Initial Decision Release No. 1379
Administrative Proceeding
File No. 3-17645

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

In the Matter of

Gary C. Snisky

Initial Decision
June 5, 2019

Appearances: Polly A. Atkinson for the Division of Enforcement, Securities and Exchange Commission

Gary C. Snisky, *pro se*

Before: James E. Grimes, Administrative Law Judge

Summary

I grant the Division of Enforcement's motion for summary disposition. Respondent Gary C. Snisky is 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 October 2016, when it issued an order instituting proceedings (OIP) under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940.[1] This is a follow-on proceeding based on a default judgment entered in August 2016 by the United States District Court for the District of Colorado, enjoining Snisky from violations of registration

[1] OIP ¶ I; *see* 15 U.S.C. §§ 78*o*(b), 80b-3(f).

and antifraud provisions of the federal securities laws.[2] Although not alleged in the OIP, that judgment followed Snisky's guilty plea and conviction for mail fraud and monetary transactions in property derived from mail fraud.[3]

This proceeding was previously assigned to a different administrative law judge, who issued an initial decision in May 2018.[4] In accordance with the Commission's directive following the Supreme Court's decision in *Lucia v. SEC*,[5] this proceeding was reassigned to another administrative law judge in September 2018.[6] The second administrative law judge assigned to this matter found that Snisky was served with the OIP in November 2016 and had filed an answer the same month.[7]

In accordance with a motions schedule, the Division of Enforcement filed a motion for summary disposition, supported by seven exhibits. Snisky then asked that the Division provide its investigative file again because prison staff could no longer locate the electronic copies previously provided, and the administrative law judge ordered the Division to produce its investigative file.[8] Snisky's response to the Division's motion was due March 20, 2019,[9] but he did not file one.

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[2] OIP ¶ II.2; *see SEC v. Snisky*, No. 1:13-cv-3149 (D. Colo. Aug. 12, 2016) (civil case), ECF No. 31.

[3] *See United States v. Snisky*, No. 1:13-cr-473 (D. Colo. July 8, 2015) (criminal case), ECF No. 138.

[4] *Snisky*, Initial Decision Release No. 1251, 2018 SEC LEXIS 1120 (ALJ May 14, 2018).

[5] 138 S. Ct. 2044 (2018); *see Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018).

[6] *See Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *3 (ALJ Sep. 12, 2018).

[7] *Snisky*, Admin. Proc. Rulings Release No. 6212, 2018 SEC LEXIS 2881, at *1 (ALJ Oct. 18, 2018).

[8] *Snisky*, Admin. Proc. Rulings Release No. 6442, 2019 SEC LEXIS 115, at *1 (ALJ Feb. 6, 2019).

[9] *Id.* at *1–2.

This proceeding was then reassigned to me.[10] In conducting this proceeding and considering the Division's motion, I gave no weight to the opinions, orders, or rulings of the administrative law judge who presided over this proceeding before the *Lucia* decision.[11] Although Snisky has not responded to the Division's motion, I do not find him in default and have considered his prior submissions given his past participation in this proceeding and pro se status.

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed.[12] In making the findings below, I have applied preponderance of the evidence as the standard of proof.[13] Most of the factual findings that follow are derived from Snisky's guilty plea, which cannot be challenged in this proceeding.[14]

Snisky's Conduct

Between 2009 and 2011, Snisky operated a company named Colony Capital, which claimed to be a private equity firm offering multiple investment opportunities.[15] He shut that entity down in 2011 and that same year formed Arete, LLC, which similarly claimed to be a private equity firm offering various investment opportunities.[16] In 2010, Snisky asked another individual to develop a fully automated system for trading in the futures market.[17] That individual created an algorithm for that purpose, but the system remained in a developmental phase and neither the individual nor

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[10] *Snisky*, Admin. Proc. Rulings Release No. 6508, 2019 SEC LEXIS 522 (ALJ Mar. 18, 2019).

