Initial Decision Release No. 1375
Administrative Proceeding
File No. 3-17693

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

In the Matter of

Sean P. Finn and
M. Dwyer LLC

Initial Decision of Default
May 8, 2019

Appearance: Hemma R. Lomax for the Division of Enforcement, Securities and Exchange Commission

Before: James E. Grimes, Administrative Law Judge

I grant the Division of Enforcement's motion for summary disposition and entry of sanctions. Respondents Sean P. Finn and M. Dwyer LLC are 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.

Procedural Background

The Securities and Exchange Commission initiated this proceeding in November 2016, when it issued an order instituting proceedings (OIP) under Section 15(b) of the Securities Exchange Act of 1934.[1] This proceeding is a follow-on proceeding based on a permanent injunction entered against Finn and Dwyer by the United States District Court for the District of Nevada.[2]

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[1] OIP ¶ I; *see* 15 U.S.C. § 78*o*(b).

[2] *See SEC v. Malom Grp. AG*, No. 2:13-cv-2280 (D. Nev.) (the civil case); OIP ¶ II.B.2.

This proceeding was previously assigned to a different administrative law judge, who issued an initial decision in April 2017.[3] In June 2018, the Commission stayed all pending cases.[4] In August 2018, the Commission allowed the stay to lapse, vacated any prior opinion it had issued in pending cases, and remanded all cases pending before it for reassignment, with instructions for the newly assigned administrative law judge to give no weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter.[5] The Commission's remand order included this case among a list of remanded cases.[6] Following the Commission's August order, this proceeding was reassigned to me.[7]

After reassignment, I determined that Respondents were served with the OIP in January 2017.[8] Because they had not answered the OIP or otherwise participated in this proceeding, I ordered them to show cause why they should not be found in default.[9]

The Division filed a timely motion for summary disposition and sanctions. Respondents have not filed an answer, a response to the order to show cause, or an opposition to the Division's motion.

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed under Commission Rule of Practice 323,

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[3] *Finn*, Initial Decision Release No. 1126, 2017 WL 1425434 (ALJ Apr. 21, 2017).

[4] *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10510, 2018 WL 3193858 (June 21, 2018).

[5] *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018).

[6] *Id.* at Ex. A.

[7] *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *2–3 (ALJ Sept. 12, 2018).

[8] *Finn,* Admin. Proc. Rulings Release No. 6292, 2018 SEC LEXIS 3149, at *1 (ALJ Nov. 5, 2018).

[9] *Id.* at *1–2.

17 C.F.R. § 201.323.[10] Because they failed to answer the OIP or otherwise participate in this proceeding, Respondents are in default.[11] As a result of Respondents' default, I have accepted as true the factual allegations in the OIP.[12] In making the findings below, I have applied preponderance of the evidence as the standard of proof.[13]

From April 2010 through September 2011, which is the relevant time period charged in the Commission's injunctive complaint, Finn was Dwyer's sole owner, officer, and employee.[14] During that time, Finn and Dwyer acted as unregistered brokers.[15]

Respondents participated in a fraudulent scheme in which at least 14 investors lost millions of dollars. Finn introduced investors either to Malom Group AG,[16] an entity based in Switzerland, or M.Y. Consultants.[17] Although

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[10] I take official notice of the docket in the civil case and the orders the court has issued. Finn and several other defendants were indicted in 2013 and charged in a 24-count indictment with securities fraud, wire fraud, and conspiracy to commit securities and wire fraud. *See United States v. Brandel*, No. 2:13-cr-439 (D. Nev.) (the criminal case), ECF No. 1. I also take notice of the docket, orders, and filings in the criminal case.

Finn was extradited from Canada in 2018 and ordered detained pending trial. *See id.*, ECF No. 390. Finn's criminal trial is currently scheduled to begin in mid-July. *See id.*, ECF No. 407, at 5.

[11] *See* 17 C.F.R. §§ 201.155(a), .220(f); *Pending Admin. Proc.*, 2018 WL 4003609, at *1.

[12] *See* 17 C.F.R. §§ 201.155(a), .220(f).

