INITIAL DECISION RELEASE NO. 1052
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17115

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

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| In the Matter of | : | |
| | : | INITIAL DECISION |
| LOUIS V. SCHOOLER | : | August 23, 2016 |

APPEARANCES: Lynn M. Dean and Sara D. Kalin for the Division of Enforcement, Securities and Exchange Commission

Philip H. Dyson for Respondent Louis V. Schooler

BEFORE: Carol Fox Foelak, Administrative Law Judge

## SUMMARY

This Initial Decision bars Louis V. Schooler from the securities industry. He was previously enjoined against violations of the antifraud and registration provisions of the federal securities laws.

## I. INTRODUCTION

### A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on February 12, 2016, pursuant to Sections 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The proceeding is a follow-on proceeding based on *SEC v. Schooler*, No. 3:12-cv-2164 (S.D. Cal. Feb. 23, 2016), *appeal pending*, No. 16-55167 (9th Cir.), in which Schooler was enjoined against violations of the antifraud provisions of the Exchange Act and the Securities Act of 1933 (Securities Act) and against violations of the registration provisions of the Securities Act. In accordance with leave granted, pursuant to 17 C.F.R. § 201.250(a), the Division of Enforcement (Division) filed a motion for summary disposition; Schooler, an opposition; and the Division, a reply.

This Initial Decision is based on the pleadings and Schooler's February 22, 2016, Answer to the OIP. 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 Schooler was enjoined were decided against him in the civil 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 Schooler was enjoined against violations of the antifraud and registration provisions in *SEC v. Schooler*. The Division urges that he be barred from the securities industry. Schooler opposes this. He acknowledges that he was enjoined but otherwise challenges the Division's assertions that he engaged in the conduct underlying *SEC v. Schooler*. He references issues raised in his pending appeal to the Ninth Circuit, such as: whether the interests at issue were securities; improper calculation of disgorgement, such as failure to acknowledge legitimate business expenses and reliance on inaccurate appraisals; lack of scienter; and good-faith reliance on advice of counsel. Schooler argues that the District Court's rulings were grossly inconsistent with Ninth Circuit precedent. Referring to the District Court's order that he pay over $147 million in disgorgement and prejudgment interest, he opines that, given that this proceeding was brought after he filed his appeal from this "colossal judgment of disgorgement," the Division "is acting out of pure vengeance and spite, akin to not only killing a person, but kicking and mutilating the corpse."[1] Opp. at 6.

## 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 *SEC v. Schooler*, of the Commission's public official records, and of Financial Industry Regulatory Authority, Inc. (FINRA), records as well. *See Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. for review denied*, 575 F. App'x 1 (D.C. Cir. 2014).

### 2. Collateral Estoppel

It is well established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by summary judgment, as in *SEC v. Schooler*; by consent; or after a trial. *See John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at *1-2 & n.1, *7 (Jan. 21, 1998) (injunction entered by summary judgment); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *10 (Feb. 4, 2008) (injunction entered by consent), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 & nn.13-14 (Oct. 12, 2007) (injunction entered after trial), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Demitrios Julius Shiva*, 1997 SEC LEXIS 561, at *5-6 & nn.6-7 (Mar. 12, 1997); *see also Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *2-10, *22-30 (July 25, 2003).

[1] Whether Schooler is living and, if so, his whereabouts, are unknown. *See* Schooler's counsel's July 14, 2016, email (reporting his death); Division's August 11, 2016, Statement ("[T]here has been a report that Schooler's yacht ran aground on a reef in or around Tahiti, no remains were recovered, and no death certificate has been issued. At present the U.S. State Department considers Schooler to be missing rather than dead.").

Nor does the pendency of an appeal preclude the Commission from action based on an injunction. *See Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 SEC LEXIS 3423, at *10 n.21 (Aug. 23, 2002); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS 2334, at *11 (Sept. 17, 1992). If Schooler is successful in overturning his injunction, he can request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending).[2] Thus, in light of the present status of *SEC v. Schooler*, the arguments and allegations that he makes in his filings are subject to collateral estoppel.

In addition to arguments and defenses that are collaterally estopped, Schooler argues that the proceeding deprives him of his right to a jury trial. This argument fails. *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977) (upholding administrative adjudication of violations and of imposition of monetary penalties). Schooler also urges that the Commission's administrative proceedings are inherently unfair and contrary to due process in that the Division had years to prepare its case while he had a limited time to prepare his defense in light of the provisions of the Commission's rules, 17 C.F.R. § 201.360, requiring that the Initial Decision be issued within a short timeline. Schooler cites no authority to support this general argument.

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## II. FINDINGS OF FACT

Schooler was enjoined, after a series of summary judgment rulings, in *SEC v. Schooler*, from committing violations of Exchange Act Section 10(b) and Rule 10b-5 and of Securities Act Sections 5 and 17(a). *SEC v. Schooler*, ECF No. 1190. He was also ordered to pay disgorgement of $136,654,250 plus prejudgment interest of $10,956,030 for a total of $147,610,280 and to pay a civil penalty of $1,050,000. *Id*.

Schooler was the president and sole owner of, and controlled, First Financial Planning Corporation, d/b/a Western Financial Planning Corporation (Western) from 1978 through 2012. Answer at 2. From at least 2005 through May 2011, Schooler was the 50% indirect owner of WFP Securities Corporation (WFP), a registered broker-dealer and investment adviser. *Id*. WFB deregistered as a broker-dealer in May 2011, and its adviser registration was canceled in February 2013. *Id*.

[2] *See Jilaine H. Bauer, Esq.*, Securities Act Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, reversed and remanded district court's judgment that was basis for OIP); *Richard L. Goble*, Exchange Act Release No. 68651, 2013 SEC LEXIS 129 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that was basis for OIP); *Evelyn Litwok*, Advisers Act Release No. 3438, 2012 SEC LEXIS 2328 (July 25, 2012) (dismissing follow-on proceeding after court of appeals, while petition for review was pending before Commission, reversed certain convictions and vacated and remanded other convictions, all of which were basis for OIP); *Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 SEC LEXIS 4020 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals, after Commission had issued bar order, vacated criminal conviction that was basis for proceeding).

Facts underlying *SEC v. Schooler*, are set forth in the court's rulings on various motions for summary judgment,[3] ECF Nos. 583, 1074, and 1081, and are as follows: Schooler and Western solicited investors throughout the country for real estate investments structured as general partnerships (GP) units.[4] They solicited investors without regard to the investors' level of sophistication in business affairs or real estate investments. They engaged in cold-calling, hosted real estate investing workshops advertised through mass mailings to targeted zip codes, and met prospective investors through networking groups. Western's salespeople and marketing materials highlighted Schooler's expertise in real estate investing. At least two, but typically four, GPs would end up owning the undeveloped real estate that Schooler and Western selected and bought. Generally, each GP held an undivided fractional interest in a parcel. Schooler determined the number of GPs that would co-own a parcel, the price each GP would pay for its interest, and the price of GP units offered to the public. The sales prices were marked up by upwards of 500% over the price Western had paid for the parcels. The 500% markup was not disclosed to investors. A one to two-year period between initial offering and GP closing was typical. For example, the Night Hawk GP offering began in May 2008 and concluded in August 2009.[5] Investments in the four GPs for the Borda parcel were taken from March 2007 to November 2010.[6]

The court ruled that the GP units were securities. ECF No. 583 at 14-17, 20. The court found that Schooler and Western materially misrepresented the value of the property known as the Stead property and acted with scienter. ECF No. 1081 at 12-14, 17-18.

