Initial Decision Release No. 1367
Administrative Proceeding
File No. 3-18126

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

In the Matter of

Gerardo E. Reyes

Initial Decision of Default
March 15, 2019

Appearances: Andrew O. Schiff for the Division of Enforcement, Securities and Exchange Commission

Gerardo E. Reyes, *pro se*

Before: Cameron Elliot, Administrative Law Judge

Summary

This is a follow-on proceeding brought after Respondent Gerardo E. Reyes pleaded guilty to wire fraud in federal district court. Reyes initially took part in this proceeding but later ceased participating. This initial decision finds Reyes in default and bars him from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical ratings organization, and from participating in an offering of penny stock.

Procedural Background

On August 22, 2017, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Reyes pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940. The OIP alleges that on March 29, 2017, Reyes pleaded guilty to two counts of wire fraud in *United States v. Reyes*, No. 1:16-cr-20963 (S.D. Fla.), based on fraudulent conduct connected with securities transactions. OIP at 2.

A different administrative law judge was originally assigned to this proceeding and issued an initial decision. *Gerardo E. Reyes*, Initial Decision Release No. 1248, 2018 SEC LEXIS 849 (ALJ Apr. 5, 2018). The Commission vacated that decision following the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). *See Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at *2-3 (Aug. 22, 2018). The matter was then reassigned to me to provide Reyes with the opportunity for a new hearing. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *2-3 (ALJ Sept. 12, 2018). I have proceeded under the Commission's instruction not to give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued by the prior administrative law judge. *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4.

As ordered by the Commission, I directed Reyes to submit a proposal for the conduct of further proceedings. *Gerardo E. Reyes*, Admin. Proc. Rulings Release No. 6070, 2018 SEC LEXIS 2565 (ALJ Sept. 24, 2018). He did not. I therefore ordered him to show cause by October 25, 2018, why he should not be found in default. *Gerardo E. Reyes*, Admin. Proc. Rulings Release No. 6185, 2018 SEC LEXIS 2838 (ALJ Oct. 15, 2018). Reyes has failed to submit a proposal for the conduct of further proceedings, respond to the show cause order, or otherwise defend this proceeding.

Respondent's Default

Reyes participated in this proceeding to some extent before it was reassigned to me. He accepted service of the OIP on October 13, 2017. *Reyes*, 2018 SEC LEXIS 2838. He participated in a telephonic prehearing conference on December 4, 2017, and sent this office an email with a narrative describing his view of the facts that led to his criminal conviction. But his participation ceased after that prehearing conference. The previously assigned administrative law judge deemed the email submitted by Reyes to be his answer. I have reviewed it, and it does not meet the requirements for an answer set out in the Commission's Rules of Practice. *See* 17 C.F.R. § 201.220(c). But even if it were an answer, his subsequent failures to participate, submit a proposal for further proceedings, or respond to the order to show cause are sufficient for a finding of default. 17 C.F.R. § 201.155(a); *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4 ("[I]f a party fails to submit a proposal, the ALJ may enter a default against that party pursuant to Rule of Practice 155 or impose another appropriate sanction under Rule of Practice 180.").

I therefore find Reyes in default and deem the allegations in the OIP to be true. 17 C.F.R. § 201.155(a). This proceeding will be determined upon consideration of the record, including the deemed-true facts in the OIP and the exhibits to the Division of Enforcement's motion for summary disposition, which was filed in January 2018, before this matter was reassigned to me. In particular, I rely on the factual proffer Reyes signed as part of his guilty plea, the facts of which are binding in this proceeding.[1] *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *26 & n.33 (Jan. 14, 2011).

Findings of Fact

Reyes was a registered representative associated with two Commission-registered broker-dealers: Allstate Financial Services from August 1999 to April 2011 and New England Securities from April 2011 to October 2012. OIP at 1. In addition to being a registered broker-dealer, New England Securities was dually registered as an investment adviser while Reyes was associated with it. *Id.* Reyes also owned Gerardo E. Reyes & Associates Inc., which was not a registered entity but purported to offer investment services. *Id.* at 2.

In 2005, Reyes asked one of his Allstate clients to join an investment club that Reyes operated through Gerardo E. Reyes & Associates Inc. Div. Ex. 2 at 1. His client made some profitable investments. *Id.* In about May 2008, Reyes sent a letter to the client saying that her investments were in danger of losing value and that she should move her money to United States treasury bonds. *Id.* In August 2008, Reyes sent her another communication stating that her investment had lost 9.3% of its value, and he recommended transferring the remaining $156,524 into bonds. *Id.*

In October 2008, Reyes notified his client that he had invested her money in a treasury bond, and eleven months later he notified her that he had purchased a second treasury bond. *Id.* at 2. He provided her with CUSIP numbers identifying the two bonds. *Id.* But these identification numbers were not valid—Reyes had not actually purchased the bonds. *Id.* In reality, the client's investments had been lost. *Id.*

---

[1] The factual proffer is Exhibit 2 to the Division's motion for summary disposition. Also in the record as attachments to the Division's motion are the indictment (Exhibit 1), transcript of the change of plea hearing (Exhibit 3), and judgment (Exhibit 4) from the criminal proceeding against Reyes.

In November 2011, the client requested early termination and distribution of the funds. *Id.* To conceal the loss, Reyes provided the client with false paperwork stating that the distribution had been approved and listing the total amount of the distribution. *Id.* In June 2012, Reyes sent the client a wire transfer of $7,163.52, which purported to be part of the early distribution. *Id.* After that, Reyes sent no further payments and ceased all communications for more than six months. *Id.* On January 21, 2013, Reyes replied to an email from the client to reassure her and give her a personal guarantee of repayment. *Id.* But Reyes made no additional payments and again stopped responding to the client's inquiries. *Id.*

Reyes admitted to law enforcement that the client's money had been lost through a bad investment. *Id.* at 3. He created the false forms to conceal that fact from his client in order to give himself time to come up with the money to pay the client back. *Id.* But, other than the wire transfer of about $7,000, Reyes was unable to repay the client. *Id.*

On December 20, 2016, Reyes was charged with two counts of wire fraud in violation of 18 U.S.C. § 1343 in the Southern District of Florida. Div. Ex. 1. On March 29, 2017, Reyes pleaded guilty to both counts. Div. Ex. 3 at 12. On June 27, 2017, the district court entered judgment against Reyes, sentenced him to probation for a term of four years, and ordered him to pay $129,273 in restitution. Div. Ex. 4 at 2, 4.

Legal Conclusions

Exchange Act Section 15(b)(6) authorizes the Commission to impose a collateral associational bar if, as relevant here, (1) a respondent was convicted of an offense specified in Section 15(b)(4)(B), which includes wire fraud, within ten years of the commencement of the proceeding; (2) the respondent was associated with a broker or dealer at the time of the misconduct; and (3) the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(4)(B)(iv), (b)(6)(A)(ii).

Advisers Act Section 203(f) has similar requirements. As applicable to this proceeding, the Commission may impose a collateral bar if (1) a respondent has been convicted of an offense specified in Section 203(e)(2) or (3), which again includes wire fraud, within ten years of the commencement of the proceeding; (2) the respondent was associated with an investment adviser at the time of the misconduct; and (3) the sanction is in the public interest. 15 U.S.C. § 80b-3(f).

(1) The Conviction

Reyes was convicted of violating 18 U.S.C. § 1343, a statute explicitly mentioned in Section 15(b)(4)(B)(iv), within ten years of the issuance of the OIP. The Advisers Act defines *convicted* to include a judgment based on a plea of guilty. 15 U.S.C. § 80b-2(6). The Commission has applied this definition to proceedings under the Exchange Act. *Gregory Bartko*, Exchange Act Release No. 71666, 2014 SEC LEXIS 4613, at *28-29 & nn.40-41 (Mar. 7, 2014), *pet. granted in part on other grounds*, 845 F.3d 1217 (D.C. Cir. 2017).

(2) Association with Broker-Dealers and Investment Adviser

Reyes was associated with two broker-dealers while he engaged in the misconduct. He was associated with Allstate Financial Services when he recommended the bond investment and provided his client with the invalid CUSIP numbers. And it was through his association with Allstate that he met the client who became the victim of his fraud. He was later associated with New England Securities, a dually registered broker-dealer and investment adviser, when he made the wire transfer of $7,163.52 on June 5, 2012, that was the basis for count 1 in the indictment. Accordingly, a sanction will be imposed under both Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act if it is in the public interest.

(3) Public Interest

Consideration of whether a sanction is in the public interest is guided by the factors set forth in *Steadman v. SEC*. These are 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 conduct, and the likelihood that the respondent's occupation will present opportunities for 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 also considers the degree of harm to investors and the marketplace resulting from the violation and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, 58 S.E.C. 1197, 1217-18 (2006); *Marshall E. Melton*, 56 S.E.C. 695, 698 (2003). This is a flexible inquiry, and no one factor is dispositive. *Kornman*, 2009 SEC LEXIS 367, at *22.

