

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

In the Matter of :
: INITIAL DECISION
JAMES A. RATHGEBER : May 30, 2014

APPEARANCES: Michelle L. Ramos and David Frohlich for the
Division of Enforcement, Securities and Exchange Commission

Respondent James A. Rathgeber, pro se

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars James A. Rathgeber (Rathgeber) from the securities industry. He was previously convicted of securities fraud and grand larceny under New York state law.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on January 27, 2014, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The undersigned granted the parties leave to file motions for summary disposition at a March 19, 2014, prehearing conference, pursuant to 17 C.F.R. § 201.250(a). James A. Rathgeber, Admin. Proc. Rulings Release No. 1315, 2014 SEC LEXIS 971 (A.L.J. Mar. 19, 2014). The Division of Enforcement (Division) filed a motion for summary disposition, Rathgeber filed an opposition (Opposition), and the Division filed a reply.

This Initial Decision is based on the pleadings and Rathgeber's Answer to the OIP and other filings. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Rathgeber was enjoined were decided against him in the criminal case on which this proceeding is based. Any other facts in his 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 Rathgeber was convicted of securities fraud and grand larceny under New York state law in People v. Rathgeber, No. 02394-2009 (N.Y. Sup. Ct. Dec. 2, 2011). The Division urges that he be barred from the securities industry. Rathgeber argues that he has paid a sufficient price for his wrongdoing and should not be sanctioned further.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the court's orders in People v. Rathgeber, as well as of the Commission's public official records.

2. Exhibits Admitted into Evidence

The following items included in the Division's Motion for Summary Disposition, at Exhibits 3, 4, 5, 6, and 7, are admitted as Division Exhibits 3, 4, 5, 6, and 7:

July 30, 2013, Certificate of Disposition Indictment No. 34161 in People v. Rathgeber (Div. Ex. 3);

December 2, 2011, transcript of sentencing hearing in People v. Rathgeber (Div. Ex. 4);

July 29, 2013, true copy of original of indictment in People v. Joseph Stevens & Company, Inc. (Div. Ex. 5);

August 1, 2011, Factual Allocution of James Rathgeber in People v. Rathgeber (Div. Ex. 6); and

August 1, 2011, transcript of plea hearing in People v. Rathgeber (Div. Ex. 7).

3. Collateral Estoppel

Rathgeber states that he pleaded guilty to the charges against him to avoid the chance of being found guilty after a jury trial and incarcerated. Opposition at 3. However, it is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See Ira William Scott, 53 S.E.C. 862, 866 (1998); William F. Lincoln, 53 S.E.C. 452, 455-56 (1998).¹

¹ Similarly, the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by consent, by summary judgment, or after a trial. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2108 (injunction entered by consent); John Francis D'Acquisto, 53

II. FINDINGS OF FACT

Rathgeber was convicted on his plea of guilty of three counts of securities fraud in violation of New York General Business Law Section 352-c(5), of one count of grand larceny in the third degree in violation of New York Penal Law Section 155.35, and two counts of grand larceny in the second degree in violation of New York Penal Law Section 155.40(1). Div. Ex. 3 at 1. He was sentenced to five years of probation and ordered to pay approximately \$280,000 in restitution. Id. At the time of his wrongdoing, Rathgeber was associated with Joseph Stevens & Company (Joseph Stevens), a registered broker-dealer, where he worked as a stockbroker from 1994 until 2008. Div. Ex. 6 at 1.

At Joseph Stevens, Rathgeber was aware of and participated in firm-wide scheme to generate excessive and undisclosed commissions in stocks. Id. He used such means as false and fraudulent pretenses, representations, and promises while engaged in inducing and promoting the issuance, distribution, exchange, sale, negotiation, and purchase of securities. Id. In his allocution, Rathgeber provided details as to the manner in which he stole over \$400,000 from twenty customers. Div. Ex. 6 at 1-4. The crimes were ongoing for years. Div. Ex. 4 at 19, Div. Ex. 6 at 1-4. Rathgeber was not a major player who brought the world's financial markets to their knees and only pleaded guilty because of the advice of his attorney and his desire to avoid being incarcerated after a frightening two days in jail. Answer at 1-2, Opposition at 2. However, Rathgeber's wrongdoing was intentional, and he knew it was wrong at the time. Div. Ex. 4 at 21, Div. Ex. 6 at 1-4. Rathgeber confirmed all trades with others at his firm, including the compliance department. Answer at 1-2, Opposition at 2. However, he was among the more culpable of the stockbrokers with whom he was indicted in the Joseph Stevens case (Div. Ex. 5). Div. Ex. 4 at 19. He and his co-defendants caused millions of dollars in harm to customers. Id.

Several of Rathgeber's customers support him and are disappointed that he can no longer be their stockbroker. Answer at attachments. However, Rathgeber has no present intention of getting back into stocks, bonds, insurance, or any other area of the financial industry. Answer at 2. Rathgeber has been released from probation, has completed court-ordered community service, and has paid \$100,000 of the court-ordered restitution. Answer at 1, Opposition at 4.

III. CONCLUSIONS OF LAW

Rathgeber has been convicted, within ten years of the commencement of this proceeding, of a felony or misdemeanor that "involves the purchase or sale of any security" and "arises out of the conduct of the business of a broker [or] dealer" within the meaning of Sections 15(b)(4)(B)(i), (ii) and 15(b)(6)(A)(ii) of the Exchange Act.

S.E.C. 440, 444 n.1, 444 (1998) (injunction entered by summary judgment); James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713 (injunction entered after trial); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997) (injunction entered after trial). See also Marshall E. Melton, 56 S.E.C. 695, 697-700, 709-13 (2003).

IV. SANCTION

As the Division requests, a collateral bar will be ordered.²

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See 15 U.S.C. §§ 78o(b)(4),(6). The Commission considers factors including:

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)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46. The Commission considers fraud to be particularly serious. Marshall E. Melton, 56 S.E.C. at 710, 713. The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. See Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

B. Sanctions

Rathgeber's conduct was egregious and recurrent and involved a high degree of scienter. His recognition of the wrongful nature of his conduct is somewhat mitigated by his attempt to displace blame for his own actions onto others at his firm, as well as by his argument that he only pleaded guilty, on the advice of his lawyer, to avoid going to prison. His previous occupation, if

² The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became effective on July 22, 2010, provided collateral bars in each of the several statutes regulating different aspects of the securities industry. Rathgeber's conviction occurred after July 22, 2010. Additionally, to the extent that his underlying wrongdoing occurred before that date, the Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank Act wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. John W. Lawton, Investment Advisers of 1940 Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722; see also Alfred Clay Ludlum, III, Advisers Act Release No. 3628 (July 11, 2013), 2013 WL 3479060; Johnny Clifton, Securities Act of 1933 Release No. 9417 (July 12, 2013), 2013 WL 3487076; Tzemach David Netzer Korem, Exchange Act Release No. 70044 (July 26, 2013), 2013 WL 3864511.

he were allowed to continue it in the future, would present opportunities for future violations. Although he has no present intention to do so, absent a bar, Rathgeber could re-enter the financial industry. The violations are neither recent nor distant in time. The degree of harm to investors and the marketplace was in the millions of dollars. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). A bar is also necessary for the purpose of deterrence. Arthur Lipper Corp., 46 S.E.C. at 100. A conviction involving dishonesty requires a bar, and because of the Commission's obligation to ensure honest securities markets, an industry-wide bar is appropriate.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, JAMES A. RATHGEBER IS BARRED from associating with any 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.³

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 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 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.

Carol Fox Foelak
Administrative Law Judge

³ Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging 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, pursuant to Exchange Act Section 15(b)(6)(A), (C).