SUMMARY
March 24, 2022

2022COA35

No. 20CA0791, *Ricchio v. Colorado Securities Commissioner* — Securities — Colorado Securities Act — Enforcement and Civil Liability — Cease-and-Desist Orders; Administrative Law — State Administrative Procedure Act — Hearings and Determinations — Initial Decisions — Exceptions

A division of the court of appeals considers whether, under section 24-4-105(14)(a)(II), C.R.S. 2021, of the Administrative Procedures Act, a respondent has the right to file exceptions to an administrative law judge's initial decision recommending that the Colorado Securities Commissioner enter a final cease-and-desist order pursuant to section 11-51-606(1.5)(d)(III), (IV), C.R.S. 2021. The majority reasons that, due to the irreconcilable conflict between certain provisions in the Administrative Procedures Act and the Colorado Securities Act, the agency-specific procedures in the Colorado Securities Act control the Commissioner's issuance of a

final cease-and-desist order. Such procedures do not permit a respondent to file exceptions to an administrative law judge's initial decision.

COLORADO COURT OF APPEALS **2022COA35**

Court of Appeals No. 20CA0791
Office of Administrative Courts Case No. XY 2019-0008

Geoffrey K. Ricchio,

Appellant,

v.

Colorado Securities Commissioner,

Appellee.

ORDER AFFIRMED

Division III
Opinion by JUDGE LIPINSKY
Gomez, J., concurs
J. Jones, J., specially concurs

Announced March 24, 2022

Jones & Keller, P.C., Paul L. Vorndran, Denver, Colorado, for Appellant

Philip J. Weiser, Attorney General, Robert W. Finke, First Assistant Attorney General, Jodanna L. Haskins, Denver, Colorado, for Appellee

¶ 1 The Colorado General Assembly has adopted numerous statutes specifying the procedures that must be followed in state administrative proceedings. It has enacted a general State Administrative Procedure Act (the APA), §§ 24-4-101 to -109, C.R.S. 2021, as well as more specific statutes setting forth the procedures for proceedings in particular state agencies.

¶ 2 But some of the latter statutes do not provide every procedural step for proceedings before the agency. The APA can fill in these gaps. The provisions of the APA "apply to agency actions unless they conflict with a specific provision of the agency's statute or another statutory provision preempts the provisions of the APA." *V Bar Ranch LLC v. Cotton*, 233 P.3d 1200, 1205 (Colo. 2010) (quoting *Well Augmentation Subdist. of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 417 (Colo. 2009)).

¶ 3 In this case, we consider, as a matter of first impression, whether the language of the APA providing that a party may appeal an initial decision regarding an agency action by filing exceptions, § 24-4-105(14)(a)(II), C.R.S. 2021, applies to the initial decision of an administrative law judge (ALJ) recommending that the Colorado

Securities Commissioner order an individual to cease selling unregistered securities in this state.

¶ 4 We hold that the exception provision of the APA does not apply to this type of proceeding. Because we disagree with Geoffrey K. Ricchio's remaining contentions, we affirm.

I. Background Facts and Procedural History

¶ 5 Ricchio appeals the Commissioner's issuance of a Final Cease and Desist Order (the final order) directing him to immediately cease selling unregistered securities in the state of Colorado and to not otherwise violate any provisions of the Colorado Securities Act (the Securities Act), §§ 11-51-101 to -1008, C.R.S. 2021.

¶ 6 Staff at the Colorado Division of Securities petitioned the Commissioner to order Ricchio to show cause why the Commissioner should not enter a final cease-and-desist order against him based on reports that Ricchio had offered and sold unregistered securities in Colorado and had failed to disclose material facts about those securities to investors. The Commissioner issued an order to show cause to Ricchio based on the staff's allegations.

¶ 7 In the order to show cause, the Commissioner referred the matter for a hearing before an ALJ. The parties submitted written closing arguments on December 23, 2019, following the hearing.

¶ 8 On January 23, 2020, the ALJ issued an initial decision in which the ALJ found that Ricchio

- offered and sold securities in the form of three promissory notes;
- sold the promissory notes to Colorado chiropractors who had attended his educational seminars;
- failed to register the promissory notes with the Division of Securities, even though he was neither eligible for nor entitled to an exemption from registration; and
- committed fraud in connection with the sale of the notes by failing to disclose material facts to the investors.

