

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

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In the Matter of :  
: INITIAL DECISION  
JILAINÉ H. BAUER, ESQ. : April 16, 2013

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APPEARANCES: Thomas J. Karr, Donna S. McCaffrey, Karen J. Shimp, and  
John P. Tavana for the Office of the General Counsel,  
Securities and Exchange Commission

Stephen J. Crimmins of K&L Gates LLP and Mark A. Cameli and  
Ryan S. Stippich of Reinhart Boerner Van Deuren s.c. for  
Respondent Jilaine H. Bauer, Esq.

BEFORE: Carol Fox Foelak, Administrative Law Judge

## SUMMARY

This Initial Decision lifts the temporary suspension of Jilaine H. Bauer, Esq. (Bauer), from appearing or practicing before the Securities and Exchange Commission (Commission).

### I. BACKGROUND

#### A. Procedural Background

The Commission issued its Order Instituting Proceedings (OIP) against Bauer on September 12, 2012, pursuant to 17 C.F.R. § 201.102(e)(3) and temporarily suspended her from appearing or practicing before the Commission. Bauer filed a petition, pursuant to 17 C.F.R. § 201.102(e)(3)(ii), seeking to lift the temporary suspension. The Commission denied her petition and ordered a hearing in its Order Denying Motion to Lift Temporary Suspension and Directing Hearing on November 13, 2012. Pursuant to leave granted at the December 4, 2012, prehearing conference, pursuant to 17 C.F.R. § 201.250, the Office of the General Counsel (GC) filed a Motion for Summary Disposition on February 11, 2013, Bauer filed an opposition on March 5, 2013, and GC filed a reply on March 11, 2013.

This Initial Decision is based on the Motion for Summary Disposition, opposition, and reply, including those attachments admitted into evidence, infra. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts were decided in the civil

case against Bauer on which this proceeding is based. Any other facts in her pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

## **B. Allegations and Arguments of the Parties**

The OIP alleges that Bauer was adjudged to have violated the antifraud provisions of the federal securities laws, based on insider trading in the shares of the Short Duration High-Yield Municipal Fund of Heartland Group, Inc. GC urges that Bauer be disqualified from appearing or practicing before the Commission for a lengthy period. Bauer urges that the proceeding be dismissed.

## **C. Procedural Issues**

### **1. Exhibits Admitted into Evidence**

The following items, of which official notice is taken pursuant to 17 C.F.R. §§ 201.250(a), .323, which are also included in GC's Motion for Summary Disposition and Bauer's opposition, are admitted into evidence:<sup>1</sup>

March 31, 2011, Order Denying in Part and Granting in Part Defendant's Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Cross Motion for Summary Judgment in SEC v. Bauer, No. 2:03-cv-01427 (E.D. Wis.) (GC Ex. 1, Bauer Ex. C); and

May 25, 2011, Decision on Cross Motions for Summary Judgment on the Insider Trading Claim in SEC v. Bauer, No. 2:03-cv-01427 (E.D. Wis.) (GC Ex. 2, Bauer Ex. D); and

June 15, 2012, Decision and Order Denying Plaintiff United States Securities and Exchange Commission's Motion for Final Judgment of Permanent Injunction and Granting in Part Other Relief Against Defendant Jilaine H. Bauer in SEC v. Bauer, No. 2:03-cv-01427 (E.D. Wis.) (GC Ex. 3, Bauer Ex. G).

### **2. Collateral Estoppel**

The Commission does not permit issues that were addressed in a previous civil proceeding against a respondent to be relitigated in an administrative proceeding against the same respondent. See James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713 & n.13; John Francis D'Acquisto, Advisers Act Release No. 1696 (Jan. 21, 1998), 53 S.E.C. 440, 444 & n.9; Demitrios Julius Shiva, Exchange Act Release No. 38389 (Mar. 12, 1997), 52 S.E.C. 1247, 1249 & nn.6-7. Nor does the pendency of an appeal preclude the Commission from

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<sup>1</sup> The parties attached many other exhibits to their pleadings, but this Initial Decision relies on these three exhibits.

action based on a court's finding that the respondent violated the securities laws. See Franklin, 91 SEC Docket at 2714 n.15.

### **3. Statute of Limitations**

Citing Gabelli v. SEC, 133 S. Ct. 1216 (2013), Bauer argues that the proceeding was not instituted within the five-year statute of limitations provided in 28 U.S.C. § 2462 because the conduct underlying the violation occurred in 2000. This argument fails. The predicate for this proceeding, pursuant to 17 C.F.R. § 201.102(e)(3), is the May 25, 2011, finding by the U.S. District Court for the Eastern District of Wisconsin that Bauer violated the securities laws.<sup>2</sup> While the five-year statute of limitations commences with the underlying wrongdoing for a proceeding brought pursuant to 17 C.F.R. § 201.102(e)(1)(ii), the Commission may choose to bring an action pursuant to 17 C.F.R. § 201.102(e)(3), as it did here, rather than 17 C.F.R. § 201.102(e)(1)(ii). Michael C. Pattison, CPA, Exchange Act Release No. 67900 (Sept. 20, 2012), 104 SEC Docket 58890, 58897-902.

Bauer also argues that this proceeding is time-barred because it was not brought within ninety days of the March 31, 2011, ruling<sup>3</sup> that Bauer violated the securities laws, quoting 17 C.F.R. § 201.102(e)(3): “No order of temporary suspension shall be entered by the Commission pursuant to paragraph (e)(3)(1) of this rule more than 90 days after the date on which the final judgment or order entered in a judicial or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) has become effective.” However, that provision continues: “whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.” Bauer’s appeal to the Court of Appeals for the Seventh Circuit is currently pending. SEC v. Bauer, No. 12-2860 (7th Cir. argued Feb. 12, 2013).

## **II. FINDINGS OF FACT**

Bauer has been found by the U.S. District Court for the Eastern District of Wisconsin in an action brought by the Commission to have violated the antifraud provisions of the federal securities laws, specifically Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. SEC v. Bauer, No. 2:03-cv-01427 (E.D. Wis. May 25, 2011).<sup>4</sup> Bauer’s wrongdoing consisted of insider trading in the shares of the

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<sup>2</sup> In Gabelli, the Court held that, for the Government in a civil penalty enforcement action, the five-year period commences when the fraud occurs, not when it is discovered. The Commission brought the case on which this proceeding is based, SEC v. Heartland Advisors, Inc., et al., No. 2:03-cv-01427, in 2003, within five years of wrongdoing that occurred in 2000.

<sup>3</sup> GC Ex. 2, Bauer Ex. C. This brief Order found, summarily, that Bauer “engaged in insider trading.” Id. The court’s thirty-nine page May 25, 2011, Decision contained findings of fact and concluded that Bauer violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. GC Ex. 3, Bauer Ex. D.

<sup>4</sup> As originally filed against ten defendants, including Bauer, the case was captioned SEC v. Heartland Advisors, Inc., et al.

Short Duration High-Yield Municipal Fund of Heartland Group, Inc. (HGI), a registered investment company. Id. During the relevant period, Bauer was a vice president of HGI and general counsel, chief compliance officer, secretary, and vice president of Heartland Advisors, Inc., a registered investment adviser and HGI's portfolio manager. Id. The court ordered disgorgement of \$20,033.25 plus prejudgment interest, representing losses avoided through the violative trading. SEC v. Bauer, No. 2:03-cv-01427 (E.D. Wis. June 15, 2012). The court declined to enjoin Bauer, citing factors set forth in SEC v. Holschuh, 694 F.2d 130, 144 (7th Cir. 1982). Id. The court also declined to award a civil penalty requested by the Commission, finding "Bauer has paid a high price for her conduct. Inasmuch as she has remained unemployed or underemployed, she has not been able to cover living expenses, including medical bills, and has been forced to draw from retirement to pay her defense costs amassing over the past nine years." Id. The court stated that it "[c]onsider[ed] the totality of the circumstances and [believed] that the litigation alone is an adequate deterrent in this case." Id.

### III. CONCLUSIONS OF LAW

Bauer has been "found by [a] court of competent jurisdiction in an action brought by the Commission to which . . . she is a party . . . to have violated [willfully] any provision of the Federal securities laws or of the rules and regulations thereunder" within the meaning of 17 C.F.R. § 201.102(e)(3)(i)(B).

### IV. SANCTION

GC urges that Bauer be disqualified from appearing or practicing before the Commission for a lengthy period. Bauer urges that the proceeding be dismissed. For the reasons set forth below, no further sanction will be ordered, and the temporary suspension will be lifted.

#### A. Sanction Considerations

The Commission determines sanctions in a proceeding pursuant to 17 C.F.R. § 201.102(e) according to the so-called Steadman factors,<sup>5</sup> and it also considers deterrence.<sup>6</sup> Steven Altman, Esq., Exchange Act Release No. 63306 (Nov. 10, 2010), 99 SEC Docket 34405, 34435, petition

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<sup>5</sup> The Steadman factors are:

the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)).

<sup>6</sup> Accord Pattison, 104 SEC Docket at 58903. Pattison was brought under 17 C.F.R. § 201.102(e)(3), while Altman was brought under 17 C.F.R. § 201.102(e)(1)(ii).

for review denied, 666 F.3d 1322 (D.C. Cir. 2011). In SEC v. Bauer, the court considered factors specified in Holschuh and deterrence. The Holschuh factors<sup>7</sup> are identical to the Steadman factors with this exception: the Steadman factors include “the egregiousness of the defendant’s actions,” which the Holschuh factors do not, instead including “the gravity of harm caused by the offense.” Thus, collateral estoppel does not apply to “the egregiousness” of Bauer’s actions, and the undersigned is not estopped from evaluating this factor. The Commission considers violations of the antifraud provisions to be particularly reprehensible. Marshall E. Melton, Advisers Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 709-10. Thus, Bauer’s conduct must be considered egregious and a sanction is appropriate in this proceeding despite the court’s rulings in SEC v. Bauer. The seven-month suspension that Bauer has already served is appropriate in the circumstances. Accordingly, the temporary suspension will be lifted.

## V. ORDER

IT IS ORDERED that the temporary suspension entered on September 12, 2012, of JILAINE H. BAUER, ESQ., from appearing or practicing before the Commission IS LIFTED.

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 Rules 102(e)(3)(iii) and 540 of the Commission’s Rules of Practice, 17 C.F.R. §§ 201.102(e)(3)(iii), .540, a party may file a petition for review of this Initial Decision within ten days after service of the Initial Decision. 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.

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Carol Fox Foelak  
Administrative Law Judge

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<sup>7</sup> The Holschuh factors are:

the totality of the circumstances surrounding the defendant and his violation, including such factors as the gravity of harm caused by the offense; the extent of the defendant’s participation and his degree of scienter; the isolated or recurrent nature of the infraction and the likelihood that the defendant’s customary business activities might again involve him in such transactions; the defendant’s recognition of his own culpability; and the sincerity of his assurances against future violations. [citations omitted].

Holschuh, 694 F.2d at 144 (citations omitted).