

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70341 / September 6, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3665 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15461

In the Matter of

TIMOTHY M. MCGINN and
DAVID L. SMITH ,

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934 AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940
AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”) against Timothy M. McGinn (“McGinn”) and David L. Smith (“Smith”) (collectively, “Respondents”).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. McGinn and Smith were the founders and primary owners of McGinn, Smith & Co., Inc. (MS & Co.), a broker-dealer based in Albany, NY. McGinn and Smith were registered from 1981 through August 2012, and were associated with MS & Co. during that time. McGinn and Smith were also indirect owners of McGinn Smith Advisors, LLC, which was

registered with the Commission as an investment advisor from January 2006 to April 2009. Pursuant to a Default Decision dated September 14, 2011, McGinn and Smith were barred from associating with any FINRA member firm.

B. ENTRY OF RESPONDENTS' CRIMINAL CONVICTION

2. On February 6, 2013, following a four-week trial in *United States v. David L. Smith and Timothy M. McGinn*, 12-cr-0028 (N.D.N.Y.) (DNH), a jury in the United States District Court for the Northern District of New York found McGinn and Smith guilty on multiple counts charged in the Superseding Indictment, including conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud and filing a false tax return. On August 13, 2013, the Court entered judgments against McGinn and Smith. McGinn was sentenced to a prison term of 180 months, and ordered to pay a fine of \$100,000 and restitution of \$5,992,800. Smith was sentenced a prison term of 120 months, and ordered to pay a fine of \$50,000 and restitution of \$5,989,726.

3. The counts of the Superseding Indictment to which McGinn and Smith were found guilty alleged, among other things, that through various securities offerings from 2006 through 2009 they devised schemes to defraud investors, made misrepresentations and omissions in private placement memoranda, and misused investor funds.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 15(b) of the Exchange Act; and

C. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 203(f) of the Advisers Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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.

For the Commission, by its Secretary, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary