INITIAL DECISION RELEASE NO. 371
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13112

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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| In the Matter of | : | |
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| KENT D. NELSON | : | INITIAL DECISION |
| | : | February 24, 2009 |
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APPEARANCES: Nancy J. Gegenheimer for the Division of Enforcement, Securities and Exchange Commission.

Kent D. Nelson, pro se.

BEFORE: Robert G. Mahony, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on August 1, 2008, 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 September 12, 2007, the United States District Court for the District of New Mexico (district court) entered a judgment, sentencing Kent D. Nelson (Respondent or Nelson) to a prison term of thirty-six months, followed by three years of supervised release, ordering him to pay a fine in the amount of $175,000, and ordering him to forfeit his interest in certain real property. 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 August 6, 2008. 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. (Prehearing Conference Transcript at 7, 9; Order of Nov. 18, 2008). Respondent filed an Answer dated December 7, 2008, which does not deny any of the allegations in the OIP. The Division filed its Motion for Summary Disposition, a supporting Memorandum of Law, and accompanying exhibits on December 15, 2008 (Motion). Respondent has not filed an opposition to the Division's Motion, which was due by January 23, 2009.

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).

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

As noted, Nelson has not denied any of the allegations contained in the OIP. He is currently incarcerated in the Federal Correctional Institution in Lompoc, California. (Prehearing Conference Transcript at 3.) From April 1999 through January 2001, Nelson was a registered representative associated with Linsco/Private Ledger Corporation, now known as LPL Financial Corporation, which is dually registered with the Commission as a broker-dealer and an investment adviser. (OIP at 1.) From January 2001 through March 2005, Nelson was the sole owner of Strategic Investment Services, LLC, an investment adviser registered with the State of California. (OIP at 1.)

On September 14, 2005, Nelson pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341, before the district court, in United States v. Nelson, Crim. Information No. 05-2021 JP (D. N.M.). (Answer at 3.) On September 12, 2007, a judgment in the criminal case was entered against Nelson. (Div. Ex. C-3.) He was sentenced to a prison term of thirty-six months,

followed by three years of supervised release, surrendered his property interest in a condominium unit in Colorado, and ordered to pay a penalty in the amount of $175,000. (Div. Ex. C-3.)

The information, to which Nelson pleaded guilty, alleged, among other things, that from December 1999 through March 2005, Nelson devised a scheme and artifice to defraud the people of the State of New Mexico of the intangible right of the honest services of their public officials. Specifically, he paid substantial sums of money to the Treasurer of the State of New Mexico to secure the award of securities work. (Div. Ex. C-1.) For purposes of executing the scheme, Nelson mailed a $5,000 check to New Mexico State Treasurer Michael Montoya (Montoya) using the U.S. Postal Service. (Div. Ex. C-1.)

His plea agreement recounts the specific facts. In 1999, Nelson was appointed Investment Advisor to the New Mexico Office of the State Treasurer (Treasurer's Office). (Div. Ex. C-2 at 3.) In his role as an investment adviser, Nelson assisted the Treasurer's Office in investing state funds, often by finding brokers with whom to place state bond proceeds. The brokers who were successful paid him a finder's fee. (Div. Ex. C-2 at 3.) Nelson received approximately $4.4 million in such finder's fees between June 2000 and March 2005. He understood from the beginning of his relationship with the Treasurer's Office that he would be expected to share a certain amount of his fees with Angelo Garcia (Garcia). In return, Nelson continued his business relationship with the Treasurer's Office. (Div. Ex. C-2 at 4.) His plea agreement admits that he "believed that [he] was buying access to the Treasurer of the State of New Mexico, and that [he] was buying influence over his discretionary commitment of funds, increasing the likelihood that he would use [him] to invest state funds." (Div. Ex. C-2 at 4.)

Nelson's interactions with the Treasurer's Office continued in the same manner after Montoya was succeeded by Robert Vigil (Vigil) in 2004. Garcia informed Nelson that some of the fees shared with him had gone to pay Vigil's campaign expenses. (Div. Ex. C-2 at 4-5.) In total, Nelson transferred about $2.9 million of his fees to Garcia over the five year period. (Div. Ex. C-2 at 5.) He also mailed Montoya a check for $5,000 on February 27, 2003. (Div. Ex. C-2 at 5.)

On June 8, 2006, Nelson was indicted by a grand jury for the State of New Mexico. He was charged with nine counts of bribery of a public officer or employee, fourteen counts of offering or paying illegal kickbacks, fourteen counts of money laundering, one count of racketeering, and one count of contracts, agreements, combinations, or conspiracies in restraint of trade. (Div. Ex. D-1.) On May 7, 2008, he pleaded guilty to one count of racketeering in the New Mexico criminal proceeding. (Div. Ex. D-2.) On May 16, 2008, the New Mexico state judge sentenced Nelson to a nine-year suspended sentence with three years probation. (Div. Ex. D-3.)

On November 7, 2005, the California Corporations Commissioner brought an action before the California Department of Corporations to bar Nelson from any position in the employment, management, or control of any investment adviser, broker-dealer, or commodity adviser, based on his guilty plea in federal court in New Mexico. Nelson did not appear in the proceeding, and California barred him for those positions on January 3, 2006. (Div. Ex. E.)

## 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. § 1341. 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. § 1341.

Nelson was a registered representative associated with Linsco/Private Ledger Corporation, which was registered as a broker-dealer and as an investment adviser at the time he began committing the underlying misconduct. He also was the sole owner of Strategic Investment Services, LLC, an investment adviser registered with the State of California. Nelson pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341, and the district court entered a corresponding judgment. Thus, Nelson has been convicted, within ten years of the commencement of this proceeding, of felonies involving violations of 18 U.S.C. § 1341.[1]

Nelson, in his Answer, contends that the SEC does not have jurisdiction to institute the present proceeding because he was not acting in his capacity as an investment adviser during the activities underlying his conviction. Even if Nelson's contention is true, his conclusion is incorrect. Neither Section 15(b) of the Exchange Act nor Section 203(f) of the Advisers Act requires the underlying criminal conviction involve an activity that the SEC regulates. It is sufficient that he was an associated person, and that he was convicted of a violation of 18 U.S.C. § 1341.

### 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. 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).

[1] Nelson'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)).

Nelson's criminal violation was egregious. Nelson participated in a "pay-to-play" scandal, providing kickbacks in return for government business. He received $4.4 million in fees for managing public funds and returned $2.9 million of those fees to the cohorts of New Mexico treasury officials. In return, the Treasurer's Office continued to allow Nelson to manage government funds. Nelson, in his Answer, contends that the facts set out in his plea agreement are false. He claims he entered into the plea agreement to avoid trial and embarrassment to his family. (Answer at 2-4.) However, he is foreclosed from attacking the factual admissions of his underlying criminal plea in the instant administrative proceeding. See Jose P. Zollino, 89 SEC Docket 2598, 2604-05 & n.20 (Jan. 16, 2007).

The criminal violations at issue here involved a continuing course of conduct over five years. The violations also involved a high degree of scienter. Nelson admitted that he knew his payments to Garcia were made to ensure continued access to the Treasurer's Office, and thus the management of public funds.

By pleading guilty to the wire fraud, Nelson admitted the wrongful nature of his conduct to the district court. However, Nelson's defense to these proceedings, his collateral attack on the circumstances surrounding his plea, is an indication that he has not fully recognized or does not fully appreciate that admission. Additionally, Nelson has not made any assurances against future violations. For the purposes of this decision, it is assumed that Nelson's claims of a flawless professional record of conduct are true. However, Nelson's continued denial of wrongdoing, the egregious and ongoing nature of his crime, and the level of scienter involved overcome any merit accorded to his otherwise unmarked record.

Nelson urges that a three-year bar be imposed, to run concurrent with his confinement. Such a sanction is not provided for under the charged sections of the securities laws. See Section 15(b)(6)(A) of the Exchange Act and Section 203(f) of the Advisers Act (granting power to censure, suspend for a period not exceeding twelve months, or bar a person in a proceeding brought under these sections). Nor does Nelson's proffered three-year bar provide adequate protection to investors, given the nature of his crime as discussed above. Any re-entry to the securities profession upon the conclusion of his prison sentence would present Nelson with additional opportunities to violate securities laws.

Viewing the Steadman factors in their entirety, I conclude that associational bars are necessary and appropriate in 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, Kent D. Nelson 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, Kent D. Nelson 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.

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Robert G. Mahony
Administrative Law Judge