**UNITED STATES OF AMERICA**

**Before the**

**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-19697**

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**In the Matter of**

**RANDALL GOULDING, ESQ.**

**Respondent**

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**THE OFFICE OF THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S PETITION TO LIFT THE TEMPORARY SUSPENSION ENTERED PURSUANT TO RULE 102(e)(3)(i)(A), (B) OF THE COMMISSION'S RULES OF PRACTICE**

## INTRODUCTION

On February 7, 2020, the Commission, pursuant to Rule of Practice 102(e)(3)(i)(A) and (B), 17 CFR 201.102(e)(3)(i)(A),(B), found that it was in the public interest to temporarily suspend Randall Goulding, Esq. ("Goulding") from appearing and practicing before it as an attorney based on final judgment against Goulding issued by the United States District Court for the Northern District of Illinois ("District Court") in *SEC v. The Nutmeg Group, LLC, et al.*, Case No. 1-09-cv-01775 (N.D. Ill.) ("underlying action"). The District Court found that Goulding violated Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act")[1] and Rule 206(4)-8 thereunder,[2] and permanently enjoined Goulding from

[1] 15 USC 80b-6(1), 80b-6(2), 80b-6(4)

[2] 17 CFR 275.206(4)-8

directly or indirectly violating Section 206(1) and (2), and 206(4), of the Advisers Act and Rule 206(4)-8 thereunder.

On March 20, 2020, Goulding filed a Petition to Lift the Temporary Practice Suspension and Request for a Hearing ("Petition"). The Commission should deny Goulding's petition because he has not advanced any meritorious arguments in support of the extraordinary relief he seeks, and it will serve the public interest to continue Goulding's suspension pending the completion of this proceeding to determine the appropriate sanction to protect the Commission's processes. Goulding has violated the Advisers Act, including its anti-fraud provisions. Absent a temporary suspension, Goulding would remain in a position to threaten the integrity of the Commission's processes and potentially harm investors during the time necessary for this proceeding to be resolved.

## BACKGROUND[3]

### A. Goulding, Nutmeg and the Funds

Randall Goulding ("Goulding"), a convicted felon, is an attorney currently licensed to practice law in Illinois. Goulding owned and managed The Nutmeg Group, LLC ("Nutmeg"), a now-defunct registered investment adviser.[4] He also owned The Law Offices of Randall S. Goulding & Associates, P.C., which provided legal services to Nutmeg, its advisory clients, Relief Defendants, and certain companies in which Nutmeg and the Relief Defendants invested.

[3] The facts set forth in this section are taken from the Commission's amended complaint in the underlying action, the District Court's: (1) February 18, 2016 Memorandum and Opinion (Docket No. 795) in SEC v Nutmeg Group granting the Commission partial summary judgment against Goulding; (2) the October 25, 2019 Findings of Fact and Conclusions of Law (Docket No. 1085); (3) the November 12, 2019 Final Judgment (Docket No.1094), and (4) other filings in the underlying action.

[4] In 1992, Goulding was convicted of conspiracy to defraud the United States, mail fraud, and illegal transportation of currency in a tax evasion and money laundering scheme. He served six months in prison, received five years of probation, and was suspended from the practice of law in Illinois for four years.

Goulding currently practices law in Illinois and represents clients before the Commission. Petition at 1.

Goulding founded Nutmeg in 2003 to make investments for, and provide investment advice to, unregistered investment pools. Nutmeg registered as an investment adviser with the Commission in June 2007. By December 2007, Nutmeg had 15 advisory clients (individually, "Fund" or collectively, "Funds"), which were structured as limited partnerships. The Funds' clients (the "investors") invested money with the Funds as limited partners.

Nutmeg was the investment adviser for all the Funds and also the general partner for 13 of them. As the investment adviser, Nutmeg directed the Funds' strategies and monitored their investments. As the general partner, Nutmeg provided offering documents and quarterly account statements to investors, maintained the books and records, and executed investment transactions on behalf of the Funds.

The Funds purchased securities issued by companies with market capitalizations well below $50 million (almost all were nanocaps) through private investments in public equity ("PIPE") transactions. The Funds engaged in these transactions mostly to acquire rights to convertible equity, convertible debt, and warrants, which allowed the Funds to convert their investments into restricted securities of these companies.

Goulding oversaw Nutmeg's operations and was responsible for its actions. Among other things, Goulding: (1) identified investment opportunities; (2) made investment decisions for the Funds; (3) negotiated investment terms; (4) approved the transfer of money and payment of expenses for Nutmeg and the Funds; (5) prepared the Funds' offering documents; (6) valued the Funds; and (7) hired his own law firm to provide legal services for Nutmeg and the Funds.