[13] *See John Francis D'Acquisto*, Investment Advisers Act of 1940 Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998).

[14] OIP ¶¶ II.A.1, II.B.3.

[15] OIP ¶ II.A.1; *see* Lomax Decl., Ex. 25 (certification that neither Respondent was registered with the Commission or associated with a Commission-registered broker-dealer).

[16] Malom is an acronym for "make a lot of money." Civil Case, ECF No. 1 at 1.

[17] Lomax Decl., Ex. 8 at 2, Ex. 24A at 123; *see* Lomax Decl., Ex. 16 (describing Finn as a broker), Ex. 17; *see also* Simpson Decl., Ex. 3 (reflecting payments received in relation to specified investors).

Finn's pitch to investors took a variety of forms, it typically involved hallmarks of fraud: purportedly riskless investment with guaranteed, quick, and highly unlikely returns.[18] Many investors were lured into placing large sums—between $250,000 and $550,000—in a supposedly secure escrow account, "always under your control," that would enable investors to access fantastic returns.[19] Portraying itself as a serious financial player—"at this time we do have a $10M minimum"—Dwyer's website described the sizeable funds to be placed in escrow as "modest."[20] But the promise of fantastic returns would turn out to be false and investors would eventually lose funds placed in escrow—which was the point of the scheme.

Other investors were solicited to provide $5.5 million in return for $11 million to be earned in one day.[21] Investors were purportedly allowed to "re-enter the program as many time[s] as they want."[22]

Investors were usually told that their investments were protected by a certificate of deposit or proof that Malom had large deposits "at a recognized and respected financial institution."[23] But because the scheme would fall apart if investors contacted the financial institutions that were supposedly protecting their risk-free investments, Finn took steps to dissuade investors from investigating potential problems. In an e-mail in September 2010, he told an investor that "[a]ny unscheduled calls or communications to the bank

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[18] *See* Lomax Decl., Ex. 3, Ex. 10; *see also* Lomax Decl., Ex. 6 (Dwyer website).

[19] *See* Lomax Decl., Ex. 2, Ex. 5 at 121629; *see also* Lomax Decl., Ex. 6, Ex. 12, Ex. 13 at 409, 412; Simpson Decl., Ex. 4.

[20] *See* Lomax Decl., Ex. 6.

[21] *See* Lomax Decl., Ex. 7A, Ex. 9.

[22] Lomax Decl., Ex. 7A; see Lomax Decl., Ex. 9.

[23] Lomax Decl., Ex. 1 at 29 ($100 million in cash and cash equivalents "at a recognized and respected financial institution"), Ex. 3 at 7766 (certificate of deposit), 7769 ("Certificate of Deposit guaranteed by an A rated insurance company that will completely guarantee the return of your cash"), Ex. 5 at 121629 ("Our money is at UBS and Credit Suisse"), Ex. 6 (Dwyer website claiming that "[o]ur money is at UBS, Credit Suisse, Deutsche Bank and HSBC"), Ex. 12 at 42 ("we are prepared to segregate $55M at Deutsche Bank, Frankfurt, Main Branch for your investment opportunity"), Ex. 13 at 410 ("cash and cash equivalents" of at least $54 million "at a recognized and respected financial institution").

will result in a cease and desist. Those calls have to be scheduled."[24] A few months later, he told principals with investor LGB9 Enterprises that "communications with the bank" had to go through Joseph Micelli, an alleged co-conspirator affiliated with Malom, and that "unscheduled communications with the bank could kill the transaction."[25]

The same day Finn warned LGB9 not to investigate, Anthony Brandel from M.Y. Consultants directed the escrow agent to disperse approximately $300,000.[26] LGB9 soon demanded its money back and Martin U. Schlaepfer, identified as a member of Malom's board, responded with a lengthy e-mail in which he said LGB9's demands were "extreme and outrageous" and "intended to cause … emotional distress."[27] A representative of LGB9 responded that it was preparing to file suit.[28]

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[24] Lomax Decl., Ex. 19.

[25] Lomax Decl., Ex. 18 at 640. Micelli was a defendant in both the civil case and the criminal case. *See* Criminal Case, ECF. No. 1; Civil Case, ECF No. 1. He pleaded guilty in the criminal case in November 2015 to conspiracy to commit wire and securities fraud. *Id*., ECF No. 187. Micelli was later sentenced to 60 months' imprisonment and ordered to pay $5.65 million in restitution. *Id*., ECF No. 262. In the civil case, the district court granted injunctive relief in September 2014, and found Micelli jointly and severally liable to pay disgorgement and interest in excess of $11.3 million and imposed a civil penalty of nearly $900,000. Civil Case, ECF No. 38.

[26] Simpson Decl., Ex. 4.

[27] Lomax Decl., Ex. 16 at 581. Brandel and Schlaepfer were charged in Finn's indictment and were also co-defendants in the civil case. *See* Criminal Case, ECF. No. 1; Civil Case, ECF No. 1. Brandel was convicted in December 2015 of conspiracy to commit wire and securities fraud, nine counts of wire fraud, and eight counts of securities fraud. Criminal Case, ECF No. 215. He was sentenced to 87 months' imprisonment and ordered to pay nearly $6.4 million in restitution. *Id*., ECF. Nos. 288, 368. Schlaepfer, who is apparently a Swiss citizen and resident, *see* Civil Case, ECF No. 32 at 2, has not been tried.

In the civil case, the court dismissed charges against Schlaepfer. Civil Case, ECF No. 99. It enjoined Brandel, however, and found him jointly and severally liable to pay disgorgement and interest of almost $6 million and imposed a civil penalty of nearly $630,000. Civil Case, ECF No. 98.

[28] Lomax Decl., Ex. 16 at 581.

Other investors soon began to express concerns.[29] In March 2011, Finn tried to assuage one investor's concerns by asserting that Malom's CEO had 30 years of international banking experience, and claiming Malom had "made billions," was a "financial powerhouse," and had "closed deals with Wal Mart, Bank of America and the State of New York."[30] Another investor claimed Malom manufactured the investor's alleged breach so that Malom could take escrowed funds.[31]

Although he did not tell investors, Finn was compensated by Malom and M.Y. Consultants for bringing in investors.[32] Respondents received approximately $845,000 from M.Y. Consultants.[33] The 14 investors Respondents recruited eventually lost over $6 million.[34]

In November 2016, the United States District Court for the District of Nevada permanently enjoined Respondents from violating Sections 5 and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act, and Exchange Act Rule 10b-5.[35] The court found Respondents and three other defendants jointly and severally liable for disgorgement of $6.5 million in profits and interest.[36] The court also imposed individual civil penalties of over $700,000 on both Dwyer and Finn.[37]

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29 *See* Lomax Decl., Ex. 2 (alleging that 17 investors, including LGB9, had collectively lost over $7.9 million).

30 Lomax Decl., Ex. 17.

31 Lomax Decl., Ex. 8.

32 Simpson Decl., Ex. 1, Ex. 3, Ex. 7; Lomax Decl. Ex. 22, Ex. 24A at 141–42; *see* Lomax Decl., Ex. 4 at 19760 ("We … are only paid a success fee when the project is funded."), Ex. 5 at 121629 (claiming that Respondents would only take "a small percentage" of profits and an "engagement fee" that would not be released to Respondents until the investor's attorney or banker approved).

33 Simpson Decl. at 8.

34 *Id.* at 4–5.

35 Civil Case, ECF No. 57.

36 *Id.* at 5.

37 *Id.*

Conclusions of Law

The Exchange Act gives the Commission authority to impose a collateral bar[38] if, as is relevant here, (1) a respondent was associated with or seeking to become associated with broker or dealer at the time of the misconduct at issue; (2) the respondent was enjoined "from engaging in or continuing any conduct or practice … in connection with the purchase or sale of any security"; and (3) imposing a bar is in the public interest.[39]

By virtue of Respondents' default, it is an established fact that "[d]uring the time in which they engaged in the conduct underlying the complaint," they "acted as unregistered brokers in violation of Section 15(a) of the Exchange Act."[40] The first factor is thus met in this case.[41]

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[38] A collateral bar, also referred to as an industry bar, is a bar that prevents an individual from participating in the securities industry in capacities in addition to those in which the person was participating at the time of his or her misconduct. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *1 & n.1 (Oct. 29, 2014).

[39] 15 U.S.C. § 78*o*(b)(4)(C), (6)(A)(iii). Exchange Act Section 15(b)(4) authorizes sanctions, such as registration revocation, against broker-dealers. 15 U.S.C. § 78*o*(b)(4). Section 15(b)(6)(A) incorporates by reference Section 15(b)(4) and provides for sanctions against "any person who is associated … with a broker or dealer." 15 U.S.C. § 78*o*(b)(6)(A). The term *person associated with a broker or dealer* includes "any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer." 15 U.S.C. § 78c(a)(18). And "the term 'person'" includes both "a natural person" and a "company." 15 U.S.C. § 78c(a)(9); *see also* 1 U.S.C. § 1 (providing that in the United States Code, "the word[] 'person' … include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). Dwyer, which is an LLC, OIP ¶ II.A.1, is thus a person and consequently is subject to sanction under Section 15(b)(6) as a person associated with a broker or dealer. *See Winning the Money Game With Ike, Inc.*, Exchange Act Release No. 83110, 2018 WL 1960468, at *2 (Apr. 26, 2018) (settled proceeding) (imposing sanctions under Section 15(b)(6) on an entity); *see infra* n.41.

[40] OIP ¶ II.A.1.

[41] *See James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *5 (Feb. 15, 2017) ("Because we find that Tagliaferri himself met the definition of a 'broker,' we also find that he met the definition of a 'person associated with a broker' for purposes of Exchange Act Section 15(b)(6)."); *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL

(continued…)

Turning to the second factor, the district court permanently enjoined Respondents from selling unregistered securities, acting as unregistered broker-dealers, committing fraud in the offer or sale of any securities, and committing fraud in connection with the purchase or sale of any securities.[42] The terms of this injunction meet the requirement that a court has enjoined Respondents from "engaging in … any conduct … in connection with the … sale of any security."[43]

To determine whether imposing a collateral bar would be in the public interest, I must weigh the factors set forth in *Steadman v. SEC*.[44] These include:

> 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.[45]

The Commission also considers the deterrent effect of administrative sanctions.[46] The public interest inquiry is "flexible" and "no one factor is dispositive."[47]

3864511, at *8 (July 26, 2013) (it is "well established that [the Commission is] authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding").

[42] *See* Civil Case, ECF No. 57.

[43] 15 U.S.C. § 78*o*(b)(4)(C).

[44] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Securities Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

[45] *David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016).

[46] *Id.* General deterrence is relevant but not determinative of whether the public interest weighs in favor of imposing a collateral bar. *See Peter Siris*, Advisers Act Release No. 3736, 2013 WL 6528874, at *11 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014).

Before imposing a collateral bar, an administrative law judge must determine, based on the evidence presented, whether a bar "is necessary or appropriate to protect investors and markets."[48] I must therefore "'review [Respondents'] case on its own facts' to make findings regarding [their] fitness to participate in the industry in the barred capacities."[49] A decision to impose a collateral bar "should be grounded in specific 'findings regarding the protective interests to be served' by barring the respondent and the 'risk of future misconduct.'"[50]

The Commission has stated as a matter of policy that an antifraud injunction "has especially serious implications for the public interest."[51] And "'[f]idelity to the public interest' requires a severe sanction when a respondent's misconduct involves fraud."[52] The Commission has thus declared that absent contrary evidence, "it will [ordinarily] be in the public interest to revoke the registration of, or suspend or bar from participation in the securities industry, or prohibit from participation in an offering of penny stock, a respondent who is enjoined from violating the antifraud provisions."[53]

Taking these principles into consideration, it is apparent that the public interest requires barring Respondents from the industry. The district court

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47 *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008).

48 *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (internal quotation marks omitted), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

49 *Id.* (quoting *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005)).

50 *Id.* (quoting *McCarthy*, 406 F.3d at 189–90); *see also John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *9 (Dec. 13, 2012) ("[T]he Commission must consider not only past misconduct, but the broader question of the future risk the respondent poses to investors."), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 WL 3030847 (May 27, 2016).

51 *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003).

52 *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *7 (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009).

53 *Melton*, 2003 WL 21729839, at *9.

enjoined Respondents from violating the antifraud provisions of the Securities Act and the Exchange Act and Respondents have presented nothing to show that they do not warrant a severe sanction.

Moreover, Respondents' conduct was egregious. They were key players in a fraudulent scheme and personally recruited 14 investors who lost over $6 million.[54]

Additionally, Respondents were enjoined from selling unregistered securities and acting as unregistered brokers.[55] The registration requirements in Section 5 and Section 15 are central to the Commission's investor-protection mission.[56] By selling unregistered securities in violation of Section 5 of the Securities Act, Respondents deprived investors of information they needed to make informed investment decisions.[57] This is particularly important here because compliance with Section 5 could well have prevented the fraud that Respondents perpetrated.

Respondents' conduct was not isolated. They participated in the scheme for approximately 18 months and received at least 13 commission payments during that time period for their efforts.[58] Finn also made seven payments, totaling $143,050 to other participants in the scheme.[59]

Finn also acted with a high degree of scienter. He never mentioned that he would be compensated for bringing in investors. He promoted investment schemes that, on their face, offered highly unlikely returns. But the indicia of fraud—risk-free investments and quick, guaranteed, and fantastic returns—show that Finn knew or should have known that investors would not receive those returns. The steps Finn took to prevent investors from learning the

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54 Simpson Decl. at 4–5, Ex. 1. Finn's actions and state of mind are attributed to Dwyer. *See Bernerd E. Young*, Exchange Act Release No. 774421, 2016 WL 1168564, at *19 n.81 (Mar. 24, 2016); *Clarke T. Blizzard*, Advisers Act Release No. 2253, 2004 WL 1416184, at *5 (June 23, 2004).

55 OIP ¶ II.A.I, B.2.

56 *See Allen M. Perres*, Securities Act Release No. 10287, 2017 WL 280080, at *3 (Jan. 23, 2017), *pet. denied*, 695 F. App'x 980 (7th Cir. 2017).

57 *See Perres*, 2017 WL 280080, at *3.

58 Simpson Decl. at 8.

59 *Id.* at 9.

truth further shows that he acted with scienter. And Finn's scienter is imputed to Dwyer.[60]

Because Respondents have not participated in this proceeding, they have not made assurances against future misconduct or demonstrated that they understand or recognize the wrongfulness of their misconduct.

Additionally, allowing Respondents to remain in the securities industry would present them with future opportunities for further misconduct and would put the investing public at risk. This determination is supported by my finding that their conduct was egregious.[61]

Finally, imposing a collateral bar will serve the Commission's interest in deterring others from engaging in similar misconduct.

In light of the factors discussed above, I find that it is in the public interest to impose collateral and penny-stock bars against Respondents.

Order

The Division of Enforcement's motion for summary disposition and sanctions is GRANTED.

Under Section 15(b) of the Securities Exchange Act of 1934, Sean P. Finn and M. Dwyer LLC are BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Under Section 15(b) of the Securities Exchange Act of 1934, Sean P. Finn and M. Dwyer LLC are BARRED from participating in an offering of penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance of trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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60 *See Blizzard*, 2004 WL 1416184, at *5.

61 *See Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) (holding that a finding of egregiousness "justifies the inference" that misconduct will recur); *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *11 (Jan. 16, 2008) ("The existence of a violation raises an inference that the violation will be repeated, and where the misconduct resulting in the violation is egregious, the inference is justified.").

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[62] 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.[63] 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.

Respondents may move the Commission to set aside the default under Rule of Practice 155(b), which 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.[64] 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.[65] Such motion, if filed, should be directed to the Commission, as the hearing officer may only set aside a default "prior to the filing of the initial decision."[66]

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James E. Grimes
Administrative Law Judge

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62 *See* 17 C.F.R. § 201.360.

63 *See* 17 C.F.R. § 201.111.

64 17 C.F.R. § 201.155(b).

65 *Id.*

66 *Id.*