SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2875 / May 15, 2009

Admin. Proc. File No. 3-13008

In the Matter of

MITCHELL M. MAYNARD
and
DORICE A. MAYNARD
3099 West Chapman Ave., Apt. 426
Orange, California 92868

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

State Disciplinary Proceeding

Former associated persons of former registered investment adviser were barred for five years from association with registered broker-dealers and investment advisers and subject to other sanctions imposed by state securities administrator for violating the state's securities laws, including its antifraud provisions. Held, it is in the public interest to bar Respondents from association with any investment adviser.

APPEARANCES:

Mitchell M. Maynard and Dorice A. Maynard, pro se.

James S. Goldman and Bradford E. Ali, for the Division of Enforcement.

Appeal filed: September 29, 2008
Last brief received: December 16, 2008

I.

Mitchell M. Maynard and Dorice A. Maynard (collectively, the "Maynards"), formerly associated with Leveraged Index Management Company ("LIMCO"), a former registered investment adviser, appeal from a decision of an administrative law judge. The law judge barred the Maynards from association with an investment adviser based on a five-year bar from association with registered broker-dealers and investment advisers and other sanctions imposed on the Maynards by the Vermont Department of Banking, Insurance, Securities, and Health Care Administration ("Vermont BISHCA"). 1/ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Mitchell Maynard has been an investment adviser since 1995. In late 1998, Mitchell Maynard organized a mutual fund based on an investment strategy that he formulated "combining a large investment in government securities with a small investment in futures and options contracts on market indices." In December 1998, he created LIMCO, an investment adviser, to manage a new mutual fund he had established, the Optimal Fund (the "Fund").

In January 1999, the Maynards registered the Fund with the Commission. In February 1999, the Maynards, on behalf of LIMCO, filed a Form ADV to register LIMCO as an investment adviser with the Commission and made a notice filing with the State of Vermont to register it as an investment adviser with the State. In April 1999, the Commission registered LIMCO as an investment adviser pursuant to Section 203(h) of the Investment Advisers Act of 1940. 2/

At all relevant times, Mitchell Maynard served as LIMCO's president, treasurer, and investment adviser representative, while Dorice Maynard, his wife, served as LIMCO's vice president of operations and marketing and corporate secretary. Dorice Maynard was primarily responsible for maintaining LIMCO's books and records. In this capacity, she managed LIMCO's finances, including the payment of all expenses, including salaries and consulting fees. In addition, she worked with her husband in marketing LIMCO and solicited at least one advisory client. She also assisted her husband in developing investment products, prepared correspondence to LIMCO investors and discussed LIMCO's business with them.

1/ Mitchell M. Maynard, Initial Decision Rel. No. 354 (Aug. 18, 2008), 93 SEC Docket 8936.

2/ 15 U.S.C. § 80b-3(h).

Following an examination by the Commission's Pacific Regional Office (the "PRO") 3/ of LIMCO's books and records, the staff of the PRO sent a letter to Mitchell Maynard in December 2000 advising him of numerous regulatory violations and deficiencies it had uncovered. The letter directed these deficiencies "to [his] attention for immediate corrective action, without regard to any other actions(s) that may result from the examination." LIMCO deregistered with the Commission in January 2001. In May 2001, LIMCO's attorney wrote to a PRO Assistant Regional Director, to "confirm that LIMCO is no longer in operation as an investment adviser, either at the federal or state level." The attorney stated that he "hope[d] this resolves any remaining issues with respect to this matter" and "trust[s] that [the matter] is now closed."

The Vermont BISHCA initiated charges against the Maynards over a year later on March 4, 2002. During a seven-day hearing, the Maynards were represented by counsel, had an opportunity to present evidence, and submitted extensive and detailed proposed findings of fact and legal arguments. The Hearing Officer issued a seventy-six page Proposal for Decision. The Maynards appealed to the Commissioner of the Vermont BISHCA, who considered Respondents' written exceptions and oral argument and, on January 3, 2007, issued Findings of Facts and Conclusions that stated it incorporated the Proposal for Decision and accepted, adopted, and affirmed "the Hearing Officer's findings, conclusions and recommendations in part, with the exceptions noted below" (the "Vermont Order"). 4/

The Vermont Order found that, from at least December 1998 through June 2001, LIMCO was a "joint venture" of the Maynards and that Dorice Maynard had a "substantive role in the company." The Vermont Order concluded that the Maynards had (i) misappropriated investor funds, including by diverting large investments in LIMCO to themselves; (ii) made numerous misrepresentations or omissions about LIMCO's performance and financial condition, including giving investors projections of high returns that had no reasonable basis; and (iii) engaged in unethical or dishonest practices, including by failing to disclose a prior bankruptcy to investors. The Vermont Order further found that Mitchell Maynard had falsely "promoted himself [to prospective investors] as a genius with trading systems and had touted designations from highly respected academic institutions."

According to the Vermont Order, Mitchell Maynard created LIMCO's initial business plan in 1998. That business plan projected that: (i) by the end of LIMCO's first year of operation, it would have assets under management of $50 million; (ii) LIMCO would be profitable after the

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3/ The PRO has been redesignated since the examination of LIMCO as the Los Angeles Regional Office ("LARO"). To avoid confusion in our discussion, we shall refer to this office as the PRO in this opinion.

4/ The Commissioner also found that Mitchell Maynard had not been shown to have violated 9 V.S.A. § 4224a(b)(1), and reduced the restitution amount to $400,000 and the bar to five years with the right to reapply after one year.

first three months of operations; and (iii) there would be a twenty-five percent return on investor equity within the first year and a one hundred percent return on investors' equity in the second year. These projections had no reasonable basis in fact.

The Vermont Order found that LIMCO's eleven investors, who had invested a total of $482,293, had little or no experience in equity investing. Many of these investors were at or near retirement age, and had "decided to invest in LIMCO or the Optimal Fund, or both based upon their conviction that Mr. Maynard was an expert in the field and they trusted him to handle their money." The Vermont Order noted that "[n]one of them understood Mr. Maynard's investment theories and many did not understand whether they were investing in LIMCO or the Optimal Fund, or both."

The Vermont Order also found that, even though LIMCO's value declined rapidly from March 1999 until it was closed, and that it had a negative value after June 1999, the Maynards issued stock certificates to LIMCO investors, claiming valuations that had no rational relationship to the actual worth of LIMCO stock. The Vermont Order found that these false valuations caused investors to believe they were investing in something of value when, in fact, they were purchasing worthless stock certificates. Further, Mitchell Maynard sent written and oral communications to LIMCO's investors assuring them "that things were going extremely well with LIMCO" and telling them about "many promising leads for LIMCO business." The Vermont Order determined that these communications were "misleading given the fact that LIMCO had no value beginning in June 1999 and that there is no credible, corroborative evidence to support a finding that LIMCO was positioned to achieve the $50 million minimum required to begin approaching profitability."

The Vermont Order also found that, from January 1999 through January 2001, the Maynards withdrew from LIMCO approximately $150,000 as salary and $45,000 in consulting fees, without disclosing these amounts to LIMCO investors or obtaining their consent. They also withdrew money for their personal expenses, including groceries, housing, car rental, and health insurance, again without disclosing this fact to the LIMCO investors or obtaining their consent. The Vermont Order further found that the Maynards' withdrawals resulted in a lack of operating funds in September 1999, after which the Maynards "obtained over $100,000.00 in credit card and home equity loans, guaranteed personally by Mr. Maynard, from [LIMCO's] initial shareholders." As determined by the Vermont Order, Mitchell Maynard "pressured" these investors to access their home equity and credit lines by advising them that "failure to do so would result in a certain loss of all the money they had invested in LIMCO." In offering his personal guarantee, Mitchell Maynard failed to inform these investors, or any of LIMCO's other investors, that he had filed for bankruptcy in 1994.

The Maynards also "withdrew large sums of cash from LIMCO . . . from ATM machines," sums that were not documented in LIMCO's books and records, which "gives rise to the inference that these amounts may not have been valid business expenses." In December 2000, the Maynards transferred $21,290.76 from LIMCO's bank account to their personal bank

account in California. Again, LIMCO's "books and records contain no entry or support for the $21,290.76 withdrawal." The Vermont Order found that the Maynards' explanation that most of this money was used to pay a LIMCO shareholder as a business expense was not credible.

The Vermont Order further determined that Mitchell Maynard had requested from one LIMCO investor that the investor allow Maynard to show prospective investors the $94,000 remaining in her IRA account "in order to solicit more investment and secure LIMCO's future," assuring the investor "that her money would not be touched" and that "it would be safe and returned to her in full." However, unbeknownst to the investor, Mitchell Maynard "sold her IRA shares and replaced them with worthless shares of LIMCO." As found by the Vermont Order, while the Maynards "earned substantial compensation" from LIMCO's investors, LIMCO itself "never was a going concern, . . . it barely generated any sales, and there were only large losses - about $530,000 worth over a 21-month period."

LIMCO ceased operating in June 2001. As found by the Vermont Order, "[n]one of LIMCO's investors recovered any of the money they had invested in LIMCO." The Maynards filed for bankruptcy in 2002, discharging all their obligations to LIMCO shareholders, including the guarantees that they had given to the aforementioned investors who had made over $100,000 in credit card and home equity loans to LIMCO.

The Vermont Order concluded that the Maynards had violated 9 V.S.A. § 4224a (fraudulent and other prohibited practices), including section 4224a(a)(1) (prohibiting employing a device, scheme, or artifice to defraud in connection with the sale of a security); section 4224a(a)(2) (prohibiting the making or omitting of an untrue statement of material fact in connection with the sale of a security); section 4224a(a)(3) (prohibiting engaging in an act, practice, or course of business that operates as a fraud or deceit upon a person in connection with the sale of a security); and section 4224a(e)(5) (prohibiting engaging in unethical or dishonest practices in providing investment advice). The Commissioner determined that it was not necessary to establish scienter for a violation of 9 V.S.A. § 4224a(a) and therefore did not affirm the Hearing Officer's finding and conclusion that scienter had been proven. The Vermont Order barred the Maynards for five years from any association or employment with a registered broker-dealer or investment adviser, or any "federal covered investment adviser," 5/ subject to their right to petition for reinstatement one year after the final order issued; and ordered that they pay $400,000 in restitution and a $20,000 administrative penalty. The Vermont Order became final on February 2, 2007, by operation of law after the Maynards failed to appeal. 6/ They have not paid any restitution.

5/ As described in the Vermont order, "a federal covered investment adviser is . . . an investment adviser who is registered with the SEC pursuant to Section 203 of the Investment Company Act of 1940. 9 V.S.A. § 4202a(3)."

6/ The Maynards cite their "financial and economic situation" as the reason for their failure to appeal the Vermont Order.

Beginning after LIMCO's termination in 2001, the Maynards operated Premium Producers Group LLC ("PPG"), which they described as a software distributor and education company that offered, among other items, Certified Equity Index Annuity Specialist and Personal Retirement Specialist designations, and advice on equity indexed annuities. According to the Maynards, PPG also pairs investment advisers with insurance agents. According to PPG's current website, effective April 1, 2009, PPG has closed and its customers will "be serviced by MDL Associates, LLC" ("MDL"). 7/

In December 2001, the Maynard made filings with the California Department of Corporations to obtain an investment adviser certificate for Terra Vista Financial Planners ("Terra Vista"), an entity owned and managed by the Maynards. The Maynards answered "no" to several questions that asked whether Terra Vista or any advisory affiliate was currently subject to a regulatory proceeding. 8/ The California Department of Corporations learned of Vermont's investigation of Mitchell Maynard and LIMCO through its review of the Central Registration Depository system and notified the Maynards of its findings in a deficiency letter. In October 2007, following the issuance of the Vermont Order, the Department denied Terra Vista's application and barred the Maynards from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser.

On April 16, 2008, we instituted this administrative proceeding to determine whether sanctions against the Maynards were in the public interest based on the Vermont Order. On June 25, 2008, after a pre-hearing conference and the Division of Enforcement had moved for summary disposition, the Maynards moved to compel the Division to provide them with the PRO examination file of LIMCO, stating that the file "is material to allegations that this follow-on proceeding may be an inappropriate abuse of discretion." The law judge denied the Maynards' motion to compel, ruling that the Maynards' document request "concerns matters that are not relevant to the issues in this administrative proceeding" and that the Maynards' belief that these documents contain exculpatory material has "no rational basis" since "[t]he fact that the Commission examined Respondents' business and did not initiate an action is not relevant to the

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7/ The MDL website, accessed by a link on the PPG website, provides the biographies of both Maynards, and does not mention any other individuals. The products and services offered by MDL, as described on its website, appear very similar to those described on the pages of the PPG website included in the record.

8/ The California Corporations Commissioner found that, in a California filing, Terra Vista answered "no" to whether "any *advisory affiliate*" was then the "subject of a regulatory proceeding" that could lead to a finding of the affiliate's "unethical conduct and/or violations of securities regulations. Terra Vista also answered "no" to Form ADV Item 2.E as to whether any "*advisory affiliate* or any *management person*" was currently the subject of an "administrative proceeding involving [investment-related business or activity, fraud, false statement, or omission, theft, embezzlement, dishonest or unethical practices.]" (emphases in original).

findings in the Vermont Order." The law judge subsequently granted the Division's motion for summary disposition. This appeal followed.

III.

Under Advisers Act Sections 203(e)(9) and (f), 9/ we are authorized to impose sanctions on a person associated with an investment adviser, consistent with the public interest, if, among other things, the associated person is subject to a State securities agency's final order that bars the person from association with an entity regulated by such agency or constitutes a final order based upon violations of laws prohibiting fraudulent, manipulative, or deceptive conduct. The Maynards do not dispute that the Vermont Order found that they committed violations of Vermont's securities laws, including laws prohibiting fraudulent, manipulative, or deceptive conduct, and that they were barred by the Vermont Order from association or employment with a broker-dealer or investment adviser for five years, subject to the right to petition for reinstatement after one year. However, the Maynards challenge this proceeding on numerous grounds.

