

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

In the Matter of :
: INITIAL DECISION
TERRY HARRIS : May 11, 2006

APPEARANCES: Michael J. O’Leary, Alana Black, and M. Graham Loomis for the
Division of Enforcement, Securities and Exchange Commission

Dexter B. Johnson of Mallon & Johnson, P.C., for
Respondent Terry Harris

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Terry Harris (Harris) from association with an investment adviser. Previously, state authorities convicted him of an investment adviser violation in Alabama and prohibited him from offering and selling securities in Illinois.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP)¹ against Harris on February 3, 2006, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that the Alabama Securities Commission (ASC) and the Illinois Securities Department issued administrative orders against Harris in 2003 and 2004, respectively, and that he was convicted of an investment adviser violation in Alabama in 2005. At a February 21, 2006, prehearing conference the parties requested leave to file cross motions for summary disposition. Leave was granted, pursuant to 17 C.F.R. § 201.250(a). See Terry Harris, Admin. Proc. No. 3-12171 (A.L.J. Feb. 21, 2006) (unpublished). Pursuant to the schedule set at the prehearing conference, Harris filed an Answer

¹ The OIP was amended, at ¶ II.F., to replace an erroneous reference to January “27,” 2005, with January “26.” Terry Harris, Admin. Proc. No. 3-12171 (A.L.J. Mar. 10, 2006) (unpublished).

on March 14, 2006, and the parties filed their motions for summary disposition on April 14, 2006.² Id. The administrative law judge is required by 17 C.F.R. § 201.250(b) to act “promptly” on a motion for summary disposition.

This Initial Decision is based on: (1) the Division of Enforcement’s (Division) Motion for Summary Disposition; (2) Harris’s Motion for Summary Judgment; and (3) Harris’s Answer. There is no genuine issue with regard to any fact that is material to this proceeding.³ All material facts that concern the activities for which Harris was sanctioned were decided against him in the cases on which this decision is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a).⁴ All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that the States of Alabama and Illinois “bar[red] Harris from engaging in the business of securities” and that he was also convicted of “transacting business as an investment adviser representative without first having been so registered” in violation of Alabama law. The Division urges that he be barred from association with any registered or unregistered investment adviser. Harris challenges procedural aspects of the state administrative and criminal proceedings against him and argues that the Commission lacks jurisdiction over him, stating that he has no plans to seek registration with the Commission in any capacity and is not, or seeking to become, associated with an investment adviser. He asks that the proceeding be dismissed.⁵

² The schedule permitted oppositions to be filed by April 21, 2006, but neither party filed one.

³ In view of the disposition of the proceeding in this Initial Decision, the June 13, 2006, hearing date scheduled at the prehearing conference is moot.

⁴ Citations to Harris’s Answer and Motion for Summary Disposition will be noted as “Ans. at ___” and “Resp. at ___,” respectively.

⁵ Harris also requests an award of costs, legal fees, and damages. Such a request, which is premature, can only be made under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and Sections 201.31-.59 of the Commission’s Rules, 17 C.F.R. §§ 201.31-.59. The EAJA and the cited Commission Rules specify the circumstances under which an award of fees and expenses will be made to a party.

C. Official Notice

Official notice is taken, pursuant to 17 C.F.R. §§ 201.250(a), .323, of the following items included in the parties' Motions for Summary Disposition and in Harris's Answer as Exhibits A and B:

Seven-page Cease and Desist Order, Terry Harris, No. CD-2003-0012 (Ala. Sec. Comm. June 10, 2003) (Ex. A); and

Five-page Consent Order of Prohibition and Fine, Networker2000 a/k/a N2K, File No. 0300182 (Ill. Sec. State Aug. 18, 2004) (Ex. B).

Official notice is taken, pursuant to 17 C.F.R. §§ 201.250(a), .323, of the following items included in the Division's Motion for Summary Disposition as Division Exhibits 1A, 1B, 3A at 9-10, 3B, and 4 at 1-4:

Form ADV, filed by N2K Trading Academy, Inc. (N2K), on December 21, 2005 (Div. Ex. 1A);

Form ADV-W, filed on February 15, 2006, withdrawing Div. Ex. 1A, N2K's December 21, 2005, Form ADV (Div. Ex. 1B);

Two-page Notice of Right to a Hearing, directed to Terry Harris, pertaining to Cease and Desist Order (Div. Ex. 3A at 9-10);

Letter, dated March 17, 2004, from the ASC to Julian L. McPhillips, Jr., Esquire, concerning Cease and Desist Order (Div. Ex. 3B); and

Four-page docket sheet, State of Alabama v. Terry Harris, Case No. CC 2004 001289.00 (Div. Ex. 4 at 1-4).