(Ricchio does not argue on appeal that the promissory notes were not securities.)

¶ 9 Based on these findings, the ALJ recommended that the Commissioner issue an order "directing [Ricchio] to cease and desist from offering and selling securities and violating the anti-fraud provisions" of the Securities Act.

¶ 10 For reasons unclear from the record, the Commissioner did not receive the initial decision until February 25, 2020. Six days later, the Commissioner issued the final order, in which he adopted the ALJ's findings of fact, conclusions of law, and recommendations. The record does not indicate when Ricchio received the initial decision.

¶ 11 Ricchio appeals the final order.

II. Analysis

¶ 12 Ricchio contends that (1) the Commissioner violated his right to due process by issuing the final order before he had an opportunity to submit exceptions to the ALJ's initial decision and (2) the final order was not supported by sufficient evidence establishing that it was necessary in the public interest. We are not persuaded by either contention.

A. Did Ricchio Have a Statutory Right to File Exceptions to the ALJ's Initial Decision

¶ 13 We first consider whether Ricchio had a statutory right to file exceptions to the ALJ's initial decision. This analysis involves an examination of the exceptions procedure set forth in the APA and the relevant portions of the Securities Act.

¶ 14 Ricchio asserts that the Commissioner violated his right to due process by failing to comply with the exceptions procedure set forth in the APA. He specifically contends that he had the right to submit exceptions to the ALJ's initial decision within thirty days of service of the decision pursuant to section 24-4-105(14)(a)(II) of the APA ("An appeal to the agency must be made as follows: . . . [w]ith regard to initial decisions regarding agency action . . . , by filing exceptions within thirty days after service of the initial decision upon the parties . . . ."). Because the Commissioner issued the final order only six days after receiving the initial decision, Ricchio contends that he was deprived of a meaningful opportunity to file exceptions to the initial order and, for that reason, we must set aside the final order pursuant to section 24-4-106(7)(b)(V), C.R.S. 2021 ("The court shall hold unlawful and set aside the agency action . . . if the court finds that the agency action is[] . . . [n]ot in accord with the procedures or procedural limitations of [the APA] or as otherwise required by law . . . .").

¶ 15 The Commissioner responds that, because the ten-calendar-day deadline set forth in section 11-51-606(1.5)(d)(V), C.R.S. 2021, of the Securities Act irreconcilably conflicts with the thirty-day

exceptions deadline set forth in section 24-4-105(14)(a)(II), the former — the more specific statute — applies. And, because the Commissioner complied with the procedures described in section 11-51-606(1.5), the Commissioner asserts that we must affirm the final order.

1. Standard of Review

¶ 16 The resolution of this issue hinges on whether the exceptions procedure in the APA irreconcilably conflicts with the procedures in the Securities Act governing administrative proceedings to address violations of section 11-51-606(1.5)(b) and, specifically, the ten-calendar-day deadline for the Commission to provide notice of a final order in section 11-51-606(1.5)(d)(V). To make this determination, we must interpret the relevant provisions of the APA and the Securities Act. "We review questions of statutory interpretation de novo." *Elder v. Williams*, 2020 CO 88, ¶ 17, 477 P.3d 694, 698.

2. Rules of Statutory Interpretation

¶ 17 When interpreting a statute, our primary objective is to ascertain and give effect to the General Assembly's intent in drafting it. *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932,

935 (Colo. 2010). "We begin by looking to the express language of the statute, construing words and phrases according to grammar and common usage." *Id.*; *see Elder*, ¶ 18, 477 P.3d at 698 ("[W]e apply words and phrases in accord with their plain and ordinary meanings."). If the statute is unambiguous, our analysis is complete, and we apply the statute as it is written. *Elder*, ¶ 18, 477 P.3d at 698. "A statute is ambiguous when it is reasonably susceptible of multiple interpretations." *Id.*

¶ 18 If two statutes irreconcilably conflict, "the specific provision prevails over the general provision." *Jenkins v. Pan. Canal Ry. Co.*, 208 P.3d 238, 241 (Colo. 2009); *see* § 2-4-205, C.R.S. 2021 ("If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision . . . ."). "A general provision, by definition, covers a larger area of the law." *Martin v. People*, 27 P.3d 846, 852 (Colo. 2001). "A specific provision, on the other hand, acts as an exception to that general provision, carving out a special niche from the general rules to accommodate a specific circumstance." *Id.*

3. The Detailed Procedures Set Forth in Section 11-51-606(1.5)

¶ 19 Section 11-51-606(1.5) contains a comprehensive set of procedures, including specific deadlines, that apply when "it appears to the securities commissioner . . . that a person has committed or may commit any of the acts or practices" set forth in section 11-51-606(1.5)(b).