A. The Maynards suggest that they did not meet the definition of an investment adviser "in the usual sense" because they "did not manage any assets or offer advice to LIMCO investors for compensation at the time they purchased LIMCO stock." The short answer is that LIMCO was a registered investment adviser at the time of the events underlying the Vermont proceeding, and the Maynards were its sole officers, managers and principals. As such, they were "persons associated with an investment adviser" as defined by Advisers Act Section 202(a)(17), 10/ and thus subject to discipline under Advisers Act Sections 203(e) and (f).

B. The Maynards assert that this matter was improperly instituted. They argue that, in its 2000 examination of LIMCO, the PRO staff identified the identical deficiencies that formed the basis of the Vermont Order. They also assert that, after they de-registered LIMCO, a member of the PRO staff informed them that the Commission would keep the LIMCO file "open." They draw two conclusions from these assertions: (1) they are entitled to access to the PRO examination file pursuant to Commission Rule of Practice 230; 11/ and (2) the staff referred this matter to Vermont to circumvent the procedural safeguards of a Commission proceeding to determine the merits of those deficiencies.

Rule 230(a) provides that, with certain limited exceptions, "the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the

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9/ 15 U.S.C. §§ 80b-3(e)(9) and (f).

10/ 15 U.S.C. § 80b-2(a)(17).

11/ 17 C.F.R. § 201.230.

Division's recommendation to institute proceedings." 12/ Such documents include "any final examination or inspection reports prepared by [other Commission offices and divisions] if the Division of Enforcement intends either to introduce any such report into evidence or to use any such report to refresh the recollection of any witness." 13/ Rule 230(b)(1) expressly provides, as relevant here, that the Division may withhold any privileged documents and any "internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this rule, or is otherwise attorney work product and will not be offered in evidence." 14/

By letter dated June 24, 2008, the Division's Boston Regional Office informed the Maynards that it had not had access to the PRO examination file before the institution of this proceeding and that therefore Rule 230 did not require its production. However, without waiving any objections, the Division provided the Maynards with certain documents from the PRO examination file, including the deficiency letter issued to LIMCO, but excluding documents that it determined were privileged, including the PRO's examination report. 15/ The withheld portion of the PRO examination file was neither introduced into evidence by the Division nor used to refresh the recollection of any witness.

Rule 230(b)(2) provides, however, that, notwithstanding the Division's authority to withhold documents under Rule 230(b)(1), the Division is not permitted to withhold "documents that contain material exculpatory evidence." 16/ The Maynards assert that the PRO examination file "contains exculpatory (or at least, explanatory) evidence and is therefore highly relevant and material." They argue that, as the facts of the PRO's 2000 examination of LIMCO "were materially the same as those of the VT Order," if "the Division's 2000 investigation . . . is still open then the Initial Decision allows for a blatant violation of the [Maynards'] Fifth Amendment due process rights and skirts Commission procedure."

12/ 17 C.F.R. § 201.230(a)(1). Comment (a) to the release adopting Rule 230 states, "[a] respondent's right to inspect and copy documents under this rule is automatic; the respondent does not need to make a formal request for access through the hearing officer." Rules of Practice; Technical Amendments and Corrections, Exchange Act Rel. No. 36174 (Aug. 31, 1995), 60 SEC Docket 245.

13/ 17 C.F.R. § 201.230(a)(1)(vi) (emphasis added).

14/ 17 C.F.R. § 201.230(b)(1)(ii).

15/ The Division offered to make the privileged documents available to the law judge for *in camera* inspection. The law judge declined the offer.

16/ 17 C.F.R. § 201.230(b)(2).

Accepting for the sake of argument that the PRO staff identified the identical conduct that became the basis for the Vermont Order, we do not see why any of the remaining information in the PRO examination file should have been produced pursuant to Rule 230(b)(2). As we have held, "to trigger the obligation to disclose under [Rule 230(b)(2)], the evidence must be 'material either to [the defendant's] guilt or punishment' . . . ." 17/ As discussed infra at E, the Maynards are collaterally estopped from challenging the findings in the Vermont Order so any information in the PRO file concerning the conduct underlying that order is not material to our analysis of the findings in that order as they pertain to our determination of the appropriate sanction in the instant proceeding.

To the extent anything in the PRO file might relate to any determination not to institute a proceeding as a result of the PRO examination, Courts have held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 18/ The Division considers a wide variety of factors in determining whether or not to recommend initiating an enforcement proceeding. 19/

Moreover, Congress granted the Commission a range of administrative remedies to address advisor misconduct. Under the Advisers Act, the Commission may directly institute an

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17/ Elizabeth Bamberg, 50 S.E.C. 201, 205 (1990) (citation omitted). See also Haight & Co., 44 S.E.C. 481, 510-511 (1971) (rejecting respondents' argument that the Division of Enforcement improperly suppressed evidence favorable to their defense) (citation omitted); Orlando Joseph Jett, 52 S.E.C. 830, 830 (1996) (discussing the obligation under Rule 230(b)(2) to produce material consistent with the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), and finding that it "is well established that the Supreme Court's Brady decision does not authorize respondents to engage in 'fishing expeditions' through confidential Government materials in hopes of discovering something useful to their defense") (citation omitted).

