UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5739 / May 26, 2021

Admin. Proc. File No. 3-16517

In the Matter of

CHARLES R. KOKESH

ORDER REQUESTING BRIEFING

On September 9, 2015, the administrative law judge issued an initial decision with respect to Charles R. Kokesh.[1] The law judge found that Kokesh was in default. The initial decision ordered that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Kokesh is permanently barred from associating with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent. The time for filing a petition for review of the initial decision has expired. No such petition has been filed by Charles R. Kokesh or the Division of Enforcement. The Commission has, however, determined to review the decision on its own initiative for the purposes described below.

Under Rule of Practice 360(d) and as specified in the initial decision here, an initial decision does not become final until the Commission gives notice that the initial decision of the law judge is the final decision of the Commission.[2] No such notice has been issued in this case. Accordingly, the sanctions in the initial decision have not become effective. We note that the initial decision ordered, among other things, collateral broker, dealer, municipal securities dealer, and transfer agent bars based on conduct that predated July 22, 2010, the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[3] Consistent

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1 *Charles R. Kokesh*, Initial Decision Release No. 876, 2015 WL 5245248 (Sept. 9, 2015).

2 *See* 17 C.F.R. § 201.360(d) ("The [initial] decision becomes final upon issuance of the [finality] order."); *Kokesh*, 2015 WL 5245248, at *5 ("The Initial Decision will not become final until the Commission enters an order of finality.").

3 After the initial decision was issued, the United States Court of Appeals for the D.C. Circuit held that collateral bars imposed by the Commission based on conduct that occurred before July 22, 2010, the effective date of the Dodd-Frank Act, were impermissibly retroactive. *See Bartko v. SEC*, 845 F.3d 1217, 1225 (D.C. Cir. 2017); Commission Statement Regarding Decision in *Bartko v. SEC* (Feb. 23, 2017), *available at* https://www.sec.gov/news/statement/commission-statement-regarding-bartko-v-sec.html.

with *Bartko v. SEC* and our prior exercise of our discretion,[4] we intend to modify the initial decision to the extent it imposes these collateral bars based on conduct that predated July 22, 2010.

In addition, in an exercise of our discretion in light of the unique facts and circumstances presented by the passage of time since the initial decision was issued, we are providing the parties with the opportunity to file briefs and submit evidence, as to whether remedial action is in the public interest under Advisers Act Section 203(f). Any briefing and evidence submitted should address the factors the Commission considers in making such a public interest determination: 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 or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[5] The Commission's inquiry is a "flexible one, and no one factor is dispositive."[6]

The initial decision here reflects the ALJ's consideration of these factors in determining that an investment adviser and certain collateral bars were in the public interest. We also note that, among other things, the initial decision stated that "Kokesh has not offered assurances against future violations or portrayed any recognition of his wrongful conduct, having defaulted in this proceeding" and that "[a]bsent a bar, Kokesh . . . would be able to engage in the securities industry again, which presents a risk of future violative conduct."[7] While the OIP's allegations may be deemed to be true based on Kokesh's default,[8] the Commission would benefit from briefing regarding what effect, if any, the passage of time since the initial decision has had on any aspects of the initial decision's public interest analysis. The Commission would also benefit from any further evidence relevant to such matters or otherwise relevant to its public interest analysis that either Kokesh or the Division of Enforcement may choose to submit, consistent

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4 *See, e.g., Sung Kook Hwang*, Advisers Act Release No. 5476, 2020 WL 1862515 (Apr. 13, 2020) (vacating collateral bars imposed based on conduct that predated the Dodd-Frank Act).

5 *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see also Lawrence Allen Deshetler*, Advisers Act Release No. 5411, 2019 WL 6221492, at *2-3 (Nov. 21, 2019) (applying *Steadman* factors in follow-on proceeding).

6 *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

7 *Kokesh*, 2015 WL 5245248, at *4.

8 *See* Commission Rules of Practice 155(a), 220(f), 17 C.F.R. §§ 201.155(a), 201.220(f). In addition, the initial decision notes that Kokesh stipulated to the facts alleged in Section II of the OIP as well as the admissibility of certain documents.

with Rule of Practice 452.[9] Any additional evidentiary materials shall be attached to the submitting party's brief, which must contain specific citations to the evidence relied upon.

Accordingly, it is ORDERED that Kokesh and the Division of Enforcement are permitted to each file an opening brief by June 16, 2021, not to exceed 5000 words, addressing the impact, if any, of the passage of time since the initial decision on the Commission's analysis of the appropriate sanction in the public interest.

It is further ORDERED that each party shall be permitted to file a brief responding to the other party's opening brief by June 30, 2021, not to exceed 5000 words.

The parties' 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.[10] Also, the Commission's Rules of Practice were recently amended to include new e-filing requirements, which took effect on April 12, 2021.[11]

By the Commission.

Vanessa A. Countryman
Secretary

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[9] Rule of Practice 452, 17 C.F.R. § 201.452.

[10] *Pending Administrative Proceedings*, Exchange Act Release No. 88415, 2020 WL 1322001 (Mar. 18, 2020), https://www.sec.gov/litigation/opinions/2020/33-10767.pdf.

[11] *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. 86,464, 86,474 (Dec. 30, 2020); *see also Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020); *Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, https://www.sec.gov/efapdocs/instructions.pdf. The amendments also impose other obligations on parties to administrative proceedings such as a new redaction and omission of sensitive personal information requirement. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465–81.