### B. The Commission's Enforcement Action against Goulding and Others

After a2008 compliance examination of Nutmeg revealed numerous deficiencies, the Commission filed the underlying action. The Commission's complaint alleged that Nutmeg, Goulding, and Goulding's son violated the Advisers Act, including its antifraud provisions, and rules thereunder by various acts and omissions. As to Goulding, the Commission's allegations included the following:

#### 1. The Asset Transfers and Nutmeg's Payments to the Relief Defendants

Goulding had the Funds transfer over $4 million in Fund assets to the Relief Defendants, purportedly to invest in public companies on behalf of the Funds and obtain freely tradeable shares through Regulation D offerings. Neither Nutmeg nor the Funds were parties to the agreements governing the investments the Relief Defendants purportedly made on the Funds' behalf. The Funds did not have title to these investments; the only interest the Funds retained was a contractual right to the proceeds from the subsequent sales of the securities that Relief Defendants purchased with the transferred assets. These investments were made in the names of the Relief Defendants, titled in the names of the Relief Defendants, and held in the Relief Defendants' bank and brokerage accounts.

Although the Relief Defendants received title to the assets in these transactions, Goulding determined how the assets were invested, negotiated the investment terms, and prepared the documentation for these investment transactions. This documentation often did not specify which Fund's assets were used to make the investments.

The Relief Defendants profited from these transactions. Nutmeg paid the Relief Defendants either 1% or 3% of the gross proceeds from sales of securities purchased with

transferred assets regardless of whether the sales were profitable. Additionally, some Relief Defendants received guaranteed minimum monthly payments, even if no assets were sold in a given month.

### 2. Goulding's Commingling of Fund Assets

Money from Funds was deposited in a Nutmeg bank account along with Nutmeg's money. Some Fund investments were made in Nutmeg's name rather than in the name of the relevant Fund. Securities owned by the Funds were deposited in brokerage accounts belonging to Nutmeg or the Relief Defendants. Additionally, some of Goulding's personal assets were held in Nutmeg's bank and brokerage accounts, thus Goulding's personal assets were commingled with assets of Nutmeg and the Funds. Goulding was solely responsible for this commingling.

### 3. Goulding's Non-Disclosures and False or Misleading Statements

Goulding did not disclose the asset transfers, commingling, or payments to Relief Defendants. He also made several materially false or misleading statements. First, Goulding falsely represented that the Funds owned certain assets even though they had been transferred to the Relief Defendants. These misrepresentations were made in two ways: (1) account statements reported securities as though the Funds owned the listed securities on the investors' behalf (rather than as a contract right derivate of them); and (2) Goulding and Nutmeg filed Form ADVs in which they certified that "no related persons" had custody of client assets. Second, the account statements provided to investors listed assets that the Funds owned on the investors' behalf without revealing that commingling was occurring. Third, Goulding and Nutmeg represented in account statements that certain amounts of cash were held on the investors' behalf when these holdings were actually in securities.

### 4. Overstated Valuation of the Funds

Prior to July 2007, Nutmeg told investors that it assessed a "10 % discount for liquidity" on all illiquid investments. Additionally, Nutmeg told investors in two Funds that held most of the assets it managed that it would value holdings of non-publicly traded securities – which consisted of restricted stock, convertible promissory notes, warrants, and debentures –by considering, among other things, the issuer's financial condition, operating results, recent sales prices for the same or similar securities, restrictions on transfer, the price paid to acquire the investment, significant recent events affecting the issuer, and the percentage of outstanding securities owned by the Fund.

Nutmeg did not value the Funds' investments this way. Instead, under Goulding's direction, Nutmeg generally valued the Funds' securities holdings – including illiquid and restricted securities -- by multiplying the number of shares owned by the Funds, or that could be converted by the Funds, by the current price of the relevant issuer's publicly traded securities. Additionally, Nutmeg did not apply any discount to the Funds' illiquid holdings until July 2008. Nutmeg's valuation methodology misled investors because it: (1) differed from the methodology Nutmeg represented it would use; and (2) overstated the Funds' value and performance. Nutmeg and Goulding reported these overstated valuations and returns on quarterly client account statements. Nutmeg also charged clients excessive management and performance fees based on the overvaluation.

The valuation methodology Nutmeg used for the Funds' illiquid and restricted securities -- a uniform 10% discount and a formula based on the price of unrestricted securities -- violated the applicable valuation standards. Under Financial Accounting Standard 157 ("FAS 157") and Commission Accounting Series Releases ("ASRs") 113 and 118, Nutmeg was required to value

the Funds' illiquid and restricted securities at "fair value." FAS 157 provides that "fair value" is the price at which an asset could be sold in an orderly market transaction. ASR 118 provides that "no single standard for determining 'fair value' can be laid down, since fair value depends upon the circumstances of each individual case." ASR 113 generally prohibits valuing restricted securities by: (1) using market quotations for unrestricted securities; or (2) applying a constant percentage discount to the market quotation for unrestricted securities without regard to other relevant factors. ASR 118 and it ASRs 113 both prohibit use of simple valuation formulas and require consideration of numerous factors including the issuer's financial condition, any purchase price discount, and the size of the fund's holdings.

**5. The Commission's Amended Complaint**

The Commission filed an amended complaint on June 14, 2011.[5] Counts I and II of the amended complaint collectively alleged that Goulding and Nutmeg violated Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. Counts III and VII collectively alleged Nutmeg violated Advisers Act Sections 204 and 206(4) and Rules 204-2 and 206(4)-2. Counts IV, V, and VI collectively alleged that Goulding and his son aided and abetted Nutmeg's violations of these Advisers Act provisions and rules.

## C. The District Court's Orders and Findings

### 1. Temporary Restraining Order, Emergency Relief, and Receiver

[5] Docket No. 314.

The District Court imposed a temporary restraining order, asset freeze, and other emergency relief against the defendants on March 25, 2009. It appointed a receiver over Nutmeg on July 21, 2009.

### 2. Order Granting the Commission Partial Summary Judgment

On February 16, 2016, the District Court granted partial summary judgment for the Commission, finding that Goulding negligently violated Sections 206(2), 206(4) of the Advisers Act and Rule 206(4)-2 thereunder. Advisers Act Section 206(2) prohibits an investment adviser from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Advisers Act Section 206(4) makes it unlawful for an investment adviser "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." Rule 206(4)-8 thereunder prohibits investment advisers from making false statements of material fact to any investor or prospective investor in a pooled investment vehicle, or failing to state material facts necessary to make statements made to such investors not misleading.

### 3. Post-Trial Findings of Fact and Conclusions of Law

On October 25, 2019, after a bench trial, the District Court issued its Findings of Fact and Conclusions of Law ("Findings"). As to Goulding, the District Court found that he materially violated various provisions of the Advisers Act, including its antifraud provisions. The District Court found that Goulding violated Advisers Act Section 206(1), "intentionally or recklessly," *i.e.*, with scienter, by:

(a) commingling and failing to segregate the Funds' assets in separate bank and brokerage accounts;

(b) transferring title to $4 million of the Funds' assets to the Relief Defendants, who were his family and friends;

(c) making undisclosed payments of Fund assets to the Relief Defendants to invest and sell the assets he transferred to them;

(d) failing to disclose to investors the commingling and transfer of the Funds' assets and the payments to the Relief Defendants;

(e) overstating the valuation of Funds' assets and investments;

(f) assessing fees from the Funds payable to Nutmeg based on overstated asset valuations;

(g) misappropriating client and investor assets from Nutmeg's commingled bank accounts for his personal benefit; and

(h) failing to disclose the overstatement of investment assets and fees, and the misappropriation of investor assets.

The District Court further found that Goulding violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder by failing to employ reasonable care in:

(a) valuing Fund assets and investments;

(b) assessing fees from the Funds payable to Nutmeg based on overstated asset valuations;

(c) misappropriating client and investor assets from Nutmeg's commingled bank accounts for his own personal benefit; and

(d) failing to disclose to investors the overstatement of investment assets and fees, and the misappropriation of investor assets.

The District Court found that all of Goulding's violations of the Advisers Act were material. The court further found that it is reasonably likely that Goulding will engage in future violations of the law, and that he should be permanently enjoined from doing so. The District Court based this conclusion on, among other things, Goulding's failure to comply with the Advisers Act, his commingling of investor funds with his personal assets, his implementation of flawed internal systems and methods for valuing and reporting the value of assets under management, his inattention to internal controls, his transfers of millions of dollars out of the Funds to the Relief Defendants, and his failure to disclose any of this to investors.

**4. Final Judgment Permanently Enjoining Goulding**

On November 12, 2019, the District Court issued its Final Judgment as to Defendant Randall Goulding ("Judgment"), which is attached as Exhibit A. The Judgment permanently enjoins Goulding from violating the Advisers Act provisions and Rules at issue in the underlying case. It provides, in relevant part, that,

> Goulding is permanently restrained and enjoined from violating, directly or indirectly, Sections 206(1) and (2) of the Advisers Act . . . by, while acting as an investment adviser and by the use of the means and instrumentalities of interstate commerce and of the mails, employing devices, schemes, and artifices to defraud his clients and prospective clients, or engaging in transactions, practices, and courses of business which operate as a fraud or deceit upon his clients or prospective clients.

*See* Judgment at 2. The judgment further provides, in relevant part, that,

> Goulding is permanently restrained and enjoined from violations, directly or indirectly, Section 206(4) of the Advisers Act . . . and Rule 206(4)-8 . . . by, while acting as an investment adviser to a pooled investment vehicle and using the means and instrumentalities of interstate commerce and of the mails, making

> untrue statements of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to an investor or prospective investor in the pooled investment vehicle or otherwise engage in any act, practice, or courses of business that is fraudulent, deceptive, or manipulative with respect to an investor or prospective investor in the pooled investment vehicle.

*See* Judgment at 2-3.

## ARGUMENT

Goulding's petition reveals his fundamental misunderstanding of the nature of Rule 102(e) proceedings and suspensions. He asserts that the temporary suspension violates his due process rights in two ways. Goulding argues that the Commission's Rule 102(e)(3) suspension authority derives from Rule 102(e)(1)(iii), which he asserts is unconstitutionally vague as to whether it encompasses reckless violations of the securities laws. Goulding also asserts the District Court's Findings cannot be accorded preclusive effect here because they were made under a "preponderance of the evidence" standard ("preponderance standard"), while, as he contends, 102(e) proceedings must use a "clear and convincing evidence" standard ("clear and convincing standard") because he characterizes them as "quasi-criminal" and Rule 102(e) suspensions as penal. The remainder of Goulding's petition contests the validity of the District Court's injunction and Findings. He contends that the District Court's injunction is invalid because it did not track the language of the statute or provide him notice of what conduct it prohibits. Goulding further argues that the District Court's Findings regarding misappropriation, disgorgement, asset over-valuation, and improper asset transfers to affiliates were wrong, and that he therefore cannot be suspended unless his conduct is litigated *de novo*. As explained below, Goulding's due process arguments are meritless, and his remaining arguments are irrelevant because he cannot contest the District Court's Findings and injunction in this proceeding.

## I. Goulding Is Not Entitled to the Extraordinary Relief of Having His Temporary Suspension Lifted.

The Commission should deny Goulding's request to lift the temporary suspension. While Rule of Practice ("Rule") 102(e)(3) provides that the Commission may lift a temporary suspension, it does not expressly set forth the standard for determining whether to grant such interim relief. As such relief is analogous to a stay pending appeal, the Commission should apply the traditional analysis it employs for considering requests for stays under Rule 401(d), 17 CFR 201.401(d). Thus, the Commission should consider whether: (1) there is a strong likelihood of success on the merits; (2) absent a stay, the movant will suffer irreparable injury; (3) there will be substantial harm to the public if a stay is not issued; and (4) a stay will serve the public interest. *See In the Matter of JD American Workwear, Inc.,* Release No. 34-43295, 73 SEC Docket 749, 2000 WL 1335438, *1 n.2 (Sept. 15, 2000) (applying this four-part analysis to determine whether a stay was appropriate under Rule 401(d)).

The Office of the General Counsel ("OGC") is unaware of any instance in which the Commission has lifted a temporary suspension imposed under Rule 102(e)(3) pending the outcome of an administrative proceeding to determine the appropriate sanction to be imposed. In view of Goulding's misconduct, which the District Court found violated the anti-fraud provisions of the Advisers Act, he is far from an appropriate candidate for such unprecedented relief. Moreover, consideration of the four factors relevant to Goulding's request to lift the temporary suspension demonstrates that he is not entitled to such relief.

### A. Goulding is Unlikely to Succeed on the Merits of his Arguments.

Goulding's petition presents two types of arguments: (1) due process challenges to the temporary suspension; and (2) attacks on the District Court's injunction and Findings. As to the former, as explained below, his due process challenges are meritless; as to the latter, under the

Commission's Rules of Practice he cannot contest the District Court's Findings or injunction in this proceeding. Goulding therefore has not shown that he will establish in this administrative proceeding that no suspension is warranted in light of his securities law violations and the injunction entered against him.

### 1. Goulding's Due Process Arguments Lack Merit.

Goulding makes two due process arguments, each unavailing. He first argues that "temporary suspensions of a professional's right to practice before the SEC . . . derive from the regulatory authority to enter a final disbarment order or lesser sanction under Rule 102(e)(1)(iii)," and that "Rule 102(e)(1)(iii) is unconstitutionally vague since the rule does not clearly identify the *mens rea* that the Commission must prove before the penal or quasi-criminal penalty remedy of disbarment and/or a final suspension can be imposed." Petition at 2. He then argues that "a penalty under Rule 102(e)(1)(iii) cannot be based upon the District Court's Findings and Conclusions which were made pursuant to the preponderance of the evidence standard. . . . Instead the sort of penalty or quasi-criminal remedy the Commission is seeking here would have to be based on *de novo* findings made pursuant to a clear and convincing evidence standard applicable to professional discipline and disbarment standards." Petition at 2.

Both arguments are based on faulty premises. Goulding seeks to equate a Rule 102(e) suspension from appearing and practicing before the Commission with disbarment. He asserts that he has a property right to practice before the Commission. And he contends that Rule 102(e) suspensions are penal and that Rule 102(e) proceedings are quasi-criminal. Because these erroneous premises underlie both of Goulding's due process arguments, we will address them first.

**a. Rule 102(e) Suspensions Are Not Equivalent to Disbarments.**

A disbarment is the expulsion of a lawyer from the bar or the practice of law. *See* Black's Law Dictionary. A Rule 102(e) suspension is not a disbarment. Attorneys suspended under Rule 102(e) are only prohibited from appearing or practicing before the Commission, but are not otherwise prohibited from practicing law. *See, e.g., Matter of Emanuel Fields*, 45 SEC 262, 1973 WL 149285, at *3 n. 20 (June 18, 1973) (rejecting attorney's due process challenge to his temporary Rule 102(e)(3) suspension and observing that "the impact of an order by us under our Rule 2(e) [the predecessor version of Rule 102(e)] is not nearly so devastating as is that of the order of a court barring a man from practicing law at all. . . . A lawyer barred by us is still free to hold himself out to the world as a lawyer, to practice before all tribunals save this one . . . ."); *Altman v. SEC*, 666 F.3d 1322, 1327 (D.C. Cir. 2011) (rejecting attorney's separation of powers and federalism challenges to his Rule 102(e)(1) suspension because "[t]he sanction imposed on Altman is limited to appearances before the Commission and has no effect either on his ability to practice law in New York State and to appear before any court"). Because Rule 102(e) suspensions are not disbarments, the cases Goulding cites involving disbarments are all distinguishable.

**b. Appearing or Practicing before the Commission is a Privilege, Not a Property Right.**

Practice before the Commission is a privilege, not a property right. *See* Exchange Act Section 4C and Rule 102(e)(1) (the Commission may censure or deny, temporarily or permanently, "the *privilege* of appearing and practicing") (emphasis added).[6] *See also Matter of Morris Mac Schwebel,* 40 SEC 347, 1960 WL 56306, at *19 (Nov. 17, 1960) ("The right to appear and practice before the Commission as an attorney is, like membership in the bar itself, a

[6] 15 78d-3; 17 CFR 201.102(e)(1)

privilege burdened with condition."); *In re Marcia Burton*, 442 B.R. 421, (W.D. N.C. 2009) (suspending attorney from practicing in bankruptcy court for misconduct and observing that "[t]he practice of law is a privilege, not a right.").

**c. Sanctions Imposed Under Rule 102(e) Are Remedial, Not Penal.**

The Commission promulgated Rule 102(e) to protect the integrity of its processes, and its sanctions are limited to those necessary to protect the investing public and the Commission from the future impact on its processes of professional misconduct. Thus its suspensions are remedial and not penal. *See, e.g., Matter of Carter*, 47 SEC 471, 1981 WL 384414, at *5 (Feb. 28, 1981); *Matter of Steven Altman, Esq.*, 2010 WL 5092725, at * 19 ("The remedial sanctions available to the Commission in Rule 102(e) and Exchange Act Section 4C attorney disciplinary proceedings include a censure, temporary suspension, and permanent disqualification from practice before the Commission.)) (Nov. 10, 2010). Rule 102(e) sanctions are forward-looking and not intended to punish an attorney for past misconduct. Rule 102(e) proceedings are thus distinct from state and federal court attorney disciplinary proceedings.

Goulding's reliance on *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), and Justice Kavanaugh's concurring opinion in *Saad v. SEC,* 873 F.3d 297 (D.C. Cir. 2017), to support his claim that Rule 102(e) suspensions are penal is misplaced. The sole question presented in *Kokesh* was whether a particular *pecuniary* sanction— disgorgement—constituted a fine, penalty, or forfeiture within the meaning of the five-year statute of limitations in 28 USC 2462. *Kokesh* held that disgorgement is a "penalty" for purposes of that statute, which applies to any "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture." *Id.* at 1639. It further held that "a *pecuniary* sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating

victim for his loss." *Id.* at 1642. *Kokesh* therefore does not compel the conclusion that a Rule 102(e) suspension is a penalty.

The relevant issue in *Saad* was whether a lifetime ban that FINRA imposed on a broker was impermissibly punitive. *See* 873 F.3d at 304. The D.C. Circuit did not rule on this issue. Instead it remanded this question to the Commission to address the relevance, if any, of *Kokesh*. *Id.* On remand, the Commission held that "*Kokesh* has no bearing on our determination that the bar 'is necessary to protect FINRA members, their customers, and other securities industry participants' and is therefore 'remedial, not punitive.'" *See Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by FINRA*, 2019 WL 3995968, at * 13 (Apr. 10, 2018). *Saad* therefore does not support Goulding's contention that Rule 102(e) suspensions are penal.

**d. Rule 102(e) Proceedings Are Civil, Not Quasi-Criminal.**

Because Goulding contends that Rule 102(e) proceedings are penal, he asserts that Rule 102(e) proceedings are quasi-criminal. Goulding is wrong. As Rule 102(e) sanctions are remedial, Rule 102(e) proceedings are civil, not quasi-criminal, proceedings. Goulding cites no authority holding that Rule 102(e) proceedings are quasi-criminal, and OGC is unaware of any such authority. Moreover, *Ruffalo*, 390 US 544 (1968) and *Daily v. Vought Aircraft Co.*, 141 F.3d 225 (5th Cir. 1998), which Goulding relies upon to support his assertion that 102(e) proceedings are quasi-criminal, are distinguishable. Both of those cases arose from a federal court's disbarment of attorneys, not a regulatory agency's suspension of an attorney from practicing before that agency.

