

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59040 / December 2, 2008

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2811 / December 2, 2008

Admin. Proc. File No. 3-12828

In the Matter of
BYRON S. RAINNER

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

Byron S. Rainer, a registered representative formerly associated with MetLife Financial Services, Inc., which is registered with the Commission as a broker-dealer and an investment adviser, appeals from a decision of an administrative law judge. The law judge barred Rainer from association with any broker, dealer or investment adviser based on Rainer's conviction for wire fraud.

On September 25, 2007, the Commission issued an Order Instituting Proceedings ("OIP") against Rainer alleging that, on February 9, 2006, Rainer pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343, before the United States District Court for the Northern District of Georgia. The OIP further alleged that, on November 20, 2006, Rainer 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. ^{1/} According to the OIP, the count of the indictment to which Rainer pled guilty alleged, among other things, that "from on or about August 2002

^{1/} We take official notice that Rainer was released from prison in October 2008. See Federal Bureau of Prison's website at <http://www.bop.gov/iloc2/LocateInmate.jsp>. See also Commission Rule of Practice 323, 17 C.F.R. § 201.323 (stating that Commission can take official notice of any material fact that might be judicially noticed by a district court of the United States); and Rule 201(b) of the Federal Rules of Evidence (stating that a district court can take notice of a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

through on or about April 2003, Rainer knowingly and willfully devised a scheme and artifice to defraud the Sheriff's Office of Fulton County, Georgia and obtained money and property from the Sheriff's Office of Fulton County, Georgia by means of materially false and fraudulent pretenses, representations and promises."

On October 30, 2007, a telephonic prehearing conference was held, at which Rainer requested that the law judge order the Division of Enforcement (the "Division") to copy and deliver its investigative file to him in prison. The Division advised the law judge that it had not furnished Rainer with its entire investigative file but, rather, had provided him with "the operative documents that we'll be relying on in this case." ^{2/} The Division further informed the law judge that it had also included a letter with its document delivery to Rainer informing him that "if he wants the [Division's] entire [investigative] file that obviously it's at his expense." The Division estimated that the cost of copying the entire file, consisting of "about 20 banker's boxes," would be about \$7,500. The law judge replied that "this proceeding is based on the conviction. So it is not likely – We're not going to re-litigate the fact of whatever went on that led to the plea and conviction." There was no further discussion by the parties or the law judge of Rainer's request, and the Division never provided Rainer with a complete copy of the investigative file.

Following the prehearing conference, the Division filed a motion for summary disposition. On March 25, 2008, the law judge granted the Division's motion and issued an initial decision barring Rainer from association with any broker or dealer and from association with any investment adviser. ^{3/} Rainer subsequently filed a petition for review of the law judge's decision. Among other matters, Rainer asserts that he "has been denied due process" as a result of the Division's failure to furnish him a copy of its investigative file. In connection with this appeal, Rainer has repeated his request for a copy of the file, and has agreed to pay the costs related to that request.

The Division opposes Rainer's request, asserting that it complied with our Rules of Practice by making its investigative file available at its offices in Atlanta. However, as indicated, Rainer was incarcerated at the time the matter was before the law judge and was, therefore, unable to access the documents at the Division's offices. The Division also contends that it had provided Rainer with "copies of every document that provided the basis for the Division's case

^{2/} The Division stated that these included a copy of the criminal indictment; Rainer's guilty plea and plea agreement; a copy of the judgment in Rainer's criminal case; a copy of Rainer's Form U4, Uniform Application for the Securities Industry; Rainer's Form U5, Uniform Termination Notice; a copy of the organizational registration status for Metropolitan Life Insurance Company as a broker-dealer; and an organizational registration status for Metropolitan Life Insurance Company as an investment adviser.

^{3/} Byron S. Rainer, Initial Decision Rel. No. 347 (Mar. 25, 2008), 92 SEC Docket 3786, 3786.

against" him, although the Division does not dispute that Rainer was not given access to the entire investigative file.

Rule of Practice 230(a)(1) provides that "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 Division's recommendation to institute proceedings." ^{4/} Rule 230(f) further provides that a respondent "may obtain a photocopy of any documents made available for inspection [provided that] [t]he respondent shall be responsible for the cost of photocopying." In Jose P. Zollino, we observed that, "[w]hile it may be unlikely that the [i]nvestigative [f]ile contains the kind of 'extraordinary mitigative evidence' that would be relevant here, [the respondent] should have been given the opportunity to review it before filing his response to the Division's motion [for summary disposition]." ^{5/}

Because Rainer was not permitted to review the Division's entire investigative file as contemplated by our rules, we believe it is appropriate to remand this case to the law judge for further consideration. ^{6/} On remand, we direct the law judge to ensure that the Division has fully

^{4/} Rule 230(e) directs that documents "shall be made available to the respondent for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree." Comment (a) to Rule 230 states that "[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, Securities Exchange Act Rel. No. 36174 (Aug. 31, 1995), 60 SEC Docket 245, 245.

^{5/} Exchange Act Rel. No. 51632 (Apr. 29, 2005), 85 SEC Docket 1292, 1296 (citing John S. Brownson, 55 S.E.C. 1023, 1027 (2002), in which we noted that "[a]bsent extraordinary mitigating circumstances," an individual who has been convicted of securities fraud "cannot be permitted to remain in the securities industry").

^{6/} Cf. Zollino, *supra*. (remanding proceeding to law judge because of failure to accord incarcerated respondent reasonable opportunity to review investigative file before law judge ruled on Division's motion for summary disposition).

complied with Rule 230, and that Rainer 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. In remanding, we express no view as to the outcome.

Accordingly, IT IS ORDERED that the disciplinary proceeding against Byron S. Rainer be, and it hereby is, remanded for further consideration.

By the Commission.

Florence E. Harmon
Acting Secretary