

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

In the Matter of :
: INITIAL DECISION
ALAN BRIAN BAIOCCHI : July 14, 2009

APPEARANCES: Christopher P. Friedman for the Division of Enforcement,
Securities and Exchange Commission

Alan Brian Baiocchi, pro se

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Alan Brian Baiocchi (Baiocchi) from association with any broker or dealer, based on his conviction of wire fraud.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on February 24, 2009, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The undersigned granted the parties leave to file Motions for Summary Disposition at a May 1, 2009, prehearing conference, pursuant to 17 C.F.R. § 201.250(a), by May 29, 2009, with Replies due on June 30, 2009. Alan Brian Baiocchi, Admin. Proc. No. 3-13380 (A.L.J. May 1, 2009) (unpublished). The Division of Enforcement (Division) timely filed its Motion for Summary Disposition on May 29, 2009. Baiocchi did not file a Motion for Summary Disposition or a Reply. 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’s May 29, 2009, Motion for Summary Disposition; and (2) Baiocchi’s Answer, dated March 18, 2009. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Baiocchi was convicted were decided against him in the criminal case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17

C.F.R. § 201.250(a). 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 Baiocchi convicted of wire fraud, based on his wrongdoing during the 1990s while associated with a broker-dealer. The Division urges that he be barred from association with any broker or dealer. Baiocchi's Answer to the OIP was non-specific, merely stating that he "denies each and every allegation" in the OIP.

C. Procedural Issues

1. Official Notice

Official notice, pursuant to 17 C.F.R. § 201.323, is taken of the following items included in the Division's Motion for Summary Disposition at Exhibits A-B:

Documents, including Indictment, First Superseding Indictment, Case Summary, Criminal Minutes, and Judgment and Probation/Commitment Order in United States v. Baiocchi, 8:02-cr-00089-DOC (C.D. Cal. Nov. 23, 2005) (Div. Ex. A);

July 31, 2007, Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit in United States v. Baiocchi (Div. Ex. B).

2. Collateral Estoppel

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).

II. FINDINGS OF FACT

On November 23, 2005, Baiocchi was convicted in the United States District Court for the Central District of California, following a verdict of guilty, of two counts of wire fraud in violation of 18 U.S.C. § 1343. United States v. Baiocchi, 8:02-cr-00089-DOC (C.D. Cal. Nov. 23, 2005), aff'd, 2007 U.S. App. LEXIS 18494 (9th Cir. July 31, 2007); Div. Exs. A, B. He was sentenced to sixty-three months imprisonment and ordered to pay restitution of \$3,800,000. Id. His wrongdoing occurred from about December 1995 to about June 1997 and was accomplished through a telemarketing operation, Intro Technology Services, Inc. (ITS), that he controlled. Id. He and others at his direction made false representations and material omissions in connection with the sale of investment interests in oil and gas programs. Id. There were more than 200 victims. Id.

III. CONCLUSIONS OF LAW

Baiocchi has been convicted, within ten years of the commencement of this proceeding, of a crime that “involves the purchase or sale of any security,” “arises out of the conduct of the business of a broker [or] dealer,” and “involves the violation of [18 U.S.C. § 1343]” within the meaning of Sections 15(b)(4)(B) and 15(b)(6)(A)(ii) of the Exchange Act. The interests that he and others sold in oil and gas programs were clearly securities, as investment contracts, within the meaning of Section 2(a)(1) of the Securities Act of 1933 and SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946).¹ His conviction arose out of the business of a broker-dealer, whether or not ITS was a registered broker-dealer. See Vladislav Steven Zubkis, 86 SEC Docket 2618, 2627 (Dec. 2, 2005), recon. denied, 87 SEC Docket 2584 (Apr. 13, 2006) (unregistered associated person of an unregistered broker-dealer barred from association with a broker or dealer).

IV. SANCTION

The Division requests a broker-dealer bar. As discussed below, Baiocchi will be barred from association with any broker or dealer because of the seriousness of his violation, taking account of the facts and circumstances of his conduct.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See Section 15(b)(6) of the Exchange Act. The Commission considers factors including:

the egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006). The public interest requires a severe sanction when a respondent’s past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. See Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

¹ An investment contract is defined as an investment of money in a common enterprise with an expectation of profit solely through the efforts of others. See Howey, 328 U.S. at 298-99.

B. Sanctions

Baiocchi's conduct was egregious and recurrent during a period of at least eighteen months. A high degree of scienter is indicated by his conviction for fraud. Baiocchi has not given assurances against future violations or recognized the wrongful nature of his conduct.

Baiocchi's previous occupation, if he were allowed to continue it, would present opportunities for future violations. Baiocchi's violations are neither recent nor distant in time. The degree of harm to investors and the marketplace is quantified in the restitution of \$3,800,000 that the court ordered him to pay. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). A broker-dealer bar is also necessary for the purpose of deterrence.

A bar is consistent with Commission precedent in litigated administrative proceedings based on a respondent's conviction involving fraud. See Joseph P. Galluzzi, 55 S.E.C. 1110 (2002); John S. Brownson, 55 S.E.C. 1023, 1027 (2002), pet. denied, Brownson v. SEC, 66 Fed. Appx. 687 (9th Cir. 2003) (unpublished); Ted Harold Westerfield, 54 S.E.C. 25 (1999); Scott, 53 S.E.C. 862; Victor Teicher, 53 S.E.C. 581 (1998), aff'd in part and rev'd in part, 177 F.3d 1016 (D.C. Cir. 1999), cert. denied, 529 U.S. 1003 (2000); Lincoln, 53 S.E.C. 452; Meyer Blinder, 53 S.E.C. 250 (1997); Benjamin G. Sprecher, 52 S.E.C. 1296 (1997); Ahmed Mohamed Soliman, 52 S.E.C. 227 (1995). "Absent extraordinary mitigating circumstances, such an individual cannot be permitted to remain in the securities industry." Brownson, 55 S.E.C. at 1027. There are no extraordinary mitigating circumstances in this case to warrant a lesser sanction.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), ALAN BRIAN BAIOCCHI IS BARRED from associating with any broker or dealer.

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