INITIAL DECISION RELEASE NO. 582
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15468

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

In the Matter of	:	INITIAL DECISION
	:	March 27, 2014
ERIC T. BURNS	:	

APPEARANCES: Thomas J. Krysa for the Division of Enforcement, Securities and Exchange Commission

Eric T. Burns, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

Summary

This Initial Decision grants the Division of Enforcement's (Division) Motion for Summary Disposition (Motion) and permanently bars Respondent Eric T. Burns (Burns) from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (collectively, collateral bar).

Procedural Background

On September 11, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP) against Burns, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that on January 17, 2013, Burns pled guilty in federal district court to five counts of wire fraud, in violation of 18 U.S.C. § 1343, in United States v. Burns, No. 12-cr-10184-EFM (D. Kan.) (Underlying Proceeding), and on May 31, 2013, Burns was sentenced to sixty-three months in prison followed by three years of supervised release and was ordered to make restitution of $2,246,870.[1] OIP at 2.

[1] The OIP in fact alleges that Burns pled guilty to "five counts of mail fraud in violation of Title 18 United States Code, Section 1343"; however, 18 U.S.C. § 1343 is the federal wire-fraud statute, and not the federal mail-fraud statute, and the judgment in the Underlying Proceeding reflects that Burns was convicted of five counts of wire fraud. Motion at 2 n.1 & Div. Ex. 1. Although Burns stipulated in his plea agreement that a maximum restitution of $2,246,870 could be imposed by the district court, Burns was ultimately ordered to make restitution of $2,003,930.28. Compare Div. Ex. 1 at 6 with Div. Ex. 2 at 1-2 and OIP at 2.

At a prehearing conference held on October 24, 2013, I deemed service of the OIP to have occurred on October 7, 2013. Tr. 7.[2] I also extended the deadline for Burns to file an answer to the OIP until November 4, 2013, and granted the parties leave to file motions for summary disposition pursuant to Commission Rule of Practice (Rule) 250. Tr. 9, 12-14. I ordered that motions for summary disposition were due by December 13, 2013, oppositions were due by January 10, 2014, and replies, if any, were due by January 17, 2014. Tr. 12-14; see Eric T. Burns, Admin. Proc. Rulings Release No. 994, 2013 SEC LEXIS 3362 (Oct. 25, 2013). On December 13, 2013, the Division filed its Motion, with supporting exhibits (Div. Exs. 1-5).[3] Burns did not file an answer or an opposition, and the Division did not file a reply.

Summary Disposition Standard

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.[4] 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323. 17 C.F.R. § 201.250(a).

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Gary M. Kornman, Exchange Act Release No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14262-63, pet. denied, 592 F.3d 173 (D.C. Cir. 2010); Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 & nn.21-24 (collecting cases), pet. denied, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), pet. denied, 66 F. App'x 687 (9th Cir. 2003).

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[2] Citation is to the prehearing transcript.

[3] Div. Ex. 1 is the June 7, 2013, judgment filed in the Underlying Proceeding; Div. Ex. 2 is the January 17, 2013, plea agreement filed in the Underlying Proceeding; Div. Ex. 3 is the Form ADV for Dimensions Financial Group, Inc. (IARD/CRD Number 107686), which is publicly available on the Commission's Investment Adviser Public Disclosure (IAPD) website at http://www.adviserinfo.sec.gov; Div. Ex. 4 is the Investment Adviser Representative Report Summary for Burns (CRD Number 2318367), which is publicly available on the Commission's IAPD website; Div. Ex. 5 is the Financial Industry Regulatory Authority, Inc. (FINRA), BrokerCheck Report for Burns, which is publicly available on FINRA's website at http://brokercheck.finra.org.

[4] Rule 250 provides that a motion for summary disposition may be made "[a]fter a respondent's answer has been filed." 17 C.F.R. § 201.250(a). Burns did not file an answer, but at the time I granted the parties leave to file motions for summary disposition, I ordered Burns to file an answer to the OIP and I fully expected Burns to comply with my order. Burns will not be prejudiced by my ruling on the Division's Motion, based on my independent assessment of the available evidence, because the other available alternative—finding Burns in default for failing to file an answer and deeming the allegations in the OIP to be true pursuant to Rule 155—would not result in a more favorable outcome. See 17 C.F.R. §§ 201.155(a), .220(f).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Rule 323.[5] See 17 C.F.R. § 201.323. The parties' filings and all documents and exhibits of record have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

Findings of Fact

A. Burns' Background and Criminal Activity

From 1998 until May 6, 2011, Burns was a registered representative associated with Dimensions Financial Group, Inc. (Dimensions), an investment adviser registered with the Commission.[6] See Div. Ex. 3; Div. Ex. 4 at 1. Burns was employed by Morgan Stanley Smith Barney LLC (Morgan Stanley) from April 2011 until October 2011, and was a registered representative associated with Morgan Stanley between September and October 2011.[7] See Div. Ex. 5 at 4.

I adopt the following facts to which Burns stipulated in his plea agreement (Div. Ex. 2 at 2-4):

On or about August 20, 2008, Burns, for the purpose of executing a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses and representations, devised a plan that caused $70,000 belonging to certain individuals to be transferred from Boston, Massachusetts, to an account in New York, New York, so that the money could be provided to him. Burns represented that he was authorized to withdraw those funds when he knew that representation was a lie.

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[5] Pursuant to Rule 323, I take official notice of the proceedings and docket sheet in the Underlying Proceeding.

[6] According to information available on the Commission's IAPD website, Dimensions was no longer registered as an investment adviser as of June 28, 2012. I take official notice, pursuant to Rule 323, of that fact. See 17 C.F.R. § 201.323. There is no indication in the record of when Dimensions first registered with the Commission as an investment adviser, but the possibility that Burns was not associated during the entire period of his wrongdoing with a registered broker-dealer or investment adviser does not insulate him from a bar. See Teicher v. SEC, 177 F.3d 1016, 1017-19 (D.C. Cir. 1999) (affirming the Commission's authority to bar persons from association with investment advisers, whether registered or unregistered); Vladislav Steven Zubkis, 58 S.E.C. 1014, 1015, 1019 n.16, 1025 (2005) (barring an unregistered associated person of an unregistered broker-dealer from association with a broker or dealer), recon. denied, Exchange Act Release No. 53651 (Apr. 13, 2006), 87 SEC Docket 2584.

[7] I take official notice of information available on FINRA's BrokerCheck website and on the Commission's IAPD website reflecting that Morgan Stanley (CRD Number 149777) is registered with the Commission as a broker-dealer and investment adviser.

On or about July 7, 2010, August 13, 2010, August 26, 2010, and June 7, 2011, Burns, for the purpose of executing a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses and representations, devised plans that respectively caused $25,000, $12,000, $150,000, and $130,000, belonging to certain individuals, to be transferred from Boston, Massachusetts, to Wichita, Kansas, so that the money could be provided to Burns who represented that he would invest it on their behalf. Burns knew that these representations were lies and that the money would not be invested as represented.

B. United States v. Burns

In October 2012, a federal grand jury charged Burns with wire fraud, in an eleven-count superseding indictment. Superseding Indictment, Underlying Proceeding, ECF No. 11 (filed Oct. 10, 2012) (Indictment). In January 2013, Burns pled guilty to five counts of wire fraud. Div. Ex. 2; Plea Hr'g Tr. 36-37, Underlying Proceeding, ECF No. 23 (filed Jan. 18, 2013). In June 2013, the district court sentenced Burns to a sixty-three month prison term followed by three years of supervised release, ordered him to pay $2,003,930.28 in restitution, and entered judgment. Div. Ex. 1. Burns did not appeal. See Dkt. Sheet, Underlying Proceeding.

Conclusions of Law

Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) authorize the Commission to impose a collateral bar as a sanction against Burns if: 1) within ten years of the commencement of this proceeding, he was convicted of any offense specified in Exchange Act Section 15(b)(4)(B) or Advisers Act Section 203(e)(2); 2) at the time of the misconduct, he was associated or seeking to become associated with a broker, dealer, or investment adviser; and 3) the sanction is in the public interest. 15 U.S.C. §§ 78*o*(b)(6)(A)(ii), 80b-3(f). Burns' wire-fraud conviction involves the violation of 18 U.S.C. § 1343, within the meaning of Exchange Act Section 15(b)(4)(B) and Advisers Act Section 203(e)(2). 15 U.S.C. §§ 78*o*(b)(4)(B)(iv), 80b-3(e)(2)(D). During the time of his misconduct, he was associated with an investment adviser and a broker-dealer.[8] See Div. Ex. 3, Div. Ex. 4 at 1; Div. Ex. 5 at 4; Official Notice. Burns did not file an answer or oppose the Division's Motion and therefore he has not offered any evidence to refute the conclusion that the statutory basis for a sanction has been satisfied. Accordingly, there is no genuine issue with regard to any material fact and summary disposition is appropriate. See 17 C.F.R. § 201.250(b). A sanction will be imposed if it is in the public interest.

[8] As set forth above, Burns was associated with an investment adviser at the time he committed all but the June 7, 2011, violation of the wire-fraud statute. Burns was employed by Morgan Stanley in April 2011, although FINRA's BrokerCheck database reflects that his registration with Morgan Stanley did not take effect until September 2011. Div. Ex. 5 at 4. Exchange Act Section 3(a)(18) defines "person associated with a broker or dealer" as "any employee of such broker or dealer" for purposes of Exchange Act Section 15(b)(6). Therefore, I find that Burns was associated with Morgan Stanley on June 7, 2011, or at the very least was "seeking to become associated" with Morgan Stanley within the meaning of Exchange Act Section 15(b)(6), at that time. See Frederick W. Wall, 58 S.E.C. 758, 763 n.9 (2005) (indicating that Exchange Act Section 3(a)(18) "should be construed broadly").

Sanctions

The Division seeks a collateral bar against Burns.[9] Motion at 1, 6. The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in Steadman v. SEC, namely: 1) the egregiousness of the respondent's actions; 2) the isolated or recurrent nature of the infraction; 3) the degree of scienter involved; 4) the sincerity of the respondent's assurances against future violations; 5) the respondent's recognition of the wrongful nature of his conduct; and 6) the likelihood of future violations (Steadman factors). 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); see Kornman, 95 SEC Docket at 14255. The Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. Kornman, 95 SEC Docket at 14255. The Commission also considers the deterrent effect of administrative sanctions. See Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46. Industry bars have long been considered effective deterrence. See Guy P. Riordan, Exchange Act Release No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23478 & n.107 (collecting cases).

In Ross Mandell, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and that the law judge's findings "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." Ross Mandell, Exchange Act Release No. 71668, 2014 SEC Lexis 849, at *7-8 (Mar. 7, 2014) (internal quotation marks omitted). After engaging in such an analysis, I have determined that it is appropriate and in the public interest to collaterally bar Burns from participation in the securities industry to the fullest extent possible.

Burns' conduct was egregious. As set forth in the Indictment, he devised and engaged in a scheme to defraud investors out of over half a million dollars, which was the amount of money he obtained as a result of the scheme.[10] Indictment at 1-9. Specifically, he effectuated this scheme by causing investor funds to be transferred from Boston, Massachusetts, to Wichita, Kansas, so that the money could be provided to him: In two instances, Burns represented that he was authorized to withdraw those funds when he knew that those representations were lies and that he was unauthorized to take and use the funds for his own benefit; and in nine instances, he represented that he would invest the funds on the investors' behalf when, in fact, he knew that those representations were lies and that the money would not be invested as represented. Id. at 1-8. Further, the district court ordered Burns to pay over $2 million in restitution. Div. Ex. 1 at 6.

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[9] Collateral bars are applicable here regardless of the date of Burns' violations. See John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61737.

[10] In a follow-on administrative proceeding after a criminal conviction, I may take into account all of the indictment's factual allegations in determining the appropriate sanction, without reference to whether such allegations were necessarily put in issue and determined in the criminal case. See Ross Mandell, 2014 SEC Lexis 849, at *10 n.13. When, as here, the underlying criminal proceeding is resolved by the respondent's guilty plea, reliance on the charging document is similar to the Commission's reliance "on the factual allegations of the injunctive complaint in a civil action settled on consent in determining the appropriate remedial action in the public interest." Marshall E. Melton, 56 S.E.C. 695, 712 (2003).

As an associated person of an investment adviser, Burns owed a fiduciary duty to investors, including an "affirmative duty of utmost good faith and full and fair disclosure of all material facts, as well as [an] affirmative obligation to employ reasonable care to avoid misleading clients." John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61738 (internal quotation marks omitted and alteration in original). Burns breached his duty to investors by lying to them and representing that he would invest their money when he knew he would not do so. Those lies "violated bedrock antifraud principles that apply throughout the securities industry," including the philosophy of full disclosure of accurate and non-misleading information to investors and the prohibition on self-dealing. Ross Mandell, 2014 SEC Lexis 849, at *15. Further, rather than play a minor role in the scheme, Burns orchestrated it.

Burns' conduct was also recurrent in that he committed eleven acts of wire fraud against at least seven investors beginning in 2008 and ending in 2011. Indictment at 1-8. This reflects a long-standing pattern of violative conduct that demonstrates unfitness for the securities industry. Burns' level of scienter was high in that he pled guilty to wire fraud that he committed "for the purpose of executing a scheme and artifice to defraud" and "for obtaining money by means of false and fraudulent pretenses and representations." Div. Ex. 2 at 2-3; see United States v. Ransom, 642 F.3d 1285, 1289 (10th Cir. 2011) (stating that conviction for wire fraud under 18 U.S.C. § 1343 requires an intent to defraud). His violations therefore cannot be categorized as isolated or merely technical. See John W. Lawton, 105 SEC Docket at 61739.

There is no evidence that Burns offered assurances against future violations or recognized the wrongful nature of his conduct during the Underlying Proceeding, and by failing to file an answer or respond to the Division's Motion, he forfeited his opportunity to do so in this proceeding. Burns' prison term is sixty-three months; however, he has not indicated whether he intends to reenter the securities industry when he is released. If Burns does intend to reenter the industry, Burns' egregious conduct—lying to investors and defrauding them on five occasions over a number of years—reflects that the likelihood of future violations is high. Burns was a licensed securities professional before, during, and after the time that his misconduct occurred, and therefore his decision to lie and cheat his clients demonstrates a "fundamental misunderstanding of his responsibilities" as a securities professional or demonstrates that he "hold[s] these obligations in contempt." Ross Mandell, 2014 SEC Lexis 849, at *21-22 (alteration in original and citations omitted); see Div. Ex. 4 at 3 (reflecting that Burns passed the Series 65 Uniform Investment Adviser Law Examination on June 10, 1998, and the Series 63 Uniform Securities Agent State Law Examination on September 23, 2011).

Burns' apparent failure to cooperate with investigations by FINRA and the Kansas Securities Commissioner is an aggravating factor that supports the imposition of an industry-wide bar. Effective October 20, 2011, the Kansas Securities Commissioner suspended Burns from all activities as an investment adviser representative as a result of his criminal conduct, and also noted that Burns failed to respond to a request for information. Div. Ex. 4 at 9-10. In August 2012, FINRA barred Burns from association with any FINRA member in any capacity, which followed his failure to respond to a FINRA request for information. Id. at 7-9. "Regulatory efforts to detect violative conduct require full cooperation by persons associated with each of the professions covered by the collateral bar"; Burns, by failing to cooperate with regulatory requests, is presumptively unfit for employment in the securities industry. John W. Lawton, 105 SEC Docket at 61740; cf. CMG Institutional Trading, LLC, Exchange Act Release No. 59325 (Jan. 30, 2009), 95

SEC Docket 13802, 13816 ("[F]ailure to cooperate during [an] investigation threatens the self-regulatory system and, in turn, investors by impeding NASD's detection of violative conduct.").

Allowing Burns to remain in the securities industry in any capacity would pose too great a risk to investors and the public. As the Commission explained in John W. Lawton, securities professionals routinely gain access to sensitive financial and investment information and potentially market-moving information about securities, issuers, and potential transactions. 105 SEC Docket at 61740. As a result, they must "take on heightened responsibilities to safeguard that information and to avoid temptations to fraudulently misuse their access for inappropriate—but potentially lucrative or self-serving—ends." Id. Burns' conduct has clearly shown that he is incapable of taking on any such heightened responsibilities in any capacity in the securities industry.

In conclusion, it is in the public interest to impose a permanent, collateral bar against Burns.

Order

It is ORDERED that, pursuant to Rule 250(b) of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement's Motion for Summary Disposition against Respondent Eric T. Burns is GRANTED.

It is FURTHER 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, Eric T. Burns is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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.

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Cameron Elliot
Administrative Law Judge