¶ 20 After the Commissioner issues an order to show cause why the Commissioner "should not enter a final order directing such person to cease and desist" from violating section 11-51-606(1.5)(b), the Commissioner "shall, within two calendar days, notify the chairperson of the securities board or an ALJ that an order to show cause has been issued." § 11-51-606(1.5)(a). "The hearing on an order to show cause shall be commenced no sooner than ten nor later than twenty-one calendar days following the date of transmission or service of the notification by the securities division . . . ." § 11-51-606(1.5)(d)(I). While the hearing date may be continued, the hearing must commence no later than "thirty-five calendar days following the date of transmission or service of the notification." *Id.*

¶ 21 If the matter proceeds to a hearing, "within ten days after the conclusion of the hearing," the securities board or the ALJ shall issue an "initial decision recommending to the securities commissioner that a final order be entered affirming, denying, vacating, or otherwise modifying the order to show cause." § 11-51-606(1.5)(d)(III). If the Commissioner issues a cease-and-desist order, he or she "shall provide notice of the final order within ten calendar days after receiving the initial decision . . . to each person against whom such order has been entered." § 11-51-606(1.5)(d)(V). Nothing in section 11-51-606(1.5) provides for extensions of these deadlines.

4. The Specific Procedures in Section 11-51-606(1.5) Govern the Commissioner's Issuance of the Final Order Addressing a Violation of Section 11-51-606(1.5)(b)

¶ 22 We hold that the procedures set forth in section 11-51-606(1.5) cannot be reconciled with the APA's procedure for filing exceptions because section 11-51-606(1.5) contains comprehensive, agency-specific procedures for proceedings to address violations of section 11-51-606(1.5)(b) and the ten-calendar-day deadline in 11-51-606(1.5)(d)(V) irreconcilably conflicts with the thirty-day exceptions deadline in the APA.

¶ 23 Section 24-4-105 of the APA provides the general procedural rules for agency "[h]earings and determinations." By its express language, the "provisions of [section 24-4-105] shall be applicable" to "parties to any agency adjudicatory proceeding." § 24-4-105(1); *see also* § 24-4-107, C.R.S. 2021 ("This article applies to every agency of the state having statewide territorial jurisdiction . . . .").

¶ 24 The APA serves as a "gap-filler." *V Bar Ranch LLC*, 233 P.3d at 1205. "Therefore, if the APA is applicable to a particular agency, both the APA and statutes specific to that agency should be read together and harmonized to the extent possible; however, if a provision of the APA and the agency's statute conflict, the agency-specific provision controls." *Id.*; *see* § 24-4-107 ("[W]here there is a conflict between [the APA] and a specific statutory provision relating to a specific agency, such specific statutory provision shall control as to such agency.").

¶ 25 Because section 24-4-105 applies to all Colorado agencies' adjudicatory proceedings if the agency has statewide territorial jurisdiction, and because the Commissioner has statewide territorial jurisdiction to enter final orders, *see* § 11-51-102, C.R.S. 2021 (providing the scope of the Securities Act); § 11-51-606(1.5)

(authorizing the Commissioner to enter final orders), the APA's procedures would initially appear to apply to the Securities Division's enforcement proceedings. But our analysis does not end here; we must consider whether the general exceptions procedure in the APA can be engrafted onto the specific procedures described in section 11-51-606(1.5).

¶ 26 As noted, section 11-51-606(1.5) reflects a comprehensive, agency-specific set of procedures that the Commissioner (and other employees of the Division of Securities) is required to follow in enforcement proceedings involving a violation of section 11-51-606(1.5)(b). Those procedures make no reference to the filing of exceptions to an initial decision issued by an ALJ or the securities board in the context of a cease-and-desist order. But the General Assembly did provide for the filing of exceptions in section 11-51-606(4)(d)(III), which applies to enforcement proceedings for violations of section 11-51-410(1), C.R.S. 2021. (That section addresses violations of the Act by a "licensed person," while section 11-51-606(1.5)(b) concerns violations by "a person" generally.)

