program requirements and by failing to

to Commission Rule of Practice 323, 17 C.F.R. § 201.323, of licensing records available through North Carolina Board of CPA Examiners’ website); *Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 WL 1862331, at *1 n.3 (May 9, 2017) (taking official notice of website search results from state government database); *see also Use of the Title*, <https://acb.wa.gov/use-title> (“Individuals that hold a current [Washington State] CPA-Inactive certificate cannot practice public accounting, and cannot use the title ‘Certified Public Accountant’ or ‘CPA.’”); *mPhase Techs.*, Exchange Act Release No. 74187, 2015 WL 412910, at *2 n.14 (Feb. 2, 2015) (taking official notice of materials posted on state government website).

⁵ 17 C.F.R. § 201.102(e)(3)(iii) (providing that, upon receipt of a timely petition to lift a temporary suspension, “the Commission shall either lift the temporary suspension, or set the matter down for hearing at a time and place designated by the Commission, or both, and after opportunity for hearing, may censure the petitioner or disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently”); *id.* § 201.102(e)(3)(iv) (allocating burdens in Rule 102(e)(3)(iii) hearing).

⁶ Compl., *SEC v. Chen*, Case No. 2:17-cv-00405-JLR (W.D. Wash. May 15, 2017), ECF No. 1.

⁷ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b).

⁸ 15 U.S.C. § 77q(a)(2).

disclose that they would instead use investor funds for purposes contrary to the EB-5 program.⁹ In holding that Chen and ASPI acted with scienter, the court found that Chen solicited investors' money with the intent to deploy those funds at ASPI's complete discretion, contrary to the terms of the EB-5 program.¹⁰ The court found that unauthorized expenditures of investors' money on payments on Chen's luxury vehicle and loans to family members showed that Chen must have been aware that he was falsifying the representations to investors.¹¹ The court also found that Chen knew that he could not verify the truth of the offering's central premise that Chen and ASPI would spend investors' funds in a way that would enable investors to qualify for EB-5 status.¹²

Following its grant of summary judgment, the court entered a final judgment on August 16, 2022,¹³ permanently enjoining Chen and ASPI from violating Exchange Act Section 10(b), Exchange Act Rule 10b-5(b), and Securities Act Section 17(a)(2), and from participating in the EB-5 program.¹⁴ The judgment also ordered Chen and ASPI to pay, respectively, \$75,000 and \$375,000 in civil money penalties to a receiver previously appointed to protect investor assets.¹⁵ The Commission previously had withdrawn its request that defendants be ordered to pay disgorgement because their business expenses exceeded the amount of that request.¹⁶ The court agreed with the Commission, however, that six investors' initial \$500,000 investments should be returned to them from funds held by the receiver.¹⁷

⁹ *SEC v. Chen*, Case No. 2:17-cv-00405-JLR, 2019 WL 652360, at *10-18, *21 (W.D. Wash. Feb. 15, 2019) (granting in part the Commission's motion for summary judgment).

¹⁰ *Id.* at *17.

¹¹ *Id.*

¹² *Id.* at *17-18.

¹³ The judgment referred to Chen as "Andy *Ching* Fong Chen," and the Complaint referred to "Andy *Shin* Fong Chen." (emphasis added). Neither the OIP nor Chen's filing, which each refer to "Andy *Chin* Fong Chen," addresses these discrepancies or suggests that they affect the temporary suspension. (emphasis added). Because Chen does not dispute that he was the subject of the Commission's injunctive proceeding, these discrepancies in the spelling of Chen's name do not affect our decision at this stage. We request, however, that the parties discuss whether the caption should be amended and inform us of the result of their discussion. *See infra* note 39.

¹⁴ *SEC v. Chen*, ECF No. 181; *see also SEC v. Chen*, Case No. 2:17-cv-00405-JLR, 2022 WL 3370206 (W.D. Wash. Aug. 16, 2022) (granting relief); *SEC v. Chen*, Case No. 2:17-cv-00405-JLR, 2019 WL 652360, at *5-6 (W.D. Wash. Oct. 18, 2021) (analyzing permanent injunction factors).

¹⁵ *SEC v. Chen*, ECF No. 181; *SEC v. Chen*, 2022 WL 3370206, at *9 (ordering defendants make payment to receiver); *SEC v. Chen*, 2021 WL 4844716, at *7 (finding that "appointment of a receiver is necessary to ensure that the investors' assets are independently controlled and preserved").

¹⁶ *SEC v. Chen*, 2022 WL 3370206, at *4 (stating that "[i]n light of Defendants' established business expenses, the SEC now agrees that no disgorgement should be ordered").

¹⁷ *Id.* at *5.

On November 10, 2022, we issued the OIP, temporarily suspending Chen from appearing or practicing before the Commission.¹⁸ The OIP further ordered that the temporary suspension become permanent unless Chen filed a petition to lift it within 30 days after service of the OIP, and we provided that if Chen filed such a petition we would “either lift the temporary suspension, or set the matter down for hearing . . . or both.”¹⁹ On December 20, 2022, Chen filed this petition requesting that we lift the temporary suspension and dismiss the proceeding.

Analysis

Under Rule of Practice 102(e)(3)(i), we may, with due regard to the public interest and without preliminary hearing, temporarily suspend from appearing or practicing before us any accountant who has been “[p]ermanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating any provision of the federal securities laws . . . or of the rules and regulations thereunder.”²⁰ Upon the filing of a petition to lift a temporary suspension under Rule 102(e)(3)(ii),²¹ Rule 102(e)(3)(iii) requires us to lift the suspension, set the matter down for hearing, or both.²² Based on the record currently before us, we find it appropriate here not to lift the suspension and to instead set the matter down for a hearing.

There is no dispute that a federal district court permanently enjoined Chen from violating antifraud provisions of the federal securities laws in an action brought by the Commission. And, in instituting this proceeding, we determined that, in view of the injunction, it was appropriate and in the public interest that Chen be temporarily suspended from appearing or practicing before the Commission.²³ A suspension furthers the policy objectives Rule 102(e)(3) was designed to serve, which include protecting the Commission’s processes and the investing public from being harmed by accountants and other professionals who have demonstrated an unwillingness or inability to comply with the requirements of the federal securities laws.²⁴

¹⁸ *Chen*, 2022 WL 16900142, at *1.

¹⁹ *Id.* at *2.

²⁰ 17 C.F.R. § 201.102(e)(3)(i).

²¹ *Id.* § 201.102(e)(3)(ii).

²² *Id.* § 201.102(e)(3)(iii).

²³ *Chen*, 2022 WL 16900142, at *1.

²⁴ *Suspension or Disbarment From Appearance or Practice Before the Commission*, Exchange Act Release No. 9164 (May 10, 1971), 36 Fed. Reg. 8933, 8933 (May 15, 1971); *see also Bruton*, 2018 WL 6061351, at *3 (explaining that a temporary suspension “is a remedial measure” that “protects the public and the Commission’s processes from an accountant who has been enjoined from violating the federal securities laws pending a hearing to determine what, if any, sanction is appropriate”); *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”).

Considering the injunction against Chen from violations of the antifraud provisions, and the findings underlying it, we find it appropriate to maintain Chen’s temporary suspension pending a hearing.²⁵

Chen argues that we should vacate the temporary suspension for various reasons, none of which we find persuasive. Chen contends, for instance, that the Commission “lacks jurisdiction” to suspend him under Rule 102 because, as a holder of a CPA-Inactive certificate, he is not currently licensed to practice as a certified public accountant, and because, according to him, he has never “practiced” before the Commission as that term is defined in Rule 102(f).²⁶ Citing Rule 102(e)(1)(iv), Chen argues that Rule 102(e) in its entirety applies to only those accountants currently “licensed to practice” as certified public accountants.²⁷

Chen’s argument ignores the language of Rule 102(e)(3)—the relevant provision here—which specifies that the Commission may temporarily suspend “*any . . . accountant,*” not only those accountants currently licensed to practice as certified public accountants.²⁸ Chen instead cites Rule 102(e)(1), which provides separate bases from those at issue here for the Commission to censure or deny persons the privilege of appearing or practicing before it, including “persons licensed to practice as accountants” who engage in “improper professional conduct.”²⁹ But Rule 102(e)(3), which provides the authority for this proceeding, contains no similarly limiting language.³⁰

Chen similarly contends that Rule 102(e) applies only to those who have actually practiced before the Commission as an accountant and that the Commission has never previously suspended a person from practicing before it who had not done so. But nothing in the text of

²⁵ See *Bruton*, 2018 WL 6061351, at *4 (denying request to lift temporary suspension where the fact that a respondent professional has been enjoined “from violating the antifraud provisions has especially serious implications for the public interest” (quoting *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003)); *Suspension or Disbarment From Appearance or Practice Before the Commission*, 36 Fed. Reg. at 8933 (stating that hearing process under Rule 102(e)(3) “assur[es] that . . . professionals and experts will have a fair opportunity to show why the interests of the investing public will not materially be jeopardized if they are permitted to continue to appear and practice before the Commission”).

²⁶ 17 C.F.R. § 201.102(f).

²⁷ *Id.* § 201.102(e)(1)(iv).

²⁸ *Id.* § 201.102(e)(3)(i) (emphasis added).

²⁹ *Id.* § 201.102(e)(1)(ii), (iv); see also *Robert W. Armstrong, III*, Exchange Act Release No. 51920, 2005 WL 1498425, at *13 (June 24, 2005) (explaining that Rule 103(e)(1)(iv) “defines the term ‘improper professional conduct’ for purposes of Rule 102(e)(1)(ii)”).

³⁰ *Bruton*, 2018 WL 6061351, at *4 (denying petition to lift Rule 102(e)(3) temporary suspension filed by enjoined person whose CPA license was inactive); cf. *Daniel S. Lezak*, Exchange Act Release No. 50729, 2004 WL 2721400, at *1 (Nov. 23, 2004) (denying petition to lift temporary suspension by person who asserted that “although he obtained a license as a certified public accountant . . . in the early 1960’s, he has not practiced as a CPA since then”).

Rule 102(e)(3) requires that an accountant have practiced before the Commission for the Commission to suspend the accountant, and Chen cites nothing imposing such a requirement. Although Chen notes that Rule 102(f) identifies examples of what constitutes “practicing before the Commission,”³¹ that provision does not establish a precondition to the exercise of Commission authority under Rule 102(e).³² Rather, Rule 102(f) identifies activities in which persons suspended under Rule 102(e) may not engage.³³

Chen also argues that the temporary suspension is “meaningless,” and thus not remedial, because his CPA license is inactive. But without a suspension, Chen could appear or practice before the Commission in the future should he become relicensed as a CPA.³⁴

Chen further asserts that the suspension is “retaliatory” because the Commission was “largely unsuccessful” in its action against him, since the court did not order disgorgement as the Commission had requested. But Chen’s allegation does not present a legally cognizable basis to challenge the Commission’s decision to institute proceedings.³⁵ And the premise of Chen’s

³¹ 17 C.F.R. § 201.102(f) (defining “practicing before the Commission” to include, but providing that it “shall not be limited to,” transacting any business with the Commission and the “preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such” person).

³² *Cf. Armstrong*, 2005 WL 1498425, at *12 (addressing availability of relief under Rule 102(e)(1) and stating that “the text of Rule 102(e) 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”); *Bruton*, 2018 WL 6061351, at *4 (denying petition to lift temporary suspension where accountant submitted a declaration stating that she had not practiced before the Commission in more than 30 years and had no present intention of doing so).

³³ *See Armstrong*, 2005 WL 1498425, at *12 (explaining that “[d]enying the person the privilege of appearing or practicing before the Commission is the authorized remedy once the Commission makes one of the findings specified in Rule 102(e)(1)(i)-(iii); appearing or practicing before the Commission at the time of the misconduct is not the precondition to imposing that remedy”).

³⁴ *See generally Convert Your CPA-Inactive Certificate to a License*, <https://acb.wa.gov/individual-licensing/move-cpa-inactive-certificate-license> (discussing process of converting CPA-inactive certificate to active CPA license). We take official notice of this webpage. *mPhase Techs.*, 2015 WL 412910, at *2 n.14. *See also, e.g., Bruton*, 2018 WL 6061351, at *4 (finding that temporary suspension was in the public interest when respondent could “reactivate her CPA license at any time” and was “not bound by a present intention not to appear or practice before the Commission”).

³⁵ *Cf. Shellenbach v. SEC*, 989 F.2d 907, 911 (7th Cir. 1993) (stating “courts will not inquire into a prosecutor’s ill motive unless there is a showing of selective enforcement” or “an attempt to discriminate by arbitrary classification”); *Busboom Grain Co., Inc. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987) (stating that “[a] strong presumption of regularity supports any order of an administrative agency”).

argument is incorrect, as the Commission's enforcement action was not unsuccessful. The court found that Chen and ASTI violated antifraud provisions of the federal securities laws, enjoined them from future violations and participation in the EB-5 program, and ordered them to pay civil money penalties.³⁶ The court also appointed a receiver to protect investor interests.³⁷

We thus find that, at this stage, the court's injunction against Chen, and the findings underlying it, "justify the continuance of his suspension until it can be determined what, if any, action may be appropriate to protect the Commission's processes."³⁸ During the hearing, the parties may address any arguments, and present any evidence, that they believe relevant to the final sanction, if any, that may be imposed.

Accordingly, IT IS ORDERED that Chen's petition to lift the temporary suspension is denied, and that the temporary suspension will remain in effect pending a public hearing and decision in this matter; and it is further

ORDERED that this proceeding be set down for a hearing before the Commission in accordance with Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110; and it is further

ORDERED that the Division of Enforcement and Chen shall conduct a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice, 17 C.F.R. § 201.221, within fourteen (14) days of service of this order.³⁹ The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference is not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

If Chen fails to appear at a hearing or conference after being duly notified, he may be deemed in default and the proceedings may be determined against him as provided by Rules 155(a), 221(f), and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.221(f), and 201.310. If in the statement filed with the Office of the Secretary either party states an intent to file a motion for summary disposition under Rule of Practice 250, the Commission shall issue a briefing schedule for such motion(s).

³⁶ *SEC v. Chen*, ECF No. 181; *SEC v. Chen*, 2022 WL 3370206; *SEC v. Chen*, 2019 WL 652360; *SEC v. Chen*, 2019 WL 652360.

³⁷ *SEC v. Chen*, 2021 WL 4844716, at *7.

³⁸ *Williams D. Shovers*, Exchange Act Release No. 59874, 2009 WL 1271170, at *2 (May 6, 2009).

³⁹ In addition to those matters specified in Rule 221 that are relevant to this proceeding, the parties should discuss whether the caption should be amended to eliminate the suffix "CPA" from Chen's name and to clarify Chen's full name. *Cf. Bruton*, 2018 WL 6061351, at *4 & n.25 (granting Bruton's request that "CPA" be stricken from the caption because the respondent's CPA license was inactive and she was thus prohibited from allowing anyone else to refer to her as a certified public accountant).

Attention is called to Rule 151(b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed with the Office of the Secretary and all motions, objections, or applications will be decided by the Commission.

Attention also is called to the OIP, in which the Commission found that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to service of paper copies, service to the Division of Enforcement of all opinions, orders, and decisions described in Rule 141, 17 C.F.R. § 201.141, and all papers described in Rule 150(a), 17 C.F.R. § 201.150(a), in these proceedings shall be by email to the attorneys who enter an appearance on behalf of the Division, and not by paper service.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission, and that any motion for summary disposition shall be filed under Rule 250(a) or (b).

The Commission also finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

The Commission will issue a final order resolving the proceeding after one of the following: (A) the completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) the completion of briefing on a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) the determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not

deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

The parties' attention is directed to the e-filing requirements in the Rules of Practice.⁴⁰

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

⁴⁰ *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020), 85 Fed. Reg. 86,464, 86,474 (Dec. 30, 2020), <https://www.sec.gov/rules/final/2020/34-90442a.pdf>; *Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, <https://www.sec.gov/efapdocs/instructions.pdf>. The amendments impose other obligations such as a redaction and omission of sensitive personal information requirement. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465–81.