[11] *See Pending Admin. Proc.*, 2018 WL 4003609, at *1.

[12] 17 C.F.R. § 201.323.

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

[14] *See Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 WL 121451, at *7 & nn.32–33 (Jan. 14, 2011).

[15] Div. Ex. 1 at 7.

[16] *Id.* at 7–8.

[17] *Id.* at 8.

Snisky used the algorithm to trade significant amounts of money or to make any real profit.[18]

Starting in at least 2010, however, Snisky falsely led investors, potential investors, and financial advisors to believe that Colony Capital, and then Arete, used the algorithm to profitably trade in the futures market.[19] Snisky did this because he believed that investors would be more likely to invest in his companies' investment offerings if they believed his companies were more profitable than they actually were.[20] Snisky also used falsehoods about the algorithm and strategic manual trades when pitching his purported bond investment program to investors, beginning in 2011.[21]

Between at least July 2011 and January 2013, Snisky brought investors, potential investors, and financial advisors to his companies' offices to view the workstation that purportedly displayed trading in the futures market, but the individual operating the workstation was actually trading in a simulated environment.[22] Snisky falsely suggested that the individual operating the workstation was trading live in the futures market and had a history of profitable trading there, when he knew the individual had no such profitable history and that the workstation was displaying a simulated environment.[23]

Despite this knowledge, Snisky invited potential investors to his office in mid-2011 and showed them documents falsely representing that his company had been trading in the futures market with 22% earnings on investments for the prior two years.[24] Some of these potential investors invested with Colony Capital and later Arete based on the false representations, and Snisky sent them false account statements indicating their funds were being invested in the futures market, earning profits.[25] Between July 2011 and March 2012,

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18 *Id.*

19 *Id.* at 8–9.

20 *Id.* at 9.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 9–10.

25 *Id.* at 10.

Snisky received $371,346.26 in investor money, but the vast majority of the money obtained was not traded in the futures market as promised.[26]

Between approximately July 2011 and January 2013, Snisky offered investors, potential investors, and financial advisors the chance to invest in Arete's "proprietary value model."[27] This model purportedly involved investments in Ginnie Mae bonds and Snisky falsely described the model as "safe" because the bonds were backed by the "full faith and credit of the United States."[28] Snisky offered a ten-year model for the bond program, which promised the investor a 10% upfront bonus and a 7% annual return; an investor could purportedly not withdraw interest for the first five years and could only withdraw interest starting in the sixth year.[29] Before April 2012, Snisky began offering a five-year model which promised a 6% annual return.[30] During 2012, Snisky made false assurances that his investment models were safe, even though he knew he had not purchased any bonds as promised.[31]

When he met with investors, potential investors, or financial advisors regarding the bond program and futures trading program, Snisky frequently falsely described himself as an "institutional trader" who was "on Bloomberg" and that this status allowed him to "make markets" and access lucrative opportunities ordinary investors could not access.[32] Snisky would often show investors, potential investors, and financial advisors his Bloomberg terminal and would display screen shots regarding Ginnie Mae bonds, implying he had or would be purchasing the displayed bond or something similar.[33] Snisky, however, was not an institutional trader and never used his Bloomberg terminal to purchase or trade anything or to "make markets."[34]

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26 *Id.* at 10–11.

27 *Id.* at 11.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 11–12.

33 *Id.* at 12.

34 *Id.*

Snisky also falsely told investors, potential investors, and financial advisors that he could make additional money for the bond program by having the invested funds participate in the "overnight lending program."[35] He explained that banks were required to have a certain amount of capital on hand and, if they did not, they could borrow the needed amount overnight from other institutions for a small interest fee.[36] Snisky falsely stated that he could participate in this overnight lending program, although he never participated and lacked the ability to do so.[37]

From approximately August 2011 to January 2013, Snisky received approximately $4,180,540.81 in investor funds that was supposed to be invested in Ginnie Mae bonds.[38] Snisky did not use any of this money to purchase those bonds.[39] He did, however, cause account statements to be mailed to investors in the bond program falsely showing their money was invested as promised and was earning a profit as promised.[40] Between the bond program and the futures trading program, Snisky's investors suffered a net loss of $5,226,965.93 due to his conduct.[41]

Prior Proceedings

Snisky pleaded guilty to mail fraud and monetary transactions in property derived from mail fraud in February 2015.[42] The district court sentenced him to 84 months of imprisonment followed by three years of supervised release and ordered him to pay restitution, totaling $2,531,032, to at least forty individuals and entities.[43] The Tenth Circuit Court of Appeals

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35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 12–13.

41 *Id.* at 13.

42 Div. Ex. 1; *United States v. Snisky*, No. 1:13-cr-473 (D. Colo. Feb. 5, 2015), ECF No. 103.

43 Div. Ex. 2.

granted Snisky's motion to voluntarily dismiss his criminal appeal.[44] Subsequently, the district court denied Snisky's 28 U.S.C. § 2255 motion,[45] and the Tenth Circuit denied a certificate of appealability and dismissed his appeal.[46]

Meanwhile, the Commission filed a civil complaint against Snisky in 2013, alleging that he perpetrated an offering fraud scheme through his investment entity Arete from August 2011 through January 2013, raising at least $3.8 million from more than 40 investors.[47] In August 2016, the district court permanently enjoined Snisky from violating Sections 5(a), 5(c), 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; Section 206(1), (2), and (4) of the Advisers Act and Advisers Act Rule 206(4)-8; and Section 7(a) of the Investment Company Act of 1940.[48] This injunction was entered by default and was accompanied by an order requiring Snisky to pay disgorgement of $2,531,032, offset by any restitution paid in the criminal case.[49] The district court denied Snisky's motion to set aside the judgment.[50] The Tenth Circuit dismissed Snisky's appeal from that order for lack of prosecution.[51]

Conclusions of Law

Under Rule 250(b), which governs summary disposition in 75-day cases, an administrative law judge may grant a motion for summary disposition if "there is no genuine issue with regard to any material fact" and "the movant is entitled to a summary disposition as a matter of law."[52] The

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44 *United States v. Snisky*, No. 15-1243 (10th Cir. Dec. 21 & 22, 2015), Doc. Nos. 01019542934 (motion) & 01019543561 (order).

45 *Snisky*, No. 1:13-cr-473 (D. Colo. May 10, 2017), ECF No. 168.

46 Div. Ex. 6.

47 Div. Ex. 4.

48 Div. Ex. 3.

49 *Id.*

50 *SEC v. Snisky*, No. 1:13-cv-3149 (D. Colo. Jan. 20, 2017), ECF No. 38.

51 Div. Ex. 7; *SEC v. Snisky*, No. 17-1052 (10th Cir. June 27, 2017), Doc. No 01019832006; No. 1:13-cv-3149 (D. Colo. Feb. 13, 2017), ECF No. 39.

52 17 C.F.R. § 201.250(b).

Commission has repeatedly upheld the use of summary disposition in cases such as this one, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction.[53] The Division's motion for summary disposition requests that collateral and penny stock bars be entered against Snisky.

Snisky's answer denies the material allegations in the OIP.[54] But the civil injunction that is the basis for this proceeding and the facts established by Snisky's guilty plea cannot be challenged in this proceeding.[55] Despite Snisky's denials and assertions, there is sufficient evidence to decide this matter in the Division's favor.[56]

Under the Exchange Act, the Commission may impose collateral and penny stock bars[57] against Snisky if, as is relevant here, (1) he was associated with or seeking to become associated with a broker or dealer at the time of his misconduct; (2) he was enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities; and (3) imposing bars is in the public interest.[58] The Advisers Act gives the Commission similar authority with respect to a person associated with or

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[53] *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *10 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5 & n.21 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009).

[54] *See generally* Answer.

[55] *See Kornman*, 2009 WL 367635, at *8; *James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *4 & nn. 13–14 (Oct. 12, 2007).

[56] *See James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *7 (Feb. 15, 2017) ("The party opposing summary disposition may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing." (internal quotation marks omitted)).

[57] 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).

[58] 15 U.S.C. § 78*o*(b)(4)(C), (6)(A)(iii).

seeking to be associated with an investment adviser at the time of his misconduct.[59]

The first factor is satisfied as Snisky acted as a broker at the time of his misconduct. "A person who acts as an unregistered broker-dealer is 'associated' with a broker dealer for the purposes of Section 15(b)."[60] A broker is someone "engaged in the business of effecting transactions in securities for the account of others."[61] During his misconduct, Snisky frequently represented that he was an institutional trader who was "on Bloomberg," could "make markets," and had access to lucrative opportunities that ordinary investors could not access when he offered investments to investors, potential investors, and financial advisors in his company's bond program, while promising bonuses and earnings on those investments.[62] These facts establish that Snisky held himself out as a broker, which satisfies the Exchange Act's definition of a broker.[63]

In addition, Snisky is subject to liability under the Advisers Act because he was seeking to become associated with an investment adviser during his misconduct. Although Snisky claims he was not the sole owner or managing member of Arete LTD,[64] he does not dispute that he was its President. Arete LTD filed a Form ADV to register as an investment adviser in November 2012 and this form listed Snisky as its president and chief compliance officer.[65] Although submitting an application on Form ADV does not mean that a firm is immediately registered as an investment adviser,[66] Snisky's

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59 15 U.S.C. § 80b-3(e)(4), (f). The Advisers Act does not authorize imposition of a penny stock bar.

60 *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *1 n.2 (Apr. 23, 2015); *see also Tagliaferri*, 2017 WL 632134, at *5.

61 15 U.S.C. § 78c(a)(4)(A).

62 Div. Ex. 1 at 11–12.

63 *See Anthony Fields, CPA*, Advisers Act Release No. 4028, 2015 WL 728005, at *18 & n.112 (Feb. 20, 2015).

64 Answer at 1–2.

65 *See* Div. Ex. 5.

66 *See* 15 U.S.C. § 80b-3(c)(2) (giving the Commission forty-five days from filing to either grant registration or institute proceedings to determine whether registration should be denied). Snisky avers that the Commission

(continued…)

participation in Arete's management during the pendency of its application establishes, at minimum, that he was seeking to become associated with an investment adviser at the time of his misconduct, which continued until January 2013 as described above.

As to the second factor, the district court permanently enjoined Snisky from violating multiple federal securities laws and rules, including laws related to engaging in or continuing any conduct or practice in connection with the purchase or sale of securities.[67] This injunction meets the statutory requirement and satisfies this factor.[68]

To determine whether to impose a bar, I must consider the public-interest factors discussed in *Steadman v. SEC*.[69] These factors 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.[70]

The Commission also considers the deterrent effect of administrative sanctions.[71] This public interest inquiry is flexible and no one factor is dispositive.[72] Before imposing a bar, an administrative law judge must

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granted the firm's status as a registered investment adviser in January 2013. Answer at 2.

[67] Div. Ex. 3 at 3 (civil injunction).

[68] 15 U.S.C. §§ 78*o*(b)(4)(C), (6)(A)(iii); 80b-3(e)(4), (f).

[69] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Scammell*, 2014 WL 5493265, at *5.

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

[71] *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *11 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). Although relevant, general deterrence is not, by itself, determinative in assessing whether the public interest weighs in favor of imposing a bar. *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007).

[72] *Kornman*, 2009 WL 367635, at *6.

specifically determine why the Commission's interests in protecting the investing public would be served by imposing an industry bar.[73]

In considering the public interest, I am mindful that "in most" cases involving fraud, the public-interest analysis will weigh in favor of a "severe sanction."[74] And because "[t]he securities industry presents continual opportunities for dishonesty and abuse," it "depends heavily on the integrity of its participants and on investors' confidence."[75]

Turning to the *Steadman* factors, the public interest weighs in favor of an industry-wide bar. Snisky's misconduct involved providing false assurances and false information to investors and potential investors so that they would invest with his companies, although he did not invest his investors' money as promised.[76]

Snisky made false statements to investors regarding the profitability and safety of investing in his bond program.[77] He further falsely told potential investors that he could participate in an overnight lending program to bolster the bond program's profitability, but he never participated in such program and had no ability to do so.[78] Snisky received over $4 million that was supposed to be used to purchase bonds but he did not invest any of this investor money in the purported bonds.[79] The false representations and amount of funds received under those false pretenses demonstrate the egregiousness of his misconduct.

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[73] *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

[74] *Siris*, 2013 WL 6528874, at *11 n.71 (quoting *Gibson*, 2008 WL 294717, at *7).

[75] *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 & n.53 (July 26, 2013) (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 (Sept. 26, 2007)).

[76] Div. Ex. 1 at 11–13.

[77] *Id.* at 11.

[78] *Id.* at 12.

[79] *Id.*

Snisky's misconduct was also recurrent. Snisky made affirmative misrepresentations and false reassurances over a period of years to induce investments.[80] Further, he was ordered to pay restitution totaling $2.5 million to at least 40 parties.[81]

Snisky's conduct also demonstrated a high degree of scienter. Snisky knew that he never invested any of the money designed for the bond program in actually purchasing bonds, yet he mailed false account statements to investors indicating such investments had been made and were generating interest.[82] He claimed to be an institutional trader who could make markets although he knew he was not an institutional trader and had never made markets.[83] During the futures trading program, he led potential investors to believe that computer workstations were trading in live markets when he knew that was not true.[84] Further, Snisky pled guilty to one count of mail fraud, which necessarily involved an intent to defraud.[85]

Snisky has acknowledged the wrongfulness of his conduct to some extent, as evidenced by his guilty plea. The record, however, does not indicate assurances against future misconduct and Snisky's answer attempts to undermine factual stipulations made in his guilty plea regarding his fraudulent scheme.[86] This undermines the previous acknowledgment of wrongfulness.

Given the egregiousness of Snisky's misconduct, his scienter, and his failure to make assurances against future violations or recognize wrongdoing in this proceeding, I determine that if Snisky remains in the securities

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80 *Id.* at 8–13.

81 Div. Ex. 2 at 5–6.

82 Div. Ex. 1 at 12–13.

83 *Id.* at 11–12.

84 *Id.* at 9–10.

85 *See* 18 U.S.C. § 1341; *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003).

86 Answer at 5 (rejecting the allegation he "alleged[ly] creat[ed] . . . a fraudulent scheme").

industry, he is likely to engage in future misconduct and would have the opportunity to cause additional harm to investors.[87]

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

In sum, the Commission's interest in protecting the investing public would be served by imposing collateral and penny stock bars against Snisky.

Order

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

Under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Gary C. Snisky is 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, Gary C. Snisky is 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.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[88] 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.[89] If a motion

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87 *See Korem*, 2013 WL 3864511, at *6 n.50 ("[T]he existence of a violation raises an inference that it will be repeated." (alteration in original) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004))); *cf. John A. Carley*, Securities Act Release No. 8888, 2008 WL 268598, at *22 (Jan. 31, 2008) (determining whether to impose a cease-and-desist order and holding that "[o]ur finding that a violation is egregious 'raises an inference that [the misconduct] will be repeated" (quoting *Geiger*, 363 F.3d at 489)), *remanded on other grounds sub nom. Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009).

88 *See* 17 C.F.R. § 201.360.

89 *See* 17 C.F.R. § 201.111.

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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James E. Grimes
Administrative Law Judge