INITIAL DECISION RELEASE NO. 1129
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17749

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of JASON B. SMITH	INITIAL DECISION ON DEFAULT May 2, 2017

APPEARANCES: Jason M. Casey and Polly Atkinson for the Division of Enforcement, Securities and Exchange Commission

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

SUMMARY

The Securities and Exchange Commission instituted this proceeding under Section 15(b) of the Securities Exchange Act of 1934 on December 27, 2016. The order instituting proceedings (OIP) alleges that Jason B. Smith was convicted of one count of conspiracy to commit wire fraud and mail fraud in violation of 18 U.S.C. §§ 1349, 1341, and 1343. Smith did not participate in this proceeding and is in default. This initial decision finds that it is appropriate and in the public interest to bar Smith from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization or from participating in an offering of penny stock.

PROCEDURAL BACKGROUND

The OIP was sent to Smith, who was incarcerated, at the Federal Correctional Institution, Ashland, Kentucky, on January 3, 2017. Around that time, Smith was transferred to a halfway house. On January 26, 2017, the Division of Enforcement communicated with a correctional official responsible for Smith to arrange a telephonic prehearing conference for February 9, 2017. Smith did not participate in the prehearing conference, but on February 9, shortly after the conclusion of the conference, he spoke with the Division and represented that he would sign an offer of settlement. I granted a joint motion to stay the proceeding under 17 C.F.R. § 201.161(c)(2), contingent on Smith promptly submitting a signed offer of settlement. *Jason B. Smith*, Admin. Proc. Rulings Release No. 4598, 2017 SEC LEXIS 484 (ALJ Feb. 13, 2017).

On March 17, 2017, the Division filed a status update explaining that Smith had not submitted a signed offer of settlement or responded to any communications. Due to Smith's failure to submit a signed offer of settlement, the stay lapsed. 17 C.F.R. § 201.161(c)(2)(ii). I ordered Smith to show cause why he should not be found in default due to failing to file an

answer, attend the prehearing conference, or otherwise defend this proceeding. *Jason B. Smith*, Admin. Proc. Rulings Release No. 4696, 2017 SEC LEXIS 835 (Mar. 20, 2017). Smith did not respond to the order to show cause. The Division filed a motion for default and sanctions, which this initial decision grants.

FINDINGS OF FACT

Smith is in default for failing to file an answer, appear at the prehearing conference, or otherwise defend this proceeding. 17 C.F.R. §§ 201.155(a), .220(f), .221(f). My factual findings are based on the record, including the OIP, the allegations of which may be considered true, and the evidence submitted by the Division in its motion for sanctions, and on the record in the criminal proceeding *United States v. Smith*, 2:14-cr-76 (E.D. Tenn.), of which I take official notice. 17 C.F.R. §§ 201.155(a), .323.

On January 28, 2015, Smith pleaded guilty to one count of conspiracy to commit wire fraud and mail fraud in violation of 18 U.S.C. §§ 1349, 1341, and 1343 in the United States District Court for the Eastern District of Tennessee. As part of his guilty plea, Smith signed a written plea agreement stipulating to the following conduct, which formed the factual basis for the guilty plea. *See* Mot., Ex. 1.

In late 2010 and early 2011, co-defendant Brian C. Rose established New Century Coal, a company ostensibly investing in the development of "Blue Gem" coal. Mot., Ex. 1, at 2. Smith worked with Rose and others to market to investors shares of limited liability partnerships issued by New Century Coal. *Id.* Smith and others prepared and distributed private placement memoranda, investor suitability questionnaires, mining development agreements and operating contracts, and subscription agreements. *Id.* at 3. These documents purported to disclose risks and provide assurance to investors that an ownership interest in a viable coal mine had been conveyed to the investor. *Id.* The documents were fraudulent. New Century Coal never produced or sold any coal and never made any legitimate return on investment to investors. *Id.* The sole purpose of New Century Coal was to defraud investors, and Smith was aware of this. *Id.* From January 2011 through June 2014, New Century Coal fraudulently received more than $15 million from more than 160 investors. *Id.* at 2-3.

Smith made numerous false statements to investors and potential investors during the course of the conspiracy. These misrepresentations include false information about New Century Coal's business history and alleged exploration, development, and production of coal; false promises of dividend payments and high returns on investment; false promises that investor funds would be used to fund coal production operations; false statements that New Century Coal would provide quarterly operating and production reports and maintain separate capital accounts for each investor; false explanations for production delays; and false invoices and expense reports fabricated to create the illusion that New Century Coal was engaged in the exploration, development, and production of coal. *Id.* at 4-5. In one instance, to convince a potential investor that New Century Coal was a successful and worthwhile investment, Smith posed as a satisfied New Century Coal investor. *Id.* at 4. This potential investor was actually an undercover United States Secret Service agent. *Id.* at 3. Smith admitted that he and his codefendants agreed to commit wire fraud and mail fraud on investors in New Century Coal and that he joined the scheme knowing this was its purpose. *Id.* at 5.

Smith was indicted along with eleven codefendants. He pleaded guilty on January 28, 2015. On January 28, 2016, Smith was sentenced to a term of imprisonment of twenty-seven months followed by three years of supervised release. Mot., Ex. 2 at 2-3. He was also ordered to pay, jointly and severally with his codefendants, $14,092,205.04 in restitution. *Id.* at 8; Order Amending Judgment, *United States v. Smith*, No. 2:14-cr-76 (E.D. Tenn. June 22, 2016), ECF No. 605.

The Division attached to its motion a spreadsheet listing compensation paid by New Century Coal to third parties and employees involved in sales of the mine partnership interests between 2009 and March 2014. Mot., Ex. 6. According to this document, which New Century Coal produced to the Division, Smith received $36,845 in "sales compensation" and $28,180 in salary during that period. *Id.*

CONCLUSIONS OF LAW

Under Section 15(b) of the Exchange Act, the Commission is empowered to bar any person who was acting as a broker or dealer from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization or from participating in an offering of penny stock, if such a bar is in the public interest and the person has been convicted of one of certain specified offenses, including mail and wire fraud. 15 U.S.C. § 78o(b)(6)(A). As set forth below, I conclude that Smith acted as a broker or dealer, was convicted of a felony involving mail and wire fraud, and collateral and penny stock bars are appropriate and in the public interest.

Smith Acted as a Broker

Under the Exchange Act, a "broker" is "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). The limited partnership interests issued by New Century Coal were securities because they were "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

The Commission and courts have employed a variety of factors to determine whether someone meets the definition of "broker." These factors include "regular participation in securities transactions, employment with the issuer of the securities, payment by commission as opposed to salary, history of selling the securities of other issuers, involvement in advice to investors and active recruitment of investors." *SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *see also, e.g.*, *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 SEC LEXIS 481, at *14 (Feb. 15, 2017) (noting that commissions are a particular hallmark of being a broker-dealer).

Nearly all of these factors support the conclusion that Smith acted as a broker. Smith regularly participated in securities transactions. The New Century Coal conspiracy lasted from 2011 to 2014, and his role in the scheme was soliciting investors in the limited partnership mine interests. Smith was an employee of issuer New Century Coal, from whom he received a salary, and he also received commissions in the form of "sales compensation." Mot., Ex. 6. Smith

actively recruited investors. According to the plea agreement, he "worked for New Century Coal as a fronter who directly contacted potential investors" and "solicited sales of shares in New Century Coal and its various coal mines." Mot., Ex. 1, at 3. He made numerous false statements to investors about New Century Coal's past performance and promised rate of return. *Id.* at 4. At least once, he "vouched for the success of the investment in New Century Coal." *Id.* The only factor that Smith does not satisfy is a history of selling the securities of other issuers. In light of the record and the plea agreement, I conclude that Smith was acting as an unregistered broker during his involvement in the New Century Coal conspiracy.

