INITIAL DECISION RELEASE NO. 489
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15147

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

In the Matter of	:	INITIAL DECISION
	:	June 3, 2013
DAVID E. RUSKJER	:	

APPEARANCES: Donald W. Searles for the Division of Enforcement, Securities and Exchange Commission

David E. Ruskjer, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision grants the Motion for Summary Disposition (Motion) filed by the Division of Enforcement (Division) and bars Respondent David E. Ruskjer (Ruskjer) from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization (NRSRO), and from participating in any offering of penny stock.

PROCEDURAL HISTORY

On December 20, 2012, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP), pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that on September 26, 2011, Ruskjer was found guilty in a jury trial of sixteen counts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, two counts of structuring financial transactions in violation of 31 U.S.C. § 5324(a)(3) and (d)(2), and twenty-two counts of money laundering in violation of 18 U.S.C. § 1957 in U.S. v. Ruskjer, No. 1:09-CR-249-HG (D. Haw.). OIP, p. 2. The OIP also alleges that on September 28, 2012, a final judgment was entered against Ruskjer permanently enjoining him from future violations of Sections 5 and 17(a) of the Securities Act of 1933 (Securities Act), and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in SEC v. Ruskjer, No. 1:09-CV-00237-HG (D. Haw.). Id.

On January 14, 2013, this Office received Ruskjer's Answer to the OIP. I held a telephonic prehearing conference on January 16, 2013, during which the parties were granted

leave to file motions for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice. The Division filed a Motion, to which were attached 11 exhibits (Exs. 1-11), on February 15, 2013.[1] Ruskjer did not file his own motion, nor did he file an opposition to the Division's Motion. Accordingly, briefing is complete.

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. See 17 C.F.R. § 201.323. The parties' filings and 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.

FINDINGS OF FACT

On May 27, 2009, the Commission filed SEC v. Ruskjer. Ex. 4. In its Complaint, the Commission alleged that Ruskjer operated a Ponzi scheme by making misrepresentations in the sale and offer for sale of securities in the form of promissory notes, and as a result raised

[1] The exhibits are: the superseding indictment in U.S. v. Ruskjer (Ex. 1), the verdict form in U.S. v. Ruskjer (Ex. 2), the Judgment in U.S. v. Ruskjer (Ex. 3), the Complaint in SEC v. Ruskjer (Ex. 4), the Commission's motion for summary judgment and supporting memorandum of points and authorities in SEC v. Ruskjer (Exs. 5 and 6), a Declaration of Donald W. Searles in SEC v. Ruskjer (Ex. 7), the Commission's statement of uncontested facts in support of its motion for summary judgment in SEC v. Ruskjer (Ex. 8), the minutes of the September 26, 2012 telephonic hearing on the Commission's motion for summary judgment in SEC v. Ruskjer (Ex. 9), the order granting the Commission's motion for summary judgment in SEC v. Ruskjer (Ex. 10), and the Final Judgment in SEC v. Ruskjer (Ex. 11).

approximately $16 million from at least 140 investors between September 2004 and December 2008. Id., pp. 2-3, 6. On July 22, 2009, the United States Attorney for the District of Hawaii filed the superseding indictment in U.S. v. Ruskjer. Ex. 1. The allegations in U.S. v. Ruskjer are essentially the same as the allegations in SEC v. Ruskjer. Id., pp. 4-12.

On September 26, 2011, a jury found Ruskjer guilty on all but one count of the superseding indictment in U.S. v. Ruskjer, including multiple counts of mail fraud and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, respectively. Ex. 2. On January 5, 2012, the District Court sentenced Ruskjer to 120 months imprisonment and ordered him to pay restitution of $11,586,334.85. Ex. 3.

On June 6, 2012, the Commission filed its motion for summary judgment in SEC v. Ruskjer. Ex. 5. Ruskjer did not oppose the motion, and the District Court granted it on September 28, 2012. Exs. 9, 10. As a result, Ruskjer was enjoined from future violations of Sections 5 and 17(a) of the Securities Act, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. Exs. 9, 10.

Certain pertinent facts necessarily found by the District Court in entering judgment in SEC v. Ruskjer are recited in the Commission's statement of uncontested facts.[2] Ex. 8. Additionally, because Ruskjer has defaulted by failing to file an opposition to the present Motion, I deem the allegations of the OIP to be true. 17 C.F.R. § 201.155(a).

Ruskjer's scheme may be summarized as follows. Doing business as Ruskjer & Associates, Ruskjer sold and offered to sell promissory notes purportedly paying fixed monthly interest rates ranging from 3% to 5%. OIP, p. 2. Neither Ruskjer nor Ruskjer & Associates were registered as brokers with the Commission. Ex. 8, p. 2. No registration statement was ever filed or in effect with the Commission for the offering of these notes. OIP, p. 2; Ex. 8, p. 2. Ruskjer personally solicited prospective investors by making presentations at places like coffee shops, hotel lounges, and private residences. OIP, p. 2; Ex. 8, p. 3. Ruskjer represented to investors that he had a lucrative investment strategy for selling call options that emphasized "safety first" and "doesn't rely on speculation." OIP, p. 2. He also told investors that he used their funds to implement his trading strategy, made 5% to 5.5% per month from such trading, and used these profits to pay investors their returns. Id. In fact, from September 2004 to December 2008, Ruskjer used only $7.9 million (or about half of the $16 million he raised) to trade securities and incurred $2.6 million in trading losses, for a cumulative loss of 95% and an average thirty-day return of negative 5.8%. Id.; Ex. 8, p. 3. Ruskjer used about $5.5 million to pay purported returns to investors, in Ponzi-like fashion, and misappropriated the remaining investor funds for personal expenses, including $523,466 to purchase a condominium. OIP, p. 2; Ex. 8, p. 3. Ruskjer acted with the intent to defraud, as required for a conviction under the mail and wire fraud statutes. Ex. 8, p. 4.

[2] D. Haw. LR 56.1(g) (Dec. 1, 2009) ("For purposes of a motion for summary judgment, material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party."). These facts may not now be disputed. See Phillip J. Milligan, Exchange Act Release No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796-97.

CONCLUSIONS OF LAW

Section 15(b)(6) of the Exchange Act allows 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 enjoined from any action specified in Section 15(b)(4)(C) of the Exchange Act, or has been convicted of mail fraud (18 U.S.C. § 1341) or wire fraud (18 U.S.C. § 1343) within the preceding 10 years. 15 U.S.C. § 78o(b)(4)(B)(iv), (b)(4)(C), (b)(6). Ruskjer, as a result of his actions as an unregistered broker, has been permanently enjoined from future violations of Sections 5 and 17(a) of the Securities Act and of Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. He has also been convicted of both mail and wire fraud within the past 10 years. Accordingly, a sanction will be imposed on Ruskjer if it is in the public interest.

SANCTION

The Division requests that I permanently bar Ruskjer from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and NRSRO, and from participating in an offering of penny stock. Motion, p. 14.

When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981): the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (Steadman factors). Gary M. Kornman, Investment Advisers Act of 1940 Release No. 2840 (Feb. 13, 2009), 95 SEC Docket 14246, 14255, pet. denied, 592 F.3d 173 (D.C. Cir. 2010). The Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. Id.

The Steadman factors weigh in favor of a severe sanction. Ruskjer's misconduct was egregious; he misappropriated at least $5.5 million from investors and fraudulently raised approximately $16 million. His misconduct was recurrent, as evidenced by his defrauding approximately 140 investors. He acted with a high degree of scienter, as demonstrated by his convictions for mail and wire fraud. He has offered no assurances against future violations and has not recognized the wrongful nature of his conduct. The respondent's occupation is unclear, and in any event he will be incarcerated for years to come, so the final Steadman factor weighs slightly in favor of a lesser sanction. Nonetheless, the egregiousness and duration of his misconduct are striking, and outweigh any consideration of leniency. Accordingly, he will receive a permanent associational bar.

ORDER

It is ORDERED that, pursuant to Rule 250 of the Commission's Rules of Practice, the Division's Motion for Summary Disposition is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, David E. Ruskjer is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, David E. Ruskjer is permanently BARRED from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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. See 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 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 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