INITIAL DECISION RELEASE NO. 1404
ADMINISTRATIVE PROCEEDING
FILE NO. 3-19697

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

In the Matter of	:	
	:	INITIAL DECISION
RANDALL GOULDING, ESQ.	:	October 29, 2020

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

Eric W. Berry of Berry Law PLLC for Respondent Randall Goulding, Esq.

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision permanently disqualifies Randall Goulding, Esq., from appearing or practicing before the Securities and Exchange Commission as an attorney. Goulding was previously found to have violated, and was enjoined from violating, the antifraud provisions of the federal securities laws.

I. BACKGROUND

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on February 7, 2020, pursuant to 17 C.F.R. § 201.102(e)(3)(i)(A) and (B) (Rule 102(e)(3)(i)(A) and (B)). The proceeding is a follow-on proceeding based on *SEC v. Nutmeg Group*, No. 09-cv-1775 (N.D. Ill.), in which Goulding was enjoined from violating, and found to have violated, the antifraud provisions of the federal securities laws. The OIP temporarily suspended him from appearing or practicing before the Commission as an attorney. On March 23, 2020, Goulding filed a petition to lift the temporary suspension and to set the matter down for a hearing. On April 21, 2020, pursuant to Rule 102(e)(3)(iii), the Commission denied Goulding's request that his temporary suspension be lifted and ordered a hearing before an administrative law judge. As agreed to by the parties, the Office of the General Counsel (OGC) filed a motion for summary disposition, pursuant to Rule 250. OGC's motion for summary disposition, Goulding's opposition, and OGC's reply were filed on May 29, July 1, and July 20, 2020, respectively.

This Initial Decision is based on the motion for summary disposition, opposition, and reply. 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 Goulding on which this proceeding is based. 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 Goulding was adjudged to have violated, and was enjoined from violating, the antifraud provisions of the Investment Advisers Act of 1940, based on his conduct in operating an investment adviser. OGC urges that he be permanently disqualified from appearing or practicing before the Commission as an attorney. Goulding urges that OGC's motion be denied and that he is entitled to a hearing *de novo* before he can be disbarred from practice before the Commission.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. §§ 201.250(b), .323, is taken of the docket report and the court's orders in *SEC v. Nutmeg Group*, of the Commission's public official records contained in the EDGAR system, and other public official records.[1]

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, 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); *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); *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); *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 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). Nor does the pendency of Goulding's appeal in *SEC v. Nutmeg Group* preclude the Commission from action based on the court's finding that he violated the securities laws. *See Franklin*, 2007 SEC LEXIS 2420, at *11 n.15; *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 the Court of Appeals vacates the judgment on which this proceeding is based, the Commission will entertain an application to reconsider any sanction or dismiss the proceeding if it is still pending. *Evelyn Litwok*, Advisers

[1] The parties also included documents from the *SEC v. Nutmeg Group* docket and EDGAR in their pleadings. *See* Mot. for Sum. Disp., App'x, at Tabs 1-5; Opp., Ex. A.

Act Release No. 3438, 2012 SEC LEXIS 2328, at *3-4 (July 25, 2012); *C. R. Richmond & Co.*, Exchange Act Release No. 12535, 1976 SEC LEXIS 1468, at *46 n.11 (June 10, 1976).

3. Rule 102(e)(i)(3)(A) & (B)

This proceeding was instituted pursuant to Rule 102(e)(3), which provides procedures that may lead to sanctions – censure or temporary or permanent disqualification from appearing or practicing before the Commission – of an attorney who has been:

> (A) Permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating . . . any provision of the Federal securities laws or of the rules and regulations thereunder; or
>
> (B) Found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) . . . any provision of the Federal securities laws or of the rules and regulations thereunder.

17 C.F.R. § 201.102(e)(3)(i).

To some extent Goulding's arguments are directed at Rule 102(e)(1)(iii), which is inapplicable to this proceeding. Rule 102(e)(1)(iii) provides for sanctions against a "person who is found *by the Commission* . . . [t]o have willfully violated . . . any provision of the Federal securities laws or the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(1)(iii) (emphasis added). This proceeding is based on actions by the U.S. District Court for the Northern District of Illinois.

Goulding also argues that the *Nutmeg* court's conclusion that his violations were either intentional or reckless does not amount to a holding that the violations were "willful." His interpretation does not accord with the long-standing definition of "willful" as it is used in the securities laws. *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Charles F. Kirby*, Securities Act Release No. 8174, 2003 SEC LEXIS 46, at *40 & n.61 (Jan. 9, 2003); *accord Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."). However, even assuming the court's judgment does not fulfill the elements of Rule 102(e)(3)(i)(B) ("unless the violation was found not to have been willful"), this argument is inapplicable to Rule 102(e)(3)(i)(A), which does not specify a willfulness element.

As to Rule 102(e)(3)(i)(A), Goulding argues that the "obey the law" injunction that the court entered against him does not specify the particular conduct that is prohibited and is thus defective. The Rule does not, however, specify any particular wording required in a respondent's injunction "by reason or his or her misconduct in an action brought by the Commission, from violating . . . any provision of the Federal securities laws or of the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(3)(i)(A). Further, as discussed above, this is not the appropriate forum to challenge the injunction itself as defective. *See John Gardner Black*,

Exchange Act Release No. 70318, 2013 SEC LEXIS 2604, at *14-17 (Sept. 4, 2013) (denying motion to set aside administrative bar based on, among other arguments, the contention that the underlying injunction was impermissibly vague).

4. Preponderance of the Evidence

Goulding argues that the court's findings, based on preponderance of the evidence, should not be given preclusive effect because a clear and convincing standard is appropriate. However, the Commission uniformly applies a preponderance of the evidence standard in its administrative proceedings because that is what the Administrative Procedure Act requires. *See Steadman v. SEC*, 450 U.S. 91, 95-102 (1981) (upholding the Commission's use of preponderance of the evidence in administrative proceedings rather than clear and convincing based on the language of 5 U.S.C. § 556(d)). As Goulding recognizes, the Commission articulated this as to proceedings against attorneys in *William R. Carter*, Exchange Act Release No. 17597, 1981 SEC LEXIS 1940, at *3 n.3 (Feb. 28, 1981), and has not deviated from the use of the preponderance of the evidence standard in Rule 102(e) proceedings against attorneys.

II. FINDINGS OF FACT

Goulding was found to have violated, and enjoined against violating, by a court of competent jurisdiction, Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder; the court also ordered him to disgorge $642,422 of ill-gotten gains plus prejudgment interest of $583,230 and to pay a civil penalty of $642,422. *SEC v. The Nutmeg Group*, No. 09-cv-01775 (N.D. Il.), ECF Nos. 1094 (Final Judgment) (Nov. 12, 2019); 1085 (Findings of Fact and Conclusions of Law) (Oct. 25, 2019).[2] His appeal is pending *sub nom. SEC v. Goulding*, No. 20-1689 (7th Cir.). Goulding is a currently a licensed attorney in good standing authorized to practice in Illinois, according to official records of the Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, of which official notice is taken, pursuant to 17 C.F.R. § 201.323.[3] Goulding has represented clients before the Commission as recently as 2019 as shown by filings in the Commission's EDGAR system and of which official notice is taken pursuant to 17 C.F.R. § 201.323.[4]

The following facts are established as found in the Findings of Fact and Conclusions of Law in *SEC v. The Nutmeg Group (Randall Goulding)*, ECF No. 1085:

Goulding co-founded Nutmeg in 2003 to make investments and provide investment advice to unregistered investment pools, and was its sole owner from 2006 to 2009. The advisory clients ("Funds") were organized as limited partnerships with Nutmeg as the general partner. The limited

[2] ECF Nos. 1085 and 1094 are attached to the motion for summary disposition at Tabs 3 and 4.

[3] *See* Lawyer Search, https://www.iardc.org/lawyersearch.asp (search last name "Goulding" and first name "Randall) (last visited Oct. 29, 2020).

[4] Opinion letters and other correspondence of Goulding included in such filings are attached to the motion for summary disposition at Tab 5.

partners were the 328 investors in the Funds. The Funds acquired securities in numerous small companies via private investments in public equity (PIPE) transactions. In a PIPE transaction a public company sells a security directly to a private investor, rather than through a public offering. The shares are sold at a discount to the current market price and are restricted for a period of time. The Funds mostly acquired convertible notes and warrants. Goulding oversaw all of Nutmeg's operations, including approving its expenses and payments to himself. He prepared the Funds' offering documents, made investment decisions for them, valued them, and approved the transfer of moneys and payment of expenses. Goulding was responsible for the books and records of Nutmeg and the Funds. Goulding's law firm provided legal services to Nutmeg and the Funds, which were its only clients. Initially Goulding was Nutmeg's Chief Compliance Officer; later he tasked two sons, who had no relevant experience, with valuing the Funds' investments and designated one of them to replace himself as CCO. Goulding hired a third son to be Nutmeg's outside accountant.

The Funds paid Nutmeg administrative or management fees and performance fees. Although Goulding made all investment decisions, he structured the securities transactions through other persons, categorized as "Relief Defendants" in *SEC v. The Nutmeg Group*, who were family and friends or companies owned by them. The Relief Defendants held title to the securities purchased with the Funds' moneys. When Relief Defendants owned by Goulding's sons sold securities, they received 3% of the sales proceeds, regardless of whether the sales were profitable; other Relief Defendants received 1% of their proceeds. Goulding commingled in the same bank accounts moneys belonging to himself, Nutmeg, and the Funds.[5]

As of the date that *SEC v. The Nutmeg Group* was filed, Nutmeg and the Funds had never been audited. Nutmeg did not have accounting records, such as ledgers, trial balances, and income and expense statements. Its records of investments on behalf of the Funds were incomplete, and there were errors in its valuation of the investments. The errors included recording incorrect stock prices, inflating the number of shares received, and overstating proceeds from the sale of shares; as a consequence, the Funds and their investors paid Nutmeg inflated management and performance fees. For example, the errors caused the value of the Mercury Fund's holdings in the first quarter of 2008 to be overstated by $485,000, or nearly 6%; and the Stealth Fund's holdings, by nearly $578,000, or 5.5%. Nutmeg provided Commission staff with documentation concerning the investments that differed from the information on Nutmeg's internal records and from information reported to investors for that quarter.

Goulding prepared and approved the offering materials provided to the Funds' potential investors. The offering materials claimed that Nutmeg purchased publicly traded stocks, directly from the issuers, at a discount. However, they did not disclose that the vast majority of the investments were in convertible notes and were very speculative investments, involving companies that were very risky and had going concern issues. Nor did the offering materials disclose Nutmeg's use of Goulding's affiliates, the Relief Defendants, to make investments for the Funds. Among the offering materials was the Nutmeg Overview, which touted Goulding's career with the Internal Revenue Service, his legal practice, and his charitable endeavors but omitted to

[5] The court led into its findings of the specific facts: "There is abundant evidence in the record that Randall used Nutmeg as his personal piggy bank." ECF No. 1085 at 36.

disclose that the IRS had imposed penalties on him for negligent preparation of tax returns, that he had been convicted of felonies, including fraud, or that his law license had been suspended for a time.

III. CONCLUSIONS OF LAW

Goulding has been "enjoined by [a] court of competent jurisdiction, by reason of his . . . misconduct in an action brought by the Commission, from violating . . . provision[s] of the Federal securities laws [and] of the rules and regulations thereunder" within the meaning of 17 C.F.R. § 201.102(e)(3)(i)(A) and "found by [a] court of competent jurisdiction in an action brought by the Commission to which he . . . is a party . . . to have violated [willfully] . . . provisions of the Federal securities laws [and] of the rules and regulations thereunder" within the meaning of 17 C.F.R. § 201.102(e)(3)(i)(B).

Specifically, the court concluded that Goulding violated Section 206(1) of the Advisers Act by "intentionally or recklessly" commingling the Funds' assets; transferring legal title to $4 million of the Funds' assets to the Relief Defendants, who were members of his family and friends; making undisclosed payments to the Relief Defendants for acting on his investment instructions; overstating the valuation of the Funds' assets; assessing fees payable by the Funds to Nutmeg based on the overstated valuations; misappropriating client and investor assets from Nutmeg's commingled bank accounts for his own benefit; and failing to disclose all of the foregoing. ECF No. 1085 at 49. He violated Advisers Act Sections 206(2) and 206(4) and Rule 206(4)-8 by failing to employ reasonable care in the valuation of Fund assets; assessing fees payable by the Funds to Nutmeg based on the overstated valuations; misappropriating client and investor assets from Nutmeg's commingled bank accounts for his own benefit; and failing to disclose the foregoing. *Id*.

IV. SANCTION

OGC urges that Goulding be permanently disqualified from appearing or practicing before the Commission. Goulding urges that OGC's motion be denied and that he is entitled to a hearing *de novo* before he can be disbarred from practice before the Commission. Since there is no genuine issue with regard to any fact that is material to this proceeding, for the reasons set forth below, Goulding will be permanently disqualified from appearing or practicing before the Commission.

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. *Steven Altman, Esq.*, Exchange Act Release No. 63306, 2010 SEC LEXIS 3762, at *67 (Nov. 10, 2010), *pet. denied*, 666 F.3d 1322 (D.C. Cir. 2011). 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)). 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 *4-5. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *See Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 SEC LEXIS 2973, at *30 (Sept. 20, 2012) (Rule 102(e)(3) proceeding); *Steven Altman, Esq.*, 2010 SEC LEXIS 3762, at *67 (Rule 102(e)(1) proceeding); *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35-36 & n.46 (Jan. 31, 2006).

In deciding to enjoin Goulding in *SEC v. The Nutmeg Group*, the court considered the so-called *Holschuh* factors.[6] The *Holschuh* factors[7] 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." However, the court did consider egregiousness in concluding that Goulding should be enjoined, stating that its conclusion "is based, *inter alia*, on Randall's complete failure to comply with the Advisers Act, his commingling of investor funds with his personal assets, his implementation of flawed internal systems and methods for valuing and reporting the value of assets under management, his inattention to internal controls, his transfers of millions of dollars out of the Funds to the Relief Defendants, and his failure to disclose any of this to investors." ECF No. 1085 at 51.

The Commission considers violations of the antifraud provisions to be particularly reprehensible. *See Chris G. Gunderson, Esq.*, Exchange Act Release No. 61234, 2009 SEC LEXIS 4322 at *21, *27-28 (Dec. 23, 2009) (permanently disqualifying, from appearing or practicing before the Commission, attorney who was permanently enjoined from violating the antifraud and registration provisions); *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *4-5.

B. Sanction

Permanent disqualification from appearing or practicing before the Commission is the appropriate sanction consistent with the gravity of Goulding's misconduct as found by the court and with Commission precedent in Rule 102(e) proceedings against attorneys. *See Steven Altman*,

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[6] The court cited to *SEC v. Yang*, 795 F.3d 674, 681 (7th Cir. 2015) (citing the *Holschuh* factors) and *SEC v. Holschuh*, 694 F.2d 130, 144-45 (7th Cir. 1982). ECF No. 1085 at 50-51.

[7] 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.

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

Esq., 2010 SEC LEXIS 3762, at *68-76; *Chris G. Gunderson, Esq.*, 2009 SEC LEXIS 4322, at *20-28.

As described in the Findings of Fact, Goulding's conduct was egregious and recurrent, over a period of several years. It involved at least a reckless degree of scienter, as indicated by the court's conclusion that he violated the antifraud provisions.[8] His occupation, which includes representing issuers before the Commission in recent years, if he were allowed to continue it, would present opportunities for future violations. Consistent with a vigorous defense of the charges against him he has not recognized the wrongful nature of his conduct or made assurances against further violations. The $642,422 in disgorgement and $642,422 civil penalty that he was ordered to pay indicate the degree of direct harm to the marketplace.[9] Permanent disqualification is also necessary for the purpose of deterrence.

V. ORDER

IT IS ORDERED that, pursuant to 17 C.F.R. § 201.102(e), RANDALL GOULDING, ESQ., IS DENIED PERMANENTLY the privilege of appearing or practicing before the Commission as an attorney.

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. 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(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). 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

[8] Scienter is required to establish violations of Advisers Act Section 206(1). *SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). It is "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *SEC v. Steadman*, 967 F.2d at 641. Recklessness can satisfy the scienter requirement. *See SEC v. Steadman*, 967 F.2d at 641-42; *David Disner*, Exchange Act Release No. 38234, 1997 SEC LEXIS 258, at *15 & n.20 (Feb. 4, 1997). Reckless conduct is "conduct which is 'highly unreasonable' and which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 47 (2d Cir. 1978) (quoting *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977)).

[9] In this connection, beyond the harm caused to particular investors by a respondent's conduct, the Commission considers 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).

undersigned's order resolving such motion to correct manifest error of fact.[10] 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.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

Served by email on both parties.

[10] Under Rule 540, "[a]ny person who seeks Commission review of an initial decision as to whether a temporary sanction shall be made permanent shall file a petition for review pursuant to 17 C.F.R. § 201.410, provided, however, that the petition must be filed within 10 days after service of the initial decision." 17 C.F.R. § 201.540(a). Rule 540 does not, however, eliminate the availability of a motion to correct under Rule 111. Also, Rule 410 separately provides that when a party files a motion to correct, "a party shall have 21 days from the date of the hearing officer's order resolving the motion to correct to file a petition for review." 17 C.F.R. § 201.410(b); *see also* Amendments to the Rules of Practice, 69 Fed. Reg. 13166, 13171 (Mar. 19, 2004) ("Rule 410(b) is amended to provide that the time to file a petition for review is stayed until 21 days after resolution of any motion to correct an initial decision filed before the hearing officer. While a motion to correct is pending, a party need not file a petition for review to preserve its appeal rights.").