18/ Heckler v. Chaney, 470 U.S. 821, 831 (1985). See also Coxon v. SEC, 137 Fed. Appx. 975 at *1 (9th Cir. 2005) (unpublished) (holding that Commission did not abuse its direction in dismissing all proceedings against an original party to the proceeding); Kotakis v. SEC, 238 F.3d 429 (8th Cir. 2006) (unpublished) (holding that "SEC's refusal to prosecute is an unreviewable decision committed to the agency's discretion by law").

19/ See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, 76 SEC Docket 296 (Oct. 23, 2001). See also SEC Enforcement Manual (Oct. 6, 2008) at 14, http://www.sec.gov/divisions/enforce/enforcement manual.pdf (outlining "basic considerations" used by Division when making a determination to open a matter under inquiry).

injunctive or administrative proceeding for violations of the Act. 20/ Congress also authorized the Commission under Advisers Act Sections 203(e) and (f) to institute an administrative proceeding based on the action of another court or administrative forum, such as the Vermont BISHCA. Nothing in the Advisers Act suggests that if the Commission does not pursue one of the available remedies, it is foreclosed from pursuing another. The Maynards' assertion that the Commission may not institute this follow-on proceeding because it did not initiate an administrative proceeding in 2000 would read out of the Act the Congressionally-granted authority to sanction associated persons, consistent with the public interest, who are subject to a state securities agency's final order barring them from association with entities regulated by that state based upon violations of the state's laws prohibiting fraudulent, manipulative, or deceptive conduct.

Contrary to their argument, the Maynards were not thereby deprived of due process. As previously noted, the Vermont BISHCA held a seven-day hearing at which the Maynards were represented by counsel and had an opportunity to present evidence and they were also accorded the opportunity to present legal argument and request specific findings of fact and conclusions of law following the hearing and, indeed, the Maynards submitted extensive and detailed proposed findings of fact. Thus, the matter was "actively litigated" in the prior proceeding and the Maynards had an opportunity to confront the charges brought against them.

Nor did the proceeding before the law judge deprive them of due process. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 21/ The Maynards had notice of the allegations against them, were permitted to introduce relevant evidence on the issue of sanctions and to present arguments in

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20/ See, e.g., Advisers Act Section 203(e)(5), 15 U.S.C. § 80b-3(e)(5) (authorizing administrative proceedings against advisers to violate the securities laws); Section 214, 15 U.S.C. § 80b-14 (injunctive actions).

21/ Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). See also Cryder v. Oxendine, 24 F.3d 175, 177 (11th Cir. 1994) (holding that "[d]ue process entitles an individual to notice and some form of hearing before state action may finally deprive him or her of a property interest"). Three factors are considered to determine the due process that an individual is entitled to when affected by a government action: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

support of their position. They now are exercising their right to appeal the law judge's decision to us. 22/

C. The Maynards also suggest that the Division somehow engaged in unethical conduct by referring the matter to the State of Vermont. The record before us is not clear whether such a referral occurred. However, assuming that it did, such referrals are specifically authorized by Commission rule that provides that, in addition to instituting its own enforcement actions, the Commission "may also, on some occasions, refer the [enforcement] matter to . . . domestic and foreign governmental authorities." 23/

D. In the alternative, the Maynards contend that the Division violated an "implicit" no-action agreement, asserting that their attorney "reached an agreement with [a PRO staff member] in March 2001 that LIMCO's deregistration at State and Federal level would stay any further enforcement action." The Maynards cite the letter their attorney wrote to the PRO in May 2001 in which he confirmed that LIMCO was no longer operating as an investment adviser and expressed his "hope [that] this resolves any remaining issues with respect to this matter and . . . trust that it is now closed." The Maynards do not claim that this letter was based on any express agreement with the PRO, verbal or otherwise. Nor do they claim that they received any response to this letter. The Maynards assert, however, that the seven years that passed between the termination of LIMCO and the commencement of this proceeding is evidence of the Division's "very apparent acceptance of the implicit Agreement with the [Maynards]." Whether the PRO agreed to close its file in 2001, or whether the PRO did, in fact, close its file is irrelevant. This proceeding is not based on the PRO's 2001 examination, but rather on the Vermont Order and the findings contained in that order. As discussed below, the Maynards are collaterally estopped from challenging the Vermont Order.

E. The Maynards argue that summary disposition was inappropriate. We have held that, in follow-on proceedings, summary disposition is appropriate except in certain rare circumstances when "a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct." 24/ As we recently noted, "[n]umerous courts have upheld an

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22/ Cf. Eagletech Communications, Inc., Exchange Act Rel. No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1229 (rejecting argument that revocation of the registration of respondent's securities constituted an unconstitutional taking, noting that "the process that is due to [the respondent] is specified in the Exchange Act and includes the instant review proceeding as a component").

