UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6583 / April 10, 2024

Admin. Proc. File No. 3-20927

In the Matter of

GEORGE MCKOWN

ORDER REQUESTING ADDITIONAL BRIEFING AND MATERIALS FROM THE PARTIES

On July 7, 2022, the Securities and Exchange Commission issued an order instituting proceedings ("OIP") against George McKown pursuant to Section 203(f) of the Investment Advisers Act of 1940.[1] After McKown failed to file an answer to the OIP, the Division of Enforcement filed a motion for entry of default and remedial sanctions on January 31, 2024. In its motion, the Division requested that the Commission bar McKown from the securities industry. To date, McKown also has not responded to that motion.

The factors the Commission considers when determining whether remedial action under Advisers Act Section 203(f) is in the public interest include 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.[2] And, in applying those factors, the Commission must do more than "recite[], in general terms, the reasons why [a respondent's] conduct is illegal," but rather "devote individual attention to the unique facts and circumstances of th[e] case."[3]

The Commission will not impose certain "collateral" bars from associating in capacities beyond the capacity in which the misconduct at issue occurred if that conduct entirely predated

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1 *George McKown*, Advisers Act Release No. 6063, 2022 WL 2531702 (July 7, 2022).

2 *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see also Lawrence Allen DeShetler*, Advisers Act Release No. 5411, 2019 WL 6221492, at *2-3 (Nov. 21, 2019) (applying *Steadman* factors in follow-on proceeding).

3 *See McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (vacating and remanding suspension for failing to meet this standard).

the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[4] But it will do so, under certain circumstances, if the misconduct continued past the July 21, 2010 effective date of the Dodd-Frank Act.[5]

It does not appear that the current record contains sufficient evidence to permit the Commission to determine what, if any, misconduct McKown engaged in after July 21, 2010, and whether collateral bars are warranted based on it. The Division's motion does not specifically address whether the Dodd-Frank Act authorizes collateral bars under the facts and circumstances presented here or identify misconduct in which McKown engaged after its effective date.

To support its motion, the Division relies on the allegations of the OIP, which the Commission may deem true if McKown has defaulted.[6] The OIP reflects that, following a jury trial, McKown was found guilty of one count of conspiracy to commit securities fraud and one count of wire fraud in violation of 18 U.S.C. §§ 371 and 1343, respectively. Although the OIP generally describes the evidence at trial, it does not specifically identify any conduct that occurred after July 21, 2010. For example, although the OIP states that "McKown and the other individual used investor proceeds to fund businesses in which one or both of them were officers, owners, or members, to make Ponzi-like payments to other investors, and to pay for personal expenses," it does not identify when those payments—or any related misconduct in which McKown may have engaged to conceal fraud from victims, such as preparing or sending false or misleading financial statements—occurred.

The Division also submitted the indictment from the criminal proceeding in which McKown was later convicted, which alleged that he engaged in a conspiracy to commit securities fraud between approximately 2008 and 2013 and committed wire fraud in connection with a September 2012 email sent by a codefendant. But "allegations in an indictment" do not "automatically have preclusive effect" simply because, as appears to be the case here, a jury

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4 *See Bartko v. SEC*, 845 F.3d 1217, 1222–24 (D.C. Cir. 2017); *Koch v. SEC*, 793 F.3d 147, 158 (D.C. Cir. 2015).

5 *See, e.g.*, *Joseph A. Meyer, Jr.*, Exchange Act Release No. 94822, 2022 WL 1288226, at *4 n.17 (Apr. 29, 2022) (finding that respondent's post-Dodd-Frank Act misconduct demonstrated that a collateral bar was necessary to protect the public (citation omitted)); *Jonathan Morrone*, Exchange Act Release No. 93847, 2021 WL 6062990, at *5 n.52 (Dec. 21, 2021) (same).

6 Rule of Practice 155(a), 17 C.F.R. § 201.155(a) (authorizing the Commission to deem a party to be in default and the OIP's allegations to be true if the party fails "[t]o answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding").

convicted a respondent in a "general verdict" that finds the respondent guilty of the counts in the indictment.[7]

The portions of the trial transcript from the criminal case against McKown also do not appear to provide sufficient information to assess McKown's post-Dodd-Frank conduct. Those excerpts contain testimony regarding events that, at least in part, appear to have taken place in 2008—i.e., not only before the effective date of Dodd-Frank Act but also before the OIP alleges McKown was associated with an investment adviser, a potential predicate for remedial action in this proceeding.[8] And, although the excerpts also contain what appear to be portions of the government's closing argument in the criminal proceeding, they do not include the underlying evidence on which that argument was based.

Under the circumstances, the Commission would benefit from further development of the evidentiary record and additional briefing addressing the Division's arguments as to why sanctions, including collateral bars, are warranted.[9] The Division should therefore submit any additional evidentiary materials that are relevant to the Commission's determination of the public interest, including materials from the criminal proceeding, such as transcripts of the trial or sentencing hearings, sentencing memoranda the parties may have submitted to the court (and/or pertinent evidence identified in them), and any substantive orders on post-trial motions. In particular, the Division should address each statutory element of the relevant provisions of Advisers Act Section 203(f). The Division's brief should discuss relevant authority relating to the legal basis for, and the appropriateness of, the requested sanctions, including collateral bars, and include evidentiary support sufficient to make an individualized assessment of whether those sanctions are in the public interest.

Accordingly, it is ORDERED that the Division of Enforcement shall submit, as it deems necessary, any additional evidentiary materials that are relevant to its motion and determination of the public interest by May 10, 2024, as well as a brief not to exceed 5,000 words, explaining the relevance of those materials to its request and the public interest and containing specific citations to the evidence relied upon.

It is further ORDERED that McKown may file a brief by June 10, 2024, not to exceed 5,000 words, addressing the same matters to be addressed by the Division. McKown's brief

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[7] *Gary McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *3 (Apr. 23, 2015); *see also Leon Vaccarelli*, Exchange Act Release No. 98757, 2023 WL 6879121 (Oct. 16, 2023) (requesting further briefing regarding the factual predicate for respondent's criminal convictions, as well as the Division's arguments as to why an industry bar was warranted, when the jury verdict form did not reflect that the jury made specific findings regarding how the respondent committed the violations at issue).

[8] *See supra* note 5; Advisers Act Section 203(f), 15 U.S.C. § 80b-3 (authorizing the Commission to order specified relief against certain persons associated with investment advisers "at the time of the alleged misconduct" or satisfying other associational requirements).

[9] *Cf. Karina Chairez*, Exchange Act Release No. 99732, 2024 WL 1093666 (Mar. 13, 2024) (ordering Division of Enforcement to submit additional evidentiary materials and briefing relevant to its motion for entry of default and sanctions).

should also address why he has failed to file an answer previously or to otherwise defend this proceeding, and why the Commission should not find him in default as a result.[10] McKown shall also include a proposed answer to be accepted if the Commission does not enter a default against him.[11] McKown is reminded that when a party defaults, the allegations in the OIP will be deemed to be true and the Commission may determine the proceeding against that party upon consideration of the record without holding a public hearing.[12] If McKown files a response to this order, the Division may file a reply within 14 days after its service.

The parties' attention is directed to the e-filing requirements in the Rules of Practice.[13] We also remind the parties that any document filed with the Commission must also be served upon all participants in the proceeding and be accompanied by a certificate of service.[14]

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10 *See George McKown*, Advisers Act Release No. 6463, 2023 WL 6879337 (Oct. 17, 2023) (show cause order).

11 *Id.*

12 Rules of Practice 155, 180, 17 C.F.R. § 201.155, .180.

13 *See* Rules of Practice 151, 152(a), 17 C.F.R. §§ 201.151, .152(a) (providing procedure for filing papers with the Commission and mandating electronic filing in the form and manner posted on the Commission's website); *Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, https://www.sec.gov/efapdocs/instructions.pdf. Parties generally also must certify that they have redacted or omitted sensitive personal information from any filing. Rule of Practice 151(e), 17 C.F.R. § 201.151(e). Rules of Practice 150(c)(1) and 152(a)(1) allow a party who cannot serve or file documents electronically (due, for example, to a "lack of access to electronic transmission devices") to serve or file paper documents upon making a certification to that effect. 17 C.F.R. §§ 201.150(c)(1), 152(a)(1).

14 *See* Rule of Practice 150, 17 C.F.R. § 201.150 (generally requiring parties to serve each other with their filings); Rule of Practice 151(d), 17 C.F.R. § 201.151(d) ("Papers filed with the Commission . . . shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service, and the mailing address or email address to which service was made, if not made in person.").

Upon review of the filings in response to this order, the Commission will either direct further proceedings by subsequent order or issue a final opinion and order resolving the matter.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary