INITIAL DECISION RELEASE NO. 377
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12828

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
BYRON S. RAINNER	:	INITIAL DECISION
	:	May 6, 2009
	:	

APPEARANCES: Edward G. Sullivan for the Division of Enforcement, Securities and Exchange Commission.

Curtis Carlson for Byron S. Rainner.

BEFORE: Robert G. Mahony, Administrative Law Judge.

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on September 25, 2007, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that, on November 20, 2006, the United States District Court for the Northern District of Georgia (district court) entered a judgment, sentencing Byron S. Rainner (Respondent or Rainner) to a prison term of thirty months, followed by three years of supervised probation, and ordering him to make restitution in the amount of $2,036,134. The Commission instituted this proceeding to decide whether remedial action is appropriate in the public interest. The Division of Enforcement (Division) seeks to bar Respondent from association with any broker, dealer, or investment adviser.

The Division has provided evidence that Respondent was served with the OIP by October 4, 2007. At a telephonic prehearing conference, at which the Division and Respondent appeared, I granted Respondent's request for an extension of time to file an Answer and the Division's request for leave to file a motion for summary disposition. (Oct. 30, 2007, Prehearing Conference Transcript at 7, 9; Order of Oct. 31, 2007.) Respondent filed an Answer dated November 19, 2007. The Division filed its Motion for Summary Disposition, a supporting Memorandum of Law, and accompanying exhibits on December 6, 2007 (Motion).[1] In a Motion for Continuance, dated January 11, 2008, Respondent requested an extension of time in which to respond to the Division's Motion. I granted Respondent's Motion, extending the time in which to respond from January 11, 2008, to February 15, 2008. (Order of Jan. 30, 2008.) Respondent

[1] I will cite to the Division's Motion as "(Div. Mot. Ex. __ at __.)."

did not file an opposition to the Division's Motion. On March 25, 2008, I granted the Division's Motion and issued an initial decision, barring Respondent from association with any broker, dealer, or investment adviser.

Respondent filed a petition for review of the initial decision on May 6, 2008. On December 2, 2008, the Commission remanded the proceeding to me "to ensure that the Division has fully complied with Rule 230 [of the Commission's Rules of Practice], and that Rainner has had a reasonable amount of time to review the investigative file before being required to file any pleadings in the case, such as a response to a motion for summary disposition by the Division." 94 SEC Docket 12093, 12095-96. On February 17, 2009, I held a telephonic prehearing conference at which Respondent's counsel represented that he had reviewed the investigative file, which had been placed on compact discs by the Division, and was prepared to respond to the Division's Motion, and I issued the scheduling order accordingly. (Feb. 17, 2009, Prehearing Conference Transcript at 3-5; Order of Feb. 17, 2009.) In a Motion for Enlargement of Time to Respond to Motion for Summary Disposition, dated March 11, 2009, Respondent requested an extension of time in which to respond to the Division's Motion. I granted Respondent's Motion, extending the time in which to respond from March 11, 2009, to March 23, 2009. (Order of Mar. 12, 2009.) Respondent filed his Response to Motion for Summary Disposition (Response),[2] dated March 23, 2009, and, on April 6, 2009, the Division filed its Reply to the Response (Reply).

The Standards for Summary Disposition

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent's answer has been filed and documents have been made available to that respondent for inspection and copying, a party may make a motion for summary disposition of any or all allegations of the OIP with respect to that respondent. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323 of the Commission's Rules of Practice.

Rule 250(b) of the Commission's Rules of Practice requires the hearing officer to promptly grant or deny the motion, or to defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law.

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003); O'Shea v. Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

[2] I will cite to Rainner's Response as "(Resp. at __.)."

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

FINDINGS OF FACT

Rainner, 38, was incarcerated in the Federal Correctional Institution in Estill, South Carolina, until late 2008. (Answer at 1; Resp. at 1-2.) From February 2000 through January 2004, Rainner was a registered representative associated with a life insurance corporation registered with the Commission as a broker-dealer and an investment adviser. (Answer at 1; Resp. at 2.)

On February 9, 2006, Rainner pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343, before the district court, in United States v. Byron S. Rainner, Case No. 1:05-CR-029-WBH (N.D. Ga.). (Answer at 1; Resp. at 1.) On November 20, 2006, a judgment in the criminal case was entered against Rainner. (Answer at 1.) He was sentenced to a prison term of thirty months, followed by three years of supervised probation, and ordered to make restitution in the amount of $2,036,134. (Answer at 1; Resp. at 1-2.)

