2 3 STATE OF OREGON DEPARTMENT OF CONSUMER AND BUSINESS SERVICES 4 DIVISION OF FINANCIAL REGULATION 5 In the Matter of: DFR Case No. S-18-0111 OAH Case No. 2018-ABC-02253 6 WIILLIAM J. KUHN D/B/A INVEST/O - REGISTERED FINAL ORDER TO CEASE AND 7 INVESTMENT ADVISORS. DESIST: FINAL ORDER TO CANCEL STATE INVESTMENT 8 (IA-307, IARD #156818, CRD ADVISER LICENSE; AND FINAL #5899238) ORDER TO CANCEL 9 INVESTMENT ADVISER Respondent. REPRESENTATIVE LICENSE 10 11 HISTORY OF THE CASE 12 On October 31, 2018, the Department of Consumer and Business Services, 13 Division of Financial Regulation, (Department)¹ issued William J. Kuhn a notice, 14 proposing to cancel the state investment adviser license issued to him for his business 15 Invest/O Registered Investment Advisors (Invest/O) and the licensees of any of its 16 salespersons. On November 27, 2018, Mr. Kuhn requested a hearing. 17 On December 3, 2018, the Department issued Mr. Kuhn an Amended Order to 18 Cease and Desist, Proposed Order to Cancel State Investment Adviser and Investment 19 Adviser Representative Licenses, and Notice of Right to Administrative Hearing. 20 On December 4, 2018, the Department referred the matter to the Office of 21 Administrative Hearings (OAH). On December 31, 2018, the OAH assigned the matter 22 to Administrative Law Judge (ALJ) Samantha Fair. On January 2, 2019, ALJ Fair issued 23 a letter to the parties and set January 14, 2019, as the deadline for submission of witness 24 lists and exhibits. On January 9, 2019, the Department submitted its witness list and 25 ¹ The Department of Consumer and Business Services includes the Division of Financial Regulation. (Test. of 26 Anderson.) The designation of "Department" is used to encompass both entities in this Order.

1

	1	• 1			
ex	h	1	hı	te	
\cup_{Λ}	ш	ш	υı	LO	•

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

On January 24, 2019, ALJ Fair convened a hearing in Salem, Oregon. Mr. Kuhn appeared and testified. The Department appeared and was represented by Senior Assistant Attorney General Joanna Tucker Davis. Also appearing on behalf of the Department was Caroline Smith, a financial enforcement officer for the Department.² Testifying on behalf of the Department was Kirsten Anderson, the licensing manager for the Department. The record closed on January 24, 2019, at the conclusion of the hearing. ALJ Fair issued a Proposed Order on February 1, 2019.

The deadline for Mr. Kuhn to file exceptions to the ALJ's Proposed Order was March 4, 2019. The Department did not receive any exceptions from Mr. Kuhn.

The Director of the Department of Consumer and Business Services ("the

Director"), acting under the Oregon Securities Law, Oregon Revised Statutes ("ORS") 59.005 to 59.451, 59.991 and 59.995, and Oregon Administrative Rules ("OAR") Chapter 441, adopts the findings of fact and conclusions of law of ALJ Fair, subject to changes in certain terminology used in the Issues section and the Conclusions of Law section of the ALJ's Proposed Order. In the Issues section and in the Conclusions of Law section, the Director has changed "state investment license" to "state investment adviser license" and has changed "state investment representative license" to "investment adviser representative license", in order to consistently use the terms "state investment adviser" and "investment adviser representative" defined in ORS 59.015(20)(a) and ORS 59.015(8)(a), respectively. The Director issues the following Findings of Fact, Conclusions of Law, and Final Orders:

ISSUES

1. Whether the Department must cancel the state investment adviser license issued to Mr. Kuhn dba Invest/O. ORS 59.175(5) and ORS 59.225(1).

² Two other Department employees were present during the hearing for observation purposes only.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

23

24

25

2.	Whether the Department	must cancel the	investment	advise
epresentative lic	ense issued to Mr. Kuhn.	ORS 59.225(4)		

3. Whether the Department may order Mr. Kuhn to cease and desist from violating any provision of the Oregon Securities Law. ORS 59.245(4).

EVIDENTIARY RULINGS

Exhibits A1 through A3, offered by the Department, were admitted into the record without objection. During his testimony, Mr. Kuhn offered an email exchange for the record. The ALJ marked the email exchange as Exhibit R1. The Department objected to the admission of Exhibit R1 as it was not submitted by the deadline date of January 14, 2019. The ALJ upheld the Department's objection and excluded Exhibit R1 from the evidentiary record.³

FINDINGS OF FACT

The Director FINDS that:

- 1. Mr. Kuhn has been an investment adviser for approximately 45 years and operates under the assumed business name Invest/O. He is the sole owner and only investment adviser representative for Invest/O. (Exs. A1 at 18; A2 at 6-7.) Mr. Kuhn moved to Oregon in 1986 and has been registered as an investment adviser in Oregon since 1987. He is one of Oregon's longest serving investment advisers. He primarily advises a small, select group of families, whose members reside throughout the United States, and whose cumulative assets are less than \$25 million. Of these individual clients, only three reside in Oregon. (Ex. A1 at 18; test. of Kuhn.) Mr. Kuhn's clients are satisfied with his services, and he has never received a complaint about his services from his clients. (Test. of Kuhn.)
- 2. Mr. Kuhn holds an Oregon state investment adviser license for his business Invest/O, whose principal place of business is in Bend, Oregon. As the investment adviser

²⁶ ³ Mr. Kuhn's testimony included the information contained in the email exchange.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

23

24

25

26

for Invest/O, Mr. Kuhn also holds an Oregon investment adviser representative license
(Ex. A2 at 1; test. of Anderson.) Mr. Kuhn and his business Invest/O are not licensed a
broker-dealers. (Test. of Anderson.)

- 3. On June 22, 2018, the Department sent an email to Mr. Kuhn and informed him that the Oregon Legislature amended the licensing requirements for investment adviser firms to require such firms to maintain an errors and omissions insurance policy of at least \$1 million, which had to be secured by July 31, 2018. (Ex. A1 at 8, 20.)
- 4. On October 31, 2018, the Department sent Mr. Kuhn a notice and informed him that it had no records showing that Invest/O had an errors and omissions insurance policy. In the notice, the Department further advised Mr. Kuhn that Invest/O's state investment adviser license and the licenses of any individuals associated with Invest/O's license would be cancelled unless Invest/O provided the Department an errors and omissions insurance policy no later than November 30, 2018. (Ex. A1 at 8, 13.) As of January 23, 2019, the Department has never received proof of any errors and omissions insurance policy for Invest/O. (Id. at 11; test. of Anderson.)
- 5. Mr. Kuhn received quotes of approximately \$2,000 per year to purchase an errors and omissions insurance policy in Oregon. There are other states where such policies would costs approximately \$500 per year if his principal place of business was in those states. Mr. Kuhn did not obtain, and has no plans to obtain, an errors and omissions insurance policy for Invest/O. (Test. of Kuhn.)

CONCLUSIONS OF LAW

The Director CONCLUDES that:

- The Department must cancel the state investment adviser license issued to Mr. Kuhn dba Invest/O.
- 2. The Department must cancel the investment adviser representative license issued to Mr. Kuhn.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

23

24

25

26

3. The Department may order Mr. Kuhn to cease and desist from violating any provision of the Oregon Securities Law.

OPINION

The Department proposes to cancel Invest/O's state investment adviser license and Mr. Kuhn's investment adviser representative license and to order Mr. Kuhn to cease and desist from violating the Oregon Securities Law based upon an allegation that Invest/O failed to maintain an errors and omissions insurance policy. As the proponent of the allegation, the Department has the burden to establish, by a preponderance of the evidence, that the allegation is correct and that it is entitled to cancel the licenses and order Mr. Kuhn to cease and desist violating the law. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); Reguero v. Teachers Standards and Practices Commission, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); Dixon v. Board of Nursing, 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. Riley Hill General Contractor v. Tandy Corp., 303 Or 390, 402 (1987). Cancellation of Licenses

In 2017, the Oregon Legislature amended the law regarding insurance requirements for state investment advisers with the amendment to be effective July 31, 2018. Effective July 31, 2018, ORS 59.175(5) provides:

(a) Except as otherwise provided in paragraph (b) or (c) of this subsection, every applicant for a license or renewal of a license as a broker-dealer or state investment adviser shall file with the director⁴ proof that the applicant maintains an errors and omissions insurance policy in an amount of at least \$1 million from an insurer

⁴ "Director" means the director of the Department of Consumer and Business Services. ORS 59.015(2).

