

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6287 / April 17, 2023

Admin. Proc. File No. 3-20134

In the Matter of

PAUL HORTON SMITH, SR.

ORDER DENYING RESPONDENT'S MOTION TO STAY PROCEEDING AND
DIRECTING RESPONDENT TO SHOW CAUSE

On October 22, 2020, the Securities and Exchange Commission issued an order instituting administrative proceedings (“OIP”) against Paul Horton Smith, Sr., pursuant to Section 203(f) of the Investment Advisers Act of 1940.¹ Smith was served with the OIP on December 6, 2022, and his answer was due 20 days thereafter.² On January 12, 2023, because Smith had not filed an answer, the Commission ordered that he show cause by January 26, 2023, why he should not be deemed to be in default and why this proceeding should not be determined against him.³

On January 30, 2023, the Office of the Secretary received a letter from Smith via facsimile.⁴ In it, Smith responded to the show cause order by representing that he “was unaware of any failure on [his] part to respond” and that he has been “advised by counsel not to testify in

¹ *Paul Horton Smith, Sr.*, Advisers Act Release No. 5618, 2020 WL 6262345 (Oct. 22, 2020).

² *Id.* at *2; Rules of Practice 151(a), 160(b), 220(b), 17 C.F.R. §§ 201.151(a), .160(b), .220(b).

³ *Paul Horton Smith, Sr.*, Advisers Act Release No. 6215, 2023 WL 173352 (Jan. 12, 2023).

⁴ We remind the parties that their filings must comply with the Rules of Practice. The electronic filing requirements are described in the *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020), 85 Fed. Reg. 86,464, 86,465-81 (Dec. 30, 2020), <https://www.sec.gov/rules/final/2020/34-90442a.pdf> and *Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, <https://www.sec.gov/efapdocs/instructions.pdf>. The rules require the redaction or omission of sensitive personal information. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465–81.

outside matters until the pending Federal Criminal matter has concluded.” Smith also requested that this proceeding be postponed “until such time as [he] is able to respond in detail.”⁵ Smith’s filing was not accompanied by a certificate of service, as required by Rule of Practice 151(d).⁶

On February 28, 2023, we issued an order directing Smith to serve his filing on the Division and file with the Commission a certificate of service by March 14, 2023.⁷ The order expressly warned Smith that, pursuant to Rule of Practice 180(c), the Commission may reject his response to the show cause order as deficient if he failed to file the requisite certificate of service.⁸ Smith has not filed a certificate of service or otherwise responded to the Commission’s order.

Smith’s postponement request appears to be a motion under Rule of Practice 161, which authorizes the Commission to order a postponement for “good cause shown.”⁹ To obtain such relief, the movant must make a “strong showing that the denial of the request or motion would substantially prejudice their case.”¹⁰ Here, Smith asks that the matter be postponed because he has “a pending Federal Criminal matter” and therefore has an “inability to respond/defend this proceeding at this time.” But Smith does not explain how or if the pending criminal matter relates to this proceeding—which is based on an underlying civil injunction—nor does he otherwise explain why denying a stay would prejudice his case.¹¹ Indeed, even in related proceedings, the Commission has repeatedly held that “the pendency of an appeal of a civil or criminal proceeding does not justify any delay in related ‘follow-on’ administrative proceedings.”¹²

⁵ 17 C.F.R. § 201.161.

⁶ 17 C.F.R. § 201.151(d).

⁷ *Paul Horton Smith, Sr.*, Advisers Act Release No. 6252, 2023 WL 2299556 (Feb. 28, 2023).

⁸ *Id.* at *1.

⁹ 17 C.F.R. § 201.161(a).

¹⁰ *Id.* § 201.161(b)(1). The Commission’s order that “all reasonable requests for extensions of time will not be disfavored” with respect to the filing and service of papers, *In re Pending Administrative Proceedings*, Securities Act Release No. 10767, 2020 WL 1322001 (Mar. 18, 2020), “does not apply to [a] request to adjourn or postpone the proceeding itself pending an appeal of the underlying suit.” *Donald J. Fowler*, Exchange Act Release No. 89226, 2020 WL 3791560, at *1 n.10 (July 6, 2020).

¹¹ *See SEC v. First Fin. Grp., Inc.*, 659 F.2d 660, 667 (5th Cir. 1981) (stay of civil proceedings denied to defendant since “[p]rotection of the efficient operation of the securities markets and the financial holdings of investors from fraudulent marketing practices may require prompt civil enforcement which can not await the outcome of a criminal investigation”) (citing *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980)).

¹² *Thomas D. Melvin*, Exchange Act Release No. 75844, 2015 WL 5172974, at *7 n.52 (Sept. 4, 2015) (citing cases); *see also Paul Free*, Exchange Act Release No. 66260, 2012 WL

Smith also represents that he has not worked in the securities industry since 2020 and “will not do so in the future.” But one’s intention to remain out of the industry does not “meet the standard of a strong showing that the denial of his motion would substantially prejudice him.”¹³ Moreover, the postponement Smith requests “could delay significantly the outcome of these proceedings,” and, as the Commission has held previously, concerns about the “inefficient use of resources” do not “override the strong public interest in the prompt enforcement of the federal securities laws.”¹⁴ Accordingly, IT IS ORDERED that Smith’s motion to postpone the proceeding is DENIED without prejudice.