23/ 17 C.F.R. § 202.5(b).

24/ Conrad P. Seghers, Investment Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2300, pet. for rev. den., 548 F.3d 129 (D.C. Cir. 2008) (quotation omitted); John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), aff'd, 66 Fed. Appx. 687 (9th Cir.

(continued...)

administrative agency's decision to grant summary disposition, without holding an in-person hearing, when no material fact is in dispute." 25/ In addition, courts have sustained Commission findings that sanctions were in the public interest following administrative hearings based on summary disposition. 26/

The Maynards argue that an in-person hearing would have produced a fuller and more accurate disclosure of the facts," that the law judge failed "to give any weight to any of the mitigating factors presented by Respondents," and that she "accepted the state order at face value." They assert that the law judge ignored their arguments that there was no applicable precedent in Vermont law interpreting the Vermont fraud statutes, that they were improperly found to be investment advisers under a "loose interpretation of the statute," and that the "Vermont prosecutors improperly alleged securities fraud." They further assert that law judge ignored "an assertion of innocence."

The doctrine of collateral estoppel prevents respondents from relitigating in an administrative proceeding before us factual findings or legal conclusions previously determined in an underlying proceeding that has been fully litigated. 27/ In their brief, the Maynards

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24/ (...continued)
2003). See also Blinder, Robinson, 837 F.2d at 1109-10; Gary M. Kornman, Exchange Act Rel. No. 59403, (Feb. 13, 2009), 95 SEC Docket 14246, 14264 & n.62, pet. for rev. filed, No. 09-1074 (D.C. Cir. Feb. 24, 2009); Jose P. Zollino, Exchange Act Rel. No. 51632 (Apr. 29, 2005), 85 SEC Docket 1292, 1296 & n.10 (discussing Brownson, supra).

25/ Kornman, supra and n.56 (citing to several cases, including Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 606-11 (1st Cir. 1994) (listing agencies that provide for summary disposition and affirming generally the validity of the procedure in administrative proceedings when there is no genuine issue of material fact); and La. Land and Exploration Co. v. FERC, 788 F.2d 1132, 1137-38 (5th Cir. 1986) (finding that "[w]here there are no issues of material fact presented which would require an evidentiary hearing, such a hearing is simply not required"). See also Sierra Ass'n for Env't v. FERC, 744 F.2d 661, 663 (9th Cir. 1984) (holding that "a trial-type hearing" is not always required because such a hearing was not necessary for a "full and true disclosure of the facts").

26/ See Seghers v. SEC, 548 F.3d 129, 134-35 (D.C. Cir. 2008) (upholding use of summary disposition in follow-on proceeding); Brownson v. SEC, 66 Fed. Appx. 687, 688 (9th Cir. 2003) (upholding use of summary disposition during sanctioning) (unpublished); Michael Batterman, 57 S.E.C. 1031 (2004), aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).

27/ See Montana v. United States, 440 U.S. 147, 153-54 (1979) (stating that collateral estoppel "preclude [s] parties from contesting matters that they have had a full and fair
(continued...)

acknowledge the principle of collateral estoppel. The Maynards' complaints about the Vermont Order were properly addressed in the appellate process provided under the laws of the State of Vermont. 28/ The Maynards state that they could not exercise their right of appeal under Vermont law because of their "financial situation." However, their decision does not give them the right now to make a collateral attack here against the Vermont Order.

The Maynards identify other facts that they suggest are mitigative. Those matters were before the law judge, and, as discussed below, we have considered them in our determination of what sanction is in the public interest.

F. The Maynards also allege that the law judge was biased against them. We find no evidence of this on the record. The fact that the law judge did not accept respondents' arguments does not suggest that she was biased. As we have previously observed, "[a]dverse rulings, by themselves, generally do not establish improper bias." 29/

IV.

In determining the appropriate remedial sanction, we are guided by the following factors in determining what sanction, if any, should be imposed in the public interest to protect the investing public:

27/ (...continued)
opportunity to litigate" and thereby "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). See also Kornman, 95 SEC Docket at 14266 (holding that, in a follow-on proceeding, the petitioner cannot collaterally attack the underlying criminal proceeding); Jose P. Zollino, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2604-05 & n.20 (stating the basis for a follow-on proceeding "is the action of district court -- in convicting and enjoining him -- and its purpose is not to revisit the factual basis for that action"); Robert Sayegh, 54 S.E.C. 46, 51 & n.19 (2007) (rejecting factual and legal challenges to underlying district court case); Michael Batterman, 57 S.E.C. 1031, 1039 & n.18 (2004) (applying the doctrine of collateral estoppel on the basis of an injunction entered after litigation on the merits).