The count of the indictment, to which Rainner pled guilty, alleged, among other things, that, from on or about August 2002 through on or about April 2003, Rainner knowingly and willfully devised and intended to devise a scheme and artifice to defraud Fulton County, Georgia (Fulton County), the Fulton County Sheriff's Department (FCSD), and citizens of Fulton County, and obtained money and property from FCSD by means of materially false and fraudulent pretenses, representations, and promises, by use of a wire communication, in interstate commerce.[3] (Answer at 1; Div. Mot. Ex. 2 at 1.) More specifically, the wire fraud count of the indictment alleged the following:

Rainner was a Financial Services Representative employed by MetLife Financial Services (MetLife), a division of MetLife, Inc., responsible for selling MetLife financial products

[3] In his Response, Rainner asserts that "the Indictment is not factually correct." (Resp. at 6.) Further, Rainner only admits to "selling away" in violation of National Association of Securities Dealers rules, and deflects the blame for any wrongdoing to others. (Resp. 6-8.) However, Rainner is collaterally estopped from challenging the allegations in the OIP which are based on the charge to which he pled guilty. See Robert Blakeney Stevenson, 48 S.E.C. 89, 90 (1985) ("The charges to which Stevenson pled guilty are essentially the same as those in the present administrative proceeding. Thus, under the doctrine of collateral estoppel, the allegations have been established by Stevenson's guilty plea, and he may not relitigate them here.").

and services and doing business under the name of Legacy Client Group in Fort Lauderdale, Florida. (Div. Mot. Ex. 2 at 1.)

Rainner met with employees of FCSD to solicit investment business, purportedly on behalf of MetLife. (Div. Mot. Ex. 2 at 3) On several occasions, he proposed that FCSD invest proceeds from the seizure and sale of real property, pursuant to writs of fieri facias, used to collect delinquent property taxes, penalties, and interest owed to Fulton County, which it maintained in a "surplus" account (Surplus Funds). (Div. Mot. Ex. 2 at 2.) He suggested that FCSD invest the Surplus Funds in an investment vehicle that would earn more interest than the ordinary bank accounts in which they had been historically kept. (Div. Mot. Ex. at 3.)

On at least two occasions, Rainner traveled from Florida to Atlanta, Georgia, for meetings with FCSD employees to whom he indicated that the Surplus Funds could earn an investment return of approximately five percent with MetLife. (Id.) In response to questions from some of the FCSD employees, Rainner assured them that the investment would comply with Georgia law because MetLife would secure the investment with government bonds as collateral. (Div. Mot. Ex. 2 at 3-4.) As a result of these meetings, FCSD executed a check to MetLife in the amount of $2,036,134 on March 25, 2003. (Div. Mot. Ex. 2 at 4.)

Rainner did not invest the Surplus Funds with MetLife. (Id.) He diverted the investment to an unrelated entity, Provident Capital Investments, Inc. (Provident Investments), based in Hollywood, Florida, which was formed for the principal purpose of providing a vehicle to manage the investment of the Surplus Funds. (Id.) Rainner expected greater personal compensation than he would have received from MetLife. (Id.) Rainner and Provident Investments' President agreed to split the profits on a 50/50 basis. (Div. Mot. Ex. 2 at 5.)

On the same day that FCSD executed its check to MetLife, Rainner sent it a letter, via facsimile, recommending that FCSD invest the Surplus Funds with Provident Investments to "diversify" FCSD's portfolio. (Id.) The letter contained several fraudulent statements, including the description of Provident Investments as a "carrier" of MetLife and an enclosure, titled "Carrier List and Links," which bore a footer indicating that it was printed from a MetLife internet page, but which had been altered to falsely include Provident Investments. (Div. Mot. Ex. 2 at 5-6.) Rainner made these fraudulent statements "on behalf of MetLife," on MetLife letterhead, and noted that "it is MetLife's pleasure to help you manage and maintain this portfolio for the people of Fulton County." (Div. Mot. Ex. 2 at 6.) Provident Investments was not a carrier of MetLife, and Rainner's recommendations in the March 25 letter were not made on behalf of MetLife. (Id.)

Rainner's intentional misrepresentations were material in that FCSD cancelled its check to MetLife on March 26, 2003, and issued a new check for the same amount to Provident Investments. (Id.)

Rainner, in his March 25 letter, had indicated that "[o]nce the funds are received, your account number and statement will be forwarded to you immediately." (Div. Mot. Ex. 2 at 7.) On or about April 29, 2003, approximately one month after receiving FCSD's check, Rainner directed Provident Investments to transmit an interim "Quarterly Asset Statement" to FCSD. (Id.) Before the statement was transmitted, Rainner caused the document to be altered to falsely

state that the monies were invested in a "US Bond Fund." (Id.) However, the Surplus Funds were not invested in government bonds or any other similar security, but rather, as Rainner knew, they were invested in far riskier venture capital arrangements (i.e., unsecured high-interest loans to new and otherwise speculative businesses). (Id.) Further, although Provident Investments' repayment obligation to FCSD was set out in the form of a Provident Investments corporate bond, it was not secured by any collateral. (Id.)

As a result of Rainner's fraudulent scheme, FCSD lost the entire amount of its investment and Rainner personally obtained monies from Provident Investments and others in excess of $300,000. (Div. Mot. Ex. 2 at 7; Declaration of Aaron W. Lipson In Support of Division's Motion For Summary Disposition at Ex. A.)

CONCLUSIONS OF LAW

Under Sections 15(b)(4)(B)(iv) and 15(b)(6)(A)(ii) of the Exchange Act, the Commission may impose a remedial sanction on a person associated with a broker or dealer, consistent with the public interest, if the person "has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction," involving the violation of 18 U.S.C. § 1343. Under Sections 203(e)(2)(D) and 203(f) of the Advisers Act, the Commission may impose a remedial sanction on a person associated with an investment adviser, consistent with the public interest, if the person "has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction," involving the violation of 18 U.S.C. § 1343.

Rainner was a registered representative associated with MetLife, which was registered as a broker-dealer and as an investment adviser at the time of Rainner's underlying misconduct. Rainner pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343, and the district court entered a corresponding judgment. Thus, Rainner has been convicted, while associated with a broker-dealer and investment adviser, of felonies involving violations of 18 U.S.C. § 1343.[4] There is no genuine issue with regard to any material fact and the Division is entitled to a summary disposition as a matter of law.

The Public Interest

To determine whether sanctions under Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act are in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. No one factor is controlling. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir.

[4] Rainner's guilty plea has the same legal effect as a conviction. See Morris v. Reynolds, 264 F.3d 38, 49 (2d Cir. 2001) (quoting Kercheval v. United States, 274 U.S. 220, 223 (1927)).

1979), aff'd on other grounds, 450 U.S. 91 (1981). Remedial sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

Rainner's criminal violation was egregious. The Commission has held that "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest sanctions under the securities laws." Marshall E. Melton, 56 S.E.C. 695, 713 (2003). Additionally, Rainner's violations caused FCSD to lose the full amount of its investment, $2,036,134. Rainner has failed to present any evidence to the contrary.

The criminal violation at issue here involved a continuing course of conduct over nine months (August 2002 to April 2003). The violation also involved a high degree of scienter. See United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999) (holding that wire fraud requires a showing of intentional fraud). On more than one occasion, at meetings with FCSD employees and in the March 25, 2003, letter, Rainner intentionally and deliberately made material misrepresentations about how the FCSD's Surplus Funds would be invested.

By pleading guilty to the wire fraud, Rainner admitted the wrongful nature of his conduct to the district court. However, Rainner's initial defense to these proceedings, that he was not the named respondent, and his current challenge to the factual basis of the indictment to which he pled guilty, are indications that he has not fully recognized or does not fully appreciate that admission. Additionally, Rainner's only assurance against future violations is that he will be under "heightened supervision," but he suggests that such increased supervision only be for a limited time. (Resp. at 9-10.) Rainner's professional record of conduct includes several customer complaints, two employer investigations, and two regulatory actions taken against him. (Div. Mot. Ex. 1(f).) Thus, even under heightened supervision, continued employment in the securities industry would present Rainner with additional opportunities to violate securities laws.

Viewing the Steadman factors in their entirety, I conclude that associational bars are necessary and appropriate to protect the public interest.

ORDER

Based on the Findings and Conclusions set forth above:

IT IS ORDERED THAT the Division of Enforcement's Motion for Summary Disposition is GRANTED;

IT IS FURTHER ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Byron S. Rainner is barred from association with any broker or dealer; and

IT IS FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Byron S. Rainner is barred from association with any 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. Pursuant to that Rule, a party

may file a petition for review of this Initial Decision within twenty-one days after service of the 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. 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 unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____

Robert G. Mahony
Administrative Law Judge