### 2. Rule 102(e)(3) is not Void for Vagueness

Goulding's "void for vagueness" argument is specious at best. The purpose of that doctrine is to ensure that the public is given fair notice as to what conduct would violate that law. *See, e.g., Dirks v. SEC,* 802 F.2d 1468, 1471 (D.C. Cir. 1986) ("the core concern of vagueness doctrine, . . . [is] that an individual be provided with sufficient warning that certain conduct is proscribed"). Here, Goulding was given fair notice as to what conduct gives rise to a temporary suspension under Rule 102(e)(3) – namely, conduct which violates the federal securities laws and which might subject that person to a permanent injunction against further violations. Rule 102(e)(3)(i) provides, in relevant part, that:

> (i)The Commission with due regard for the public interest and without preliminary hearing may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer or other professional or expert who has been by name:
>
> (A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the federal securities laws or of the rules and regulations thereunder; or
>
> (B) found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of Federal securities laws or of the rules and regulations thereunder.

See 17 CFR 201.102(e)(3)(i)(A), (B).

Under Rule 102(e)(3), the Commission has already provided notice that it may temporarily suspend a respondent that is found culpable in a predicate action – by either the entry of an injunction or a finding that the respondent violated or aided and abetted violation of the federal securities laws. The fact that the respondent's predicate culpability is established in prior litigation between the Commission and the respondent does not undermine that respondent

had adequate notice that he could be subject to a temporary suspension.[7] The purpose of a Rule 102(e)(3) proceeding is solely to determine the appropriate sanction in light of the injunction or findings of federal securities law violations.

Even if Goulding's vagueness argument had merit – which it does not – it would not be a basis to lift his Rule 102(e)(3) temporary suspension. Rule 102(e)(3)(i) does not require the Commission to determine whether the respondent's federal securities law violations were willful. Rule 102(e)(3)(i)(A) has no state of mind requirement; it allows the Commission to temporarily suspend any respondent who has been permanently enjoined regardless of the respondent's intent. And under Rule 102(e)(3)(i)(B), the Commission may suspend a respondent who has been found to have violated, or aided and abetted violation of, the federal securities laws *unless* the court or administrative judge in the predicate action explicitly found that the violations were *not* willful. The District Court made no such finding regarding Goulding's violations. And, as Goulding was temporarily suspended under subsection (A) and (B) of Rule 103(e)(3), even if there were an ambiguity regarding the meaning of "willful," that would not be a basis to lift the temporary suspension.

Goulding's argument hinges on his assertion that the Rule 102(e)(3) suspension authority derives from Rule 102(e)(1)(iii). This argument is twice flawed. First, Rule 102(e)(3)'s suspension authority derives, not from Rule 102(e)(1)(iii), but independently from the Commission's rulemaking authority under the federal securities laws, including Section 23(a) of the Exchange Act of 1934 ("Exchange Act"), 15 USC 78w(a). *See* Amendment of Rule 2(e) of

[7] Goulding had ample notice and opportunity to be heard on these issues in the underlying action. And, if the Commission does not lift the temporary suspension, he will also have notice and an opportunity to show cause why he should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. See Rule 102(e)(3)(iii), 17 CFR 202.102(e)(3)(iii).

the Rules of Practice, Securities Exchange Act Release No. 9164 (May 10, 1971). Each of the three prongs of Rule 102(e) is independent of the others. Each prong is triggered by a different predicate and prescribes a different procedures for the Commission to take.

Moreover, even if this were a Rule 102(e)(1)(iii) proceeding, Goulding's vagueness argument regarding that provision would fail. Under Rule 102(e)(1)(iii), the Commission may suspend a person, after it provides notice and opportunity for a hearing, if it finds that the person "willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder." See 17 CFR 201.102(e)(1)(iii). Goulding's acknowledgment that for purposes of civil violations of the federal securities laws and industry bars, "willful" encompasses recklessness, Petition at 12, 14 n.1, should end the inquiry.

Despite the plain language of Rule 102(e)(1)(iii) and the cases holding that the term "willful" encompasses reckless conduct, Goulding claims that the Rule is vague because (in his view) Rule 102(e) proceedings are quasi-criminal, and therefore "willfully" should have the same meaning here as it has in the criminal law, *i.e.,* a knowing violation of the law. [8] Petition at 12. But this argument fails because these proceedings are not quasi-criminal and Goulding cites no authority holding that they are.

### 3. Goulding's Burden of Proof Argument Lacks Merit.

Goulding's argument that the District Court's Findings cannot be given preclusive effect because Rule 102(e)(1)(iii) proceedings require a higher burden of proof than the preponderance

[8] Goulding acknowledges the holding in *Wonsover v. SEC*, 205 F.3d 408 (D.C. Cir. 2000) that "willfulness" means intentionally or recklessly committing an act that constitutes a violation of the securities laws, but questions its viability after *Kokesh*. Petition at 14 n. 1. *Wonsover*, however, remains good law.

standard used by the District Court fares no better than his vagueness argument.[9] First, as noted above, this is not a Rule 102(e)(1)(iii) proceeding. Second, it is well-settled that the burden of proof in Commission administrative proceedings, including disciplinary proceedings, is a preponderance of the evidence. *See, e.g., Steadman v. SEC*, 450 US 81 (1981); *Matter of William R. Carter*, 1981 WL 384414, at *31 n.3. As this is the same burden of proof used by the District Court, there is no due process impediment to giving preclusive effect to the District Court's Findings here – findings which followed extensive litigation where Goulding had every opportunity to be heard and to present any defenses he believed he may have had.

Additionally, none of Goulding's arguments that the clear and convincing standard applies to Rule 102(e) proceedings are valid. As explained above, Rule 102(e) suspensions are not penal and Rule 102(e) proceedings are not quasi-criminal.[10] Nevertheless, Goulding argues that *Steadman* "should not be extended to proceedings that impair the value of a *professional* license, given the greater investment in time and education needed to obtain a professional license and the largely reputational interest embodied in a business license." Petition at 16. But *Steadman's* holding applies to all federal agency adjudications under the Administrative Procedure Act ("APA"), 5 USC 554. Goulding cites no authority holding that the clear and

[9] Although Goulding's argument is directed toward Rule 102(e)(1)(iii), we assume that he would make the same argument regarding Rule 102(e)(3). It is worth noting, however, that Goulding's claim that Rule 102(e)(1)(iii) "permits automatic disbarment or attorney discipline based solely on judicial findings" is incorrect. Petition at 14-15. Under Rule 102(e)(1)(iii), the Commission conducts an original administrative proceeding to determine whether the respondent willfully violated the federal securities laws and, if so, the appropriate sanction.

[10] Goulding's petition seems to suggest that the clear and convincing standard is universally used in state attorney disciplinary proceedings; but not all states use that standard. For example, New York, Alabama, and Alaska, among other jurisdictions, use the preponderance standard in attorney disciplinary proceedings. *See, e.g., Matter of Capoccia*, 59 N.Y.2d 549, 466 N.Y.S.2d 268, 453 N.E.2d 497 (1983); Dodd v. Board of Com'rs of Alabama State Bar, 350 So. 2d 700 (Ala. 1977); Matter of Robson, 575 P.2d 771 (Alaska 1978).

convincing standard applies to federal agency adjudications, and OGC is aware of no such authority.

**4. Goulding Cannot Litigate His Challenges to the Court's Injunction and Findings in This Proceeding.**

Goulding's remaining points attack the District Court's injunction and Findings. Petition at 16-29. He cannot, however, litigate these disputes in this proceeding. Rule 102(e)(3)(iv) provides, in relevant part, that "the petitioner may not contest any finding made against him or her . . . in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated." See Rule 102(e)(3)(iv), 17 CFR 201.102(e)(3)(iv). The Commission has "long refused to permit a respondent to re-litigate issues that were addressed in previous civil proceedings against the respondent." *See, e.g., Matter of Demetrious Julius Shiva*, 52 S.E.C. 1247, 1997 WL 112328, at *2 (Mar. 12, 1997) ((rejecting attempts to challenge injunction and noting that "we have long refused to permit a respondent to re-litigate issues that were addressed in a previous civil proceeding against the respondent"); *Matter of Joseph P. Galluzzi*, , 2002 WL 1941502, at *3 (Aug. 23, 2002) ("a party cannot challenge his injunction or criminal conviction in a subsequent administrative proceeding."). The appropriate forum for Goulding to contest the Court's injunction and/or Findings is the court of appeals. *See, e.g., Matter of Jose P. Zollino*, Exchange Act Release No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2007 WL 98919, at *4 n.20 (refusing to consider respondent's challenges to underlying injunctive and criminal proceedings in follow-on industry bar proceeding and observing that, "those matters are properly addressed to the appellate court."); *Matter of Michael Batterman*, 84 SEC Docket 1349, 2004 WL 2785537, at * 3 (Dec. 3, 2004) (challenges to the basis of a prior proceeding are properly addressed to the appellate court). Thus, even if Goulding's challenges to the District Court's injunction and Findings were meritorious – which they are not – he cannot

litigate them in this Rule 102(e)(3) proceeding. Thus, the likelihood of success on the merits factor weighs against issuing a stay of the temporary suspension.

**B. Goulding Has Not Demonstrated that He Will Suffer Irreparable Injury Absent a Stay of the Temporary Suspension.**

Goulding does not argue that he will suffer irreparable injury absent a stay of the temporary suspension. To the contrary, he notes that he has already directed the clients he was representing before the Commission to retain new counsel. Petition at 1. Consequently, this factor thus weighs against issuing a stay of the temporary suspension.

**C. There is Benefit, Not Substantial Harm, to the Public If the Temporary Suspension is Maintained Pending a Hearing on the Appropriate Sanction.**

Goulding violated the Advisers Act, including its antifraud provisions, and also aided and abetted Nutmeg's violations of the Advisers Act. These violations enriched Goulding and his family at the expense of investors. A stay of Goulding's temporary suspension could expose the public to further harm if he is allowed to practice before the Commission as an attorney while this case is adjudicated. Thus, keeping the temporary suspension in place pending a hearing on the appropriate sanction will benefit rather than harm the public. This factor therefore weighs against issuing a stay of the temporary suspension.

**D. The Public Interest Will Be Protected by Maintenance of the Temporary Suspension Pending a Hearing on the Appropriate Sanction.**

In its February 7, 2020 Order Instituting Proceedings and Imposing Temporary Suspension, the Commission found it "in the public interest" that Goulding be temporarily suspended. Goulding has not identified any relevant changes in circumstances that would suggest that it is now in the public interest to permit him to appear and practice before the Commission. Nor has he offered any reason to question the Commission's previous

determination that temporarily suspending him would serve the public interest. The public interest thus also weighs against issuance of a stay of the temporary suspension.

In sum, all four factors the Commission considers in determining whether to grant a stay of the temporary suspension weigh against granting Goulding that extraordinary relief.

**Conclusion**

The Commission should deny Goulding's petition to lift his suspension and set this matter for a hearing to determine the appropriate sanction.

DATED: April 3, 2020

Respectfully submitted,

THOMAS J. KARR
Assistant General Counsel

/s/DONNA S. MCCAFFREY
Special Trial Counsel

SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
Washington, DC 20549-9612
Phone: (202) 551-5174 (McCaffrey)
Email: mccaffreyd@sec.gov

## CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, I caused a true and correct copy of the Office of Litigation and Administrative Practice's Opposition to Respondent's Petition to Lift the Temporary Suspension Entered Pursuant to Rule 102(e)(3)(A),(B) of the Commission's Rules of Practice to be served upon the parties and persons entitled to notice below, by mailing through the U.S. Postal Service by first class mail:

Eric Berry, Esq.
Berry Law PLLC
745 Fifth Avenue, 5th Floor
New York, New York 10151
(Counsel for respondent Randall Goulding, Esq.)

/s/Donna S. McCaffrey

# Exhibit A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

THE NUTMEG GROUP, LLC,
ET AL.

Defendants,

Case No.: 09-CV-1775

Magistrate Judge Gilbert

**FINAL JUDGMENT AS TO DEFENDANT RANDALL GOULDING**

After a bench trial in which this Court issued findings of fact and conclusions of law [Docket No. 1085] in favor of the Plaintiff Securities and Exchange Commission ("SEC") and against Defendant Randall Goulding ("Defendant Goulding" or "Goulding") finding Goulding liable for violating Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8], and after this Court having granted summary judgment against Goulding [Docket No. 795] finding him liable for violating Sections 206(2) and 206(4) of the Advisers Act [15 U.S.C. §§ 80b-6(2) and 80b-6(4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8], and the Court having considered the evidence in this matter and the parties' submissions and arguments regarding appropriate remedies, the Court hereby enters this Final Judgment:

I.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant Goulding is permanently restrained and enjoined from violating, directly or indirectly, Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and 80b-6(2)] by, while acting as an investment adviser and by the use of the means and instrumentalities of interstate commerce and of the mails, employing devices, schemes, and artifices to defraud his clients and prospective clients, or engaging in transactions, practices, and courses of business which operate as a fraud or deceit upon his clients or prospective clients.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Goulding's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Goulding or with anyone described in (a).

II.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant Goulding is permanently restrained and enjoined from violating, directly or indirectly, Section 206(4) of the Advisers Act [15 U.S.C. § 80b-6(4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8] by, while acting as an investment adviser to a pooled investment vehicle and using the means and instrumentalities of interstate commerce and of the mails, making untrue statements of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to an investor or prospective investor in the pooled investment vehicle or otherwise engage in any act, practice,

or courses of business that is fraudulent, deceptive, or manipulative with respect to an investor or prospective investor in the pooled investment vehicle.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Goulding's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Goulding or with anyone described in (a).

III.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant Goulding is liable for disgorgement of $642,422, representing profits gained as a result of Goulding's misappropriation of client assets, together with prejudgment interest thereon in the amount of $583,230 and a civil penalty in the amount of $642,422 pursuant to Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)(2)]. Defendant Goulding shall satisfy this obligation by paying $1,868,074 to the Securities and Exchange Commission within 30 days after entry of this Final Judgment. Defendant Goulding may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant Goulding may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Randall Goulding as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment. Defendant Goulding shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant Goulding relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Goulding. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt and/or through other collection procedures authorized by law at any time after 30 days following entry of this Final Judgment. Defendant Goulding shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

IV.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

V.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice

**SO ORDERED** this 12 day of November, 2019.

HON. JEFFREY T. GILBERT
UNITED STATES MAGISTRATE JUDGE