20

21

22

23

24

25

26

1	authorized to transact insurance in this state or from any other insurer approved by the director according to standards established by rule.				
2	(b) A licensed broker-dealer subject to section 15 of the Securities Exchange Act				
3	of 1934, as amended, is not required to comply with paragraph (a) of this subsection.				
4	(a) A lineaged state investment advison who has its maineignal place of hysiness in a				
5	(c) A licensed state investment adviser who has its principal place of business in a state other than this state is exempt from the requirements of paragraph (a) of this subsection.				
6	subsection.				
7	OAR 441-175-0185 provides, in part:				
8	(1) Investment advisors and broker-dealers subject to ORS 59.175 must submit proof of insurance to the division as a condition of licensure and annual renewal.				
9	(2) Proof of insurance may be demonstrated by submitting to the division an				
10	attestation of compliance on a form approved by the Director and a policy				
11	declaration page or a certificate of liability coverage specifying errors and omissions coverage[.]				
12	Invest/O is an Oregon-licensed state investment adviser. As such, it is required to				
13	file with the Department proof that it maintains an errors and omissions insurance policy				
14	unless an exemption applies. Invest/O is not licensed as a broker-dealer. Invest/O's				
15	principal place of business is in Bend, Oregon. Therefore, the exemptions provided in				
16	ORS 59.175(5)(b) and (c) are not applicable to Invest/O. Invest/O is required to maintain				
17	an errors and omissions insurance policy in an amount of at least \$1 million and provide				
18	proof of this insurance policy to the Department.				
19	The Department has never received proof of any errors and omissions insurance				

sions insurance policy for Invest/O. Mr. Kuhn, the sole owner and operator of Invest/O, never obtained such an insurance policy and has no plans to do so. Therefore, Invest/O, and Mr. Kuhn as its sole proprietor, is in violation of ORS 59.175(5) and OAR 441-175-0185(1), for failing to maintain and provide proof of such a policy.

In his request for hearing and during the hearing, Mr. Kuhn sought a waiver of the requirement to maintain the errors and omissions insurance policy. He noted that he is a sole proprietor with a limited client base of less than \$25 million in assets. Mr. Kuhn



pointed out his long history of providing satisfactory investment adviser services to his limited clients without a history of any complaints filed against him. He credibly asserted that such a history demonstrates his exceptional knowledge of investments and his skill in providing such services. He argued that such factors should be considered in determining the need for an errors and omissions insurance policy and the amount of the insurance policy. However, as pointed out by the Department, the Oregon legislature did not provide the Department any discretion in waiving or modifying the requirement for the errors and omissions insurance policy. ORS 59.175(5)(a) mandates that a state investment adviser shall provide the Department proof of an errors and omissions insurance policy in an amount of no less than \$1 million. Other than the two exceptions contained in ORS 59.175(5)(b) and (c), neither of which are applicable in this case, state investment advisers must maintain such insurance policies regardless of their size, their complaint history, their experience, or the financial burden the costs of the policies may impose on the advisers.

ORS 59.225 provides, in part:

(1) If the Director of the Department of Consumer and Business Services finds that an applicant or licensee has ceased to do business as a broker-dealer, state investment adviser, investment adviser representative or salesperson, or has failed to maintain a bond or other security required by ORS 59.175 (4), or has failed to maintain an errors and omissions insurance policy required by ORS 59.175 (5), or is subject to an adjudication of mental incompetence or to the control of a conservator or guardian, or cannot be located after reasonable search, the director may cancel the license or application.

* * * * *

(4) The suspension of a license of a broker-dealer or state investment adviser shall suspend the license of any salesperson of the broker-dealer or the license of any investment adviser representative of the state investment adviser. The revocation, cancellation, withdrawal or expiration of a license of a broker-dealer or state investment adviser shall cancel the license of any salesperson of the broker-dealer or the license of any investment adviser representative of the state investment adviser[.]

ORS 59.225(1) indicates that the director "may" cancel a license for a variety of

Labor and mudustries building 350 Winter Street NE, Suite 410 Salem, OR 97301-3881 Telephone: (503) 378-4387

reasons, including the lack of an errors and omissions insurance policy. However, because ORS 59.175(5)(a) mandates that a state investment adviser maintain an errors and omissions insurance policy, the director does not have any actual discretion with regards to the cancellation of the license. Pursuant to ORS 59.175(5)(a), a licensed state investment adviser must have an errors and omissions insurance policy. Therefore, if the state investment adviser does not have such a policy, then the state investment adviser cannot be licensed. Pursuant to ORS 59.225(1), the Department must cancel Invest/O's state investment adviser license.

ORS 59.225(4) requires the suspension of the licenses of any investment adviser representative of the state investment adviser when the state investment adviser's license is cancelled. Because Invest/O's state investment adviser license must be cancelled, Mr. Kuhn's investment adviser representative license must also be cancelled.

Order to Cease and Desist

ORS 59.245 provides, in part:

The Director of the Department of Consumer and Business Services:

* * * * *

(4) If the director has reason to believe that any person has engaged, is engaging or is about to engage in any violation of the Oregon Securities Law, may issue an order, subject to ORS 59.295, directed to the person to cease and desist from the violation or threatened violation.

In its Amended Order, the Department sought an order against Invest/O and Mr. Kuhn to cease and desist from failing to maintain an errors and omissions insurance policy, from failing to provide the Department with proof of coverage for such insurance policy, and from violating the Oregon Securities Law.⁵ However, ORS 59.245 restricts the order to cease and desist to those statutes or rules that a person has violated, is violating, or is about to violate. As explained above, the Department established that

⁵ The Oregon Securities Law includes ORS 59.005 to 59.505, 59.991 and 59.995. See ORS 50.005.

Invest/O and Mr. Kuhn violated, and intends to continue violating, ORS 59.175(5) and				
OAR 441-175-0185(1). The Department did not allege or prove that Invest/O or Mr.				
Kuhn violated any other provisions of the Oregon Securities Law. Therefore, pursuant to				
ORS 59.245(4), the Department may issue an order to Invest/O and Mr. Kuhn to cease				
and desist from any further violations of ORS 59.175(5) and OAR 441-175-0185(1), the				
statute and administrative rule that were violated.				
FINAL ORDERS				
The Director issues the following FINAL ORDERS:				
4. Under ORS 59.245(4), Respondent is ORDERED to CEASE AND DESIST				
from:				
A. Failing to maintain an E & O insurance policy required by ORS 59.175(5);				
and				
B. Failing to provide the Division with proof of coverage for the required E & O				
insurance policy, as required by OAR 441-175-0185(1).				
5. The Director hereby cancels the state investment adviser license of Invest/O,				
under ORS 59.225(1), because Invest/O violated ORS 59.175(5) by failing to maintain an				
E & O insurance policy, and because Invest/O violated OAR 441-175-0185(1), by failing				
to provide the Division proof of coverage for the required E & O insurance policy.				
6. The Director hereby cancels the investment adviser representative license of				
William J. Kuhn, under ORS 59.225(4), because the Director is cancelling the state				
investment adviser license of Invest/O.				
SO ORDERED this 1st day of April, 2019.				
CAMERON C. SMITH, Director Department of Consumer and Business Services				
/s/ Dorothy Bean Dorothy Bean, Chief of Enforcement Division of Financial Regulation				

NOTICE OF RIGHT TO JUDICIAL REVIEW

You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review is in accordance with ORS 183.482(1) to the Oregon Court of Appeals.