¶ 27 We presume that the General Assembly intended to allow for the filing of exceptions in enforcement proceedings under section

11-51-606(4) but not proceedings under section 11-51-606(1.5). *See Ceja v. Lemire*, 154 P.3d 1064, 1066 (Colo. 2007) ("If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said." (quoting *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000))).

¶ 28 More importantly, the thirty-day deadline for filing exceptions in the APA cannot be reconciled with the ten-calendar-day deadline in section 11-51-606(1.5)(d)(V): The Commissioner "*shall* provide notice of the final order within ten calendar days after receiving the initial decision." (Emphasis added.) Because the General Assembly used the word "shall," the Commissioner is required to provide notice of the final order to the parties — which necessarily requires the prior issuance of a final order — within ten calendar days following the Commissioner's receipt of the initial decision. *See DiMarco v. Dep't of Revenue*, 857 P.2d 1349, 1352 (Colo. App. 1993) ("Unless the context indicates otherwise, the word 'shall' generally indicates that the General Assembly intended the provision to be mandatory."). Moreover, the thirty-day right to file exceptions in

section 24-4-105(14)(a)(III) cannot be reconciled with the General Assembly's clear intent to provide for expedited administrative and judicial review of the Commissioner's determination that a respondent violated section 11-51-606(1.5)(b).

¶ 29 We cannot harmonize the exceptions procedure in the APA with the procedures set forth in section 11-51-606(1.5). The Commissioner lacked the discretion to disregard the ten-calendar-day statutory deadline for issuance of the final order so as to allow Ricchio to file exceptions within thirty days of the ALJ's initial decision. Because the Commissioner could not have complied with both section 11-51-606(1.5)(d)(V) and section 24-4-105(14)(a)(III), we conclude that such procedures irreconcilably conflict. Accordingly, the more specific procedures in section 11-51-606(1.5), and not the general exceptions procedure in the APA, apply to Ricchio's administration proceeding. *See* § 24-4-107; *V Bar Ranch*, 233 P.3d at 1205; *see also Carrara Place, Ltd. v. Arapahoe Cnty. Bd. of Equalization*, 761 P.2d 197, 205 (Colo. 1988) (holding that, although section 24-4-105(14)(a) requires agencies to make formal findings of fact and conclusions of law when issuing decisions, that requirement does not apply to decisions of the Arapahoe County

Board of Equalization "in light of the specific hearing and appellate provisions set out in the property tax statutes").

¶ 30 In his special concurrence, Judge Jones provides a thoughtful semantic analysis of the distinction between an "initial decision recommending . . . that a final order be entered," *see* § 11-51-606(1.5)(d)(III), which he characterizes as a legal nullity if not adopted by the Commissioner, and "an initial decision by an administrative law judge or a hearing officer," which, in the absence of the filing of exceptions, "shall become the decision of the agency," *see* § 24-4-105(14)(a)(II), (14)(c). We do not adopt the reasoning of the special concurrence because we are aware of no legal authority, from any jurisdiction, holding that under the federal, or any state version of, the APA, an "initial decision" in the form of a recommendation is not an "initial decision[] regarding agency action" to which an aggrieved party has the right to file exceptions. § 24-4-105(14)(a)(II).

¶ 31 In sum, because the record reflects that the Commissioner complied with the procedural requirements in section 11-51-606(1.5), we decline to set aside the final order on the

grounds that he did not allow Ricchio thirty days to file exceptions to the ALJ's initial decision pursuant to section 24-4-105(14)(a)(II).

5. The Commissioner Did Not Violate Ricchio's Right to Due Process

¶ 32 We next consider Ricchio's more general argument that, regardless of any conflict between the exceptions provision of the APA and section 11-51-606(1.5), the Commissioner violated his due process rights by issuing the final order before he had an opportunity to submit exceptions to the ALJ's initial decision.

¶ 33 "To [e]nsure the fairness of [administrative] hearings, due process requires, at a minimum, notice and an opportunity to be heard in a meaningful manner." *Nichols v. DeStephano*, 70 P.3d 505, 507 (Colo. App. 2002), *aff'd*, 84 P.3d 496 (Colo. 2004). "In evaluating the inherent fairness of a hearing, we must consider the total effect of the entire procedure on the rights of the individual." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

¶ 34 The record reflects that Ricchio had notice of the hearing on the order to show cause, appeared at the hearing, presented evidence at the hearing concerning why the Commissioner should not issue a final cease-and-desist order against him, submitted a

written closing argument, and appealed the Commissioner's final order to this court.

