

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75982 / September 24, 2015

Admin. Proc. File No. 3-16155

In the Matter of
NICHOLAS ROWE

ORDER DENYING MOTION FOR
SUMMARY AFFIRMANCE AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

Nicholas Rowe appeals from an initial decision in which an administrative law judge permanently barred him from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization pursuant to Section 203(f) of the Investment Advisers Act of 1940.¹ As explained below, we find that the existing record contains sufficient evidence to establish the threshold statutory prerequisites to institute a proceeding under Advisers Act Section 203(f), but does not contain enough evidence to allow us to determine what sanction is in the public interest. We therefore remand this matter to the law judge for further proceedings.

I. We instituted these proceedings against Rowe after he consented to an order issued by the New Hampshire Bureau of Securities Regulation that barred him from the securities industry and was based on alleged antifraud violations.

We instituted this follow-on proceeding pursuant to Advisers Act Section 203(f) on September 23, 2014, alleging in our order instituting proceedings (the "OIP") that Rowe had consented to an order issued on March 12, 2013 by the New Hampshire Bureau of Securities Regulation (the "Consent Order").² The Consent Order alleged that from January 1, 2007, to March 12, 2013, Rowe, an investment adviser representative, and Focus Capital Wealth Management, Inc., an investment adviser ("Focus"; together with Rowe, "Respondents"), engaged in highly risky trading strategies that were unsuitable for certain New Hampshire

¹ *Nicholas Rowe*, Initial Decision Release No. 746, 2015 WL 847167, at *8 (Feb. 27, 2015).

² *Nicholas Rowe*, COM20111-0037, Consent Order (State of N. H. Bureau of Sec. Reg., Dep't of State Mar. 12, 2013).

customers, thereby violating antifraud provisions of New Hampshire state securities laws.³ Specifically, the Consent Order alleged that "[a]lthough Rowe claimed he was engaging in a legitimate and complicated trading strategy, analysis of the NH Customers' accounts revealed that Rowe was essentially placing large, short-term and very speculative directional bets on the stock market while increasing the NH Customers' risk tolerances over time," "completely ignor[ing] the NH Customers' individual and specific risk tolerances." The Consent Order further alleged that Rowe failed to disclose the risks associated with the investments in question and failed to disclose the basis for the fees he charged. Rowe and Focus agreed to cease and desist from any alleged violations of 421-B:4,⁴ to pay a \$5,000 fine and a \$15,000 penalty, to pay restitution to certain customers, and to be permanently barred from any securities licensure in the state of New Hampshire.⁵ Respondents further agreed that they would not "take any action or make or permit to be made any public statement . . . denying, directly or indirectly, any allegation in this Consent Order or creating the impression that the Consent Order is without factual basis." But despite that general waiver, Respondents specifically retained the right "to take contrary legal or factual positions in litigation or other legal proceedings in which the State of New Hampshire is not a party."

After we instituted these proceedings, the Division of Enforcement moved for summary disposition. The law judge granted the Division's motion, finding that there was no genuine issue of material fact and that the Division was entitled to summary disposition as a matter of law.⁶

³ The Consent Order alleged that Capital and Rowe violated New Hampshire Revised Statutes Annotated Section 421-B:4, V, incorporating by reference Section 421-B:4, I, which together prohibit an investment adviser or investment adviser representative from employing any device, scheme, or artifice to defraud another person, or engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person. The Consent Order specifically alleged that Rowe violated Section 421-B:V(a), which prohibits recommending to clients the purchase of any security without reasonable grounds to believe the recommendation is suitable, and Section 421-B:V(h), which prohibits, among other things, misrepresenting to clients the fees to be charged for advisory services, or omitting to state a material fact necessary to make the statements regarding fees, in light of the circumstances under which they are made, not misleading. N.H. Rev. Stat. Ann. §§ 421-B:V(a), (h).

⁴ Rowe also agreed to cease and desist from any alleged violations of Section 421-B:3, another antifraud provision.

⁵ Respondents also agreed "to waive their right to an administrative hearing and any appeal therein."

⁶ See Rule of Practice 250(b), 17 C.F.R. § 201.250(b) (setting forth conditions under which summary disposition may be granted).

II. The statutory prerequisites for this proceeding exist.

Advisers Act Section 203(f), incorporating by reference Section 203(e)(9), authorizes the Commission to impose certain sanctions on a person who "is subject to any final order of a State securities commission (or any agency . . . performing like functions)" that "bars such person from engaging in the business of securities" or that is "based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct," and who, at the time of the alleged misconduct, was associated with an investment adviser.⁷ As discussed below, we find, as the law judge did, that there is no genuine issue of material fact that these statutory prerequisites for instituting an administrative proceeding are satisfied.

A. The Consent Order provided a valid basis for initiating a follow-on proceeding.

We find that the Consent Order is a final order for purposes of this proceeding. Although Section 203(e)(9) does not define the term "final order," we recently determined in the context of administrative proceedings under Section 15(b)(4)(H) of the Exchange Act, which uses identical language without defining the term "final order," that "final order" means "a written directive or declaratory statement issued by a state agency under statutory authority that provides for notice and opportunity for a hearing and constitutes a final disposition or action by the state agency."⁸ Under this definition, we find that the Consent Order is a "final order" under Section 203(e)(9) because it is a written directive issued by the New Hampshire Bureau of Securities Regulation⁹ that constitutes a final disposition of the securities law violations against Rowe,¹⁰ and the New Hampshire statutes authorizing such proceedings provided notice and the opportunity for a hearing.¹¹

⁷ 15 U.S.C. § 80b-3(f) (incorporating by reference 15 U.S.C. § 80b-3(e)(9)). Section 203(f) also authorizes sanctions against other types of respondents based on other actions, omissions, convictions, or injunctions; we note in the text only those applicable to Rowe.

⁸ See *Nicholas Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at *7 (June 26, 2014). See also *Disqualification of Felons and other "Bad Actors" from Rule 506 Offerings*, Securities Act Release No. 9414, 2013 WL 3817311, at *22-24 (July 10, 2013) (adopting similar definition of "final order" in Rule 501(g) of Regulation D, 17 C.F.R. § 230.501(g)).

⁹ See N.H. Rev. Stat. Ann. §§ 421-B:21, I & I-a (granting secretary of state and appointees various securities-related authorities and jurisdictions), 421-B:10 (granting secretary of state power to deny, suspend, or revoke securities licenses).

¹⁰ The disposition is final because Rowe explicitly waived his right to appeal. See *supra* note 5.

¹¹ See generally N.H. Rev. Stat. § 421-B:26-a (setting forth hearing procedures to be used in administrative proceedings brought pursuant to N.H. Rev. Stat. Ann., Title XXXVII, Chap. 421-B, Securities). See also N.H. Rev. Stat. § 421-B:26-aV(a) (providing that if the secretary of state issues an order granting any part of a staff petition for relief in an adjudicatory proceeding

(continued...)

We also find that the Consent Order bars Rowe from engaging in the business of securities in New Hampshire. In the Consent Order, Rowe agreed to be, and was, by the terms of the order, barred from securities licensure in New Hampshire. New Hampshire statutes make it unlawful for unlicensed persons to transact business in the state as a broker-dealer, issuer-dealer, investment adviser, or agent.¹² Because investment adviser representatives are required to be licensed as agents,¹³ unlicensed investment adviser representatives would also be barred from transacting business in New Hampshire. Thus, the bar that Rowe agreed to and that was imposed in the Consent Order bars him from engaging in the securities business in New Hampshire, and the Consent Order therefore satisfies the requirements of Section 203(e)(9)(A).

We further find that the Consent Order was based on violations of statutes that prohibit fraudulent, manipulative, or deceptive conduct.¹⁴ While Rowe denies that he committed such violations, the Consent Order is nonetheless "based on" such violations, and thus satisfies the requirements of Section 203(e)(9)(B).¹⁵

Rowe argues that the Consent Order is not valid because it was entered under duress.¹⁶ But this is not the forum in which to litigate that claim. We have no power to vacate the Consent Order ourselves. Any challenge to the Consent Order should be directed to whatever judicial or

(...continued)

brought pursuant to Title XXXVII, Ch. 421-B, "the respondent shall be informed, as part of the hearing notice, of the respondent's right to a hearing"). As noted above, *see supra* note 5, Rowe waived his right to a hearing.

¹² N.H. Rev. Stat. Ann. § 421-B:6.1.

¹³ *Id.*

¹⁴ *See supra* note 3.

¹⁵ While we find that the Consent Order satisfies the requirements of both Section 203(e)(9)(A) and Section 203(9)(B), either of those subsections, standing alone, would be sufficient basis for proceeding under Section 203(f).

¹⁶ In his brief on appeal, Rowe relies on what purports to be an affidavit signed by an attorney who represented Respondents in bankruptcy proceedings to support his argument that New Hampshire officials used duress to induce him to sign the Consent Order. Indeed, the affidavit, dated March 18, 2015, states that representatives of the New Hampshire Bureau of Securities Regulation used duress to this end. While this appeal was pending, however, our Office of the Secretary received an unsolicited submission dated June 26, 2015, apparently from the same attorney who signed the earlier affidavit, in which the attorney states that he "[does] not believe that [the New Hampshire officials] used any unethical tactics or unlawful means" to persuade Rowe to agree to the Consent Order, nor that they "exerted any undue influence" against Rowe. Since we do not address the question of duress, neither the affidavit nor the June 26, 2015 submission plays any role in our consideration of this matter.

other forum might have jurisdiction over such a claim.¹⁷ If the Consent Order were vacated following such a challenge on this or any other ground, Rowe could then file a motion in this proceeding to vacate or reconsider any order issued by us.¹⁸

Rowe also argues that the Consent Order is not final because he plans to appeal. But even if he had actually filed an appeal, a pending appeal "ordinarily does not detract from [a lower court order's] finality (and therefore its preclusive effect) for purposes of subsequent litigation."¹⁹ It thus does not remove the basis for this administrative proceeding, nor does it provide a reason to delay the proceeding.²⁰

B. Rowe was associated with an investment adviser at the time of the alleged misconduct.

Section 202(11) of the Advisers Act defines "investment adviser," in relevant part, as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."²¹ Section 202(17) defines "person associated with an investment adviser," in relevant part, as "any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser."²²

A Form ADV for Focus, filed with the Commission on August 6, 2012, indicates that Focus provided investment advisory services, including financial planning services and portfolio management, to between eleven and twenty-five clients during its most recently completed fiscal year, and that it was compensated for those services by a percentage of assets under

¹⁷ Cf. *James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *4 (Oct. 12, 2007) (finding that "the appropriate forum for Franklin's challenge to the validity of the injunction [entered by a federal district court] is through an appeal to the United States Court of Appeals").

¹⁸ See, e.g., *Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 WL 6608201, at *1 (Dec. 18, 2012) (granting motion to vacate bar where conviction that provided basis for bar order was reversed by court of appeals); *Jimmy Dale Swink, Jr.*, Exchange Act Release No. 36042, 1995 WL 467600, at *1 (Aug 1, 1995) (same). Rowe has stated that he plans to appeal, notwithstanding the waiver contained in the Consent Order. See *supra* note 5.

¹⁹ *Blinder Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 n.6 (D.C. Cir. 1988).

²⁰ See *Charles Philip Elliot*, Exchange Act Release No. 31202, 1992 WL 258850, at *3 & n.15 (Sept. 17, 1992) (finding no need to delay proceeding until outcome of respondent's appeal), *aff'd*, 36 F.3d 86 (11th Cir. 1994) (per curiam).

²¹ 15 U.S.C. § 80b-2(11).

²² *Id.* § 80b-2(17).

management, hourly charges, fixed fees, and performance-based fees.²³ The form, which was signed by Rowe as president of Focus, identified Rowe as a control person of Focus, and as Focus's president, chief executive officer, and chief compliance officer since January, 2001. Based on this evidence, we find that Rowe was associated with an investment adviser at the time of the alleged misconduct.

IV. The record does not contain enough evidence for a public interest determination.

The law judge determined that a collateral bar was in the public interest based on allegations of a state securities regulator that Rowe settled by way of a consent order. But as discussed below, we find that because Rowe's consent agreement reserved the right to deny the allegations of the state regulator's complaint in proceedings such as this one and Rowe has denied those allegations here, the public interest determination cannot be based solely on those contested allegations. And we find no other basis in the record on which to base such a determination.

In deciding whether to impose a sanction in the public interest under Section 203(f), we look to the factors set forth in *Steadman v. SEC*: "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 or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations."²⁴ We may also consider whether a sanction will have a deterrent effect.²⁵ The inquiry is flexible, and no single factor is dispositive.²⁶ We look to the entire record of the case, and to the particular circumstances, to determine whether a sanction is in the public interest.²⁷

²³ We take official notice of this Form ADV pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, which allows us to take official notice of, among other things, any matter in the public official records of the Commission. The Form is available at <http://www.adviserinfo.sec.gov>.

²⁴ *E.g.*, *Gary M. Kornman*, Securities Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009) (citing *Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).

²⁵ *Toby G. Scammell*, Investment Advisers Act Release No. 3961, 2014 WL 5493265, at *5 & n.35 (Oct. 19, 2014) (citing additional cases).

²⁶ *Id.* (citing *David Henry Disraeli*, Securities Exchange Act Release No. 57027, 2007 WL 448515, at *15 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam); *Kornman*, 2009 WL 367635, at *6 (same)).

²⁷ *Scammell*, 2014 WL 5493265, at *5 (quoting *Marshall E. Melton*, Investment Advisers Act Release No. 2151, 2003 WL 21729839, at *2 (July 25, 2003)).

When a respondent has consented to the entry of an injunction in an action brought by the Commission, and has agreed not to contest the allegations of the complaint in any later disciplinary proceeding brought by the Commission, we may rely on those allegations in making our public interest finding.²⁸ Here, however, Rowe's consent agreement specifically reserved his right "to take contrary legal or factual positions in litigation or other legal proceedings in which the State of New Hampshire is not a party." We find that this administrative proceeding is a "legal proceeding" within the meaning of the Consent Order and that the State of New Hampshire is not a party to this proceeding. Thus, the Consent Order did not prevent Rowe from denying the allegations of the Consent Order in this proceeding. In his Answer to the OIP, Rowe denied all of the allegations in the Consent Order. We therefore cannot take the allegations in the Consent Order as true in determining an appropriate sanction in the public interest, and the record does not contain enough additional evidence to allow us to make such a determination.

We therefore remand this matter to the law judge so that he may admit and consider additional evidence from any relevant source, subject to challenge by either party, and, based on such additional evidence, determine an appropriate sanction, if any.²⁹

Accordingly, it is ORDERED that the initial decision entered against Rowe be vacated; and it is further

ORDERED that this case be remanded to the administrative law judge for further proceedings consistent with this order.

By the Commission.

Brent J. Fields
Secretary

²⁸ See, e.g., *Siris v. SEC*, 773 F.3d 89, 96 (D.C. Cir. 2014) (holding that the Commission's reliance on the complaint "was appropriate because the [consent] judgment unambiguously barred [the respondent] from making any future challenge to the allegations in the complaint"); *Tzemach David Netzer Korem*, Exchange Act Release Number 70044, 2013 WL 3864511, at *2 & n.12, *5 n.43 (July 26, 2013).

²⁹ Given our holding, the Division's motion for summary affirmance is denied.