Egregiousness, recurrence, and degree of harm to investors

Reyes committed serious misconduct. Honesty is of paramount importance in the securities industry. *Montford & Co.*, Advisers Act Release

No. 3829, 2014 SEC LEXIS 1529, at *85-86 (May 2, 2014). Reyes falsely told his client that he had invested her money in treasury bonds when her money was actually lost. Instead of admitting this, Reyes fraudulently produced CUSIP numbers and distributed confirmation statements to give the appearance that all was well. He even sent a payment that purported to be a distribution from the bonds. The concealment lasted years. He told his client he purchased the first bond in October 2008 and gave her a personal guarantee in January 2013. This misconduct resulted in Reyes being convicted of two felony counts of wire fraud. Although the court did not impose a custodial sentence, his sentence of four years of probation and restitution of $129,273 reflects the seriousness of the offense and the harm done to his client and the investing public.

Compared to other fraud offenses in the securities industry, the conduct Reyes pleaded guilty to is not the most egregious. "Fraud is not fungible. Its gradations and varieties are infinite." *Richard C. Spangler, Inc.*, 46 S.E.C. 238, 252 (1976) (footnote omitted). As described in the factual proffer, his fraud was one of concealment and not outright theft. But any fraud perpetrated on a client by a member of the securities industry is serious, especially when it results in a criminal conviction. *Cf. Melton*, 56 S.E.C. at 713 ("[W]e recognize that conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws."); *Kornman*, 2009 SEC LEXIS 367, at *23 ("[T]he importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business.").

Scienter

Reyes acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). Wire fraud is a specific intent crime. By pleading guilty, Reyes admitted that he "devised or intend[ed] to devise [a] scheme or artifice to defraud." 18 U.S.C. § 1343. He created false documents and identification numbers and sent knowingly false reassurances. This demonstrates a high degree of scienter.

Assurances against future violations, recognition of wrongful conduct, and likelihood of future violations

By pleading guilty to his criminal charges, Reyes has demonstrated at least some recognition of the wrongfulness of his conduct. At the prehearing conference held in this matter before it was reassigned to me, Reyes said, "I

pleaded guilty because of my knowledge of what had transpired and I fully accept what consequences there are incurred." Prehr'g Tr. 17 (Dec. 4, 2017).[2] With respect to whether he might reenter the securities industry, he said, "I am not in that industry. I have not been for the last five years and don't intend to be." *Id.* at 24. His professed willingness to avoid the securities industry is mitigating to some extent.

But when considering the likelihood of future violations, the Commission weighs a respondent's past conduct. The mere existence of a past violation is not sufficient to justify sanctions. *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *23 n.50 (July 26, 2013). But past conduct is evidence in a "broader inquiry into whether a person presents a future risk to the public." *Id.* (quoting *John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *33 (Dec. 13, 2012)). This is the case "because, as the Supreme Court has recognized, the 'degree of intentional wrongdoing evident in a defendant's past conduct' is an important indication of the defendant's propensity to subject the trading public to future harm." *Lawton*, 2012 SEC LEXIS 3855, at *33 (quoting *Aaron*, 446 U.S. at 701. In light of the past intentional wrongdoing by Reyes, the risk of future harm to the public is high if he is able to remain in the industry.

* * *

Weighing all the factors, I find that the appropriate sanction is a full collateral and penny stock bar. By fraudulently concealing a significant financial loss for years, Reyes harmed his client. His conviction for fraud supports imposing a bar. *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 SEC LEXIS 4193, at *25 (Oct. 29. 2014) ("'Fidelity to the public interest' requires a severe sanction when a respondent's misconduct involves fraud because the 'securities business is one in which opportunities for dishonesty recur constantly.'" (quoting *Chris G. Gunderson, Esq.*, Exchange Act Release No. 61234, 2009 SEC LEXIS 4322, at *21 (Dec. 23, 2009))). Finally, imposing a bar will serve the Commission's interest in deterring Reyes specifically and others generally from engaging in similar misconduct. *Reinhard*, 2011 SEC LEXIS 158, at *28. A bar in these circumstances is a "legitimate prophylactic remedy consistent with [the Commission's] statutory obligations." *Id.* (quoting *Kornman v. SEC*, 592 F.3d 173, 189 (D.C. Cir. 2010).

---

[2] Because Reyes made these statements before this proceeding was remanded and reassigned to me, I have only considered the statements to the extent they are favorable to Reyes.

Order

It is ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Gerardo E. Reyes is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of 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. Under 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 any 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.

Reyes may move to set aside the default in this case. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). 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. *Id.*

_____

Cameron Elliot
Administrative Law Judge