¶ 35 Even if the exceptions procedure in section 24-4-105(a)(II) applied to this case, the purpose of filing exceptions is "to place the agency on notice of the basis for the requested review of the initial decision. By requiring such a specific statement, subsection (a)(II) exceptions further the purpose of agency review of initial decisions, providing the agency with an opportunity to correct errors before judicial review is sought." *Lanphier v. Dep't of Pub. Health & Env't*, 179 P.3d 148, 151 (Colo. App. 2007). Because the failure to file exceptions "result[s] in a waiver of the right to judicial review of the final order of such agency," § 24-4-105(14)(c), a respondent's filing of exceptions preserves his or her due process right to appeal the initial decision.

¶ 36 But, here, Ricchio had a statutory right to appeal the initial decision, albeit by appealing the final order pursuant to section 11-51-607(1), C.R.S. 2021 ("Any person aggrieved by a final order of the securities commissioner may obtain a review of the order in the court of appeals . . . ."). Ricchio exercised that right when he filed this appeal. Further, Ricchio does not say how he was prejudiced

by lacking an opportunity to file exceptions to the initial decision before he appealed the final order.

¶ 37 Accordingly, we conclude that the Commissioner did not violate Ricchio's right to due process by entering the final order before Ricchio could file exceptions to the initial decision because Ricchio had "notice and an opportunity to be heard in a meaningful manner." *Nichols*, 70 P.3d at 507.

¶ 38 Finally, we decline to address Ricchio's argument, raised for the first time in his reply brief, that the state violated his right to due process because the ALJ did not issue the initial decision or transmit it to the Commissioner within the time frames specified in section 11-51-606(1.5)(d)(III). *See Flagstaff Enters. Constr., Inc. v. Snow*, 908 P.2d 1183, 1185 (Colo. App. 1995).

B. The Public Interest Requirement for a Cease-and-Desist Order

¶ 39 Ricchio also contends that the Commissioner erred by issuing the final order because it was not supported by sufficient evidence establishing that it was necessary in the public interest. Ricchio specifically argues that the Commissioner erred because (1) every factor announced in *Steadman v. Securities & Exchange*

Commission, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), and discussed in *Westmark Asset Management Corp. v. Joseph*, 37 P.3d 516, 519 (Colo. App. 2001), weighs against a finding that the final order is in the public interest; and (2) the final order amounts to a disfavored "obey the law order." We disagree.

1. Standard of Review

¶ 40 As noted above, section 11-51-607(1) provides that "[a]ny person aggrieved by a final order of the [Commissioner] may obtain a review of the order in the court of appeals pursuant to the provisions of section 24-4-106(11) . . . ." Section 24-4-106(11)(e), in turn, provides that "[t]he standard for review as set forth in subsection (7) of this section shall apply to appeals brought under this subsection (11)."

¶ 41 Under subsection (7)(b)(VIII), a reviewing court "shall hold unlawful and set aside the agency action . . . if the court finds that the agency action is . . . [u]nsupported by substantial evidence when the record is considered as a whole." § 24-4-106(7)(b)(VIII). "Substantial evidence is that quantum of probative evidence that a fact finder would accept as adequate to support a conclusion,

without regard to the existence of conflicting evidence." *Westmark Asset Mgmt.*, 37 P.3d at 520.

¶ 42 "We review an agency's conclusions of law de novo." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 730 (Colo. App. 2009).

2. The Commissioner's Issuance of a Cease-and-Desist Order

¶ 43 Section 11-51-606(1.5)(d)(IV)(A) provides that

> [i]f the securities commissioner reasonably finds that the person against whom the order to show cause was entered has engaged, or is about to engage, in acts or practices constituting violations as set forth in paragraph (b) of this subsection (1.5) and makes the findings required by section 11-51-704(2), he or she may issue a final cease-and-desist order . . . [d]irecting such person to cease and desist from further unlawful acts and practices . . . .