II. FINDINGS OF FACT

Harris was convicted on his January 26, 2005, plea of guilty, of transacting business as an investment adviser representative without having been registered under Section 8-6-3(b) of the Code of Alabama 1975 before the Circuit Court of Montgomery County, Alabama. Ans. at 2; Resp. at 2 n.1; Div. Ex. 4 at 2. Section 8-6-3(b) provides, "It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless: (1) He is so registered under this article [with exceptions not relevant here]." Harris was sentenced on April 28, 2005, to five years' imprisonment, suspended, and placed on five years' probation or until the following conditions are met: (1) payment of court costs of \$10,000, a fine of \$2,500, and restitution of \$1.6 million; (2) undergo a workshop for licensing; and (3) 500

hours of community service. Div. Ex. 4 at 2. That case is currently under appeal. Ans. at 2; Resp. at 2 n.1; Div. Ex. 4 at 2-4.

Harris was “permanently prohibited from offering and selling securities in the State of Illinois” by the Illinois Secretary of State on August 18, 2004, pursuant to Sections 11.E(2), (3), and (4) of Illinois Securities Law of 1953, §§ 815 ILCS 5/11.E(2), (3), (4). Ans. at 2; Ex. B. Harris and others had violated Sections 12.A and 12.D, §§ 815 ILCS 5/12.A, .D, by offering for sale securities that were not registered in accordance with those provisions. Ex. B at 2-3. Specifically, between May 2002 and February 2003, Harris and others operated an “investment program”; investors were solicited to pay \$35 a month into the program and to recruit other investors; Harris and others represented that they would trade options for returns of 200% or more and that investors could earn up to \$21,920. Ex. B at 2.

Harris was ordered by the ASC on June 10, 2003, to “cease and desist from further offers or sales of any security, of any security into, within, or from the State of Alabama.” Ans. at 2; Ex. A at 7. The ASC found that, from December 1, 1999 through August 2002, he and others engaged in the offer and/or sale of unregistered investment contracts in violation of Alabama law, placed investor funds into a blind pool investment fund, and engaged in trading. Ex. A at 3-5. The ASC found that the trading was not always profitable but was represented to investors as such, while the majority of funds paid out to investors were actually monies paid into the program by other investors rather than trading profits. Ex. A at 5. The ASC concluded that Harris and others thereby violated Section 8-6-3(a) of the Code of Alabama 1975 by acting as securities agents and/or broker dealers without having registered in accordance with law and “employed a device and/or scheme to defraud by engaging in a course of business which operated as a fraud or deceit upon investors in violation of Section 8-6-17(a)(1),(2),(3), Code of Alabama 1975.” Ex. A at 6. A “Notice of Right to a Hearing” was directed to Harris along with the cease-and-desist order. Div. Ex. 3A at 9-10. Harris maintains that he made a timely request for a hearing, while the Division maintains that he did not. Ans. at 3; Resp at 6 n.6; Div. Ex. 3B. There is no record of the entry of a “final order” in the cease-and-desist proceeding, and Harris maintains that the cease-and-desist order did not become a “final order,” while the Division maintains that it did. Ans. at 3; Resp. at 6 n.6; Div. Ex. 3B. The undersigned has made no finding of fact on the status of ASC’s cease-and-desist order in view of the parties’ divergence on this issue.

Harris is president, a director, and 75% or more owner of N2K, which filed an application on Form ADV with the Commission seeking to become a registered investment adviser on December 21, 2005. Ans. at 1; Div. Ex. 1A. On February 3, 2006, the Commission instituted a proceeding, Admin. Proc. No. 3-12170, to determine whether the application should be denied pursuant to Section 203(c)(2)(B) of the Advisers Act. On February 15, 2006, N2K filed Form ADV-W withdrawing its application. Div. Ex. 1B. As a result the Commission dismissed the proceeding. See N2K Trading Academy, Inc., Advisers Act Release No. 2505 (Mar. 31, 2006). Harris now has no plans to seek registration with the Commission in any capacity. Resp. at 8.

III. CONCLUSIONS OF LAW

Pursuant to Section 203(f) of the Advisers Act, the Commission may impose a sanction on “any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser” if such person has been convicted, within ten years of commencement of proceedings, of a felony or misdemeanor that “involves the purchase or sale of any security,” . . . “arises out of the conduct of the business of a broker, dealer, . . . investment adviser” or of “any crime that is punishable by imprisonment for 1 or more years . . .” or “is subject to any final order of a State securities commission (or any agency or officer performing like functions) . . . that . . . bars such person . . . from engaging in the business of securities” Sections 203(e)(2), (3), (9) and 203(f) of the Advisers Act.

