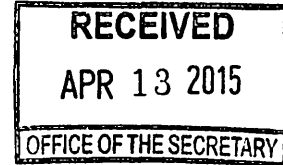


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**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING
File No. 3-16155**

In the Matter of

Nicholas B. Rowe,

Respondent.

**DIVISION OF ENFORCEMENT'S
MOTION FOR SUMMARY AFFIRMANCE**

The Division of Enforcement ("Division"), pursuant to Rule 411(e) of the Commission Rules of Practice, 17 C.F.R. § 201.411(e), hereby moves for summary affirmance of the Initial Decision in this matter.

On February 27, 2015, Administrative Law Judge Patil granted the Division's Motion for Summary Disposition and issued an Initial Decision.¹ The Initial Decision found that Respondent Nicholas Rowe met the statutory requirements for the imposition of a permanent associational bar, pursuant to Section 203(f) of the Investment Advisers Act of 1940. Specifically, Rowe was found to be subject to an order of the New Hampshire Bureau of Securities, barring him from engaging in the business of securities in New Hampshire based on violations of New Hampshire laws prohibiting fraudulent conduct in the purchase or sale of securities. After considering the appropriateness of a sanction using the factors set forth in *Steadman v. SEC*, 603 F.3d 1126, 1140 (5th Cir. 1979), the Initial Decision barred Rowe from association with a broker, dealer, investment

¹ *Nicholas B. Rowe*, Initial Decision Release No. 746, 2015 WL 847167

adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization.

The Initial Decision contains no prejudicial error and no exercise of discretion or decision of law or policy that the Commission should review. Accordingly, the Division respectfully requests summary affirmance.

THE INITIAL DECISION

The Initial Decision granted the Division's Motion for summary disposition and imposed a permanent associational bar against Respondent Rowe. The administrative law judge found:

- 1) Respondent had been associated with an investment adviser by owning and operating an investment advisory firm, Focus Capital Wealth Management. Respondent did not deny this association, and admitted in his Answer that Focus Capital was his firm. Initial Decision, Findings of Fact ("Findings"), ¶ 1 & n.4.
- 2) Respondent signed and is subject to a Consent Order with the New Hampshire Bureau of Securities Regulation ("the Bureau"), based on an offer of settlement by Rowe and Focus Capital. Findings, ¶ 2. Respondent does not deny he signed or is subject to the Consent Order, but seeks to negate that consent by claiming that he signed under duress.
- 3) The Bureau entered the Consent Order, which bars Respondent from engaging in the business of securities in New Hampshire based on Rowe's violations of New Hampshire laws prohibiting fraudulent, manipulative or deceptive conduct in the purchase and/or sale of securities. Findings, ¶¶ 3-5.
- 4) By signing the Consent Order, Rowe agreed that he had consented voluntarily, that no "promise, representation, or threat" had been made by the Bureau to make him sign, and that he would not take any action to deny any allegation in the Consent Order. Findings, ¶¶ 6, 7.

Based on these findings, the ALJ concluded that Respondent met the statutory requirements for the imposition of an associational bar. Specifically, the Initial Decision concludes that Rowe was associated with an investment adviser at the time of his misconduct and subject to a final order of a state securities commission that barred him from the securities business based on violations of laws that prohibit fraudulent conduct in the securities industry. With these legal elements

established, Judge Patil found no genuine issue with regard to any material fact and concluded summary disposition was appropriate.

Judge Patil then found that a permanent associational bar was in the public interest, applying the factors set forth in *Steadman*, 603 F.2d at 1140. The Initial Decision details the evidence that the ALJ considered to find that each of the *Steadman* factors weighed in favor of barring the Respondent:

- 1) Respondent's actions were egregious and recurrent. The Consent Order describes Respondent's complete disregard of at least 11 customers' investment needs by investing in very speculative stock market bets leading to more than \$2 million dollars in client losses. Initial Decision, p. 7.
- 2) Respondent acted with scienter, citing multiple parts of the Consent Order that demonstrate his fraudulent intent. Initial Decision, p. 7.
- 3) There is a high likelihood Respondent would commit future violations if not barred, based on his repeated denials of all responsibility for his actions, his shifting of blame, his insistence that his investment strategies were suitable, and his desire to challenge the Consent Order. Initial Decision, pp. 7-8.
- 4) Respondent, if not barred, would have the interest and opportunity to continue to violate the securities laws, based on the six-year duration of his violations and his on-going refusal to recognize that his strategy was unsuitable. Initial Decision, pp. 8-9.
- 5) The imposition of associational bar would provide effective deterrence. Initial Decision, p. 9.

ARGUMENT

Summary Affirmance Is Appropriate Here

Pursuant to SEC Rule of Practice 411(e)(2), the Commission may grant summary affirmance if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument. If no prejudicial error was committed in the conduct of the proceeding and the decision does not embody an exercise of discretion or decision of law or policy that is important for the Commission to review, summary affirmance may be granted.

The Commission has found summary affirmance to be appropriate in follow-on proceedings like this one. Here, “the relevant facts are undisputed and the initial decision does not embody an important question of law or policy warranting further review by the Commission.” *Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730 at *1, n.2 (Aug. 26, 2011). Summary affirmance has been granted in several cases where the factual issues on review were “by nature limited in scope” and which had been decided by summary disposition. *David F. Bandimere*, Securities Act Rel. No. 9512, Exchange Act Rel No. 71333, 2014 WL198175, at *3, n.11 (Jan. 16, 2014)(citing *A-Power Energy Generation Sys., Ltd.*, Exchange Act Release No. 69439, 2013 WL 1755036, at *1 (Apr. 24, 2013); *Andover Holdings, Inc.*, Exchange Act Release No. 68966, 2013 WL 653011, at *1 (Feb. 21, 2013)). In *Bandimere*, the Commission reiterated the point it made in *Butler*: summary affirmance would be appropriate “in a follow-on proceeding in which the petitioner was precluded from challenging the underlying convictions on which the proceeding was based, rendering key factual issues not open to challenge on appeal.” 2014 WL 198175, at *3. That same reasoning would apply to a follow-on proceeding based on an injunction by a state securities commission.

In *Joseph Contorinis*, the Commission granted summary affirmance in a follow-on proceeding imposing an associational bar by summary disposition. Exchange Act Release No. 72031, 2014 WL 1665995 (Apr. 25, 2014). Contorinis was both convicted of securities fraud and enjoined from further securities law violations in a civil proceeding. The Commission found no need to obtain further argument and no issue of law or policy to review. *Id.* at *2. Similarly, in *Mark Feathers*, Exchange Act Release No. 73634, 2014 WL 6449870 (Nov. 18, 2014), the Commission granted partial summary affirmance in a follow-on proceeding imposing an associational bar by summary disposition. The Commission granted summary affirmance

regarding the injunction imposed against Feathers by the District Court. It then reviewed whether the sanction was in the public interest because the initial decision “did not specifically articulate why the facts and circumstances of the case warrant an industry-wide bar or how such a bar will protect the interests of the investing public.” *Id.* at *1. Here, however, the Initial Decision sets forth in detail the facts that establish that permanently barring Respondent is in the public interest.²

In his Petition for Review, Respondent makes the same argument that he made in opposing summary disposition: that he did not sign the Consent Order voluntarily. As stated by Judge Patil, “The thrust of Rowe’s defense is that he is the victim of a corrupt state government and clients who supposedly perjured themselves to inculcate him.” Initial Decision, p. 6. The Initial Decision, however, rightly holds that Respondent may not use this administrative proceeding to collaterally attack the Consent Order or to raise issues that could have been raised in a proceeding in New Hampshire. *Id.*, pp. 5-6. Judge Patil concludes, “While Rowe attempts to revisit the circumstances that led to the Consent Order, at no time does he deny that he is subject to it. Nor does he deny that the Consent Order bars him from participation in the securities industry in New Hampshire.” *Id.*, p. 6. Respondent’s duress argument—the sole point he raises in his Petition for Review—does not establish error or raise an important point of law or policy. To the contrary, it highlights the appropriateness of the bar imposed and the prudence of the prohibition on collateral attacks in Commission administrative proceedings.

² In *Feathers*, the Commission also considered respondent’s assertion that he had been denied the opportunity for a public hearing by the court’s grant of summary disposition. *Id.* at *3. Respondent Rowe made a similar argument in his opposition to summary disposition, and obliquely raises that same point in his Petition for Review by demanding that he be allowed to call witnesses. Like in *Feathers*, Rowe has “had the opportunity to produce documents, affidavits, or some other evidence to demonstrate that there was a genuine and material factual dispute that the law judge could not resolve without a hearing.” *Id.* Like in *Feathers*, Rowe failed to establish the existence of a genuine issue of material fact, and the ALJ was not required to conduct an in-person hearing. *Id.*; Initial Decision, p. 2, n.3. The Division respectfully suggests that there is no need for the Commission to review or comment on this established point of law.

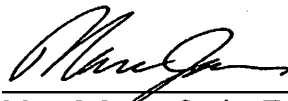
CONCLUSION

As Respondent has not raised any issue of material fact, does not challenge that he is subject to the Bureau's Consent Order, and provides no evidence or argument that the associational bar is not in the public interest, there is no error or issue of law or policy to review. Accordingly, the Division respectfully requests the Commission grant the Division's Motion for Summary Affirmance of the Initial Decision.

Respectfully submitted,

DIVISION OF ENFORCEMENT

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Date: April 10, 2015