¶ 44 Section 11-51-704(2), C.R.S. 2021, provides that, to issue a final cease-and-desist order, the Commissioner must find that "the action is necessary or appropriate in the public interest and is consistent with the purposes and provisions of [the Securities Act]."

3. Sufficient Evidence in the Record Establishes that the Final Order Was Appropriate in the Public Interest

¶ 45 In the initial decision, the ALJ concluded that

> [a] cease and desist order is appropriate in this matter. While Dr. Ricchio testified that he will no longer issue the promissory notes in Colorado, the purpose for a cease and desist order is both prospective and retrospective. From a public policy standpoint, a cease and desist order should both alert the public to the actions of Dr. Ricchio as well as prevent Dr. Ricchio from future actions that violate the [Securities Act]. Entry of a cease and desist order is in the public interest pursuant to [section] 11-51-704(2) . . . .

¶ 46 The Commissioner incorporated the ALJ's conclusions of law into the final order and said that, "based upon the [r]ecord, . . . it is necessary in the public interest and is consistent with the provisions of the [Securities Act] to issue this [final order]." The final order directed Ricchio to immediately cease offering and selling unregistered securities in Colorado and to not otherwise violate the Securities Act, including its anti-fraud provisions.

¶ 47 As an initial matter, we reject Ricchio's contention that the *Steadman* factors govern our resolution of this issue. While *Steadman* and *Westmark Asset Management* each analyzed the public interest requirement of an agency's final order under section 11-51-704(2), neither case involved a cease-and-desist order. *See Steadman*, 603 F.2d at 1140 (analyzing the propriety of an

injunction that permanently excluded the respondent from the investment industry); *Westmark Asset Mgmt.*, 37 P.3d at 519-20 (determining whether the Commissioner abused his discretion by denying the respondents' licensure applications).

¶ 48 Under the Securities Act, permanent injunctions, licensure applications, and cease-and-desist orders are distinct types of adjudicatory decisions. Each adjudicatory decision has different requirements that must be satisfied before the Commissioner can issue the order. Indeed, the General Assembly housed each of those distinct requirements in different sections of the Securities Act. *See* § 11-51-410 (licensure applications); § 11-51-602, C.R.S. 2021 (permanent injunctions); § 11-51-606(1.5) (cease-and-desist orders). Thus, cases construing the requirements for issuance of one type of order are not necessarily applicable when determining the requirements for the issuance of the other types of orders. *Compare* § 11-51-602(2) (providing that, in conjunction with entering a permanent injunction, the Commissioner may seek "a claim for damages . . . or restitution, disgorgement, or other equitable relief . . . if the applicable scienter standard of section 11-51-604[, C.R.S. 2021,] is met"), *with Black Diamond Fund*, 211

P.3d at 736 (holding that "proof of scienter is not required" if the Commissioner "issued only a cease and desist order under section 11-51-606(1.5)(d)(IV)").

¶ 49 Ricchio correctly observes that *Westmark Asset Management* applied the factors discussed in *Steadman* and held that "the [C]ommissioner properly relied on [such] factors for guidance in defining public interest as that term is used in [section] 11-51-704(2)." *Westmark Asset Mgmt.*, 37 P.3d at 521. However, the court did not hold that those factors had to have been met before the Commissioner was authorized to issue an order denying the respondents' licensure applications, let alone that those factors are mandatory in cases involving different types of final orders. Rather, the court simply deferred to the Commissioner's reasonable interpretation of a statute that he was responsible for administering. *See id.*

¶ 50 We conclude that the Commissioner did not abuse his discretion by failing to consider the *Steadman* factors before issuing the final order. *Westmark Asset Management* does not mandate that the Commissioner must apply those factors before issuing a final cease-and-desist order, and *Black Diamond Fund* holds that

one of those factors — proof of scienter — is inapplicable to the issuance of a final cease-and-desist order, 211 P.3d at 736.

¶ 51 We also conclude that the Commissioner did not abuse his discretion by issuing the final order because sufficient evidence in the record establishes that the order was appropriate in the public interest. As the record reflects, Ricchio

- offered unregistered securities to Colorado investors;
- sold three promissory notes to Colorado investors;
- knew but did not disclose the risks associated with the promissory notes;
- did not discuss with the investors the collateralizations of the notes, investment strategy, or how he would use the investment proceeds;
- repaid the investor's principal investments, but only after the investors expended considerable time and effort to recover their investments; and
- failed to pay interest to the investors, as he had agreed in the promissory notes.

¶ 52 We reject Ricchio's contention that, by reaching this conclusion, we would effectively hold that "proof of a violation of the

[Securities Act alone] makes an order prohibiting future violations necessary in the public interest." We agree that a cease-and-desist order may not be appropriate in all instances where a respondent violated a provision of the Securities Act. For this reason, the absolute rule that Ricchio advances is inconsistent with the case law. Rather, in *Black Diamond Fund*, the division explained "[i]t is self-evident that the sanction here, an order to cease further violations of the [Securities Act], is predicated on the conclusion that violations of the [Securities Act] had occurred." 211 P.3d at 738. Thus, the division held that the specific instances on which the Commissioner relied when issuing the cease-and-desist order were sufficient to establish that the order was in the public interest, not that any other violations would meet that standard. We reach the same conclusion here.

¶ 53 Moreover, because "[t]he design of the [Securities] Act is to protect investors by promoting full disclosure," *Western-Realco Ltd. P'ship 1983-A v. Harrison*, 791 P.2d 1139, 1144 (Colo. App. 1989), the final order was in the public interest because it provided necessary information to the public about Ricchio's prior conduct so that potential investors can make informed decisions about

entering into subsequent investments Ricchio might peddle in Colorado. *See* § 11-51-101(2), C.R.S. 2021 ("The purposes of [the Securities Act] are to protect investors and maintain public confidence in securities markets while avoiding unreasonable burdens on participants in capital markets. This article is remedial in nature and is to be broadly construed to effectuate its purposes.").

¶ 54 Finally, we reject Ricchio's contention that the final order amounts to an improper "obey-the-law" injunction. Ricchio bases his contention on the holding in *Rome v. Mandel*, 2016 COA 192M, ¶ 81, 405 P.3d 387, 402, that such orders are "presumptively suspect" because they are "too nebulous to decipher." But the holding in *Rome* is inapposite because it analyzed the propriety of a permanent injunction that "effectively barr[ed the respondents] from any involvement in the securities industry in Colorado," not a cease-and-desist order. *Id.* at ¶ 13, 405 P.3d at 391. The division largely based its decision on the requirements in C.R.C.P. 65(d), which provides that "an *injunction* must be 'specific in terms' and 'describe in reasonable detail . . . the act or acts sought to be

restrained.'" *Id.* at ¶ 76, 405 P.3d at 401 (emphasis added) (quoting C.R.C.P. 65(d)).

¶ 55 As noted, injunctions and cease-and-desist orders are different types of orders, with distinct requirements. Here, the final order is a form of cease-and-desist order — it did not effectively bar Ricchio from selling securities in Colorado or operating in the state's securities industry. Because Ricchio concedes that the Commissioner was not required to make specific findings that the final order was appropriate in the public interest under section 11-51-702(4), *see Black Diamond Fund*, 211 P.3d at 738, the holding and analysis in *Rome*, let alone the type of order discussed in that case, are inapplicable to the facts in this case.

¶ 56 For these reasons, we hold that the Commissioner did not abuse his discretion by determining that the final order was appropriate in the public interest. Notably, the final order is virtually identical to other cease-and-desist orders that divisions of this court have affirmed. *See, e.g.*, *Joseph v. Mieka Corp.*, 2012 COA 84, ¶¶ 57-58, 282 P.3d 509, 518; *Black Diamond Fund*, 211 P.3d at 738.

III. Conclusion

¶ 57 The final order is affirmed.

JUDGE GOMEZ concurs.

JUDGE J. JONES specially concurs.

JUDGE J. JONES, specially concurring.

¶ 58 I agree with the result the majority reaches and with much of the majority's analysis. But I disagree with the majority's analysis in one respect. In rejecting Ricchio's contention that he was entitled under section 24-4-105(14)(a)(II), C.R.S. 2021, to thirty days to file exceptions to the initial decision of the administrative law judge (ALJ), the majority perceives a conflict between that provision and section 11-51-606(1.5), C.R.S. 2021, and resolves that conflict in favor of the latter because it is the more specific and because doing so is necessary to give effect to the General Assembly's manifest intent. Were I to perceive a conflict between these two statutes I would join the majority's analysis. But I don't see any such conflict. In my view, the plain language of section 24-4-105(14)(a)(II) dictates that it doesn't apply to proceedings under section 11-51-606(1.5).