Harris argues that the Commission does not have jurisdiction over him because he has never sought to register with the Commission in any capacity, and since N2K’s application for investment adviser registration has been withdrawn, he is not a “person associated with an investment adviser” within the meaning of Advisers Act Section 202(a)(17). Further, he argues that the ASC cease-and-desist order is not a “final order” and neither the ASC nor the Illinois order “bars [him] from engaging in the business of securities” within the meaning of Advisers Act Section 203(e)(9). With reference to his Alabama conviction, he argues that the violation is so minor that it should not have been criminalized, that his guilty plea was entered under duress, and that he is appealing the conviction.

The withdrawal of N2K’s application to become a registered investment adviser does not moot this proceeding against Harris. The Commission has authority to bar persons from association with registered or unregistered investment advisers or otherwise sanction them under Section 203 of the Advisers Act. Teicher v. SEC, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999). The Commission clearly has jurisdiction over Harris in light of his conviction for having transacted business as an unregistered investment adviser representative.

Harris’s conviction was for a “crime that is punishable by imprisonment for 1 or more years . . .” within the meaning of Sections 203(e)(9) and 203(f) of the Advisers Act. Further, he is foreclosed from arguing that the facts concerning his involvement in the underlying wrongdoing are not proved. It is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See Ira William Scott, 53 S.E.C. 862, 866 (1998); William F. Lincoln, 53 S.E.C. 452, 455-56 (1998). Even if Harris is appealing his conviction, the pendency of an appeal does not preclude “follow-up” action. Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Ira William Scott, 53 S.E.C. at 865 n.8.

Illinois “permanently prohibited [Harris] from offering and selling securities in the State of Illinois.”⁶ It could be argued that Illinois did not “bar[him] from engaging in the business of

⁶ Harris does not dispute that the Illinois order is a “final order” within the meaning of Advisers Act Section 203(e)(9). Because of the parties’ disagreement on the status of the ASC cease-and-

securities” within the meaning of Advisers Act Section 203(e)(9) because he was not prohibited from engaging in investment adviser activities in the securities business.⁷ However, the prohibition and the underlying wrongdoing can be taken into account in determining the sanction.⁸ See Int’l S’holders Servs. Corp., 46 S.E.C. 378, 386 n.19 (1976).

IV. SANCTION

Harris will be barred from association with an investment adviser, registered or unregistered.

The Commission determines sanctions pursuant to a public interest standard under Sections 203(e) and 203(f) of the Advisers Act.⁹ It considers factors such as:

the seriousness of the violation; the isolated or recurrent nature of the violation, the respondent’s state of mind; the sincerity of the respondent’s assurances against future violations; the respondent’s recognition of the wrongful nature of the misconduct; the respondent’s opportunity to commit future violations; the age of the violation; and the degree of harm to investors and the marketplace resulting from the violation.

Marshall E. Melton, 80 SEC Docket 2812, 2814 (July 25, 2003); see also Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979).

A securities-related conviction weighs heavily against a respondent. See Frederick W. Wall, 86 SEC Docket 857, 863 (Sept. 19, 2005). While Harris diminishes the seriousness of his violation, the violation is punishable by a lengthy prison sentence, as indicated by the suspended five-year sentence he received. Its seriousness, as well as the degree of harm to investors and the

desist order, discussed above, the undersigned has placed no reliance on it in the Conclusions of Law and Sanction sections of this Initial Decision.

⁷ Like the federal regulatory distinction between the Securities Exchange Act of 1934 and the Advisers Act, Illinois distinguishes between broker-dealer activities in the offer and sale of securities and investment adviser activities. See, e.g., § 815 ILCS 5/2.5, .5a, .7, .11, .12b.

⁸ Harris does not challenge the findings of fact and conclusions of law in the Illinois order. Indeed, the Commission does not permit a respondent to re-litigate issues that were addressed in a previous civil proceeding against him. See Michael J. Markowski, 55 S.E.C. 21, 26-27 (2001), pet. denied, No. 01-1181 (D.C. Cir. 2002) (unpublished); John Francis D’Acquisto, 53 S.E.C. 440, 444 (1998); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 (1997).

⁹ Thus, in addition to issues related to the violator, it “weigh[s] the effect of [its] action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally.” Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975); see also Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n.67 (1976); Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

marketplace, is also indicated by the \$1.6 million restitution order. Consistent with a vigorous defense of this proceeding, Harris has not recognized the wrongful nature of his conduct or given assurances against future violations. Although Harris does not intend to seek registration with the Commission, he has not foresworn work in the investment adviser or securities businesses. The facts found in the Illinois order constitute an additional aggravating factor, indicating a recurrent violation, between May 2002 to February 2003, and a disinclination to comply with laws regarding securities. This adds to the likelihood of future violations.

V. ORDER

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, TERRY HARRIS IS BARRED from association with any registered or unregistered investment adviser.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to 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 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that 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 a 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 occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge