INITIAL DECISION RELEASE NO. 876
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16517

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

In the Matter of	:	INITIAL DECISION OF DEFAULT
	:	September 9, 2015
CHARLES R. KOKESH	:	

APPEARANCES: Timothy S. McCole for the Division of Enforcement, Securities and Exchange Commission

Charles R. Kokesh, *pro se*

BEFORE: Jason S. Patil, Administrative Law Judge

Summary

This Initial Decision of Default grants the Division of Enforcement's motion for default against Respondent Charles R. Kokesh, and permanently bars Kokesh from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (collectively, industry bar).

Procedural Background

On April 28, 2015, the Securities and Exchange Commission issued an Order Instituting Administrative Proceedings (OIP) against Kokesh, pursuant to Section 203(f) of the Investment Advisers Act of 1940. The OIP alleges that on March 30, 2015, a final judgment was entered against Kokesh in *SEC v. Kokesh*, No. 1:09-cv-1021 (D.N.M.) (the civil proceeding), enjoining Kokesh from violating Investment Company Act of 1940 Section 37, and from aiding and abetting violations of Securities Exchange Act of 1934 Sections 13(a) and 14(a), Exchange Act Rules 12b-20, 13a-1, 13a-13, and 14a-9, and Investment Advisers Act of 1940 Sections 205(a), 206(1), and 206(2). OIP at 1.

Service of the OIP occurred on June 1, 2015, and Kokesh's Answer was due by June 22, 2015. *See Charles R. Kokesh*, Admin. Proc. Rulings Release No. 2782, 2015 SEC LEXIS 2276 (June 8, 2015). Kokesh never filed an Answer; he also never responded to my order to show cause. *See Charles R. Kokesh*, Admin. Proc. Rulings Release No. 2888, 2015 SEC LEXIS 2699 (July 1, 2015).

On July 30, 2015, the Division moved for default.[1] Attached to the motion were two exhibits: the March 2015 Memorandum Opinion and Order Granting Plaintiff's Motion for Entry of Final Judgment in the civil proceeding (Ex. 1); and the March 2015 Final Judgment in the civil proceeding (Ex. 2). Pursuant to 17 C.F.R. § 201.323, I take official notice of Exhibits 1 and 2.[2]

Conclusion of Default

I find Kokesh to have defaulted in this proceeding. Kokesh is in default for failing to file an Answer or to otherwise defend the proceeding. OIP at 2; 17 C.F.R. §§ 201.155(a), .220(f). Likewise, consistent with 17 C.F.R. § 201.155(a), the allegations of the OIP are deemed to be true.[3]

Kokesh is notified that he may move to set aside the default in this case. Pursuant to 17 C.F.R. § 201.155(b), a default may be set aside for good cause, to prevent injustice, and on such conditions as may be appropriate. A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. 17 C.F.R. § 201.155(b).

Findings of Fact

A final judgment was entered against Kokesh in the civil proceeding on March 30, 2015, following a jury trial. Ex. 2 at 1. Kokesh was permanently enjoined from directly or indirectly violating Advisers Act Sections 205(a), 206(1), and 206(2), Exchange Act Sections 13(a), 14(a) and Rules 12b-20, 13a-1, 13a-13, and 14a-9, and Investment Company Act Section 37.[4] *Id.* Kokesh was ordered to pay a civil penalty of $2,354,593 and disgorgement of $34,927,329, with prejudgment interest of $18,077,103.37. *Id.* at 1-2. This judgment was based on the following facts:

Kokesh owned and controlled two Commission-registered investment-adviser firms, Technology Funding Ltd. (TFL) and Technology Funding, Inc. (TFI) (collectively, the Advisers). Ex. 1 at 1. TFL and TFI were contracted to provide investment advice to four Commission-registered business development companies (Funds). *Id.* Kokesh knowingly and willfully converted investment-company assets to his own use or to the use of another. *Id.* at 2. Through TFL and TFI, Kokesh converted $34,927,329 from the Funds. *Id.*

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[1] Kokesh did not respond to the motion. Accordingly, the Division did not file a reply brief.

[2] On June 5, 2015, the parties submitted a Joint Prehearing Conference Statement. In it, Kokesh stipulated to the admissibility of these exhibits. Joint Statement at 2.

[3] Further, Kokesh stipulated to the facts alleged in Section II of the OIP. Joint Statement at 2.

[4] Kokesh had been found liable for, among other things, knowingly and substantially assisting the employment of a device, scheme, or artifice to defraud a client and engaging in a transaction, practice, or course of business that operated or would operate as a fraud or deceit upon a client, constituting a violation of Adviser Act Sections 206(1) and 206(2). Ex. 1 at 3-4.

From 1995 through 2006, Kokesh directed the Advisers' treasurer to take $23,807,091 from the Funds to pay salaries and bonuses to Kokesh and other officers of the Advisers. Ex. 1 at 2. The contracts between the Advisers and the Funds contained no bonus provision and prohibited payments to the Advisers that were not expressly specified in the contracts. *Id.* Kokesh signed the contracts. *Id.* Kokesh did not disclose the bonus payments to the Funds' directors or in Commission filings he signed on the Funds' behalf. *Id.* Moreover, until a 2000 amendment, the contracts specifically prohibited reimbursements to cover salaries of the Advisers' controlling persons, including Kokesh and the other officers. *Id.* The 2000 amendment permitted reimbursement for controlling-person salaries, but it was based on misleading proxy statements signed by Kokesh that falsely identified him as the only controlling person. *Id.* at 2-3. The proxy statements also falsely stated that Kokesh's average annual salary from 1998 through 2000 was $221,000 when, in fact, it was $771,000. *Id.* at 3. Following the amendment, Kokesh caused TFL and TFI to take average annual payments more than fifteen times greater than the anticipated average annual payments disclosed in the proxy statements. *Id.*

From 1995 through 2006, Kokesh directed the treasurer to take $5,007,441 from the Funds to cover the Advisers' office rent. Ex. 1 at 3. Kokesh knew the contracts specifically prohibited such rent reimbursement. *Id.* Kokesh did not disclose the rent payments to the Funds' directors. *Id.*

In 2000, Kokesh caused the Advisers to take $6,112,797 in payments falsely described in SEC reports he signed as tax distributions. Ex. 1 at 3. The contracts required several conditions to be met before the Advisers could be paid a distribution to cover their tax obligations; however, the payments in 2000 did not satisfy the contracts' stated conditions for tax distributions and had nothing to do with any tax obligation. Kokesh personally received more than 90% of the money. *Id.* Kokesh knew the money he received was not related to a tax liability, but he did not return the money to the Funds, and he paid only $10,304 in federal taxes in 2000. *Id.*

Conclusions of Law and Remedial Sanctions

Industry Bar Is Authorized

Advisers Act Section 203(f) authorizes imposition of an industry bar against Kokesh if: (1) at the time of the alleged misconduct, he was associated with an investment adviser; (2) he has been enjoined from any action, conduct, or practice specified in Advisers Act Section 203(e)(4); and (3) the sanction is in the public interest. 15 U.S.C. § 80b-3(f). Kokesh owned and controlled two Commission-registered investment-adviser firms, and thus was associated with an investment adviser within the meaning of Advisers Act Section 203(f), and the injunction imposed on Kokesh in the civil case is an injunction within the meaning of Advisers Act Section 203(e)(4). 15 U.S.C. §§ 80b-3(e)(4), (f); Exs. 1, 2.

Kokesh did not file an Answer or oppose the Division's motion for a default, and therefore he has not offered any evidence to refute the conclusion that the statutory basis for a sanction has been satisfied. A sanction will be imposed if it is in the public interest.

The Public Interest Supports Imposition of Industry Bar

The Division seeks an industry bar against Kokesh. Mot. for Default at 7. 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. 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). The Commission's inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. *Gary M. Kornman*, 2009 SEC LEXIS 367, at *22. The Commission has also considered the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006); *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003).

Before imposing an industry-wide bar, a 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 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 WL 907416, *2 (Mar. 7 2014).

Kokesh's conduct was egregious, recurrent, and involved a high level of scienter. It was egregious because it involved Kokesh's knowingly and willfully converting nearly $35 million from the Funds. Further, some of the converted funds were directed to Kokesh and other officers of the Advisers as bonuses, yet Kokesh did not disclose the bonus payments to the Funds' directors or in Commission filings he signed on the Funds' behalf; and the conversion of funds was, in part, enabled by misleading proxy statements that Kokesh had signed. His conduct was recurrent because it spanned an eleven-year period. Scienter is apparent from Kokesh's signing documents, filed with the Commission, over the course of years, which were misleading and enabled conversion.

As to the final three *Steadman* factors, Kokesh has not offered assurances against future violations or portrayed any recognition of his wrongful conduct, having defaulted in this proceeding. Absent a bar, Kokesh, who was only civilly pursued, would be able to engage in the securities industry again, which presents a risk of future violative conduct.

With these considerations in mind, I have determined that it is appropriate and in the public interest to impose an industry bar against Kokesh. However, the conduct at issue occurred in or before 2006, meaning municipal advisor and nationally recognized statistical rating organization bars cannot be imposed. *See Koch v. SEC*, 793 F.3d 147, 157-58 (D.C. Cir. 2015) (holding that individual may not be barred from associating with municipal advisors or nationally recognized statistical rating organizations if violations occurred before the 2010 Dodd-Frank Act became effective).

Order

It is ORDERED that the Division of Enforcement's motion for default against Charles R. Kokesh is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Charles R. Kokesh is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

This Initial Decision shall become effective in accordance with and subject to the provisions of 17 C.F.R. § 201.360. Pursuant to 17 C.F.R. § 201.360, 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 17 C.F.R. § 201.111. 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 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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Jason S. Patil
Administrative Law Judge