28/ See, e.g., Batterman, 57 S.E.C. at 1039 (holding that, to the extent that respondents wish to challenge the basis of the underlying decision, "those matters properly are addressed to the appellate court").

29/ Scott Epstein, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13860 & n.56.

> [T]he 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. 30/

The Commission's determination that a remedial, disciplinary sanction is in the public interest is based on the particular circumstances and entire record of the case. An investment adviser is a "fiduciary in whom clients must be able to put their trust." 31/ Further, an investment adviser has an affirmative duty of "utmost good faith, and full and fair disclosure of all material facts," as well as an affirmative obligation "to employ reasonable care to avoid misleading" his or her clients. 32/

The Maynards contend that, because the Vermont Order did not find that they had acted with scienter, it was improper for the law judge to make a contrary finding. The Maynards further assert that any finding of scienter "is primarily mitigated by [their] claim of innocence" and that no other evidence presented by the Division "demonstrated any capacity on the part of the [Maynards] to act deceptively or willfully violate securities laws." However, the Commissioner of the Vermont BISHCA determined that it was not necessary to establish scienter for a violation of Vermont's antifraud provision, so he did not affirm the Hearing Officer's finding and conclusion that scienter had been proven. While the Vermont Order did not make a specific finding of scienter, its detailed findings of the Maynards' misconduct, including the misappropriating of investor funds for their personal use, their numerous misrepresentations or omissions to their customers about LIMCO's performance and financial condition, and the other detailed findings regarding the Maynards' unethical and dishonest practices in the Vermont Order, provides ample support for concluding that they acted at least recklessly if not with

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30/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). See also Robert Bruce Lohmann, 56 S.E.C. 573, 581-82 (2003) (citations omitted) (same); and Donald T. Sheldon, 51 S.E.C. 59, 86 (1992)(citations omitted), aff'd, 45 F. 3d 1515 (11th Cir. 1995) (same). See also Marshall E. Melton, 56 S.E.C. 695, 697 (2003) (noting that the Commission has a "responsibility to protect the investing public" in an administrative proceeding).

31/ Robert Radano, Investment Advisers Act Rel. No. 2750 (June 30, 2008), 93 SEC Docket 7495, 7507; Ahmed Mohamed Soliman, 52 S.E.C. 227, 231 (1995).

32/ Radano, 93 SEC Docket at 7507 (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963)). See also Michael Batterman, 57 S.E.C. 1031, 1043 (2004) (noting investment adviser's "affirmative duty" to disclose material facts and "affirmative obligation" to exercise reasonable care to avoid misleading clients), aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).

knowledge. 33/ But even if we accepted the Maynards' contention that they did not act with scienter, we conclude that the remaining Steadman factors independently support a bar.

The Vermont Order found that, from at least December 1998 through June 2001, the Maynards defrauded their customers by misappropriating hundreds of thousands of dollars from LIMCO and its investors, including diverting investments in LIMCO to themselves and otherwise treating LIMCO's bank account as if it were their own personal account. During this period, the Maynards also made numerous misrepresentations or omissions about LIMCO's performance and financial condition, including showing investors high projected rates of return which had no reasonable basis and failing to disclose a prior bankruptcy to certain investors in securing loans from them. They solicited a client to entrust them with the last $94,000 remaining in the client's retirement account, assuring her that her money would not be touched, and then, without the knowledge or consent of the client, sold the shares in the account and replaced them with worthless shares of LIMCO. We note, as did the law judge, that the Vermont Commissioner reduced the proposed duration of the Vermont bar and the amount of restitution. However, as the Maynards admit in their brief, "the findings in the VT Order were egregious." Their misconduct occurred over the course of several years and was not an isolated event. 34/ We accordingly find that the Maynards' misconduct was egregious and recurrent.

Given the egregiousness of the Maynards' conduct in making numerous misrepresentations or omissions to the LIMCO investors over an extended period of time and continually misleading them as to the financial condition of the company, we are unable to give much weight to the sincerity of their assurances against future violations. In this regard, we note that, even after the events covered by the Vermont Order, the Maynards provided false answers in their filings with the California Department of Corporations that inquired as to whether Terra Vista was affiliated with any person that was subject to a regulatory proceeding. We thus do not find their assurances to be mitigative.

The Maynards have shown little appreciation for the responsibilities of an investment adviser and little remorse for the impact of their conduct on their investors. They describe

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33/ See Justin Ficken, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10890 (finding that former associated person's actions were designed to evade detection by mutual fund managers and thus supported finding that he acted with scienter); Jeffrey L. Gibson, Exchange Act Rel. No, 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2109, appeal filed, No. 08-3377 (6th Cir. Apr. 3, 2008) (finding an associated person's actions to disguise his misconduct from investors was evidence that the person acted with scienter).

