UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 98757 / October 16, 2023

INVESTMENT ADVISERS ACT OF 1940
Release No. 6462 / October 16, 2023

Admin. Proc. File No. 3-21030

In the Matter of

LEON VACCARELLI

ORDER REQUESTING ADDITIONAL BRIEFING AND MATERIALS

On September 2, 2022, the Securities and Exchange Commission issued an order instituting administrative proceedings ("OIP") against Leon Vaccarelli pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940.[1] After Vaccarelli filed an answer to the OIP,[2] the Commission entered a briefing schedule for motions for summary disposition.[3] On May 25, 2023, the Division of Enforcement filed a motion for summary disposition in which it requested that the Commission impose an industry-wide associational bar on Vaccarelli.

To support its motion, the Division relied on the OIP and various materials from a criminal case referenced in the OIP,[4] including the sealed and superseding indictments against Vaccarelli, excerpts from the jury trial transcript, the jury verdict, the district court's judgment, its restitution order, and the mandate of the United States Court of Appeals for the Second Circuit in Vaccarelli's appeal from the district court's judgment. The general verdict form that the Division submitted states that a jury found Vaccarelli guilty of three counts of mail fraud, nine counts of wire fraud, six counts of securities fraud, and three counts of money laundering. We believe that the Commission would be assisted in its determination of this proceeding by the submission of additional briefing and materials.

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1 *Leon Vaccarelli*, Exchange Act Release No. 95671, 2022 WL 4011090 (Sept. 2, 2022).

2 *Leon Vaccarelli*, Exchange Act Release No. 96853, 2023 WL 1926499, at *1 (Feb. 9, 2023) (construing Vaccarelli's response to an earlier show cause order as his answer).

3 *Leon Vaccarelli*, Exchange Act Release No. 97425, 2023 WL 3243512 (May 3, 2023).

4 *United States v. Leon Vaccarelli*, No. 18-cr-00092 (D. Conn. filed May 2, 2018).

Exchange Act Section 15(b)(6)(A) authorizes the Commission to suspend or bar a person from associating in the securities industry if it finds, on the record after notice and opportunity for hearing, that (1) the person was convicted of violating the federal mail or wire fraud statutes, or of a crime involving the purchase or sale of any security, within ten years of the commencement of the proceeding; (2) the person was associated with a broker or dealer at the time of the misconduct; and (3) such a sanction is in the public interest.[5] Similarly, Advisers Act Section 203(f) authorizes the Commission to suspend or bar a person from associating in the securities industry if it finds, on the record after notice and opportunity for hearing, that (1) the person was convicted of violating the federal mail or wire fraud statutes, or of a crime involving the purchase or sale of any security, within ten years of the commencement of the proceeding; (2) the person was associated with an investment adviser at the time of the misconduct; and (3) such a sanction is in the public interest.[6]

When determining whether remedial action, such as an industry bar, is in the public interest under Exchange Act Section 15(b) or Advisers Act 203(f), the Commission must consider the question with reference to the underlying facts and circumstances of the case.[7] 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.[8] 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."[9]

With respect to the second element—Vaccarelli's associations—the Division primarily relies on the OIP, which states that, "[a]fter an investigation, the Division of Enforcement alleges that" "[f]rom February 2011 to July 2017, Vaccarelli was a registered representative of a broker-dealer registered with the Commission and an investment adviser representative associated with

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[5] 15 U.S.C. § 78*o*(b)(6)(A) (cross-referencing Exchange Act Section 15(b)(4), 15 U.S.C. § 78*o*(b)(4)); *see also id.* § 78*o*(b)(4)(B)(i), (iv) (discussing convictions involving the purchase or sale of securities or for violating 18 U.S.C. § 1341 or § 1343).

[6] 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e), 15 U.S.C. § 80b-3(e)); *see also id.* § 80b-3(e)(2)(A), (D) (discussing convictions involving the purchase or sale of securities or for violating 18 U.S.C. § 1341 or § 1343).

