INITIAL DECISION RELEASE NO. 570
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15448

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

In the Matter of	:	INITIAL DECISION
	:	March 10, 2014
GARY A. COLLYARD	:	

APPEARANCES: Jonathan S. Polish and Thu B. Ta for the Division of Enforcement, Securities and Exchange Commission

Robert O. Knutson for Gary A. Collyard

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Procedural History

On September 3, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP), pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act), alleging that on February 27, 2012, Gary A. Collyard (Collyard) pled guilty to one count of conspiracy to commit securities fraud and one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371, in United States v. Collyard, No. 12-cr-58 (SRN) (D. Minn.) (Collyard). The OIP also alleges that the District Court sentenced Collyard to a 120-month prison term followed by three years of supervised release and ordered him to pay restitution of $5,672,944.44.[1] On August 13, 2013, the District Court forwarded Collyard's Notice of Appeal to the United States Court of Appeals for the Eighth Circuit.[2] Collyard, ECF No. 91.

At a prehearing conference on October 17, 2013, Collyard represented that he had been unable to communicate with his attorney. Tr. 14-15. I waived Collyard's obligation to file an Answer because he acknowledged his guilty plea and that the District Court entered a judgment in

[1] This is the restitution amount set forth in the original Judgment filed August 2, 2013, in Collyard. OIP at 2; Docket in Collyard, Electronic Case File (ECF) No. 85.

[2] If Collyard is successful in his appeal and the statutory basis for the sanction in this proceeding is no longer present, the remedy is to petition the Commission for reconsideration of this action. See Jon Edelman, 52 S.E.C. 789, 790 (1996).

Collyard as set forth in the OIP. Tr. 22-25; see Gary A. Collyard, Admin. Proc. Rulings Release No. 1027, 2013 SEC LEXIS 3501 (Nov. 7, 2013).

At the prehearing conference, I granted the Division of Enforcement (Division) leave to file a motion for summary disposition, and the Division filed its Motion for Summary Disposition (Motion), a Memorandum of Law in Support of its Motion (Memorandum), and a Declaration of Jonathan S. Polish in Support of its Motion (Polish Declaration) on November 15, 2013. Tr. 19, see 17 C.F.R. § 201.250. The following exhibits are attached to the Polish Declaration:

Exhibit A, the Amended Information in Collyard, filed February 27, 2012;

Exhibit B, the Plea Agreement in Collyard, filed April 19, 2013;

Exhibit C, the Memorandum Opinion and Order denying Collyard's motion to withdraw his guilty plea in Collyard, filed May 28, 2013;

Exhibit D, the transcript of the August 1, 2013, sentencing hearing in Collyard;

Exhibit E, the Amended Judgment in Collyard, filed August 12, 2013;

Exhibit F, the OIP;

Exhibit G, the October 17, 2013, prehearing conference transcript; and

Exhibit H, Gary A. Collyard, Admin. Proc. Rulings Release No. 1027, 2013 SEC LEXIS 3501 (Nov. 7, 2013).

Collyard's Response in Opposition to the Division's Motion (Opposition), filed January 15, 2014, includes Appendix A, the January 10, 2014 Affidavit of Robert O. Knutson in Opposition to Motion; and Appendix B, the August 6, 2012-dated Affidavit of Gary A. Collyard in Opposition to Plaintiff's Motion to Amend the Complaint in Collyard. The Division filed a Reply in Support of its Motion (Reply) on February 6, 2014.

Summary Disposition Standard

Under Commission Rule of Practice (Rule) 250(b), 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). I GRANT the Division's Motion because there are no material issues of fact in dispute. Collyard admits that the judgment was entered against him in the underlying criminal proceeding and he was sentenced to 120 months in prison and ordered to make restitution of over $5 million. Polish Declaration, Exhibit G at 22-24.

Findings of Fact

I admit into evidence the declarations, exhibits, and appendices that are part of the filings made by the parties, and take official notice of the public record in Collyard. See 17 C.F.R. § 201.323. I have considered the entire record and reject all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981).

In his Plea Agreement to a charge of conspiracy to commit securities fraud and a count of conspiracy to commit bank fraud, Collyard, who the Division alleges is in his early sixties, agreed the United States would prove, among other things, the following facts beyond a reasonable doubt, should the criminal matter go to trial:

> SECURITIES
>
> Beginning in at least January 2006, through December 2010, [Collyard], conspired with others, . . . did knowingly, willfully, and unlawfully conspire, by the use of means and instrumentalities of interstate commerce, directly and indirectly use and employ manipulative and deceptive devices and contrivances in connection with the sale of securities, and did make untrue statements of material facts and omitted to state material facts necessary in order to make the statements not misleading in connection with the sale of said securities, in violation of [18 U.S.C. § 371; 15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5].
>
> . . .
>
> [Collyard] was a "finder" for Bixby Energy Systems, Inc. . . .
>
> Collyard . . . knowingly and willfully caused unqualified investors to be solicited to invest in Bixby in violation of the federal securities laws. . . . To entice the investors, [Collyard] . . . made, and caused to be made, numerous material false statements, false representations, and omissions of material facts about Bixby's business project and prospects of conducting an initial public offering of Bixby shares.
>
> . . .
>
> [Collyard], . . . and others, affirmatively concealed, and did not disclose, (i) that Bixby was in dire financial condition, and (ii) a majority of the investor money was going to pay commissions, large salaries, travel and other fund raising expenses; and (iii) that investor money was being used to make payments to other investors.
>
> . . .

> [Collyard] agrees that he is responsible for approximately $3.0 million in losses to investors.
>
> BANK FRAUD
>
> Beginning in at least April 2005, through September 2011, [Collyard], conspiring with others, did knowingly, willfully, and unlawfully conspire, by devising a scheme and artifice to defraud multiple federally insured banks, to obtain money, funds and credits owned by and under the custody and control of those banks, by means of false and fraudulent pretenses, representations and promises, in violation of [18 U.S.C. §§ 371, 1344].
>
> . . .
>
> [Collyard] agrees that he is responsible for approximately $1.3 million in losses.

Polish Declaration, Exhibit B at 1-7 (formatting altered); see OIP at 1.

More than fifty persons were victims of Collyard's fraud; many wrote letters to the District Court, and four testified at the sentencing hearing on August 1, 2013. Polish Declaration, Exhibit D at 4, 7, 42-59. According to the Presentencing Report, Collyard lived in a home valued at over a million dollars and had several expensive cars. Id. at 41-42. At the sentencing hearing, Judge Susan Richard Nelson stated:

> You have engaged in a history of lying. Not only have you engaged in a history of lying, you don't ever take responsibility for your actions. You were convicted in 1998 for submitting false expense reports to the IRS during a civil audit. You've currently pled guilty to evading your tax responsibilities to the State of Minnesota. And as you heard from these victims – and I read in many, many more letters that I received – you are accused of lying and cheating for much of your life.
>
> . . .
>
> I have never, ever seen a criminal Defendant come up here at sentencing and fail to at least show some remorse or apologize in some fashion to the victims in the room, even if you believe, which I presume you still do, that you're somehow innocent of these charges. No acknowledgment of people's pain.
>
> That is a serious problem, because what that suggests is that you're not easily deterred. . . .
>
> I hope that this prison term is sufficient. It's the maximum I can give you. I'm not convinced that it is, because there is nothing either in your life that I've heard of or anything in this case, especially the way you've treated your victims here today, that suggests that you're going to be deterred at all.

Id. at 63-65. At the sentencing hearing, Judge Nelson refused Collyard's request for self-surrender. Id. at 72.

In an Amended Judgment filed August 12, 2013, based on Collyard's guilty pleas to conspiracy to commit securities fraud and conspiracy to commit bank fraud, Collyard was sentenced to a 120-month prison term followed by three years of supervised release and ordered to pay restitution of $5,383,014.44. Polish Declaration, Exhibit E. "The restitution breaks down as follows: $1,232,010 on the bank fraud, $4,440,784.44 on the Bixby securities fraud." Polish Declaration, Exhibit D at 62.

Arguments

The Division seeks a full industry bar against Collyard. Motion; Memorandum at 1, 9. The Division argues that this is in the public interest in light of Collyard's admitted conduct and his conviction in Collyard, contending that his conduct was egregious, recurrent, and committed knowingly, and that Collyard has failed to acknowledge his wrongdoing or express remorse for his misconduct. Memorandum at 5, 7-9.

In his Opposition, Collyard asserts that the requested sanction is inappropriate and not in the public interest because: (1) no factual hearing, determination, or finding was made that he committed a violation for which the requested sanction would apply or to support the Division's broad assertions; (2) he entered into the Plea Agreement without adequate legal representation and while in ill health;[3] and (3) "[i]t is not in the public interest to hinder or impede the activities of legitimate finders like" Collyard. Opposition at 1-4.

In reply, the Division: (1) reasserts that Collyard's Plea Agreement and conviction in Collyard are the basis for a bar in this proceeding; (2) argues that there is no meaningful distinction between a conviction as the result of a plea agreement and a conviction as the result of a trial on the merits; and (3) contends that it would be perverse for a person to avoid a bar in an administrative proceeding simply by pleading guilty in an underlying proceeding. Reply at 1-2.

Conclusions of Law

This proceeding was instituted pursuant to Section 15(b)(6) of the Exchange Act, which empowers the Commission, when it is in the public interest, to take certain actions where a person, has been convicted, within ten years of the OIP, of a felony that involves conspiracy involving the purchase or sale of any security, arises out of the conduct of a broker or dealer, the misappropriation of funds, or has willfully violated the Exchange Act. These situations apply to Collyard. Section 15(b)(6) also requires that at the time of the misconduct, the person was associated or seeking to become associated with a broker or dealer. Despite his protestations, in this administrative proceeding, Collyard in his Plea Agreement admitted that he "did knowingly,

[3] In a Memorandum and Order filed May 28, 2013, after an evidentiary hearing, the District Court rejected Collyard's arguments that he should be allowed to withdraw his guilty plea based on mental impairment. Polish Declaration, Exhibit C at 23, 26.

willfully, and unlawfully conspire, by the use of means and instrumentalities of interstate commerce, directly and indirectly use and employ manipulative and deceptive devices and contrivances in connection with the sale of securities," thus establishing that he acted as an unregistered broker or -dealer during the period of his misconduct.[4] Polish Declaration, Exhibit B at 2-5; OIP at 2; see Vladislav Steven Zubkis, 58 S.E.C. 1014, 1025 (2005) (it is well established that Exchange Act Section 15(b) applies to a natural person acting as a broker or dealer.)

Pursuant to Section 15(b)(6) of the Exchange Act, the Commission can censure, place limitations on the activities or functions of, suspend for a period not exceeding twelve months, or bar a person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization or from participating in an offering of penny stock. The generally accepted criteria for making a public interest determination are:

> [T]he 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), aff'd on other grounds, 450 U.S. 91 (1981). See Donald T. Sheldon, 51 S.E.C. 59, 86 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995); Joseph J. Barbato, Securities Act of 1933 Release No. 7638 (Feb. 10, 1999), 69 SEC Docket 178, 200 n.31.

Application of the Steadman factors shows overwhelmingly that Collyard should be barred from participating in the securities industry to the maximum extent possible. His conduct was egregious and recurrent; it involved two schemes, one by which he obtained funds from investors through misrepresentations for almost five years, and the other by which he unlawfully obtained business loans from federally insured banks through the provision of false information over a period of over six years. Polish Declaration, Ex. B at 1-7.

Collyard admitted in the Plea Agreement that he knowingly and willfully committed criminal actions. Id. at 2-3, 5. However, since at least August 2013, Collyard has asserted his innocence. Polish Declaration, Exs. C at 18, 23-24, D at 19. It follows that there is no admission of wrongdoing or assurance of future lawful conduct, and Collyard's continued participation in the securities industry will present opportunities for future wrongdoing.

[4] Collyard's collateral attacks and alleged improprieties as to the underlying criminal proceeding are beyond the scope of this administrative proceeding. See Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1108 (D.C. Cir. 1988); James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713-14, aff'd, 285 F. App'x 761 (D.C. Cir. 2008); Joseph P. Galluzzi, 55 S.E.C. 1110, 1115-16 (2002).

Collyard's incarceration should keep the public safe for a limited period of time, but there is nothing to ensure the public safety after his release from prison. Lastly, a sanction will further the Commission's interest in deterring others from engaging from similar misconduct.

For all these reasons, I find it is necessary and appropriate in the public interest to impose a full industry bar and other measures allowed by Section 15(b)(6) of the Exchange Act.

Order

I ORDER, pursuant to Section 15(b) of the Securities Exchange Act of 1934, that Gary A. Collyard is permanently BARRED from associating with a 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, including acting as any promoter, finder, consultant, agent, or other person who engages 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.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 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 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.

_____

Brenda P. Murray
Chief Administrative Law Judge