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

Administrative Proceedings Rulings
Release No. 4989 / August 22, 2017

Administrative Proceeding
File No. 3-17902

In the Matter of

John T. Lynch, Jr.

Order Denying Motion for Summary Disposition

On April 5, 2017, the Commission issued an order instituting proceedings (OIP) pursuant to Section 8A of the Securities Act of 1933, Sections 4C, 15(b), 15B(c)(4), and 21C of the Securities Exchange Act of 1934, Section 9(b) of the Investment Company Act of 1940, and Rule 102(e) of the Commission's Rules of Practice. The OIP alleges that Lynch, while associated with LFC, a registered broker-dealer, acted as an investment banker and underwriter's counsel for a series of municipal bond offerings for the benefit of Christopher Brogdon. OIP at 2-10. The OIP further alleges that Lynch failed to conduct required due diligence and ignored red flags related to the bond offerings, that Lynch aided and abetted and caused LFC's failure to ensure certain disclosures were made in connection with the bond offerings, and that Lynch falsely represented that he was qualified to serve as LFC's underwriter's counsel. *Id.*

The OIP followed Lynch's submission and the Commission's acceptance of an offer of settlement, pursuant to which Lynch was found to have violated Section 17(a)(2) and (3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder, and aided and abetted and caused LFC's violation of Section 15(c) of the Exchange Act and Rule 15c2-12 thereunder, and was ordered to cease and desist from committing or causing those violations. OIP at 10-11. The OIP further denied Lynch the privilege of appearing or practicing before the Commission as an attorney, and ordered him to pay disgorgement, prejudgment interest, and civil penalties totaling $44,676. *Id.* at 11. Lynch agreed to additional proceedings to determine whether it is appropriate in the public interest to impose additional non-

financial sanctions, and agreed that the allegations of the OIP "shall be accepted as and deemed true by the hearing officer." *Id.* at 10.

On June 26, 2017, the Division filed a motion for summary disposition, which included the declaration of David H. Tutor, to which were attached three exhibits. Lynch timely filed an opposition, which included the declaration of Lynch himself, the declaration of John W. Loofbourrow, and the declaration of Jacob A. Englander, to which were attached eight exhibits. The Division timely filed a reply, which included a second declaration of David H. Tutor, to which were attached two exhibits (DX Reply 1-2).

BACKGROUND

Lynch resides in Scottsdale, Arizona, and was 68 years old at the time the OIP issued. OIP at 3. He has a bachelor's degree from LaSalle University, a business degree from the Wharton School, and a law degree from St. Louis University School of Law. OIP at 3; Lynch Decl. ¶ 2. He is an inactive member of the Pennsylvania state bar and has not been an active member of any state bar since 1983. OIP at 3. He is presently employed as a managing director of John W. Loofbourrow Associates, Inc. Lynch Decl. ¶ 6; DX Reply 1.

Lynch served as a managing director, head of investment banking, and underwriter's counsel for LFC from May 2009 to August 2014, although as an "independent investment banking consultant" rather than an employee. Lynch Decl. ¶ 8; OIP at 3. LFC is a defunct broker-dealer headquartered in Phoenix, Arizona. OIP at 3. LFC remains registered with the Commission and the Municipal Securities Rulemaking Board (MSRB) as a municipal adviser, but is no longer registered as a municipal securities dealer. *Id*.

LFC served as the primary underwriter of the bond offerings at issue. OIP at 3. There were twelve such bond offerings, and the proceeds were to be used to undertake healthcare-related projects throughout the southeastern and midwestern United States. *Id*. The bond offerings were fraudulent, in part because of Lynch's misconduct. OIP at 2-3.

That misconduct took three forms. First, on numerous occasions throughout 2013, Lynch was made aware that Brogdon had caused the issuers of bond offerings in 2010 and 2012 to fail to comply with MSRB-mandated disclosure requirements, and was continuing to cause such failures for bond offerings in 2013, but Lynch did not conduct or cause to be conducted any review of MSRB's electronic disclosure database in connection with the underwritings for which he was responsible, and instead relied solely on the representations of Brogdon and others. OIP at 4-7. As a result, the 2013

bond offerings disclosed official statements that were materially misleading. *Id*. at 7. Second, Lynch acted as investment banker and underwriter's counsel for LFC's underwriting of an April 2013 offering involving bonds previously issued by Clayton County, Georgia (the "Clayton V Offering"), as to which LFC failed to ensure the issuer executed a continuing disclosure agreement to provide certain information to the MSRB. *Id*. at 7-8, 10. Lynch thereby aided and abetted and caused LFC's violation of Section 15(c) of the Exchange Act and Rule 15c2-12 thereunder, which prohibits underwriters from participating in offerings of municipal securities without reasonably determining that the issuer has a written agreement to provide certain information to the MSRB. *Id*. at 8, 10; 17 C.F.R. § 240.15c2-12(b)(5)(i). Third, Lynch served as underwriter's counsel on twelve bond offerings between 2010 and 2013, held himself out as underwriter's counsel in each offering's official statement, and received $290,000 total in underwriter's counsel fees, even though he was not authorized to practice law during that period. OIP at 9-10.

DISCUSSION

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 summary disposition as a matter of law. 17 C.F.R. § 201.250(c). In accordance with the OIP's instructions, I accept and deem true the factual allegations in the OIP. OIP at 10. I have also considered admissions made by Lynch, declarations, affidavits, documentary evidence, and facts officially noticed pursuant to 17 C.F.R. § 201.323. *See* 17 C.F.R. § 201.250(c). Preponderance of the evidence has been applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). The filings, documents, and exhibits of record have been fully reviewed and carefully considered, and I have viewed the evidence in the light most favorable to Respondent. *See Jay T. Comeaux*, Securities Act Release No. 9633, 2014 WL 4160054, at *2 (Aug. 21, 2014).

The criteria to determine whether a sanction is in the public interest are the *Steadman* factors: (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 that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009), *petition for review denied*, 592 F.3d 173 (D.C. Cir. 2010). The

Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, 58 S.E.C. 1197, 1217-18 & n.46 (2006); *Marshall E. Melton*, 56 S.E.C. 695, 698 (2003). The Commission's inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. *Gary M. Kornman*, 2009 WL 367635, at *6. In deciding whether the public interest warrants an industry bar, I must determine that "such a remedy is necessary or appropriate to protect investors and markets." *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (quoting *John W. Lawton*, Investment Advisers Act Release No. 3513, 2012 WL 6208750, at *9 (Dec. 13, 2012)), *vacated in part on other grounds* Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

Under these legal standards, a hearing is necessary to determine what sanction, if any, is in the public interest. Three considerations lead to this conclusion.

First, the degree of scienter attributable to each of Lynch's violations is unclear. Lynch committed primary violations of Exchange Act Section 10(b) and Rule 10b-5(b) thereunder, which require proof of scienter, and Lynch therefore acted with scienter in committing at least one charged violation. OIP at 10; *see Aaron v. SEC*, 446 U.S. 680, 695 (1980). The OIP alleges three courses of misconduct, the first of which, repeated failure to conduct underwriting due diligence in the face of multiple red flags, may have involved scienter. But the OIP does not necessarily support that conclusion, because it does not assert that Lynch "made" any particular misrepresentations, as required under Section 10(b) and Rule 10b-5(b). *See* OIP at 4-7; *John P. Flannery*, Securities Act Release No. 9689, 2014 WL 7145625, at *10-11 (Dec. 15, 2014), *vacated on other grounds*, 810 F.3d 1 (1st Cir. 2015). It seems particularly unlikely that Lynch acted with scienter in the second alleged course of conduct, failing to ensure the issuer filed a continuing disclosure agreement in the Clayton V Offering; the Division does not specifically contend that the misconduct involved scienter, and the implicated statute and regulation apparently do not require proof of it. *See* Mot. at 15; 15 U.S.C. § 78o(c); 17 C.F.R. § 240.15c2-12(b)(5)(i). The third alleged course of misconduct, receiving $290,000 in underwriter's counsel fees while repeatedly misrepresenting his status as an actively licensed attorney, seems the most likely to have been committed with scienter because it involved specific misrepresentations, although Lynch asserts that those misrepresentations "were not designed to mislead." Opp'n at 7; *see* 15 U.S.C. § 77q(a)(2); OIP at 9-10. In short, it is possible that Lynch acted with scienter in repeatedly misrepresenting his legal qualifications, but not in

failing to conduct underwriting due diligence or in connection with the Clayton V Offering, or vice versa, or something else. But if he acted with scienter only in misrepresenting his legal qualifications, a permanent associational bar and investment company bar would seem less warranted than a permanent prohibition on appearing or practicing before the Commission, to which Lynch has already agreed.

Second, the degree of egregiousness and recurrence involved in Lynch's due diligence failures is unclear. The third alleged course of misconduct seemingly satisfies all the elements of the charged antifraud violations: obtaining money (as required by Securities Act Section 17(a)(2)) by a course of business (as required by Securities Act Section 17(a)(3)) to repeatedly misrepresent (as required by Securities Act Section 17(a)(2) and Exchange Act Section 10(b) and Rule 10b-5(b) thereunder) Lynch's qualification to act as underwriter's counsel. *See* 15 U.S.C. § 77q(a)(2), (3); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. It is possible that the first alleged course of misconduct also satisfies these statutes, but, again, the OIP does not allege that Lynch "made" any particular misrepresentations, so it is impossible to tell whether Lynch violated Section 17(a)(2), Section 10(b), and Rule 10b-5(b) recurrently, or merely violated Section 17(a)(3) once, or something else. And the evaluation of egregiousness is made more difficult by the OIP's silence on the consequences of Lynch's due diligence failures. Although the OIP asserts that the official statements for the 2013 bond offerings were materially misleading because of Lynch's lack of due diligence, the OIP does not identify any fraud losses or other harm to investors arising from those misleading official statements.

Third, in contrast to other recent administrative proceedings involving partial settlements, the present OIP does not provide that disputed issues may be resolved "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence." *E.g.*, *David Lubin*, Exchange Act Release No. 81172, 2017 WL 3057896, at *5 (Jul. 19, 2017). Indeed, Lynch apparently negotiated away such a provision, as demonstrated by a handwritten amendment to his Offer of Settlement. *See* DX Reply 2 at 5. Summary disposition therefore may not be an "appropriate vehicle" for resolving this 120-day proceeding. *See Jay T. Comeaux*, 2014 WL 4160054, at *4 n.30.

ORDER

I ORDER that the Division's motion for summary disposition is DENIED.

I further ORDER that a telephonic prehearing conference shall be held on August 29, 2017, at 2:00 p.m. Eastern to set the prehearing schedule. The parties are encouraged to confer before the prehearing conference with a view to jointly proposing a prehearing schedule.

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Cameron Elliot
Administrative Law Judge