

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 82877 / March 14, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18403

In the Matter of

EDMUND W. BAILEY,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION 4C
OF THE SECURITIES EXCHANGE ACT OF
1934 AND RULE 102(e) OF THE
COMMISSION’S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Edmund W. Bailey (“Bailey” or “Respondent”) pursuant to Section 4C of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 102(e)(1)(ii) of the Commission’s Rules of Practice.¹

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the

¹ Section 4C(a), 15 U.S.C. § 78d-3(a), provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission . . . to have engaged in unethical or improper professional conduct

Rule 102(e)(1)(ii), 17 C.F.R. § 201.102(e)(1)(ii), provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission . . . to have engaged in unethical or improper professional conduct

findings contained in this Order Instituting Administrative Proceedings Pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order, as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:²

A. **RESPONDENT**

1. Bailey was a Commission employee from early January 2003 until March 9, 2012.

2. At the time he left his employment with the Commission, Bailey served as a Senior Associate Chief Accountant within the Office of the Chief Accountant ("OCA"), and worked on matters concerning auditor independence. Bailey supervised a team consisting of himself and two other accountants (the "Independence Team") that, as one of its responsibilities, consulted with private accountants regarding their compliance with the Commission's auditor independence requirements, including Regulation S-X Rule 2-01 ("Rule 2-01").

Rule 2-01 provides in part that the Commission will not recognize an accountant as independent if the accountant is not, in fact or appearance, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement. Rule 2-01(c) provides a non-exhaustive list of circumstances that are inconsistent with this general independence standard, such as an auditor's provision of certain "non-audit" services to its audit client. Rule 2-01(c)(4) provides that "[a]cting, temporarily or permanently, as a[n] ... employee of an audit client" is inconsistent with an auditor's independence. 17 C.F.R. § 210.2-01(c)(4)(i) and (vi).

B. **RESPONDENT'S IMPROPER PROFESSIONAL CONDUCT**

3. On July 28, 2011, the Commission's Boston Regional Office ("BRO") opened a Matter Under Inquiry ("MUI") into possible violations of auditor independence requirements by a certain audit firm ("Audit Firm"). The MUI was converted to a formal investigation in September 2011 (the "BRO Investigation"). The BRO Investigation focused in significant part on Audit Firm's practice of loaning staff to its audit clients to perform tax work ("tax-loaned staff"), and whether such practice violated the prohibition in Rule 2-01(c)(4)(vi) on "acting, temporarily or permanently, as a[n] . . . employee" of the audit client.

² The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding. Respondent has reserved the right to dispute the facts underlying these findings in other proceedings not brought by the Commission.

4. While Bailey was employed by the Commission, he and the Independence Team that he supervised participated personally and substantially in connection with BRO's decision to investigate Audit Firm's tax-loaned staff policies and practices and in the subsequent BRO Investigation. For example:

- a. On July 26, 2011, two days before opening a MUI, BRO staff consulted with Bailey and at least one other member of the Independence Team in connection with the decision to open a MUI into Audit Firm's tax-loaned staff policies and practices.
- b. In late 2011, seven people in OCA, including Bailey and his Independence Team, received from BRO staff documents produced by Audit Firm as well as a memorandum prepared by BRO staff that identified issues and preliminary questions for OCA's analysis. The memorandum also requested OCA's input on several auditor independence issues relevant to the investigation.
- c. Between December 2011 and January 2012, Bailey and his Independence Team consulted with BRO staff regarding Audit Firm's tax-loaned staff policies, particular tax-loaned staff engagements, and whether those policies and engagements were consistent with Rule 2-01. Through his participation in these communications, Bailey was provided OCA's analyses of Audit Firm's engagements and policies at issue and BRO's investigative strategy.

5. On March 9, 2012, Bailey left the Commission. Two days before his departure, Bailey received in-person counseling from the Commission's Office of the Ethics Counsel regarding the post-employment conflict of interest restrictions in 18 U.S.C. § 207 and the obligation in 17 C.F.R. § 200.735-8(b) to provide, prior to appearing before or communicating with the agency on behalf of a private party within the first two years after leaving the Commission, written notice to the Commission that: (1) describes the contemplated representation and/or communication; and (2) represents that the former employee, while on the Commission's staff, had neither personal and substantial responsibility nor official responsibility for the matter that is the subject of the representation.

6. On May 9, 2013, BRO staff contacted Audit Firm's counsel to notify them that the staff had made a preliminary determination to recommend charges against Audit Firm as a result of the BRO Investigation. The potential charges pertained to, among other violations, certain Audit Firm tax-loaned staffing engagements.

7. On June 3, 2013, Audit Firm submitted a Wells Response to BRO that addressed, *inter alia*, the tax-loaned staff engagements at issue.

8. Bailey, serving as an expert for Audit Firm, prepared a report that was submitted as part of Audit Firm's June 3, 2013 Wells Response (the "Expert Report"). In his Expert Report, Bailey summarized Audit Firm's tax-loaned staff policies and concluded that they contain "nothing that would be inconsistent with the auditor independence rules resulting in a violation of Regulation S-X 2-01(c)(4)(i-x)." Bailey's report included a "Qualifications" section stating that

“[t]hroughout my nine years with the Commission’s Staff, I believe I was directly involved in all matters affecting auditor independence being considered by the Commission’s Staff.”

9. Bailey understood that Audit Firm would submit his Expert Report to the Commission staff as part of its Wells Response. He did not notify the Commission that he was contemplating providing that report to Audit Firm for submission to the Commission.

10. On February 22, 2016, the United States Attorney’s Office for the Eastern District of Texas announced that it had reached a settlement with Bailey to resolve allegations that Bailey violated 18 U.S.C. § 207 by providing his Expert Report to Audit Firm with the understanding that it would be part of Audit Firm’s Wells Response. Bailey did not admit to any wrongdoing but agreed to pay, pursuant to 18 U.S.C. § 216(b), a \$40,000 civil fine to resolve the allegations. *See* <https://www.justice.gov/usao-edtx/pr/former-sec-senior-associate-chief-settles-conflict-interest-allegations>.

C. VIOLATIONS

11. As a result of the conduct described above, Respondent violated 17 C.F.R. § 200.735-8(b) because he did not notify the Commission that he was contemplating providing his Expert Report to Audit Firm for submission to the Commission, and failed to provide any prior notice to the Commission that Audit Firm would submit his Expert Report as part of its Wells Response.

12. As a result of the conduct described above, Respondent violated the post-employment conflict of interest restrictions set forth in 18 U.S.C. § 207(a)(1) and (a)(2).

- a. By providing his Expert Report to Audit Firm for submission to the Commission, Bailey violated Section 207(a)(1) because his Expert Report was a communication made to the Commission in connection with the BRO Investigation, which is a particular matter involving specific parties in which Bailey participated personally and substantially as a Commission employee.
- b. Bailey violated Section 207(a)(2) because his Expert Report was a communication made to the Commission in connection with the BRO Investigation, which is a particular matter that: (1) involved a specific party, Audit Firm; and (2) was pending under Bailey’s “official responsibility” during his Commission employment. The BRO Investigation was pending under Bailey’s “official responsibility” within the meaning of Section 207(a)(2) because accountants working under Bailey’s supervision actually participated in the matter. *See* 5 C.F.R. § 2641.202(j)(1).

13. Former Commission employees who violate 18 U.S.C. § 207(a) “are subject to an administrative enforcement proceeding as set forth in Rule 102(e).” 17 C.F.R. § 200.735-13(c).

14. Rule 102(e) of the Commission’s Rules of Practice allows the Commission to censure a person, or deny such person, temporarily or permanently, the privilege of appearing and

practicing before the Commission if it finds that such person has “engaged in improper professional conduct.” 17 C.F.R. § 201.102(e)(1)(ii).

15. By violating 17 C.F.R. § 200.735-8(b) and Sections 207(a)(1) and (a)(2), Bailey engaged in improper professional conduct pursuant to Section 4C of the Exchange Act and Rule 102(e)(1)(ii) of the Commission’s Rules of Practice. *See* 17 C.F.R. § 201.102(e)(1)(ii).

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent’s Offer.

Accordingly, pursuant to Section 4C of the Exchange Act and Rule 102(e)(1)(ii) of the Commission’s Rules of Practice, it is hereby ORDERED, effective immediately, that:

Respondent is suspended from appearing or practicing before the Commission.

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

By the Commission.

Brent J. Fields
Secretary