

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90674 / December 15, 2020

INVESTMENT COMPANY ACT OF 1940
Release No. 34142 / December 15, 2020

Admin. Proc. File No. 3- 19243

In the Matter of

FIDELITY TRANSFER SERVICES, INC.
and
RUBEN SANCHEZ

ORDER REQUESTING ADDITIONAL MATERIALS

On July 10, 2019, the Securities and Exchange Commission issued an Order Instituting Proceedings (“OIP”) against Fidelity Transfer Services, Inc., a registered transfer agent, and Ruben Sanchez, Fidelity’s only known officer, pursuant to Sections 17A(c) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940.¹ On September 18, 2020, the Division of Enforcement moved to find Fidelity in default and for sanctions.²

The default motion seeks in part to find Fidelity liable for violating Exchange Act Section 17(a)(1) and (a)(3). These provisions require a registered transfer agent to make, keep, and furnish records that the Commission, “by rule, prescribes as necessary or appropriate.”³ In discussing these provisions, the OIP states that “Rules 17Ad-6, 17Ad-7, and 17Ad-10 of the Exchange Act prescribe specific types of records to be created and maintained by a registered transfer agent.”⁴ Although the OIP alleges that a December 9, 2014 letter to Sanchez

¹ *Fidelity Transfer Servs., Inc.*, Exchange Act Release No. 33550, 2019 WL 3035436 (July 10, 2019).

² The Division of Enforcement effected service on Fidelity but was unable to do so with respect to Sanchez, and the matter has since proceeded only as to Fidelity.

³ 15 U.S.C. § 78q(a)(1), (a)(3).

⁴ *Fidelity Transfer Servs., Inc.*, 2019 WL 3035436, at *2.

“request[ed] basic required records from Fidelity,”⁵ it does not address the extent to which Fidelity was required to make, keep, and furnish these records, and records sought through other requests, by Rules 17Ad-6, 17Ad-7, or 17Ad-10, or by another Commission rule.

The default motion went beyond what was alleged in the OIP, claiming that Fidelity ignored “three separate staff requests for required records” and that each request “included records that are required by the SEC’s rules governing transfer agents, and that are central to a transfer agent’s most basic duties.” Specifically, the Division asserted in the default motion that:

Chicago OCIE’s March 2, 2018 and March 28, 2018 letters to Fidelity requested reports of daily transfer activity, which are required under Rule 17Ad-6(a)(1), and which are to be kept by transfer agents for a period of not less than two years under Rule 17Ad-7(a). Likewise, Los Angeles Enforcement’s December 10, 2018 subpoena called for GRNH’s shareholder list, which a transfer agent is required to “maintain and keep current” under Rule 17Ad-10(b).

But the Division did not allege this in the OIP and has not adduced copies of these various referenced requests or otherwise substantiated its assertions in the default motion with evidentiary support. The Division should thus supplement the record with another declaration attaching such documents and any other evidence relevant to whether the requested records at issue were required by Commission rules.⁶

Further, the Division should address the applicable standard for “willfulness” under Exchange Act Section 15(b)(4)(A), which Exchange Act Section 17A(c)(3) incorporates. The Division cites Exchange Act Sections 15(b)(4)(A) and 17A(c)(3) in seeking sanctions against Fidelity. Exchange Act Section 15(b)(4)(A) authorizes sanctions where the respondent has “willfully made or caused to be made in any application for registration or report required to be filed . . . any statement which was . . . false or misleading”⁷ According to the Division, “willfully” in this context “means intentionally committing the act which constitutes the

⁵ *Id.*; see 17 C.F.R. § 201.155(a) (providing that, where a respondent has defaulted, the Commission may deem true allegations in the OIP).

⁶ See 17 C.F.R. § 201.155(a) (providing that the Commission may determine a proceeding against a defaulting party “upon consideration of the record, including the [OIP]”; *cf.* 17 C.F.R. § 201.250 (“[A]ny party may make a motion for summary disposition on one or more claims or defenses, asserting that the undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted pursuant to § 201.323 show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law.”)).

⁷ 15 U.S.C. § 78o(b)(4)(A).

violation,” citing the holding in *Wonsover v. SEC*.⁸ We note, however, that subsequent precedent interpreting Section 207 of the Investment Advisers Act of 1940, which has similar language to that of Exchange Act Section 15(b)(4)(A),⁹ held that “negligent conduct” was insufficient to establish a violation of that provision.¹⁰ The Division should address whether the language of these Exchange Act and Advisers Act provisions are distinguishable for purposes of construing the meaning of willfully, and whether Section 15(b)(4)(A) requires scienter. The Division should further address the extent to which Fidelity acted with scienter in making the Commission filings at issue and the evidence that would support such a finding.

Accordingly, it is ORDERED that the Division shall file a brief by January 15, 2021, not to exceed 2,000 words, limited to addressing the matters raised in this order. Additional evidentiary materials shall be attached to the brief, which must contain specific citations to the evidence relied upon. If any such evidentiary materials are sensitive, the Division may move for a protective order over such records.¹¹ Fidelity may file a brief, not to exceed 2,000 words, in response to the Division’s brief by February 16, 2021. The Division may file any reply, not to exceed 1,000 words, by March 2, 2021.

Attention is called to the Commission’s March 18, 2020 order regarding the filing and service of papers, which provides that pending further order of the Commission parties to the extent possible shall submit all filings electronically at apfilings@sec.gov.¹²

For the Commission, by the Office of General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

⁸ 205 F.3d 414 (D.C. Cir. 2000).

⁹ See 15 U.S.C. § 80b-7 (making it “unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed . . . or willfully to omit to state in any such application or report any material fact . . .”).

¹⁰ *Robare v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019).

¹¹ See 17 C.F.R. § 201.322(a) (allowing a party to request “a protective order to limit from disclosure . . . to the public documents . . . that contain confidential information”).

¹² See *Pending Administrative Proceedings*, Exchange Act Release No. 88415, <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.