To the extent that Schooler is arguing in this proceeding contrary to the above findings of fact, again it must be stressed that he is collaterally estopped. His means of challenging the result is through an appeal to the Court of Appeals for the Ninth Circuit, which he is pursuing. *See Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 SEC LEXIS 3125, at *10-11 & n.19 (Dec. 2, 2005).

## III. CONCLUSIONS OF LAW

Schooler has been enjoined "from engaging in or continuing any conduct or practice in connection with . . . the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) of the Exchange Act and Sections 203(e)(4) and 203(f) of the Advisers Act.

## IV. SANCTION

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

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[3] Schooler argues that various issues, *e.g.*, scienter, were inappropriate for summary judgment. *See, e.g.*, Opp. at 5; Opp. Ex. A at 51-53, 55-56.

[4] The GPs were formed over the course of thirty-one years. ECF No. 1074 at 11.

[5] ECF No. 583 at 6.

[6] ECF No. 583 at 10.

## A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. §§ 78*o*(b)(6), 80b-3(f). 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*, 2003 SEC LEXIS 1767, at *5. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006). 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 Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

## B. Sanction

Schooler argues that no sanction should be imposed, pointing to arguments that he is pursuing before the court of appeals, noting a lack of any prior violations, and stating it is unlikely that his future occupation – if any, in light of his age – will present opportunities for future violations.

Schooler's lack of a disciplinary history is not mitigative and does not remove the need for sanctions. *Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 SEC LEXIS 1621, at *42 & n.39 (May 15, 2009) ("[T]he absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws.")

As described in the Findings of Fact, Schooler's conduct was egregious and recurrent, over a period of years, and involved some degree of scienter, as found by the court. His occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, he could resume engaging in the securities industry. The violations are neither recent nor distant in time. Consistent with a vigorous defense of the charges against him, Schooler has not recognized the wrongful nature of his conduct. Schooler argues that no investor lost money. Nonetheless, the more than $136 million in disgorgement that he was ordered to pay is a measure of the direct harm to the marketplace. 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*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24,

1975). An injunction involving dishonesty weighs in favor of a bar, and because of the Commission's obligation to ensure honest securities markets, an industry-wide bar is appropriate.

The Commission considers an antifraud injunction to be especially serious and to subject a respondent to the severest of sanctions. *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *29-30. Indeed, from 1995 to the present, there have been over thirty-five litigated follow-on proceedings based on antifraud injunctions in which the Commission issued opinions, and all of the respondents were barred[7] – thirty-four unqualified bars and three bars with the right to reapply after five years.[8] Further, in every such case that followed the statutory provision of collateral bars, the Commission imposed a collateral bar rather than an industry specific bar, reasoning that the antifraud provisions of the securities laws apply broadly to all securities-related professionals and violations demonstrate unfitness for future participation in the securities industry, even if the disqualifying conduct is not related to the professional capacity in which the respondent was acting when he or she engaged in the misconduct underlying the proceeding. *See John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *42-43 (Dec. 13, 2012), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 SEC LEXIS 1926 (May 27, 2016).

## V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, LOUIS V. SCHOOLER 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.[9]

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

[7] In the cases authorized before the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which authorized collateral bars, the Commission imposed industry-specific bars, such as a bar from association with an investment adviser on a respondent who had been associated with an investment adviser at the time of his violation.

[8] Those three were *Richard J. Puccio*, Exchange Act Release No. 37849, 1996 SEC LEXIS 2987 (Oct. 22, 1996), *Martin B. Sloate*, Exchange Act Release No. 38373, 1997 SEC LEXIS 524 (Mar. 7, 1997), and *Robert Radano*, Advisers Act Release No. 2750, 2008 SEC LEXIS 1504 (June 30, 2008). The Commission's opinions do not make clear the factors that distinguished these cases from those in which unqualified bars were imposed, but there is little difference between a "bar" and a "bar with the right to reapply in five years."

[9] Thus, Schooler 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).

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.

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Carol Fox Foelak
Administrative Law Judge