INITIAL DECISION RELEASE NO. 467
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14700

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

In the Matter of	:	INITIAL DECISION
	:	August 21, 2012
GREGORY BARTKO, ESQ.	:	

APPEARANCES: Robert K. Gordon for the Division of Enforcement, Securities and Exchange Commission

Gregory Bartko, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Motion for Summary Disposition filed by the Division of Enforcement (Division) and permanently bars Respondent Gregory Bartko, Esq. (Bartko), from association with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent.

PROCEDURAL HISTORY

The Securities and Exchange Commission (Commission) issued its Order Instituting Administrative Proceedings (OIP) on January 18, 2012, 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).[1] The OIP alleges that on November 18, 2010, the United States District Court for the Eastern District of North Carolina, Western Division, entered a judgment of conviction against Bartko in United States v. Bartko, No. 5:09-CR-321-D, finding him guilty of one count of conspiracy in violation of 18 U.S.C. § 371, four counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342, and one count of the sale of unregistered securities in violation of 15 U.S.C. §§ 77e and 77x and 18 U.S.C. § 2. OIP, p. 2. Bartko, who is incarcerated, filed his Answer to the OIP, with Exhibit A attached, on February 14, 2012.

[1] On the same day, the Commission issued an Order of Suspension, pursuant to Rule 102(e)(2) of the Commission's Rules of Practice, which suspended Bartko from appearing or practicing before the Commission. Gregory Bartko, Esq., Exchange Act Release No. 66182.

A prehearing conference was held on March 8, 2012, at which the parties were granted leave to file motions for summary disposition pursuant to Rule 250(a) of the Commission's Rules of Practice. On April 23, 2012, the Division filed its Motion for Summary Disposition and Memorandum of Law Against Bartko (Motion), with Exhibits A through F attached (Div. Ex. A through Div. Ex. F), and on May 9, 2012, Bartko filed his Memorandum of Law in Response to the Division's Motion (Opposition).[2]

SUMMARY DISPOSITION STANDARD

A motion for summary disposition may be granted 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. 17 C.F.R. § 201.250(b). 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 noticed pursuant to Rule 323 of the Commission's Rules of Practice. 17 C.F.R. § 201.250(a).

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases), petition for review denied, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a "follow-on" proceeding involving fraud is not appropriate "will be rare." See John S. Brownson, Exchange Act Release No. 46161 (July 3, 2002), 55 S.E.C. 1023, 1028 n.12, petition for review denied, 66 F. App'x 687 (9th Cir. 2003).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. The findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding. See Phillip J. Milligan, Exchange Act Release No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796-97; Ted Harold Westerfield, Exchange Act Release No. 41126 (Mar. 1, 1999), 54 S.E.C. 25, 32 n.22 (collecting cases). The Commission does not permit a respondent to relitigate issues that were addressed in a previous proceeding against the respondent. See William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 455-56. Bartko does not dispute this. Opposition, p. 1.

Thus, the district court's findings, discussed and relied upon throughout this Initial Decision, are binding. The parties' motion papers and indeed all documents and exhibits of record have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

[2] Bartko did not file a motion for summary disposition and the Division did not file a reply to Bartko's Opposition. Accordingly, briefing is complete.

FINDINGS OF FACT

Bartko, age 58, was an attorney licensed to practice law in Georgia, Michigan, and North Carolina and has represented clients before the Commission. Answer, p. 1. He was also a licensed securities dealer and held himself out as an investment banker.[3] Div. Ex. C, p. 5. From 1999 through at least November 2010, Bartko was the president and chief executive officer of Capstone Partners, LC (Capstone), a broker-dealer registered with the Commission. Answer, p. 1. During the time at issue, Capstone was registered as an investment adviser in Georgia and North Carolina, but has since failed to renew its registration with those states. Id.

Beginning in January 2004, Bartko sought investors for the Caledonian Fund, a private equity fund created by Bartko and his business partner. Div. Ex. C, p. 5. Bartko discussed investment opportunities with John Colvin (Colvin), a Tennessee businessman who sent Bartko marketing materials used to raise money from individuals. Id., pp. 5-7. These materials contained overt indicia of fraud, including guaranteed returns and claims that investments were protected and secured.[4] Id. These and other materials also identified Scott Hollenbeck (Hollenbeck), Colvin's business partner, as a manager and creator of Franklin Asset Exchange, LLC (Franklin Asset), and Webb Financial Group, Inc. (Webb Group), the entities that would raise the money.[5] Id., pp. 3-5, 7. Bartko conducted NASD record checks on Colvin and Hollenbeck, which revealed fraud that Colvin had committed in the securities industry and sanctions that had been imposed on Hollenbeck for forgery and misconduct concerning the sale of securities. Id., pp. 6-8.

In February through March 2004, Bartko and Colvin signed a letter of intent and the Caledonian Fund entered into a notes subscription agreement with Franklin Asset, under which Webb Group and Franklin Asset agreed to provide money to the Caledonian Fund. Id., pp. 8, 10. Between February and May 2004, Hollenbeck, through Franklin Asset, sent $701,000 to the Caledonian Fund. Id., pp. 9-10, 17. This money was raised from investors such as the Landmark Baptist Church through the use of false claims, including that the investments were insured by surety bonds. Id., p. 9.

In April 2004, the North Carolina Securities Division (Securities Division) ordered Hollenbeck to cease and desist from selling securities. Id., p. 11. In the following month, Bartko and his former law partner agreed to represent Hollenbeck in connection with the Securities Division's pending investigation. Id., pp. 16-17. In June 2004, Hollenbeck sent documents to Bartko that detailed Hollenbeck's fraudulent sales tactics, including fake surety bonds and guaranteed returns promised to investors in Franklin Asset. Id., pp. 18-20. Hollenbeck also sent Bartko a copy of an application for an insurance policy purchased by Colvin for Franklin Asset

[3] Bartko held Series 7, 24, 63, and 79 securities licenses. Div. Ex. C, p. 5.

[4] In January 2011, after a jury trial, Colvin was convicted of related conspiracy and mail fraud charges and sentenced to 300 months of imprisonment. Id., pp. 79-80.

[5] Hollenbeck was also identified as the president of Webb Group and the co-managing general partner of Franklin Asset. Id., pp. 5, 7.

that purportedly guaranteed investors a return on their investment. Id., p. 19. This insurance policy, however, was merely a directors and officers liability policy that did not protect or guarantee a return on investments in Franklin Asset.[6] Id., pp. 10, 18-19.

The Caledonian Fund never invested any of the $701,000 that it received from investors, nearly half of which Bartko personally received and spent. Id., p. 27. In November 2004, the Caledonian Fund ceased operations and Bartko created a new fund, the Capstone Private Equity Bridge and Mezzanine Fund, LLC (Capstone Fund). Id., pp. 27-28. The Capstone Fund engaged Hollenbeck, or entities controlled by Hollenbeck, to raise money from investors, even though Bartko knew that Hollenbeck had used fraudulent tactics in connection with raising money for the Caledonian Fund through Webb Group and Franklin Asset. Id., pp. 28-29.

In December 2004, a potential investor in the Capstone Fund raised the issue of the insurance bonds with Bartko. Id., p. 32. On the same day, Bartko asked Hollenbeck's insurance broker to add the Capstone Fund to the Franklin Asset insurance policy, the same policy that Hollenbeck used to falsely promise investors that their investments were insured. Id., pp. 31-32. A representative of the insurance brokerage company told Bartko that he needed to obtain Colvin's and Hollenbeck's consent and that the insurance policy did not guarantee investment returns. Id., pp. 32-33.

On the following day, Bartko and his co-counsel represented Hollenbeck at a deposition taken by Commission staff, at which Hollenbeck admitted to using fraudulent tactics to sell investments, including using a document purporting to be a surety bond.[7] Id., p. 33. Hollenbeck denied, however, that he had sold any securities since being fired from a securities firm and losing his securities licenses in 2003. Id. When Commission staff specifically asked Hollenbeck what financial products he was selling at the time, Hollenbeck failed to disclose his involvement in selling financial products for the Caledonian and Capstone Funds, and Bartko did not correct his client's omission. Id., pp. 33-34.

After a thirteen-day trial, on November 18, 2010, a jury found Bartko guilty of one count of conspiracy in violation of 18 U.S.C. § 371, four counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342, and one count of the sale of unregistered securities in violation of 15 U.S.C. §§ 77e and 77x and 18 U.S.C. § 2. Div. Exs. A, pp. 2, 10, 12; C, p. 1; D, pp. 1-2; F, p. 2. The court entered a judgment against Bartko on April 4, 2012, convicting him of the foregoing offenses and sentencing him to 276 months of imprisonment, followed by three years of supervised

[6] Hollenbeck used fraudulent insurance documents, including an altered directors and officers insurance policy, as part of his sales presentation materials. Id., p. 18 n.10.

[7] The deposition arose out of a September 2004 lawsuit by the Commission against Mobile Billboards of America, Inc. Id., pp. 3, 33.

release. It also imposed on him more than $886,000 in criminal monetary penalties.[8] Div. Ex. E, pp. 1-3, 4, 6.

CONCLUSIONS OF LAW

Section 203(f) of the Advisers Act instructs the Commission to sanction any person who, at the time of the misconduct, was associated with an investment adviser, if the Commission finds that the sanction is in the public interest and the person has been convicted of any offense specified in Section 203(e)(2) or (3) within ten years of the commencement of the proceedings. Bartko has been convicted of felonies involving, among other things, the purchase or sale of securities arising out of the conduct of the business of a broker, dealer, or investment adviser, and involving the violation of 18 U.S.C. §§ 1341 and 1342, all within the meaning of Section 203(e)(2) of the Advisers Act.[9] See 15 U.S.C. §§ 80b-2(a)(6), -3(e)(2). Bartko admits this. Answer, p. 1; Opposition, p. 2.

Accordingly, a sanction shall be imposed on Bartko if it is in the public interest.[10] See Feeley & Willcox Asset Mgmt. Corp., Securities Act Release No. 8249 (July 10, 2003), 56 S.E.C. 616, 618, 647 (barring a person associated with an unregistered investment adviser from association with an investment adviser), motion for reconsideration denied, Securities Act Release No. 8303 (Oct. 9, 2003), 56 S.E.C. 1264.

SANCTIONS

The appropriateness of any remedial sanction in this proceeding is guided by the well-established public interest factors set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). See Joseph P. Galluzzi, Exchange Act

[8] The criminal penalties include a $600 assessment and restitution in the amount of $885,946.89, the latter for which he and other co-defendants were found jointly and severally liable. Div. Ex. E, p. 13.

[9] Section 15(b)(6)(A) of the Exchange Act instructs the Commission to sanction any person who, at the time of the misconduct, was associated with a broker or dealer, if the Commission finds that the sanction is in the public interest and the person has been convicted of any offense specified in Section 15(b)(4)(B) within ten years of the commencement of the proceedings. Bartko was convicted – that is, sentenced – more than two months after this proceeding was instituted. However, because Section 202(a)(6) of the Advisers Act defines "convicted" to include, among other things, a verdict (with qualifications not relevant here), whether or not a sentence has been imposed, any issue regarding whether this proceeding was properly instituted pursuant to Section 15(b) of the Exchange Act need not be decided because Section 203(f) of the Advisers Act provides a proper statutory basis for this proceeding.

[10] If the underlying conviction is vacated, Bartko may request the Commission to reconsider any sanction imposed in this proceeding. See Charles Phillip Elliott, Exchange Act Release No. 31202 (Sept. 17, 1992), 50 S.E.C. 1273, 1277 n.17, aff'd on other grounds, 36 F.3d 86 (11th Cir. 1994).

Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1120. They include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140.

Bartko's conduct was egregious, recurrent, and involved a high degree of scienter. Over an extended period of time, he violated numerous federal laws by perpetuating an interstate criminal scheme to fraudulently obtain funds from investors through the use of material misrepresentations. The egregiousness of Bartko's conduct is further demonstrated by the fact that he was sentenced to 276 months of imprisonment, followed by three years of supervised release, and ordered to pay approximately $886,000 in restitution. See Don Warner Reinhard, Exchange Act Release No. 63720 (Jan. 14, 2011), 100 SEC Docket 36940, 36947 & n.21 (citing Robert Bruce Lohmann, Exchange Act Release No. 48092 (June 26, 2003), 56 S.E.C. 573, 583 n.20 (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions")). Bartko has failed to offer assurances against future violations and to recognize the wrongful nature of his conduct. He maintains that he is innocent, that the jury's verdict is the product of prosecutorial misconduct, and that the district court's January 17, 2012, order is flawed. Opposition, pp. 3, 8.

The Division requests that Bartko be barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSRO). Motion, pp. 14-17. Bartko argues that the alleged prosecutorial misconduct should be taken into account in considering the public interest and that a temporary suspension is an appropriate sanction. Answer, pp. 1-5; Opposition, pp. 2-9. Even assuming the truth of these allegations in Bartko's pleadings, which, as stated previously, are taken as true pursuant to Rule 250(a) of the Commission's Rules of Practice, a permanent associational bar is nonetheless in the public interest because of the egregious, recurrent, and unrepentant nature of his conduct.[11]

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted on July 21, 2010, added collateral bar sanctions to Section 203(f) of the Advisers Act. The new sanctions authorize the Commission to simultaneously suspend or bar an individual who has engaged in certain unlawful conduct from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Prior to Dodd-Frank, collateral sanctions were generally authorized only on a piecemeal basis, i.e.,

[11] The charged conspiracy continued through January 2010. Div. Ex. A, pp. 2, 15. However, the jury apparently heard no inculpatory evidence postdating 2005. Div. Ex. C, pp. 73-79. Therefore, I, too, have not considered any such post-2005 evidence to the extent that it would weigh in favor of a severe sanction. Even assuming that the alleged prosecutorial misconduct should be considered in mitigation, and disregarding any inculpatory post-2005 evidence, the evidence against Bartko is so "overwhelming," and his misconduct so shameless, that a permanent bar is plainly warranted. Div. Ex. C, p. 118. Also, inasmuch as Bartko raises arguments in his pleadings that are inconsistent with the findings of the district court, his arguments are rejected because, as established previously, these issues cannot now be relitigated.

only when an individual sought association with the particular branch of the securities industry at issue. Teicher v. SEC, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999) (the Commission could not impose sanctions as to any specific branch until it could "show the nexus matching that branch"). The issue is whether Dodd-Frank's broader collateral bar can be applied to Bartko, whose misconduct ended before the enactment of Dodd-Frank.

Retroactive application of a new law authorizing or affecting the propriety of prospective relief requires inquiry into whether the new law would impair vested rights – that is, "rights a party possessed when he acted." Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994); Fernandez-Vargas v. Gonzales, 548 U.S. 30, 44 n.10 (2006) (noting that vested rights are "something more substantial than inchoate expectations and unrealized opportunities," and include "an immediate fixed right of present or future enjoyment"). In those cases where the question of retroactivity cannot be resolved by statutory construction and the new law authorizes injunctive relief, the question of retroactive application essentially reduces to the question of whether such application would impair vested rights. See Mueller v. Angelone, 181 F.3d 557, 568 (4th Cir. 1999) (describing two-step analysis under Landgraf); see also Wayde M. McKelvy, Exchange Act Release No. 65423 (Sept. 28, 2011), 102 SEC Docket 46319; Glenn M. Barikmo, Initial Decision Release No. 436 (Oct. 13, 2011), 102 SEC Docket 47146, Finality Order, Exchange Act Release No. 65782 (Nov. 17, 2011); John D. Friedrich, Advisers Act Release No. 3394 (Apr. 6, 2012), 103 SEC Docket 53102.

Dodd-Frank lacks an express retroactivity provision, and "'normal rules of [statutory] construction'" do not reveal Congress' intent regarding retroactivity. Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225, 228 (D. Mass. Mar. 1, 2011) (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)); see also SEC v. Daifotis, 2011 WL 2183314 at *14 (N.D. Cal. June 6, 2011). The requested relief is injunctive, and the question, then, is whether retroactive application of Dodd-Frank's collateral bar would impair Bartko's vested rights.

Bartko plainly had no such vested right to associate with an investment adviser. Before Dodd-Frank's enactment, any person convicted of the crimes Bartko committed was subject to an investment adviser associational bar under Section 203(f) of the Advisers Act. 15 U.S.C. § 80b-3(e)(2), (f) (2002).

Bartko also had no vested right to associate with a broker, dealer, municipal securities dealer, or transfer agent. Before Dodd-Frank, a conviction like Bartko's could bar him from such associations, even though the bar could not be imposed until the person actually sought association. 15 U.S.C. §§ 78o(b)(6)(A), 78o-4(c)(4), 78q-1(c)(4)(C) (2002); Teicher, 177 F.3d at 1020-21.

The analysis is more complicated with respect to a municipal advisor or NRSRO. There was no associational bar or similar provision predating Dodd-Frank with respect to a municipal advisor, nor was there a formal associational bar with respect to an NRSRO. See, e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011) (noting the absence of these two bars before Dodd-Frank). In 2006, before Dodd-Frank's enactment, there existed a statutory provision for revoking the registration of an NRSRO if any person associated with it was found to have been convicted of the crimes

Bartko committed. 15 U.S.C. § 78o-7(d)(1) (2006) (referencing 15 U.S.C. § 78o(b)(4)(B)). However, the jury apparently heard no inculpatory evidence postdating the enactment of this provision. Although there is evidence that Bartko continued his criminal misconduct after 2006, his criminal conviction is necessarily based only on pre-2006 misconduct.[12] As to association with a municipal advisor or NRSRO, therefore, Bartko possessed a right approximating an "immediate fixed right of present or future enjoyment." Fernandez-Vargas, 548 U.S. at 44 n.10.

Thus, Bartko had no vested rights in association with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent, but did have such rights with respect to a municipal advisor or NRSRO. A permanent bar is therefore warranted, but only with respect to investment advisers, brokers, dealers, municipal securities dealers, and transfer agents.

ORDER

It is ORDERED, pursuant to Rule 250(b) of the Securities and Exchange Commission's Rules of Practice, that the Division of Enforcement's Motion for Summary Disposition against Respondent Gregory Bartko, Esq., is GRANTED.

It is FURTHER ORDERED, pursuant to Section 203(f) of the Investment Advisers Act of 1940, that Gregory Bartko, Esq., is barred from association with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. See 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 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 occurs, the Initial Decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge

[12] Had Bartko's conviction been based on misconduct continuing after the enactment of this provision, he would have been barred from association with an NRSRO. See, e.g., Lodavina Grosnickle, Initial Decision Release No. 441 (Nov. 10, 2011), Finality Order, Exchange Act Release No. 65949 (Dec. 14, 2011).