

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

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In the Matter of : INITIAL DECISION  
: February 27, 2015  
NICHOLAS ROWE :

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APPEARANCES: Marc J. Jones and Lawrence Pisto for the Division of Enforcement,  
Securities and Exchange Commission

Nicholas Rowe, pro se

BEFORE: Jason S. Patil, Administrative Law Judge

### Summary

This Initial Decision grants the Division of Enforcement's motion for summary disposition and permanently bars Respondent Nicholas Rowe from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (collectively, associational bar).<sup>1</sup>

### Procedural Background

On September 23, 2014, the Securities and Exchange Commission issued an Order Instituting Administrative Proceedings (OIP) against Rowe pursuant to Section 203(f) of the Investment Advisers Act of 1940. The OIP alleges that in March 2013, Rowe consented to an order issued by the New Hampshire Bureau of Securities Regulation, barring Rowe and his firm from securities licensure in New Hampshire. OIP at 2. Rowe was served with the OIP on September 27, 2014, as established by U.S. Postal Service confirmation of receipt. *See Nicholas Rowe*, Admin. Proc. Rulings Release No. 1899, 2014 SEC LEXIS 3795 (Oct. 8, 2014). He filed his Answer on November 10, 2014.

At a prehearing conference, attended by the Division and Rowe, I granted the Division leave to file a motion for summary disposition and a motion to amend the OIP. *See Nicholas Rowe*, Admin. Proc. Rulings Release No. 2018, 2014 SEC LEXIS 4314 (Nov. 13, 2014). On

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<sup>1</sup> The hearing tentatively set for April 6, 2015, is canceled.

December 9, 2014, I granted the Division's motion to amend the OIP. *See Nicholas Rowe*, Admin. Proc. Rulings Release No. 2111.

The Division timely filed its motion for summary disposition, along with a declaration and copy of the New Hampshire Bureau of Securities Regulation's Consent Order, *In the Matter of Nicholas Rowe*, COM 2011-0037 (Consent Order). Thereafter, Rowe filed his opposition to the Division's motion, with an attachment labeled "Exhibit A: Proofs That This Matter Cannot Be Handled Outside of a Hearing." The attachment contains no documentary evidence or affidavits in support.<sup>2</sup> The Division filed its reply with no further exhibits.

### Summary Disposition Standard

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by him, uncontested affidavits, or facts officially noticed pursuant to Rule of Practice 323. 17 C.F.R. § 201.250(a).

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. *See Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at \*40-41 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at \*19-20 & nn.21-24 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare."<sup>3</sup> *John S. Brownson*, Exchange Act Release No. 46161, 2002 SEC LEXIS 3414, at \*9 n.12 (July 3, 2002), *pet. denied*, 66 F. App'x 687 (9th Cir. 2003).

Here, the New Hampshire Bureau of Securities Regulation's Consent Order contains the agency's factual allegations, which Rowe did not admit or deny when he consented to that order. However, the Commission has held that: "For purposes of consent injunctions that are agreed to and entered by a court . . . , we will construe the 'neither admit nor deny' language as precluding a person who has consented to an injunction . . . from denying the factual allegations of the injunctive complaint in a follow-on proceeding before this agency." *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at \*28 (July 25, 2003); *see Nicholas*

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<sup>2</sup> Rowe was not only encouraged to file supporting evidence, but instructed that any evidence shall be filed in hard-copy paper format pursuant to the Rules of Practice. *See Nicholas Rowe*, 2014 SEC LEXIS 4314, at \*2-3; Prehr's Conference Tr. at 6-8.

<sup>3</sup> Contrary to Rowe's contention in his opposition, "it is well established that the Commission's summary disposition procedures satisfy the 'notice and opportunity for a hearing' requirement in the Commission's administrative proceedings." *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 SEC LEXIS 3451, at \*62 (Nov. 4, 2013); *see Kornman v. SEC*, 592 F.3d 173, 182-83 (D.C. Cir. 2010).

*S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 2270, at \*23-24, \*32-33 (June 26, 2014) (applying *Melton* to a consent order entered by a state securities commission).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Rule of Practice 323, including the Commission's official public records. *See* 17 C.F.R. § 201.323. Allegations of the OIP not denied in Rowe's Answer are deemed admitted. 17 C.F.R. § 201.220(c). Preponderance of the evidence has been applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). The parties' filings and all documents and exhibits of record have been fully reviewed and carefully considered. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

### **Findings of Fact**

1. Between 2001 and 2012, Rowe owned and operated an investment adviser, Focus Capital, Inc., a.k.a. Focus Capital Wealth Management, Inc.<sup>4</sup> He was identified on Focus Capital's Forms ADV during the period 2007-2012 as its president and chief executive officer. OIP at 1 (not denied in Rowe's Answer); Form ADV, Schedule A, Focus Capital Wealth Management, Inc., Aug. 6, 2012, *available at* <http://www.adviserinfo.sec.gov>.

2. On March 8, 2013, Rowe signed the Consent Order with the New Hampshire Bureau of Securities Regulation on behalf of himself and Focus Capital. Consent Order at 11. The Consent Order was based upon an offer of settlement by Rowe and Focus Capital that the Bureau decided to accept. *Id.* at 1.

3. On March 12, 2013, the Bureau entered the Consent Order against Rowe. Consent Order at 11; OIP at 2 (not denied in Rowe's Answer).

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<sup>4</sup>Answer, Ex. 1 at 4 (“[T]he State of NH took action to bar Nicholas Rowe and his firm Focus Capital, Inc. from working in the investment field.”) & 5 (Rowe “owned a firm, Focus Capital, Inc. from about 2001-2012.”). The Consent Order provided that:

Prior to June 25, 2012, Focus was a federally covered investment adviser that was required to be registered with the . . . Commission . . . and had been notice filed with the State of New Hampshire as required under RSA 421-B:7, 1-b. As of June 25, 2012, Focus became a state licensed investment adviser and was properly licensed with the State of New Hampshire. . . . As an investment adviser, Focus was engaged in the business of recommending, buying and selling securities for the accounts of others and rendering investment advice for compensation. . . . Rowe was an owner and an investment advisor representative for Focus.

Consent Order at 1; *see also id.* at 7; OIP at 1 (“Rowe was the owner of Focus Capital Wealth Management, Inc. . . . Focus Capital was registered as an independent investment adviser with the Commission from 2005 to 2012, at which point it registered with New Hampshire and withdrew its registration with the Commission.”) (not denied in Rowe's Answer).

4. The Consent Order bars Rowe from engaging in the business of securities in New Hampshire. Consent Order at 10 (“Respondents agree to be permanently barred from any security licensure in the State of NH.”) & 11 (“Respondents are barred from securities licensure in the State of NH.”); *see* N.H. Rev. Stat. Ann. § 421-B:6 (“It is unlawful for any person to transact business in this state as a broker-dealer, issuer-dealer, investment adviser, or agent unless such person is licensed under this chapter.”).

5. The Consent Order is based on Rowe’s violations of New Hampshire laws prohibiting fraudulent, manipulative, or deceptive conduct in the purchase and/or sale of securities. Consent Order at 7-8 (detailing violations of N.H. Rev. Stat. Ann. § 421-B:4, V(a) & (h), which prohibit investment advisers from engaging in unethical business practices, including the recommendation of unsuitable investments and misrepresentations to advisory clients) & 9 (“Respondents agree to cease and desist from any alleged violations of RSA 421-B:3 and 421-B:4.”). The relevant period of Rowe’s misconduct was from January 2007 to the entry of the Consent Order in 2013. *See id.* at 2.

6. By signing the Consent Order, Rowe agreed that he had “voluntarily consented to the entry of this Consent Order and represent[ed] and aver[red] that no employee or representative of the Bureau has made any promise, representation or threat to induce its execution.” Consent Order at 9.

7. Rowe agreed to “not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any allegation in this Consent Order or creating the impression that the Consent Order is without factual basis.” Consent Order at 10.

### **Conclusions of Law**

Advisers Act Section 203(f) authorizes the Commission to impose an associational bar against Rowe if: 1) at the time of the alleged misconduct, he was associated with an investment adviser; 2) he is subject to a final order of a state securities commission that either bars him from association with an entity regulated by such commission or constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct as specified in Advisers Act Section 203(e)(9); and 3) the sanction is in the public interest. 15 U.S.C. § 80b-3(e)(9), (f).

Regarding the first requirement, Rowe was associated with an investment adviser, Focus Capital, at the time of his misconduct. *See* Findings of Fact ¶¶ 1, 5, *supra*.

Regarding the second requirement, the Consent Order constitutes a final order. Consent Order at 9 (“Respondents agree to waive their right to an administrative hearing and any appeal therein under this chapter.”). The order is finalized for the purposes of this administrative proceeding, notwithstanding Rowe’s intention to seek judicial review of the order after his

bankruptcy case is resolved.<sup>5</sup> See *John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at \*7 n.9 (Jan. 21, 1998); cf. *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 n.6 (D.C. Cir. 1988) (“[T]he fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for purposes of subsequent litigation.”).

The Bureau is a “State securities commission (or agency or officer performing like functions)” within the meaning of Advisers Act Section 203(e)(9). 15 U.S.C. § 80b-3(e)(9); see N.H. Rev. Stat. Ann. §§ 421-B:21, I & I-a (granting secretary of state and designees various securities-related authorities and jurisdictions) & 421-B:10 (granting power to deny, suspend, or revoke securities licenses). Moreover, the Consent Order bars Rowe from the securities business in New Hampshire, and is based on violations of laws that prohibit fraudulent, manipulative, or deceptive conduct as specified in Advisers Act Section 203(e)(9). See Finding of Fact ¶¶ 4-5, *supra*. The legal violations on which the Consent Order is predicated include N.H. Rev. Stat. Ann. § 421-B:4, ¶ V(h), which prohibits:

Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser, investment adviser agent, or any employee of the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such services, or omitting to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

Consent Order at 7-8.

Although Rowe may put forward mitigating evidence concerning the circumstances surrounding his misconduct, he may not relitigate factual questions conclusively decided in the underlying proceeding, as he consented to the Consent Order and agreed not to deny, directly or indirectly, any allegation in the order or create the impression that the order was without factual basis.<sup>6</sup> See *Siris v. SEC*, 773 F.3d 89, 91, 95-96 (D.C. Cir. 2014); Consent Order at 10. Moreover, Rowe may not use this administrative proceeding to collaterally attack the underlying

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<sup>5</sup> If Rowe succeeds in overturning the Consent Order, he may request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending). See, e.g., *Jilaine H. Bauer, Esq.*, Securities Act Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013); *Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 SEC LEXIS 4020 (Dec. 18, 2012).

<sup>6</sup> Although the Consent Order did not affect Rowe’s “right to take contrary legal or factual positions in litigation or other proceedings in which the State of New Hampshire is not a party,” Consent Order at 10, Rowe’s right to take such positions does not affect the application of factual preclusion where he unambiguously agreed not to deny the Consent Order’s allegations. See *Siris*, 773 F.3d at 96 (“[T]he Commission’s application of factual preclusion in the follow-on proceeding was appropriate because the judgment unambiguously barred [the respondent] from making any future challenge to the allegations[.]”).

proceeding or raise issues that could have been raised in that proceeding but were not. *See Blinder, Robinson & Co.*, 837 F.2d at 1108-09; *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at \*11 (Oct. 12, 2007), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 SEC LEXIS 3423, at \*10-11 (Aug. 23, 2002).

Rowe attempts to deny and deflect the findings of the Bureau and the terms of the Consent Order. *See generally* Answer & Ex. 1; Rowe Opp. & Ex. A. Rowe asserts that: “All allegations in the consent order . . . are denied by Mr. Rowe.” Answer at 2. Rowe continues that he “did not consent to the . . . Consent Order,” and that he “could not have consented because in any contract apparent consent may be vitiated because of mistake, fraud, innocent misrepresentation, duress, or undue influence. Mr. Rowe plans to ask the courts to vacate the consent decree after the conclusion of his bankruptcy cases.” *Id.* (emphasis omitted). The thrust of Rowe’s defense is that he is the victim of a corrupt state government and clients who supposedly perjured themselves to inculcate him. *See, e.g.*, Rowe Opp., Ex. A at 13.

While Rowe attempts to revisit the circumstances that led to the Consent Order, at no time does he deny that he is subject to it. Nor does he deny that the Consent Order bars him from participation in the securities industry in New Hampshire. Accordingly, there is no genuine issue with regard to any material fact and summary disposition is appropriate. *See* 17 C.F.R. § 201.250(b). A sanction will be imposed if it is in the public interest.

### Sanctions

The appropriateness of any remedial sanction in this proceeding is guided by the *Steadman* factors: 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); *see Gary M. Kornman*, 2009 SEC LEXIS 367, at \*22. The Commission’s inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. *Gary M. Kornman*, 2009 SEC LEXIS 367, at \*22. The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at \*35-36 (Jan. 31, 2006); *Marshall E. Melton*, 2003 SEC LEXIS 1767, at \*4-5.

After analyzing the public interest factors in light of the protective interests served, I have determined that it is appropriate and in the public interest to bar Rowe from participation in the securities industry to the fullest extent possible. *See Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at \*7-8 (Mar. 7, 2014).

1. *The egregious and recurrent nature of Rowe's misconduct*

Rowe's actions were egregious. While Rowe professed to his clients that "he was engaging in a legitimate and complicated trading strategy," he "was essentially placing large, short-term and very speculative directional bets on the stock market" for clients whose risk tolerance was far less than would be appropriate for this highly speculative trading strategy. Consent Order at 3. The Consent Order details eleven different investors for whom Rowe made unsuitable investments, completely ignoring his customers' risk tolerances and investment horizons. *See id.* at 3-7. For example, Rowe failed to disclose the risks of his "strategy" to two elderly widows who lost more than \$900,000 combined, *see id.* at 3-4, among various other clients. Rowe is largely responsible for more than \$2 million in clients' investment losses. *Id.* at 3-7. He also failed to disclose that he was assessing fees across clients' entire accounts, including funds invested in money markets. *Id.* at 4-7.

2. *Scienter*

Rowe was at all times fully aware that he was perpetuating a fraudulent and deceptive scheme, which he achieved through misrepresentations to his investment clients. The Consent Order, as noted above, is predicated in pertinent part on Rowe's violations of state law prohibiting such misrepresentations. Consent Order at 7-8 (citing N.H. Rev. Stat. Ann. § 421-B:4, ¶ V(h)). Rowe induced one of his victims—an elderly widow who lost almost \$800,000—to invest money with him by boasting, dishonestly, that "he was the number one financial adviser in New Hampshire." Consent Order at 3.

Rowe told at least five clients that he had to charge them a heightened fee so he could pay an unnamed "Wall Street" trader for "trading signals." Consent Order at 3-6. When one client "questioned Rowe further about the identity of the Wall Street trader, Rowe explained he couldn't reveal the name as he had signed a confidentiality agreement with the Wall Street trader and revealing the name could be harmful to other Focus clients." *Id.* at 5.

Although Rowe asserts that his "strategy" was sound (despite crippling investor losses), at the core, while intentionally disregarding his clients' risk tolerance, he knowingly gambled on risky investments, while charging them heightened, undisclosed fees. In summary, Rowe's misconduct undoubtedly evidences scienter—"a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (internal quotation marks omitted).

3. *Lack of assurances against future violations and recognition of the wrongful nature of his conduct*

Although "[c]ourts have held the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it will be repeated.'" *Tzernach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at \*23 n.50 (July 26, 2013) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)) (alteration in internal quotation omitted). Rowe does little to rebut that inference.

Rowe has neither recognized the wrongfulness of his conduct nor provided assurances against future violations. He continues to deny all responsibility for his actions. Answer at 2 (“All allegations in the consent order . . . are denied by Mr. Rowe.”); Rowe Opp., Ex. A at 15 (“Mr. Rowe did not engage in the conduct alleged in the Consent Order.”). He also denies that the securities trading practices he engaged in were unsuitable for his investors. *See, e.g.*, Answer at 2 (claiming statistical research that shows that leveraged and inverse ETFs were less risky than the market as a whole); Rowe Opp., Ex. A at 4 (“The verifiable facts found in the (honorable) expert testimony on risk . . . show Mr. Rowe and his firm acted correctly and in his clients['] best interest.”).

Rowe places blame on everyone but himself. He repeatedly claims that his former clients are “perjurers and liars” and that the Bureau staff is “corrupt or inept.” *See, e.g.*, Answer at 2 (“The corrupt or inept representatives of the Bureau that dealt with Mr. Rowe made the mistake of believing the stories of perjurers and liars.”) (emphasis omitted) & 3 (stating that: the “corrupt or inept representatives of the Bureau” made it “clear he would not receive a fair hearing”; “If the SEC relies on the ‘Consent Order’ then the SEC joins the State of NH Bureau of Securities Regulation in its criminal misconduct, mistakes, use of duress or undue influence, and fraud”; “the morally weak and greedy complainants lied”; and “the claimants perjured themselves well over 100 times in the arbitration”); Answer, Ex. 1 at 4 (former clients were “flagrant liars”), 12 (claiming two of three FINRA arbitrators were “woefully incompetent”) & 18 (claiming Bureau’s expert lied under oath). In his opposition, he makes similar allegations, with no citation to documentary evidence or affidavits, against his former clients and state officials in an attempt to show that they are liars and corrupt. *See, e.g.*, Rowe Opp., Ex. A at 1-2, 4, 9-10, 18. Rowe makes it clear that he has no intention of recognizing the wrongfulness of his conduct or taking steps to prevent future violations. His accusations also compound the egregiousness of his conduct.

Thus, Rowe provides no assurances against future violations. To the contrary, he has expressed his desire to “ask the courts to vacate the consent decree.” Answer at 2. In combination, Rowe’s vehemence that his investment strategies were suitable and his desire to challenge his Consent Order indicate a high likelihood of future violations if Rowe is not permanently barred. *See Christopher A. Lowry*, Investment Company Act Release No. 2052, 2002 SEC LEXIS 2346, at \*19 (Aug. 30, 2002) (failure to make assurances against future violations and to recognize wrongdoing demonstrates the threat of future violations), *aff’d*, 340 F.3d 501 (8th Cir. 2003).

#### 4. *Opportunities for future violations*

Rowe’s conduct, as alleged in the Consent Order, was recurrent and would likely have continued if he had been left unchecked. For at least eleven investors, during the period 2007 through 2013, Rowe engaged in a continued course of highly speculative trading, ignoring his clients’ risk tolerances. *See* Consent Order at 2-7. Even today, he fails to recognize the unsuitability of his trading strategies (involving leveraged and inverse ETFs for his moderate risk tolerance clients) and claims that these strategies were less risky than the market as a whole. *See* Answer at 2; Rowe Opp., Ex. A at 15. As reflected above, he is adamant that he did nothing

wrong. In the absence of an associational bar, Rowe will have the interest and opportunity to resume his dangerous practices.

5. *Other considerations*

Associational bars have long been considered effective deterrence. *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 SEC LEXIS 4166, at \*81 & n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). In this case, such bar will provide such deterrence.

All of the foregoing supports the imposition of a strong sanction—the imposition of a permanent associational bar, including all collateral bars, against Rowe.

**Order**

It is ORDERED that, pursuant to Rule of Practice 250(b), the Division of Enforcement’s motion for summary disposition against Respondent Nicholas Rowe is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Nicholas Rowe is permanently BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule of Practice 360. *See* 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 of Practice 111. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that 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 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 occurs, the Initial Decision shall not become final as to that party.

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Jason S. Patil  
Administrative Law Judge