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

[8] *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).

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

an investment adviser registered with the Commission."[10] The Rules of Practice permit a movant to support a motion for summary disposition with "undisputed pleaded facts."[11] But the Division has not attempted to establish by reference to Vaccarelli's answer that its allegations regarding his associations are undisputed.[12]

With respect to the third element—the public interest—the Division relies on the statement of undisputed facts contained in its brief, which it largely bases on the allegations of the superseding indictment. The superseding indictment and jury form may permit the Commission to find that Vaccarelli was convicted of the 21 counts charged in the superseding indictment and that the elements for each of those offenses had been established beyond a reasonable doubt.[13] But the factual "allegations in an indictment" do not "automatically have preclusive effect" simply because a jury convicted a respondent in a "general verdict" that finds the respondent guilty of the counts in the indictment.[14] The jury verdict form does not reflect that the jury made specific findings regarding how Vaccarelli committed the violations at issue. Therefore, on the present record, we are uncertain what "facts the jury necessarily determined in returning [Vaccarelli's] conviction"—in other words, the facts "'distinctly put in issue and directly determined' in the criminal prosecution."[15]

Under the circumstances, the Commission would benefit from further briefing regarding the factual predicate for Vaccarelli's criminal convictions, as well as the Division's arguments as to why these facts establish that an industry bar is warranted.[16] The Commission would also benefit from any further materials relevant to such matters or otherwise relevant to its public interest analysis, including, but not limited to, the jury instructions from the criminal proceeding, transcripts, or any materials supporting findings made by the district court in connection with

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[10] *Vaccarelli*, 2022 WL 4011090, at *1. The Division also cites a paragraph from the superseding indictment alleging that Vaccarelli was, at unspecified times, a registered representative and investment adviser. This allegation standing alone, even if accepted as true, would not appear to establish that Vaccarelli was associated with a broker, dealer, or investment adviser at the time of his misconduct.

[11] *See* Rule of Practice 250(b), 17 C.F.R. § 201.250(b).

[12] *See* https://www.sec.gov/files/litigation/apdocuments/3-21030-2023-1-26-resp-state-show-cause.pdf (filing deemed to be Vaccarelli's answer).

[13] *See, e.g.*, *Gary McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *3 (Apr. 23, 2015); *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *8-9 (July 25, 2003); *Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 658791, at *3 (Sept. 15, 1998).

[14] *McDuff*, 2015 WL 1873119, at *3.

[15] *Hemphill v. Schott*, 141 F.3d 412, 416 (2d Cir. 1998) (quoting *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1961)).

[16] *See generally Shawn K. Dicken*, Exchange Act Release No. 90215, 2020 WL 6117716 (Oct. 16, 2020).

sentencing or the disposition of any relevant pre- or post-trial motions.[17] The Division should also specify whether it requests that the Commission take official notice of any public databases relevant to the duration and extent of Vaccarelli's associations in the securities industry or of events in the Commission's injunctive action against Vaccarelli.[18]

Accordingly, it is ORDERED that the Division shall submit, as it deems necessary, any additional evidentiary materials that are relevant to its motion and determination of the public interest by November 15, 2023, as well as a brief not to exceed 5,000 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 Vaccarelli may file a brief by January 2, 2024, not to exceed 5,000 words, addressing the same matters to be addressed by the Division. Vaccarelli's brief should also address why he has failed to respond to the Division's motion for summary disposition, and why the Commission should not find him in default as a result. Any such response shall be accompanied by a response to the Division's motion for summary disposition. The parties are advised that any settlement discussions in which they might be engaged do not

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[17] *See Emich Motors Corp.*, 340 U.S. at 569 (explaining that the facts actually decided by general jury verdict of guilty can be determined by reviewing the record in the criminal proceeding, "including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the court"); *Chisholm v. DLA*, 656 F.2d 42, 48-49 (3d Cir. 1981) (allowing agency to establish "which issues were litigated" by a conviction culminating in a general jury verdict by "introduction of the record of the criminal proceeding"); *Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730, at *3 n.23 (Aug. 26, 2011) (relying on the indictment, together with jury instructions and findings made by the court in the criminal proceeding, to "establish the factual framework for [the Commission's] analysis" of sanctions); Restatement (Second) of Judgments § 27 cmt. f (stating that the determination of "what issues, if any, were litigated and determined by the verdict and judgment" should in the first instance be based on the "pleadings and other materials of record in the prior action").

[18] *See* Rule of Practice 323, 17 C.F.R. § 201.323 (permitting the Commission to take official notice of "any material fact which might be judicially noticed by a district court of the United States" or "any matter in the public official records of the Commission"); *cf. Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 WL 121451, at *5 (Jan. 14, 2011) (considering respondent's criminal conviction in sanctions analysis although it was not referenced in the OIP (citing *Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 WL 21468604, at *5 n.20 (June 26, 2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions"))).

automatically toll deadlines in this proceeding. Instead, a party may request that the Commission extend or stay deadlines based on settlement discussions, which neither party here has done.[19]

Vaccarelli shall deliver any filings to the proper prison authorities no later than the due date, for forwarding to the Commission's Office of the Secretary.[20] Because filing a document with the Office of the Secretary does not serve it on the opposing party, Vaccarelli must also mail any filing to counsel for the Division of Enforcement.[21] If Vaccarelli files a response to this order, the Division may file a reply within 14 days after receiving it, not to exceed 2,500 words. We remind the parties that any document filed with the Commission must be accompanied by a certificate of service specifying how it was served on other parties to the proceeding.[22]

As warned in our previous briefing order, a party's failure to file a required brief or comply with the briefing order may result in the Commission's determination of the matter at issue against that party, entry of default, dismissal of the proceeding, or the prohibition of the introduction of evidence or the exclusion of testimony regarding the matter at issue.[23] We remind Vaccarelli that when a party defaults, the allegations in the OIP will be deemed to be true

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19 *Cf. Water Now, Inc.*, Exchange Act Release No. 96648, 2023 WL 173351, at *1 (Jan. 12, 2023) (granting extension of time based on Division's representation that respondent had retained counsel and was now engaged in settlement discussions); *Thomas Garnette Martin, Jr.*, Advisers Act Release No. 6375, 2023 WL 5203103, at *1 (Aug. 14, 2023) (granting "motion to stay proceedings pending Commission consideration of an offer of settlement," applying standards similar to those found in Rule of Practice 161(c)(2), 17 C.F.R. § 201.161(c)(2)).

20 *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that, under federal prison mailbox rule, pro se prisoners' notices of appeal are "filed" at moment of delivery to prison authorities for forwarding to the district court); *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (per curiam) (noting that this "mailbox rule [applies] to other filings by pro se prisoners").

21 The Division is represented by David London. His address is Division of Enforcement, U.S. Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, Massachusetts 02110, and his email address is LondonD@sec.gov.

22 *See* Rule of Practice 150, 17 C.F.R. § 201.150 (generally requiring parties to serve each other with their filings); Rule of Practice 151(d), 17 C.F.R. § 201.151(d) ("Papers filed with the Commission … shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service, and the mailing address or email address to which service was made, if not made in person.").

23 *Vaccarelli*, 2023 WL 3243512, at *2 (citing Rule of Practice 180(c), 17 C.F.R. § 201.180(c)).

and the Commission may determine the proceeding against that party upon consideration of the record without holding a public hearing.[24]

Upon review of the filings in response to this order, the Commission will either direct further proceedings by subsequent order or issue a final opinion and order resolving the matter.

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

Vanessa A. Countryman
Secretary

[24] Rules of Practice 155, 180, 17 C.F.R. §§ 201.155, .180; *Leon Vaccarelli*, Exchange Act Release No. 96420, 2022 WL 17401534, at *1 (Dec. 1, 2022).