INITIAL DECISION RELEASE NO. 638
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15671

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

In the Matter of	:	
	:	INITIAL DECISION
PATRICK G. ROONEY	:	July 22, 2014

APPEARANCES: Daniel J. Hayes and Andrew Shoenthal for the Division of Enforcement, Securities and Exchange Commission

Gerald M. Miller and Matthew M. Showel of Vanasco Genelly & Miller for Respondent Patrick G. Rooney

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Patrick G. Rooney (Rooney) from the securities industry. He was previously enjoined from violating the antifraud and reporting provisions of the federal securities laws.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on January 8, 2014, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The proceeding is a follow-on proceeding based on SEC v. Rooney, No. 11-cv-8264 (N.D. Ill. Dec. 19, 2013), in which Rooney was enjoined against violations of the antifraud and other provisions of the federal securities laws. The undersigned granted the parties leave to file motions for summary disposition at a February 19, 2014, prehearing conference, pursuant to 17 C.F.R. § 201.250(a). Patrick G. Rooney, Admin. Proc. Rulings Release No. 1249, 2014 SEC LEXIS 589 (A.L.J. Feb. 19, 2014). The Division of Enforcement (Division) timely filed a motion for summary disposition; Rooney, an opposition; and the Division, a reply.

This Initial Decision is based on the pleadings and Rooney's 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 Rooney 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 Rooney was enjoined from violating the antifraud and reporting provisions of the federal securities laws in SEC v. Rooney. The Division urges that he be barred from the securities industry. Rooney argues that additional sanctions that the Division seeks in this proceeding are "piling on," and, to the extent that any additional sanction is warranted, it should be limited to censure, temporary suspension or other remedy short of a bar.

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. Rooney, 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 *2 n.1 (Apr. 18, 2013).

2. Exhibits Admitted into Evidence

The following items included in support of the Division's Motion for Summary Disposition, at Exhibits 1, 2, 3, and 6, are admitted as Division Exhibits 1, 2, 3, and 6:

November 18, 2011, Complaint in SEC v. Rooney, ECF No. 1 (Div. Ex. 1);

December 16, 2013, Consent of Patrick G. Rooney in SEC v. Rooney, ECF No. 59-1 (Div. Ex. 2);

December 19, 2013, Judgment as to Patrick G. Rooney and Solaris Management, LLC, in SEC v. Rooney, ECF No. 62 (Div. Ex. 3); and

April 15, 2013, Form 10-K for the year ended December 31, 2012, of Positron Corporation (Positron) (Div. Ex. 6).

3. Collateral Estoppel

The Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against a respondent, whether resolved by consent, like SEC v. Rooney; by summary judgment; or after a trial. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2108 (injunction entered by consent); John Francis D'Acquisto, 53 S.E.C. 440, 441 n.1, 444 (1998) (injunction entered by summary judgment); James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket

2708, 2713 (injunction entered after trial); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). See also Marshall E. Melton, 56 S.E.C. 695, 697-700, 709-13 (2003).

3. Due Process

Rooney argues that the remedies, if any, imposed against him should be left to the District Court and the Division's request for sanctions in this proceeding in addition to the sanctions imposed in SEC v. Rooney constitute unfair "piling on." However, Section 203(f) of the Advisers Act specifically authorizes an administrative proceeding such as this one based on a respondent's injunction.

II. FINDINGS OF FACT

Rooney, 51, is the founder, sole owner, and managing partner of Solaris Management LLC (Solaris Management), a Delaware limited liability company and unregistered investment adviser. Answer at 1. Since 2003, Solaris Management has been the general partner and investment adviser to the Solaris Opportunity Fund, LP (Solaris Fund), a Delaware limited partnership and a pooled investment vehicle. Id. The Solaris Fund is not registered as an investment company, in reliance on Section 3(c)(1) of the Investment Company Act of 1940. Id. Along with its offshore feeder fund, the Solaris Offshore Fund (Offshore Fund), Rooney handled the day-to-day management of the Solaris Fund and the Offshore Fund and made all investment decisions for the funds on behalf of Solaris Management. Id.

Rooney is permanently enjoined from violating the antifraud and reporting provisions of the federal securities laws: Section 17(a) of the Securities Act of 1933 (Securities Act); Sections 10(b) and 13(d)(1) of the Securities Exchange Act of 1934 (Exchange Act) and Rules 10b-5 and 13d-1 thereunder; and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rules 206(4)-8(a)(1) and (a)(2) thereunder. Div. Ex. 3. Additionally, Rooney and Solaris Management were ordered to disgorge $715,700 plus prejudgment interest of $166,476, and a civil penalty of $715,700 and conditional officer and director bar were imposed on Rooney. SEC v. Rooney, ECF No. 82.

The wrongdoing that underlies Rooney's injunction is set forth in the Commission's complaint in SEC v. Rooney (Div. Ex. 1) and is as follows:[1] From February 2005 to November

[1] In administrative proceedings based on a consent injunction, the Commission considers the allegations in the complaint in determining whether a remedial, disciplinary sanction is in the public interest. Marshall E. Melton, 56 S.E.C. 695, 698-700, 709-13 (2003). A respondent who has consented to an injunction is not permitted to contest the factual allegations of the injunctive complaint. Id. at 712.

In his December 3, 2013, Consent, Rooney affirmatively stated that "in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, [he] understands that he shall not be permitted to contest the factual allegations of the complaint in this action." Further, he stated that he "understands and agrees to comply with . . . the Commission's policy 'not to permit a defendant . . . to consent to a judgment . . . that imposes a

2008, contrary to the Solaris Fund's stated investment strategy, Rooney and Solaris Management invested over $3.6 million of the Solaris Fund's money in Positron, a financially troubled microcap company of which Rooney had been Chairman since July 2004. By November 2008, all of the Solaris Fund's assets were invested in Positron, and the fund owned over 60% of the company. Rooney hid the Positron investment and his affiliation with Positron from the Solaris Fund for four years, misleading investors into believing he was a disinterested investment adviser and that they were invested in a diversified hedge fund.

Rooney has worked in the securities industry for thirty years without any regulatory incident or violation of the federal securities laws. Opposition at 2. The Commission investigated Rooney in 2006 on similar facts and closed the investigation without action. Id. at 2-4. Rooney has no intention of working as an investment advisor or broker, managing an investment fund, or otherwise managing other people's money. Id. at 5; Id., Ex. D at 2.

III. CONCLUSIONS OF LAW

Respondent has been permanently 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 203(e)(4) and 203(f) of the Advisers Act.

IV. SANCTION

The Division requests that a collateral bar be imposed. Rooney urges that, if any sanction is warranted, it should be no more than a censure or temporary suspension. As the Division requests, a collateral bar will be ordered.[2, 3]

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sanction while denying the allegations . . . in the complaint.'" Div. Ex. 2 at 4. Finally, he agreed he "will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis" and "hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint." Id.

[2] The fact that neither Rooney, Solaris Management, nor the funds were registrants is not a barrier to imposing an investment adviser bar and collateral bar. The Commission has authority to bar persons from association with investment advisers, whether registered or unregistered. See Teicher v. SEC, 177 F.3d 1016, 1018 (D.C. Cir. 1999); see also Tzemach David Netzer Korem, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *32 (July 26, 2013) ("It is well established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding."); Vladislav Steven Zubkis, Exchange Act Release No. 52876 (Dec. 2, 2005), 86 SEC Docket 2618, 2627, recons. denied, Exchange Act Release No. 53651 (Apr. 13, 2006), 87 SEC Docket 2584, 2585 (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer).

[3] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became effective on July 22, 2010, provided collateral bars in each of the several statutes

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See Section 15(b) of the Exchange Act. 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, 56 S.E.C. at 698. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46.

In proceedings based on an injunction, the Commission examines the facts and circumstances underlying the injunction in determining the public interest. See Marshall E. Melton, 56 S.E.C. at 698. "An injunction, by its very nature, is predicated on conduct that . . . violate[s] laws, rules, or regulations." Id. at 709. The Commission considers an antifraud injunction to be particularly serious. Id. at 710, 713. 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 Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

B. Sanctions

Rooney's conduct was recurrent over a period of years. Rooney now argues that the fact that the Commission had investigated him previously for similar conduct without taking enforcement action against him shows that his conduct was not egregious and without heightened scienter. Nevertheless, to have been enjoined from violation of Securities Act Section 17(a)(1), Exchange Act Section 10(b) and Rule 10b-5, and Advisers Act Section 206(1) required at least a reckless degree of scienter. Rooney argues that his consent to an injunction

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regulating different aspects of the securities industry. Rooney's wrongdoing occurred before July 22, 2010. However, the Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank Act wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722; see also Alfred Clay Ludlum, III, Advisers Act Release No. 3628 (July 11, 2013), 2013 WL 3479060; Johnny Clifton, Securities Act Release No. 9417 (July 12, 2013), 2013 WL 3487076; Tzemach David Netzer Korem, Exchange Act Release No. 70044 (July 26, 2013), 2013 WL 3864511.

constitutes an acknowledgement of the wrongful nature of his conduct and an assurance against future violations and it is unfair to penalize him for a vigorous defense of the charges. However, his previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. The violations are recent. The precise degree of harm to investors has not been established, but, 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, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). A bar is also necessary for the purpose of deterrence. Arthur Lipper Corp., 46 S.E.C. at 100.

Rooney argues that he is not a recidivist, but a lack of a disciplinary record is not an impediment to imposing sanctions for a respondent's first adjudicated disciplinary violation. See Robert Bruce Lohmann, 56 S.E.C. 573, 582-83 (2003); Martin R. Kaiden, 54 S.E.C. 194, 209-10 (1999). Rooney argues, based on the Steadman factors, that any sanction should be limited to a censure or suspension and that, in any event, a collateral bar is not appropriate in that he never was employed by or as a broker-dealer, municipal securities dealer, transfer agent, or national recognized statistical organization. Concerning his request for a limited sanction, the Commission considers an antifraud injunction to be especially serious and to subject a respondent to the severest of sanctions. Marshall E. Melton, 56 S.E.C. at 710, 713. Indeed, from 1995 to the present, there have been over thirty-five follow-on proceedings based on antifraud injunctions in which the Commission issued opinions, and all of the respondents were barred[4] – thirty-five unqualified bars and three bars with the right to reapply after five years.[5] 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 (Dec. 13, 2012), 105 SEC Docket 61722, 61739.

V. ORDER

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act, of 1940, PATRICK G. ROONEY IS BARRED from associating with any broker, dealer, investment

[4] The historic cases 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.

[5] Those three were Richard J. Puccio, 52 S.E.C. 1041 (1996), Martin B. Sloate, 52 S.E.C. 1233 (1997), and Robert Radano, Advisers Act Release No. 2750 (June 30, 2008), 93 SEC Docket 7495. 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."

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 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 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 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