Nevertheless, in light of all the circumstances, including Smith’s *pro se* status and his expression of remorse for missing a prior filing deadline, we find it appropriate to offer Smith one last opportunity to respond to the allegations in the OIP and otherwise defend himself in this proceeding. If Smith wishes to have this case proceed with him as a participant, he must therefore make a responsive filing by the deadline below, which includes filing a proposed answer to the charges in the OIP.

Accordingly, it is ORDERED that Smith SHOW CAUSE by May 1, 2023, why the Commission should not find him in default and why this proceeding should not be determined against him due to his failure to file an answer to the allegations in the OIP, respond to the Commission’s order directing him to cure a deficient filing, or otherwise defend this proceeding. Smith’s submission shall address the reasons for his failure to timely file an answer, and include a proposed answer to be accepted in the event that the Commission does not enter a default

266986, at *2 (Jan. 26, 2012) (“As we have previously stated, the pendency of an appeal generally is an insufficient basis upon which to prolong a Commission proceeding.”); *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *3 (Sept. 26, 2007) (“It is well established that the existence of an appeal of the District Court’s decision does not affect the injunction’s status as a basis for administrative action.”).

¹³ See *Fowler*, 2020 WL 3791560, at *2 (rejecting argument that a stay of the follow-on proceeding would cause no prejudice to the Commission or the public interest because respondent did not intend to work in the securities industry absent a successful appeal of his injunction); cf. *Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *41 (May 29, 2015) (rejecting argument that a bar was unnecessary since respondent had “left the industry,” because “[a]bsent a bar, nothing would prevent [respondent] from reentering the industry”).

¹⁴ *Free*, 2012 WL 266986, at *2; see also *Francis V. Lorenzo*, Exchange Act Release No. 82755, 2018 WL 994316 at *1 (Feb. 21, 2018) (rejecting request to stay proceeding based on “unnecessary expenditure of resources” pending certiorari petition to the U.S. Supreme Court); *Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 WL 1941502, at *3 n.21 (Aug. 23, 2002) (“[T]he pendency of an appeal does not preclude us from acting to protect the public interest.”).

against him. Smith is also reminded of his obligation to adhere the Rules of Practice, regardless of whether he retains counsel or proceeds *pro se*.¹⁵

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.¹⁶ Both the OIP and the first show cause order informed Smith that a failure to file an answer could result in deeming him in default and determining the proceedings against him.¹⁷

If Smith files a response to this second order to show cause, the Division may file a reply within 14 days after its service. If Smith does not file a response, the Division shall file a motion for entry of an order of default and the imposition of remedial sanctions by May 30, 2023. The motion for sanctions should address each statutory element of the relevant provisions of Section 203(f) of the Advisers Act.¹⁸ The motion 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.¹⁹ The parties may file opposition and reply briefs within the deadlines provided by the Rules of Practice.²⁰ The failure to timely oppose a dispositive motion is itself a basis for a finding of default;²¹ it may result in the determination of particular claims, or the proceeding as a

¹⁵ See *Micah J. Eldred*, Exchange Act Release No. 96083, 2022 WL 9195015, at *2 n.12 (Oct. 14, 2022) (noting that even unrepresented parties are expected to comply with our rules).

¹⁶ Rules of Practice 155, 180, 17 C.F.R. §§ 201.155, .180.

¹⁷ *Smith*, 2020 WL 6262345, at *2; *Smith*, 2023 WL 173352, at *1.

¹⁸ 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).

¹⁹ 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 L. 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).

²⁰ See Rules of Practice 154, 160, 17 C.F.R. §§ 201.154, .160.

²¹ See Rules of Practice 155(a)(2), 180(c), 17 C.F.R. §§ 201.155(a)(2), .180(c); see, e.g., *Behnam Halali*, Exchange Act Release No. 79722, 2017 WL 24498, at *3 n.12 (Jan. 3, 2017).

whole, adversely to the non-moving party and may be deemed a forfeiture of arguments that could have been raised at that time.²²

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.²³

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

Vanessa A. Countryman
Secretary

²² See, e.g., *McBarron Cap. LLC*, Exchange Act Release No. 81789, 2017 WL 4350655, at *3–5 (Sep. 29, 2017); *Bennett Grp. Fin. Servs., LLC*, Exchange Act Release No. 80347, 2017 WL 1176053, at *2–3 (Mar. 30, 2017), *abrogated in part on other grounds by Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Apollo Publ'n Corp.*, Securities Act Release No. 8678, 2006 WL 985307, at *1 n.6 (Apr. 13, 2006).

²³ The parties' attention is again directed to the e-filing requirements in the Rules of Practice. See *supra* note 4.