Smith Was Convicted of a Qualifying Offense

The Commission may impose a collateral bar on a person acting as a broker who has been convicted of a felony involving the violation of 18 U.S.C. §§ 1341 (mail fraud) or 1343 (wire fraud). 15 U.S.C. § 78o(b)(6)(A)(ii), (b)(4)(B)(iv); *see Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *2-3 & n.3 (Mar. 7, 2014). Smith's conviction of mail and wire fraud conspiracy is such an offense. Mot., Ex. 2. And Smith's date of conviction, January 28, 2016, was within ten years of the commencement of these proceedings. 15 U.S.C. § 78o(b)(6)(A)(ii); *see Joseph Contorinis*, Exchange Act Release No. 72031, 2014 SEC LEXIS 4627, at *10 (Apr. 25, 2014).

The Public Interest Factors Favor a Bar

To determine whether a sanction is in the public interest, the Commission applies the *Steadman* factors. These 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 conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *10-11 (Apr. 20, 2012). Consideration of whether sanctions are in the public interest is a flexible inquiry and no single factor is dispositive. *Vladimir Boris Bugarski*, 2012 SEC LEXIS 1267, at *11.

Smith's conduct was egregious. As a result of the New Century Coal conspiracy, over 160 investors were bilked out of more than $15 million. The entire operation was a fraud and the conspirators, including Smith, had no intention of returning any money to investors. The conduct was criminal, and Smith was sentenced to twenty-seven months' imprisonment.

The conduct was recurrent. The scheme ran for three-and-a-half years and involved many investors and potential investors.

Smith acted with a high degree of scienter. In the plea agreement, he admitted that he "knew the unlawful purpose of the fraud scheme and willfully joined the scheme." Mot., Ex. 1, at 5. Specifically, Smith knew that New Century Coal was fraudulent and never intended to produce coal or pay back its investors. *Id.* at 3.

Smith recognized the wrongful nature of his conduct. Smith accepted responsibility for his actions by pleading guilty and admitting to his wrongful conduct. The Division argues that

his guilty plea provides little evidence of a sincere recognition of his illegal conduct because it came after years of fraudulent conduct. Mot. at 10. I do not fully accept this argument. I acknowledge that Smith did not accept responsibility until after the scheme was uncovered by the authorities and that pleading guilty can reduce the criminal penalties and be in a defendant's self-interest. Nevertheless, Smith's admission of guilt was voluntary and came with significant costs. The Division has not identified any specific evidence that shows a lack of sincerity. This factor does not weigh against Smith.

No information about Smith's past occupation or plans for the future has been brought to my attention. And Smith did not participate in this proceeding to offer any assurances that he will not engage in future violations. I place no weight on these factors.

Considering the factors as a whole, I find that collateral and penny stock bars are in the public interest. Most factors weigh strongly in favor of the bar. I give particular weight to the egregiousness and recurrence of the conduct, the harm done to investors, and Smith's scienter. Based on Smith's past conduct, the risk of future violations is high. *See Aaron v. SEC*, 446 U.S. 680, 701 (1980) (noting that "the degree of intentional wrongdoing evident in a defendant's past conduct" is an "important factor" in evaluating the likelihood of future violations); *John W. Lawton*, Investment Advisers Act of 1940 Release No. 3513, 2012 SEC LEXIS 3855, at *34 (Dec. 13, 2012) ("We consider the nature of the respondent's past violative conduct—e.g., its egregiousness, recurrence, and scienter—not to evaluate whether such conduct merits punishment but rather to evaluate the risk of future harm to the public and remedies that will protect investors and the markets from such future harm."). While Smith accepted responsibility by pleading guilty in his criminal case, this does not overcome the other factors.

ORDER

Pursuant to Rule 155 of the Commission's Rules of Practice, I GRANT the Division's motion for default and sanctions. 17 C.F.R. § 201.155(a).

Pursuant to Section 15(b) of the Securities Exchange Act of 1934, I ORDER that Jason B. Smith is BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The initial decision will not become final until the Commission enters an order of finality. The Commission

will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

Smith may move to set aside the default in this case. Rule of Practice 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

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Brenda P. Murray
Chief Administrative Law Judge