¶ 59 To be sure, section 11-51-606(1) says that administrative proceedings under article 51 of title 11 "shall be conducted pursuant to the provisions of sections 24-4-104 and 24-4-105." But that doesn't mean those provisions apply beyond what their plain language permits. We must look to the text of the law directly

pertaining to the agency action at issue and the text of the provision of the State Administrative Procedure Act (APA) allegedly applicable to see if there is a fit between the two.

¶ 60 I start with section 24-4-105(14)(a)(II). It directs how "an *appeal* to the agency" proceeds. § 24-4-105(14)(a) (emphasis added). As relevant to this case, it applies to an initial decision that is an "order." § 24-4-105(14)(a), (15)(b). It allows a party wishing to "reverse or modify the initial decision of the [ALJ]," § 24-4-105(15)(a), to file exceptions to the initial decision. That is the appeal of the order. § 24-4-105(14)(a)(II). If a party timely files exceptions, the agency may remand to the ALJ or it may "affirm, set aside, or modify the order or any sanction or relief entered therein." § 24-4-105(15)(b). But if no party files exceptions — that is, if no party appeals the initial decision — "the initial decision of any other agency shall become the decision of the agency," § 24-4-105(14)(b)(III), and the parties waive the right to judicial review of the "final order of such agency," which is the initial decision, § 24-4-105(14)(c).

¶ 61 In short, the "appeal" allowed under section 24-4-105(14), by its plain and unambiguous terms, applies only to an "order" of an

ALJ that has inherent and independent legal effect and that, if not appealed, is final and binding on the parties.[1]

¶ 62 But section 11-51-606(1.5) doesn't provide for any such order. Rather, the proceeding begins by issuance of "an order to show cause why *the securities commissioner* should not enter a final order directing such person to cease and desist from the unlawful act or practice" or impose other specified sanctions. § 11-51-606(1.5)(a) (emphasis added). The matter is heard initially by an ALJ or "panel of the securities board." § 11-51-606(1). The ALJ or board, after conducting a hearing, "shall enter findings of fact, conclusions of law, and an initial decision *recommending* to the securities commissioner that a final order be entered affirming, denying, vacating, or otherwise modifying the order to show cause." § 11-51-606(1.5)(d)(III) (emphasis added). It is then up to the securities commissioner to decide whether to "issue a final cease-and-desist order" imposing sanctions. § 11-51-606(1.5)(d)(IV).

[1] In this way, the APA creates a process much like that applicable to the usual civil case: A decision by the district court that may be appealed to the court of appeals but that, if not so appealed, is final and binding on the parties.

¶ 63 What happens if the securities commissioner doesn't issue such an order? Nothing. Does the "recommendation" of the ALJ or the securities board then have any legal effect? No. In contrast to the APA, nothing in section 11-51-606(1.5) — or any other provision of law — gives the recommendation any independent legal effect. No party can be bound by any such recommendation.

¶ 64 In other words, under section 11-51-606(1.5), there is no "appeal" from an ALJ's or securities board's recommendation because there is no legally binding "order" to appeal. Thus, section 24-4-105(14), by its own terms, simply doesn't operate on a recommendation issued under section 11-51-606(1.5). *See In re Marriage of Zander*, 2021 CO 12, ¶ 14 ("In reviewing a statute, . . . we are required to 'adopt a construction that avoids or resolves potential conflicts' with other statutes . . . ." (quoting *Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12, ¶ 24)); *In re Parental Responsibilities Concerning M.D.E.*, 2013 COA 13, ¶ 16 (we should not "extend the application of [a statute's] provisions beyond the clear limits of their reach"); *see also Oracle Corp. v. Dep't of Revenue*, 2017 COA 152, ¶ 55, *aff'd*, 2019 CO 42.

¶ 65 In sum, section 24-4-105(14) applies to ALJ orders that have legal force. But it doesn't say that every initial decision by an ALJ must have such force. And a proceeding under section 11-51-606(1.5) plainly doesn't result in the issuance of such an initial decision. Thus, section 24-4-105(14)'s "appeal" process can't apply to this case.[2]

[2] I agree with the majority that due process doesn't require that we engraft an "exceptions" process on section 11-51-606(1.5), C.R.S. 2021.