34/ See Jeffrey L. Gibson, Exchange Act Rel. No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2108-09 (concluding that conduct was recurrent when it occurred over three years and involved a large number of respondent's clients); Seghers, 91 SEC Docket at 2305 (finding conduct was not isolated when it occurred over a four month period).

LIMCO as a "failed business." They assert to us that they merely engaged in "substandard accounting principles." While the Maynards contend that they have acknowledged deep regret, they nonetheless have written to their PPG customers that they "have always been honest about this matter," i.e. the Vermont Order, and that their regulatory difficulties occurred because they had been "so vocal in standing up against the unseemliness in the insurance industry," causing "some [to feel] . . . bound to try and use this against us." They also have failed to pay any restitution to their customers. 35/

The Maynards suggest that there is no likelihood of future misconduct and that their present employment does not offer opportunities for misconduct. They assert that, because they do not "'offer advice' on any specific security, they do not dictate the inputs or outcomes of any analysis, nor the suitability of a security for a particular client, nor do they have any control over which financial products an advisor may or not recommend to their individual client." However, according to the pages of the PPG website included in the record, 36/ PPG provided information and programs about equity-indexed annuities, offered certified marketing designations for investment advisers, and, as the Maynards describe in their Opposition to the Division's Motion for Summary Disposition, "pairs agents with a registered investment adviser who becomes responsible for overall planning and recommendations for the client's portfolio and investment goals." The Maynards also state in their brief that they "have chosen to remain in step with the analysis and educational needs of the investment advisor community." 37/ We are, therefore, concerned by the close nexus between the Maynards' current business and the investment advisory business, and by the opportunities to rejoin the investment advisory business that may

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35/ See Zollino, 89 SEC Docket at 2608 & n.33 (concluding that former associated person's "failure to acknowledge guilt or show remorse indicates that there is a significant risk that, given the opportunity, [he] would commit further misconduct in the future"); Brownson, 55 S.E.C. at 1030 (finding that former registered representative's "unwilling[ness] to accept responsibility for his actions . . . suggests a troubling lack of appreciation for the responsibilities of a securities professional").

36/ As noted earlier, PPG is now closed and its customers are being serviced by MDL, with which the Maynards are associated and which offers products and services bearing similar descriptions to those described in the pages of the PPG website included in the record.

37/ On PPG's homepage, the Maynards highlighted the benefits "[f]or broker-dealers and RIAs" of a particular program that, they claim, provides "a great way to gather assets and manage them." The website stated that the Maynards' program is designed to assist "advisors [who] need tools to help use them in financial planning" by providing "tools . . . for any marketing organization or financial professional who would like to responsibly offer products such as equity indexed annuities or exchange-traded funds in a compelling yet academically sound manner." Moreover, the website specifically focuses on the benefits their programs and services provides to broker-dealers and registered investment advisers.

arise for the Maynards unless they are permanently barred. As we recently noted, "[t]he securities industry presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors' confidence." 38/

Moreover, the Maynards attempted to register Terra Vista as an investment adviser with the State of California -- an effort that continued until the application was denied following a contested hearing in 2007. The Maynards assert that they had abandoned their interest in the California registration several years before the California Corporation Commissioner issued the order denying their application and barring them from association with an investment adviser, broker-dealer, or commodity adviser. They contend that, in the California proceeding, "Respondents *only* argued to refute misconceptions that their application contained false statements to defend against permanent disbarment, and *did not* argue in an attempt to keep the adviser application alive" (emphasis in original). Nonetheless, Terra Vista's application remained pending until it was denied in 2007 and, during this period, the Maynards neither withdrew the application nor advised the agency of their purported intent to abandon it. Their actions undercut their assertions that they have no further interest in entering the securities industry.

In further mitigation, the Maynards note that they cooperated with the Commission staff in 2000 and voluntarily de-registered. They also note that they have no prior disciplinary history. However, we have stated that the absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws. 39/

Based on a consideration of the Steadman factors, and all of the circumstances in this case, we have determined that barring the Maynards serves the public interest and is remedial.

An appropriate order will issue. 40/

By the Commission (Chairman Schapiro and Commissioners CASEY, WALTER, AGUILAR and PAREDES).

Elizabeth Murphy
Secretary

38/ Kornman, 95 SEC Docket at 14257; Vincent M. Uberti, Exchange Act Rel. No. 58917 (Nov. 7, 2008), 94 SEC Docket at 11406, 11414.

39/ See, e.g., Scott Epstein, 95 SEC Docket at 13865.

40/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2875 / May 15, 2009

Admin. Proc. File No. 3-13008

In the Matter of

MITCHELL M. MAYNARD
and
DORICE A. MAYNARD
3099 West Chapman Ave., Apt. 426
Orange, California 92868

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Mitchell M. Maynard and Dorice A. Maynard be, and they hereby are, barred from association with an investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary