

Initial Decision Release No. 1195
Administrative Proceeding
File No. 3-17352

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

In the Matter of

**Saving2Retire, LLC, and
Marian P. Young**

Initial Decision
October 19, 2017

Appearances: Jennifer D. Brandt for the Division of Enforcement,
Securities and Exchange Commission

Finis Cowan for Respondents

Before: James E. Grimes, Administrative Law Judge

Summary

Respondents in this case, Saving2Retire, LLC, and Marian P. Young, are an investment adviser and its sole principal. The allegations against Respondents are straightforward and fall into two categories. The first is whether Young improperly registered Saving2Retire with the Securities and Exchange Commission despite the undisputed fact that Saving2Retire did not have sufficient assets under management to meet the threshold for such registration. The second is whether Saving2Retire and Young, acting on Saving2Retire's behalf, failed to maintain certain books and records and impeded the Commission's examination of Saving2Retire.

Because the Division of Enforcement prevailed on summary disposition regarding most of its claims in the second category, the primary issue during the hearing in this matter was whether Young improperly registered Saving2Retire with the Commission. Respondents failed to satisfy their burden to show that Saving2Retire qualified for an exemption allowing it to register despite not meeting the assets-under-management threshold. And the Division met its burden on the remaining books and records allegation.

Saving2Retire is therefore liable for violating Sections 203A and 204 of the Investment Advisers Act of 1940 and paragraphs (1), (2), (4), and (6) of Advisers Act Rule 204-2(a). And Young is liable for aiding and abetting and causing these violations.

Introduction

In July 2016, the Securities and Exchange Commission instituted this proceeding under subsections (e), (f), and (k) of Section 203 of the Advisers Act.¹ In the order instituting proceedings (OIP), the Division alleged that Saving2Retire willfully violated Advisers Act Sections 203A and 204, and paragraphs (1), (2), (4), and (6) of Advisers Act Rule 204-2(a).² After the parties elected to proceed under the Commission's amended rules of practice, I ultimately scheduled the merits hearing to begin in May 2017.³

In January 2017, I ruled on the Division's motion for summary disposition.⁴ I granted the motion with respect to the allegations that Saving2Retire violated Advisers Act Section 204(a) and Advisers Act Rule 204-2(a)(1), (2), and (6), and that Young aided and abetted and caused Saving2Retire's violations.⁵ I otherwise denied the Division's motion.⁶

During the hearing, the Division called Young and one other witness. Young rested without calling any witnesses. I admitted forty-four of the Division's exhibits and sixteen of Respondents' exhibits.⁷

¹ See 15 U.S.C. § 80b-3(e), (f), (k).

² OIP ¶¶ 10–12.

³ *Saving2Retire, LLC*, Admin. Proc. Rulings Release No. 4098, 2016 SEC LEXIS 3049, at *1, *3 (ALJ Aug. 26, 2016); *Saving2Retire, LLC*, Admin. Proc. Rulings Release No. 4289, 2016 SEC LEXIS 3956, at *1 (ALJ Oct. 20, 2016); *Saving2Retire, LLC*, Admin. Proc. Rulings Release No. 4648, 2017 SEC LEXIS 655, at *1 (ALJ Mar. 3, 2017).

⁴ *Saving2Retire, LLC*, Admin. Proc. Rulings Release No. 4565, 2017 SEC LEXIS 300 (ALJ Jan. 30, 2017).

⁵ *Id.* at *12–17.

⁶ *Id.* at *4–12, *18.

⁷ Tr. 9–13, 54, 116–17.

Findings of Fact

I base the following findings of fact and conclusions on the entire record and the demeanor of the witnesses who testified at the hearing, applying preponderance of the evidence as the standard of proof.⁸ All arguments that are inconsistent with this decision are rejected.

This case concerns certain statutory and regulatory requirements applicable to investment advisers. An investment adviser normally may not register with the Commission unless the adviser has at least \$100 million in assets under management.⁹ The \$100 million threshold does not apply to an *internet investment adviser*, which is an adviser that “[p]rovides investment advice to all of its clients *exclusively* through an interactive website.”¹⁰ Notwithstanding the internet exclusivity requirement, an internet investment adviser is permitted to “provide investment advice to fewer than 15 clients through other means during” any twelve-month period.¹¹ In other words, the regulatory safe harbor allows an internet investment adviser to give advice to fourteen clients through means other than an interactive website in a twelve-month period. Both internet and traditional advisers are required to maintain certain client records described in rules promulgated by the Commission.¹² Internet advisers must also keep records demonstrating that they qualify for the internet-investment-advisers exemption.¹³

Young has worked in the securities industry since the mid-1980s.¹⁴ In 1997, she formed Young Capital Growth Company, an investment advisory firm, which she operated until 2011, when she formed Saving2Retire.¹⁵

⁸ See *Rita J. McConville*, Securities Exchange Act of 1934 Release No. 51950, 2005 WL 1560276, at *14 (June 30, 2005), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

⁹ 15 U.S.C. § 80b-3a(a)(1)(A); 17 C.F.R. § 275.203A-1(a).

¹⁰ 17 C.F.R. § 275.203A-2(e)(1)(i) (emphasis added).

¹¹ *Id.*

¹² See 15 U.S.C. § 80b-4(a); 17 C.F.R. § 275.204-2(a)–(c).

¹³ 17 C.F.R. § 275.203A-2(e)(1)(ii).

¹⁴ Tr. 67–68.

¹⁵ Tr. 68.

Saving2Retire is an investment adviser.¹⁶ Since she formed it, Young has been Saving2Retire’s sole owner, member, and employee.¹⁷ Young registered Saving2Retire with the Commission in April 2011.¹⁸ From 2011 through 2015, Saving2Retire never had more than \$5 million in assets under management.¹⁹

Young testified that she relied on the internet-investment-advisers exemption when she registered Saving2Retire with the Commission.²⁰ She admitted, however, that Saving2Retire did not have a functioning website until September 2013.²¹ It also never had any internet clients.²²

In the OIP, the Division alleged that during the twelve months preceding the filing of Saving2Retire’s April 2013 Form ADV,²³ Saving2Retire provided investment advice to fifteen clients “by means other than its interactive website.”²⁴ During the hearing, the Division submitted evidence that between April 2012 and April 2013, Saving2Retire provided non-internet investment advice to at least fourteen clients. The Division submitted fourteen exhibits demonstrating that non-internet advice was provided²⁵; in two of those exhibits (31 and 39), it is unclear whether the accounts relate to one or more clients, and neither side elicited testimony about their contents. As to each of these clients, the Division presented evidence showing that the client

¹⁶ Saving2Retire Answer at 2; OIP ¶¶ 2, 4; Tr. 67.

¹⁷ Tr. 67–68; Young Answer at 2.

¹⁸ Tr. 68–69; Saving2Retire Answer at 2.

¹⁹ Div. Ex. 9 at 33–34; Tr. 69.

²⁰ Tr. 70.

²¹ Tr. 70–71.

²² Tr. 74, 85. The Division admitted that the website, once operational, was an “interactive website.” OIP ¶ 7; see *Saving2Retire*, 2017 SEC LEXIS 300, at *7 n.3.

²³ Form ADV is used by investment advisers to register with the Commission. See 17 C.F.R. §§ 275.203-1(a), 279.1. Investment advisers are required to amend their Form ADV on an annual basis. 17 C.F.R. § 275.204-1(a)(1).

²⁴ OIP ¶ 8.

²⁵ Div. Exs. 27–29, 31–34, 36–39, 41–43.

established a trading account with Scottrade and simultaneously gave Saving2Retire authority to manage and trade in the account.²⁶ Each client also authorized Scottrade to debit advisory fees from the client's Scottrade account.²⁷ Finally, the Division submitted the clients' Scottrade account statements showing that during the relevant timeframe, Scottrade debited each client's account for management fees paid to Saving2Retire.²⁸

Most accounts were debited monthly from sometime in 2012 until 2014 or 2015.²⁹ Other clients' accounts were debited over shorter timeframes, thus accounting for the focus on April 2012 to April 2013.³⁰

Young invested Saving2Retire's clients' funds with Dimensional Fund Advisors.³¹ Dimensional Fund Advisors is not open to retail investors; an investor can only invest in its funds through an investment adviser.³²

Javier Villarreal, who led a Commission examination of Saving2Retire, testified during the hearing. In the course of cross-examination, Respondents' counsel asked about the determination that Saving2Retire had more than

²⁶ Div. Ex. 23; Tr. 51–52.

²⁷ Div. Ex. 23; Tr. 50–51.

²⁸ Div. Exs. 27–29, 31–34, 36–39, 41–43.

²⁹ See Div. Exs. 27–29, 31–33, 39, 41, 42. The IRA account in Division Exhibit 31 was debited monthly from June 2012 to February 2013 before that client stopped being a client. Div. Ex. 31 at 1576–1613.

³⁰ See Div. Exs. 34, 37, 38, 43; see also Div. Ex. 36 (reflecting payments from March 2013 through May 2015). One of the accounts in Division Exhibit 34 was debited monthly—but only between March 2012 and April 2013. Div. Ex. 34 at 2540–82. Exhibit 36 was debited in March and April 2013, during the relevant timeframe, and monthly thereafter. Div. Ex. 36 at 2738, 2742; see *id.* at 2744–2836. The accounts in Division Exhibit 37 were debited seven times in 2012. Div. Ex. 37 at 2847–58, 2875, 2895. The account for the client in Division Exhibit 38 was only debited three times, but those debits occurred between March 1, 2013, and April 12, 2013. Div. Ex. 38 at 2907, 2911. Finally, the account for the client in Division Exhibit 43 was debited twice, for a total of \$97.04, in August and September 2012. Div. Ex. 43 at 3691, 3694.

³¹ Tr. 49; see Div. Exs. 27–29, 31–34, 36–39, 41–43.

³² Tr. 49.

fourteen non-internet clients. In particular, counsel focused on Saving2Retire's clients' Scottrade account applications.³³ In the applications, Saving2Retire's clients agreed that they had "entered into a separate agreement to pay management or advisory fees to [the client's] [a]dvisor."³⁴ Separately, under a box titled "authorization for advisory fees," each client checked a box indicating that the client "authorize[d] Scottrade to debit [the client's] account for advisory fees."³⁵

Young's counsel suggested that the form contained a discrepancy relating to whether clients agreed to pay management or advisory fees.³⁶ Villarreal saw no discrepancy because he believed, based on his industry experience, that the terms were synonymous.³⁷ For her part, Young disagreed, saying that she had "never really heard that."³⁸ She offered that "[s]ome people are management consultants. They are not giv[ing] advice, but they're managing so"³⁹

Young denied that she ever had more than fourteen non-internet clients in a given year.⁴⁰ During the hearing, Young opined that the term *client* did not include people to whom she is related because she does not do "any services for them."⁴¹ She added that one client could have multiple accounts and that people in the same household would only count as one client.⁴²

³³ See Tr. 58; Div. Ex. 23.

³⁴ *E.g.*, Div. Ex. 23 at 591.

³⁵ *E.g., id.* The amount Scottrade debited from each client's account varied each month. Saving2Retire, however, did not assess performance fees. Div. Ex. 3 at 24. Assuming, therefore, that Saving2Retire assessed fees based on the value of each client's holdings, the formula used to calculate those fees seemingly varied each month and varied between clients. As a result, the manner in which Saving2Retire calculated fees is not readily discernible.

³⁶ Tr. 58.

³⁷ Tr. 58–59.

³⁸ Tr. 99.

³⁹ *Id.*

⁴⁰ Tr. 99–100.

⁴¹ Tr. 76, 99.

⁴² Tr. 99.

Young “count[ed] a client as someone [she was] giving a service to and who [she was] billing.”⁴³

In support of her claim that Saving2Retire never had more than fourteen non-internet clients, Young offered only what purported to be a consolidated list of client balances from TD Ameritrade as of May 31, 2011.⁴⁴ The list contained handwritten annotations to the effect that several of the people listed were “not a client.”⁴⁵ But the list—from 2011—has no bearing on the Division’s evidence pertaining to the period from April 2012 to April 2013. And the people labeled “not a client” on the list were not among the clients identified by the Division whose accounts were debited for management fees.⁴⁶ Young never introduced any evidence contradicting the Division’s evidence that Division Exhibits 27 through 29, 31 through 34, 36 through 39, and 41 through 43 depict at least fourteen clients with active Scottrade accounts that paid investment management fees between April 2012 and April 2013. It is unclear whether Division Exhibits 31 and 39 each relate to more than one client.

In 2014, the Commission launched an initiative to examine all registered internet investment advisers to verify that they were complying with the requirements that governed their registration.⁴⁷ Officials from the Commission’s Office of Compliance Inspections and Examinations phoned Young in November 2014 to explain that Saving2Retire would be examined and to let her know that they would be sending her a request for certain information and documents.⁴⁸ The officials then e-mailed Young a cover letter, a four-page request for twenty-eight specific types of information, and an explanation of the examination process and the Commission’s authority to conduct it.⁴⁹

⁴³ Tr. 98–99.

⁴⁴ Resp. Ex. 15.

⁴⁵ *Id.*

⁴⁶ *Compare id.*, with Div. Exs. 27–29, 31–34, 36–39, 41–43.

⁴⁷ Tr. 26–27; Div. Ex. 2 at 8.

⁴⁸ *See* Tr. 29–30; Div. Ex. 2 at 7.

⁴⁹ Div. Ex. 2; *see* Tr. 30–31.

Villarreal aptly described Young’s brief response as “inadequate.”⁵⁰ For instance, among other items, Saving2Retire was required to maintain trial balances and a journal of cash receipts and disbursements.⁵¹ Young responded “N/A” to a request for these items.⁵² She deemed as “[n]on-material” requests for the number of clients who obtained advice through Saving2Retire’s website during the previous twelve months.⁵³ Young spurned a request for Saving2Retire’s clients’ names, account numbers, and balances. In response to a request for this information, Young provided a list of eight clients, identified as clients A through H, and listed their account balances using imprecise—and unlikely—rounded figures, such as \$1,000,000.00 and \$400,000.00.⁵⁴ And despite being asked, Young did not provide records showing that she provided advice exclusively through a website or records that showed that she provided advice through other means.⁵⁵

After receiving Young’s response, Villarreal and two colleagues phoned Young in December 2014.⁵⁶ On the call, Young was defensive and asked why she had to produce the requested records.⁵⁷ After Villarreal explained Saving2Retire’s recordkeeping responsibilities and the fact that Saving2Retire is subject to Commission examinations, it became evident that Young did not know Saving2Retire was required to maintain the records that the Commission requested.⁵⁸ Young then admitted that Saving2Retire had not maintained the client records the Commission’s staff requested.⁵⁹ She

⁵⁰ Tr. 32; *see* Div. Ex. 3.

⁵¹ 17 C.F.R. § 275.204-2(a)(1), (6).

⁵² Div. Ex. 3 at 23; *see* Div. Ex. 2 at 11.

⁵³ Div. Ex. 3 at 23; *see* Div. Ex. 2 at 11–12.

⁵⁴ *See* Div. Ex. 15; Tr. 34–35.

⁵⁵ *See* Div. Ex. 2 at 13; Div. Ex. 3 at 24; Tr. 35; *see also* 17 C.F.R. § 275.203A-2(e)(1)(ii) (requiring an internet adviser to maintain records showing that the adviser provided advice exclusively through its website).

⁵⁶ Tr. 37; *see* Div. Ex. 4; Div. Ex 6 at 27.

⁵⁷ Tr. 37–38.

⁵⁸ Tr. 38.

⁵⁹ *Id.*

also admitted that Saving2Retire had no internet clients.⁶⁰ Villarreal and his colleagues gave Young eight days to compile Saving2Retire's records and to produce the requested information "on a rolling basis."⁶¹ Another examiner followed up later that day by e-mail and listed the specific information that the Commission required Respondents to produce.⁶²

The next day, Young sent an e-mail, saying that she was sick would not be able to respond "until next week."⁶³ When Villarreal spoke to Young a week later, she said that she intended to withdraw Saving2Retire's registration and "went on a bit of a rant" complaining that "we have too much regulation."⁶⁴ After being told that Saving2Retire was still subject to an examination, Young declared that she would not supply the requested information.⁶⁵ She then hung up.⁶⁶

Commission staff e-mailed Young again in January 2015 and gave her one week to comply with its request for information.⁶⁷ The next day, Young complained to her congressman about the Commission's investigation.⁶⁸ The following week, Young sent Commission staff a letter in which she stated, among other things, that she would be closing her internet-only business and withdrawing Saving2Retire's registration in about six to eight weeks.⁶⁹ She added that she hoped she would be allowed to withdraw Saving2Retire's registration.⁷⁰

⁶⁰ Tr. 38–39.

⁶¹ Tr. 38; Div. Ex. 4 at 25.

⁶² Div. Ex. 4.

⁶³ Div. Ex. 5.

⁶⁴ Tr. 42–43.

⁶⁵ *Id.*

⁶⁶ Tr. 43.

⁶⁷ Div. Ex. 6.

⁶⁸ Div. Ex. 7.

⁶⁹ Resp. Ex. 5 at 333.

⁷⁰ *Id.* at 334.

In February 2015, Villarreal e-mailed Young a deficiency letter regarding the Commission’s examination of Saving2Retire.⁷¹ In the letter, which was also mailed to Young, Commission staff asserted that Young thwarted the Commission’s examination and brought a list of “violations and weaknesses to [Young’s] attention for immediate corrective action.”⁷²

Young responded by letter in March.⁷³ Young said that she planned to “reorganize[e] [her] company, clos[e] the internet[-]only business,” and “transfer[] to [s]tate [r]egistration.”⁷⁴ According to Young, after “the [s]tate [r]egulator” approved her state registration, she would withdraw Saving2Retire’s Commission registration.⁷⁵

In May 2015, Division of Enforcement staff sent Saving2Retire a subpoena requiring it to produce certain documents.⁷⁶ After Saving2Retire failed to respond, Division counsel e-mailed Young and asked her to contact counsel by the following week.⁷⁷

Young responded by letter in early June.⁷⁸ In her letter, Young referenced the plan she discussed in her March letter and said that she had “completed all steps except for withdrawing [Saving2Retire’s] registration.”⁷⁹ Young asserted that California’s securities regulator was conducting an ongoing examination and she did not want to withdraw from Commission registration before registering with the state of California.⁸⁰

⁷¹ Div. Ex. 8.

⁷² *Id.* at 31.

⁷³ Resp. Ex. 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Div. 16 at 186–209; *see id.* at 210–11.

⁷⁷ *Id.* at 185.

⁷⁸ Resp. Ex. 7.

⁷⁹ *Id.*

⁸⁰ *Id.*; *see* Tr. 96 (explaining that “it was my living and my only source of living, so if I withdraw the registration then . . . I can’t do anything”).

In July 2015, Division staff sent Young an investigative subpoena requiring her to appear in Dallas for testimony on August 26, 2015.⁸¹ Young, who lives outside Houston, responded by letter that she could not travel to Dallas “due to medical and financial constraints.”⁸² Division staff sent a second subpoena directing Young to appear on August 31.⁸³ Young evidently did not appear for testimony on August 31; on that date, Division staff sent Young another subpoena, this time directing her to testify on September 14, 2015.⁸⁴

Young responded to the last subpoena on September 11, 2015.⁸⁵ In an e-mail to Division counsel, Young said she had nothing further to produce and felt overwhelmed.⁸⁶ She also purported to invoke her rights under the Fifth Amendment.⁸⁷ Finally, Young said she was “still trying to get help with some answers,” but because she had yet to find those answers, she could not “attend a hearing.”⁸⁸

In November 2015, California’s Commissioner of Business Oversight issued a notice of intent to deny Saving2Retire’s investment adviser application and to bar Young from association with any investment adviser, broker-dealer, or commodity adviser.⁸⁹ Young and Saving2Retire were given thirty days to request a hearing.⁹⁰ According to a later order from California’s Commissioner, Young and Saving2Retire were personally served with the notice in December 2015.⁹¹ In March 2016, after Young and Saving2Retire failed to respond, the Commissioner denied Saving2Retire’s investment

⁸¹ Div. Ex. 11.

⁸² Div. Ex. 12 at 134; Tr. 84.

⁸³ Div. Ex. 13 at 138, 140.

⁸⁴ Div. Ex. 14.

⁸⁵ Div. Ex. 17.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Div. Ex. 10 at 110.

⁹⁰ *Id.* at 111.

⁹¹ *Id.* at 110.

adviser application and barred Young from association with any investment adviser, broker-dealer, or commodity adviser.⁹²

During the hearing in this matter, Young testified that she did not receive the notice issued in November 2015 by California's Commissioner.⁹³ She said that she first learned of the notice after receiving the Commissioner's March 2016 order.⁹⁴

Also during the hearing, Young admitted that she never produced to the Commission cash receipts, a disbursement journal, a general ledger, or income or cash flow statements.⁹⁵ According to Young, she did not produce these items because they were not current.⁹⁶ She also failed to keep bank statements or cancelled checks, explaining that those items were available online from Saving2Retire's bank.⁹⁷ Young admitted that she did not keep cash reconciliations or give the Commission Saving2Retire's bank statements.⁹⁸ And she never provided a current client list.⁹⁹

Young offered what she claimed was a copy of a portion of Saving2Retire's check register.¹⁰⁰ The entries in the register were handwritten and, accepting Young's testimony, were maintained much as one might maintain a register for a personal checking account.¹⁰¹ On cross-examination, Young admitted that she had not previously produced the check register, either during the examination, investigation, or the pendency of this proceeding.¹⁰²

⁹² *Id.* at 111.

⁹³ Tr. 97–98; *see* Div. Ex. 10 at 110.

⁹⁴ Tr. 97–98; *see* Div. Ex. 10.

⁹⁵ Tr. 80–81, 106.

⁹⁶ Tr. 81.

⁹⁷ Tr. 81, 103.

⁹⁸ Tr. 81–82.

⁹⁹ Tr. 109.

¹⁰⁰ Resp. Ex. 3; Tr. 100.

¹⁰¹ *See* Resp. Ex. 3; Tr. 104–05.

¹⁰² Tr. 105–06.

At the close of the hearing, the parties and I discussed the handwritten check register. Ultimately, I admitted the exhibit but decided to give it no weight because it had not previously been produced and thus the Division could not verify the information contained in it.¹⁰³

Issues

A. Unless an investment adviser meets the requirements of an exemption, the adviser must have at least \$100 million in assets under management in order to register with the Commission. Having less than \$5 million in assets under management, Saving2Retire registered using the internet-investment-advisers exemption. Saving2Retire, however, did not have an operational interactive website until two years after Young registered it as an internet investment adviser, never had any internet clients, and never maintained records demonstrating that it provided investment advice exclusively through its website. Was Saving2Retire permitted to register with the Commission?

B. Under Advisers Act Section 204(a), an investment adviser must maintain those client records described in Advisers Act Rule 204-2(a) and must make those records available for Commission examination “at any time.” Saving2Retire did not maintain the records required by four paragraphs under Rule 204-2(a) and Young, acting on Saving2Retire’s behalf, impeded the Commission’s examination of Saving2Retire’s records. Did Respondents violate Advisers Act Section 204(a) and Advisers Act Rule 204-2(a)?

Discussion and Conclusions of Law

1. Saving2Retire is not eligible for Commission registration.

1.1. The internet-investment-advisers exemption.

By way of background, the number of investment advisers registered with the Commission grew considerably between 1980 and 1996.¹⁰⁴ Because the Commission lacked the resources to keep pace with this growth, Congress became “concerned about [a] lack of adequate oversight . . . and the impact inadequate regulation may have on investors and American consumers.”¹⁰⁵ In

¹⁰³ Tr. 112–13.

¹⁰⁴ S. Rep. No. 104-293, at 3 (1996).

¹⁰⁵ *Id.*

light of these concerns and concerns about the overlap of responsibility between the Commission and state securities regulators, Congress decided to divide the responsibility for regulating investment advisers based on the amount of assets under the advisers' management.¹⁰⁶ It thus enacted Section 203A of the Advisers Act, which limited Commission registration to those advisers with assets under management in excess of \$25 million "or such higher amount as the Commission may, by rule, deem appropriate."¹⁰⁷

The following year, the Commission promulgated Advisers Act Rule 203A-1, which set \$30 million as the threshold for Commission registration.¹⁰⁸ The Commission raised the threshold in 2011 to \$100 million.¹⁰⁹

In 2002, the Commission exempted internet investment advisers from the \$100 million registration threshold.¹¹⁰ In creating this exemption, the Commission noted that investment advisers that provide investment advice through an interactive website found themselves in a quandary.¹¹¹ They would often not meet the monetary threshold for Commission registration.¹¹² Because their services were offered through a website, however, their clients could come from any or all states at any time.¹¹³ As a result, without an

¹⁰⁶ *See id.* at 3–5.

¹⁰⁷ *Id.* at 4; *see* Investment Advisers Supervision Coordination Act, Pub. L. 104-290, tit. III, § 303(a), 110 Stat. 3416, 3437–38 (1996) (codified at 15 U.S.C. § 80b-3a).

¹⁰⁸ *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, 62 Fed. Reg. 28,112, 28,133 (May 22, 1997) (codified at 17 C.F.R. § 275.203A-1(a)(1) (1998)).

¹⁰⁹ *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, 76 Fed. Reg. 42,950, 43,011 (July 19, 2011) (codified at 17 C.F.R. § 275.203A-1(a)(1)).

¹¹⁰ *See* Exemption for Certain Investment Advisers Operating Through the Internet, 67 Fed. Reg. 77,620, 77,620 (Dec. 18, 2002) (codified at 17 C.F.R. § 275.203A-2(f) (2004)).

¹¹¹ *Id.* at 77,620–21.

¹¹² *Id.*

¹¹³ *Id.*

internet-investments-advisers exemption, internet advisers would necessarily be required to shoulder the burden of registering in all fifty states.¹¹⁴

As codified, Advisers Act Rule 203A-2(e) allows an internet investment adviser with less than \$100 million in assets under management to register with the Commission if the adviser meets certain requirements.¹¹⁵ To qualify as an internet investment adviser, an adviser must (1) “[p]rovide[] investment advice to all of its clients exclusively through an interactive website”; and (2) “[m]aintain[], in an easily accessible place, . . . a record demonstrating that it provides investment advice to its clients exclusively through an interactive website.”¹¹⁶ Notwithstanding the exclusivity requirement, an adviser relying on the exemption in subsection (e) is permitted to provide investment advice directly to a client—*i.e.*, through means other than the internet—so long as the adviser provides advice in this manner to no more than fourteen clients in a twelve-month period.¹¹⁷

As used in the rule, the term *interactive website* is “a website in which computer software-based models or applications provide investment advice to clients based on personal information each client supplies through the website.”¹¹⁸ And the term *client* is defined with reference to Advisers Act Rule 202(a)(30)-1(a), which defines the term to include a natural person and all relatives living with that person together with all accounts and trusts of which those persons are the only primary beneficiaries.¹¹⁹

¹¹⁴ *Id.*

¹¹⁵ 17 C.F.R. § 275.203A-2(e). The internet advisers exemption was originally located in subsection (f). It was redesignated as subsection (e) in 2011. *See* Rules Implementing Amendments, 76 Fed. Reg. at 43,012.

¹¹⁶ 17 C.F.R. § 275.203A-2(e)(1)(i)–(ii).

¹¹⁷ 17 C.F.R. § 275.203A-2(e)(1)(i).

¹¹⁸ 17 C.F.R. § 275.203A-2(e)(2).

¹¹⁹ 17 C.F.R. §§ 275.202(a)(30)-1(a)(1), .203A-2(e)(3). The term also includes a “corporation, general partnership, limited partnership, limited liability company, [or] trust (other than a trust” the sole beneficiary of which is a client who is a natural person). 17 C.F.R. § 275.202(a)(30)-1(a)(2).

1.2. Respondents bear the burden of proving Saving2Retire’s eligibility for the exemption.

The Commission adopted the internet-investment-advisers exemption under Congress’s express direction in Section 203A to make appropriate exemptions to the general rule that advisers have sufficient assets under management to register.¹²⁰ That statutory structure controls the assignment of the burden of proof. Because “the burden of proving . . . [an] exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits,” the burden of proving that Saving2Retire could take advantage of the exemption—including the fourteen-client safe harbor—falls on Respondents.¹²¹ Applying this interpretative principle in this context is appropriate because the facts regarding Saving2Retire’s eligibility “lie peculiarly in [Respondents]’ knowledge.”¹²² As discussed above, to qualify for the exemption, advisers must maintain records showing that they qualify. Given the foregoing, if the Division meets its burden to show that an investment adviser registered despite its failure to meet a registration requirement, it is fair to assign to the adviser the burden to show eligibility to register under an exemption to that requirement.¹²³

¹²⁰ See 15 U.S.C. § 80b-3a(c); Exemption for Certain Investment Advisers Operating Through the Internet, 67 Fed. Reg. at 77,625.

¹²¹ *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948); see *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008) (applying the “familiar principle” that when a statute reads “with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such)” the burden of proving those exemptions falls on the party asserting it); accord *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953) (holding that issuers bear the burden of proving their entitlement to exemption from the prohibition in Section 5(a) of the Securities Act of 1933 against the unregistered sale of securities).

¹²² *Dixon v. United States*, 548 U.S. 1, 9 (2006) (quoting 2 John William Strong et al., *McCormick on Evidence* § 337 (5th ed. 1999)); see *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 626 (1993).

¹²³ See 17 C.F.R. § 275.203A-2(e)(1)(ii). Although the structures of the statute and rule indicate that it is appropriate to place the burden on Respondents, there are countervailing considerations. In contrast to *Ralston Purina*, in which the Supreme Court assigned the burden of proving entitlement to sell unregistered securities to the issuer because of the “broadly remedial purposes of federal securities legislation,” 346 U.S. at 126,

(continued...)

1.3. Saving2Retire did not qualify for registration as an internet investment adviser.

There is no dispute that Saving2Retire never came close to meeting the \$100 million minimum threshold necessary to register with the Commission. At all times, it had less than \$5 million in assets under management.¹²⁴ Respondents are thus left to rely on the internet-investment-advisers exemption.

As noted, to qualify for the internet-investment-advisers exemption, an adviser must provide investment advice “exclusively through an interactive website” and it must keep records showing that it does so.¹²⁵ But Saving2Retire met neither of these requirements.

As Young conceded, Saving2Retire never had any internet clients.¹²⁶ It follows that it did not provide advice exclusively through an interactive website. It also follows that no records existed showing that Saving2Retire provided investment advice exclusively through an interactive website. Saving2Retire, therefore, did not qualify for registration as an internet investment adviser.¹²⁷

Respondents do not deny liability or address the merits of the Division’s charges in their post-hearing brief. Earlier, however, in opposing the Division’s motion for summary disposition, Respondents asserted that Saving2Retire’s lack of internet clients was not problematic.¹²⁸ They argued

determining whether investment advisers should register with the Commission or with state regulators is largely a line-drawing issue that is not directly concerned with protecting investors. And unlike the sale of unregistered securities, there should normally be little doubt regarding which exemption an adviser claims. Advisers are required to affirmatively state the basis for registration on the Form ADVs that they file with the Commission. See 17 C.F.R. § 279.1; SEC, Form ADV (Paper Version), Part 1A, Item 2, <https://www.sec.gov/about/forms/formadv-part1a.pdf>.

¹²⁴ See Div. Ex. 9 at 33–34; Tr. 69.

¹²⁵ 17 C.F.R. § 275.203A-2(e)(1)(i)-(ii).

¹²⁶ Tr. 74, 85.

¹²⁷ See 17 C.F.R. § 203A-2(e)(1).

¹²⁸ For completeness, I address the issues that arose during the course of this proceeding.

that when it promulgated the internet-investment-advisers exemption, the Commission expected that an internet adviser would need a grace period after registration before its website would be fully functional.¹²⁹ Indeed, I have already concluded that the Commission’s observations in the exemption’s adopting release show that the Commission “contemplated an adviser being able to rely on the internet adviser exemption before the adviser has any internet clients and before it establishes a functional website.”¹³⁰ Nothing, however, supports the idea that an adviser could go more than two years without a functioning website while relying on the internet adviser exemption, which depends on the adviser having an interactive website. Allowing an adviser to go that long without the means to comply with the exemption’s requirements would render the exemption meaningless. The fact that the Commission contemplated a grace period is therefore of no use to Respondents.

The parties have also debated whether Saving2Retire fell within the safe harbor of the exclusivity provision; they debate whether Saving2Retire provided advice to more than fourteen investment clients in a twelve-month period through means other than an interactive website.¹³¹ This debate is not particularly relevant because the exemption only applies to an adviser that qualifies in the first instance as an internet investment adviser, which Saving2Retire failed to do.

Even if this debate were relevant, however, Respondents could not prevail. They have not satisfied their burden of proving by a preponderance of the evidence that the safe harbor applied.

As discussed in the findings of fact, other than Young’s testimony that she had fewer than fifteen non-internet clients during any twelve-month period, Respondents failed to provide any evidence identifying Saving2Retire’s clients during the period that it was registered with the

¹²⁹ See *Saving2Retire*, 2017 SEC LEXIS 300, at *8.

¹³⁰ *Id.* at *9; see 67 Fed. Reg. at 77,622 (“Internet Investment Advisers must typically register early in their development and testing phase in order to obtain venture capital, and many may not even be fully operational 120 days later.”).

¹³¹ See *Saving2Retire*, 2017 SEC LEXIS 300, at *9–12; see also Tr. 76–77, 98–100.

Commission.¹³² Most tellingly, Respondents did not produce the records Saving2Retire was required to maintain demonstrating that it had no more than fourteen non-internet clients.¹³³

Undercutting Respondents' scant evidence, the Division has provided some evidence that between April 2012 and April 2013, Saving2Retire provided investment advice to more than fourteen clients, as that term is used in Rule 203A-2(e). I reach that conclusion by determining based on the Division's evidence that Saving2Retire had at least fourteen clients during this timeframe and that there is some evidence that it had more. Then I determine that Saving2Retire gave those clients advice during the same time period.

Saving2Retire's clients during this time frame are depicted in fourteen Division Exhibits: Division Exhibits 27 through 29, 31 through 34, 36 through 39, and 41 through 43. Each of these exhibits appears to relate to one or more natural persons. In most cases an exhibit contains evidence concerning a single natural person and trusts of which the natural person appears to be the beneficiary or accounts of the natural person's cohabitant relatives.¹³⁴ Given the applicable definition of client, exhibits containing

¹³² See Tr. 99–100. Respondents Exhibit 15 purportedly pertains to accounts with TD Ameritrade as of May 31, 2011. It contains handwritten notations indicating that certain people depicted were “not a client.” For two reasons, I give this exhibit no weight. First, as I found above, Respondents Exhibit 15 is irrelevant. It does not pertain to the April 2012 to April 2013 time period for which the Division presented evidence that Respondents had non-internet clients, and Young conceded that after 2011, all of her clients' accounts were held at Scottrade. Tr. 69. And none of the clients identified by the Division's evidence, as discussed below, were among those labeled “not a client.” Second, Respondents presented nothing to explain why some of the people listed in the exhibit were “not a client,” how that conclusion was reached, or who reached it.

¹³³ See 17 C.F.R. § 275.203A-2(e)(1)(ii); *cf.* Div. Ex. 15 (undated list of purported clients that Young provided during examination that fails to identify the clients); Resp. Ex. 15 (annotated list of client TD Ameritrade accounts as of May 31, 2011).

¹³⁴ See Div. Exs. 27–29, 32–34, 36–38, 41–43.

evidence of multiple accounts for people with the same surname at the same residence are deemed to relate to a single client.¹³⁵

The other exhibits contain evidence that might relate to more than one client. Division Exhibit 39 includes accounts that could belong to or benefit cohabitant relatives, but the individuals do not share a surname.¹³⁶ Division Exhibit 31 includes the account of a natural person and the account of a profit-sharing-plan trust with unidentified beneficiaries.¹³⁷ Saving2Retire, therefore, may have had sixteen clients during the time period from April 2012 to April 2013.¹³⁸ Given that Respondents bore the burden of proof and the attendant risk of nonpersuasion, the ambiguity about the number of clients cannot inure to Respondents' benefit.¹³⁹

¹³⁵ The term client is defined to include all accounts a natural person possesses and all trusts of which he or she is the sole beneficiary together with all accounts and trusts his or her cohabitant relatives possess or of which they are the beneficiaries. 17 C.F.R. § 275.202(a)(30)-1(a)(1).

¹³⁶ Compare Div. Ex. 39 at 2934–3030 (individual account under one surname), *with id.* at 3031–3386 (individual and IRA accounts of individual with different surname).

¹³⁷ Compare Div. Ex. 31 at 1571–1622 (individual IRA), *with id.* at 1389–1570 (profit-sharing-plan trust).

¹³⁸ See 17 C.F.R. §§ 275.202(a)(30)-1(a), .203A-2(e)(3). I did not rely on evidence relating to the investors in Division Exhibits 24 through 26, 30, 35, or 40. Some of these investors made only a handful of payments in 2014 or 2015, outside the charged window. See Div. Ex. 24 at 221–31; Div. Ex. 40 at 3403. Others never paid Saving2Retire any fees. See Div. Exs. 25, 26, 35. It is not clear whether the investor in Division Exhibit 30 paid fees. See, e.g., Div. Ex. 30 at 1165 (reflecting debit as “asset mgmt entry” without indicating recipient). In any event, the evidence relating to this investor falls outside the April 2012 to April 2013 window.

¹³⁹ See *Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017) (“It is well established that the party who bears the burden of proof loses if the record is inconclusive on the crucial point.”); *Fallon v. Illinois*, 882 F.2d 1206, 1217 (7th Cir. 1989) (“The burden of proof determines the risk of nonpersuasion. Its significance is limited to those cases in which the trier of fact is left in doubt. If the trier is in doubt, it must decide against the party bearing the burden of proof.” (citations omitted)).

And Saving2Retire provided investment advice to these clients between April 2012 and April 2013.¹⁴⁰ Each client gave Scottrade the authority to debit the client’s Scottrade account to pay “advisory fees.”¹⁴¹ Specifically, each client signed an “investment advisor limited trading and advisory fee authorization,” which authorized Scottrade “to debit [the client’s] account for *advisory fees*” based on invoices from his or her investment adviser, Saving2Retire.¹⁴²

As discussed above, during the April 2012 to April 2013 time period, Scottrade relied on this authorization and debited the accounts of each of these clients at least two times to pay advisory fees to Saving2Retire. The fact that Scottrade debited the clients’ accounts during the relevant timeframe for advisory fees shows that Saving2Retire provided those clients with investment advice.¹⁴³ This determination is bolstered by the fact that Young placed clients’ funds with Dimensional Fund Advisors, a firm whose funds were only available for investment through an investment adviser.¹⁴⁴ There is thus evidence that Saving2Retire provided non-internet investment advice to sixteen clients—more than the fourteen-client limit—in a twelve-month period. When weighed against the lack of evidence presented by Respondents, Saving2Retire and Young have not shown that it was more likely than not that Saving2Retire can claim refuge in the exemption’s safe harbor.¹⁴⁵

Given the foregoing, Saving2Retire did not qualify as an internet investment adviser as that term is defined in the exemption in Advisers Act Rule 203A-2(e).¹⁴⁶ Because it did not qualify for the exemption and because it never had \$100 million in assets under management, Saving2Retire was

¹⁴⁰ See Tr. 98–99 (Young testifying that she “count[ed] a client as someone [she was] giving a service to and who [she was] billing”).

¹⁴¹ See Div. Ex. 23.

¹⁴² *E.g., id.* at 591 (emphasis added).

¹⁴³ See Div. Exs. 27–29, 31–34, 36–39, 41–43; see also Tr. 51, 98–99.

¹⁴⁴ Tr. 49.

¹⁴⁵ See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (“the preponderance standard” used in administrative proceedings considers “how convincing the evidence in favor of a fact must be in comparison with the evidence against it”).

¹⁴⁶ 17 C.F.R. § 275.203A-2(e).

prohibited from registering with the Commission as an investment adviser.¹⁴⁷ By nonetheless registering, Saving2Retire violated Section 203A(a)(1)(A).¹⁴⁸

The Division argues that Young aided and abetted and caused Saving2Retire's violation. To demonstrate aiding and abetting liability, the Division must show: (1) a primary violation; (2) knowledge by Young of the primary violation; and (3) Young's substantial assistance in the commission of the primary violation.¹⁴⁹ To establish liability for causing a violation, the Division must similarly show: (1) a primary violation; (2) an act or omission by Young that caused the violation; and (3) that Young knew, or should have known, that her conduct would contribute to the violation.¹⁵⁰ "[O]ne who aids and abets a primary violation is necessarily 'a cause of' that violation."¹⁵¹

I have determined that a primary violation occurred. The record establishes that Young is the only control person associated with Saving2Retire; she owns it and is its sole employee and member.¹⁵² And Young admitted that she registered Saving2Retire with the Commission, purporting to rely on the internet adviser exemption.¹⁵³ These facts establish that Young knew of the primary violation. And because she is the one who registered Saving2Retire, she provided substantial assistance in the commission of the violation. Young thus aided and abetted and caused Saving2Retire's violation of Section 203A.

¹⁴⁷ See 15 U.S.C. § 80b-3a(a)(1)(A); 17 C.F.R. § 275.203A-1(a).

¹⁴⁸ 15 U.S.C. § 80b-3a(a)(1)(A).

¹⁴⁹ *Mohammed Riad*, Exchange Act Release No. 78049A, 2016 WL 3627183, at *17 n.41 (July 7, 2016), *pet. filed*, No. 16-1275 (D.C. Cir. Aug. 4, 2016).

¹⁵⁰ *Robert M. Fuller*, Securities Act Release No. 8273, 2003 WL 22016309, at *4 (Aug. 25, 2003).

¹⁵¹ *Eric J. Brown*, Securities Act Release No. 9299, 2012 WL 625874, at *11 (Feb. 27, 2012), *pet. denied sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

¹⁵² Tr. 67–68; Young Answer at 2.

¹⁵³ Tr. 68–70; *see* Saving2Retire Answer ¶ 4.

2. Respondents failed to maintain required books and records and impeded the Commission's examination.

In Advisers Act Section 204(a), Congress gave the Commission the authority to define those records that an investment adviser must maintain.¹⁵⁴ Congress also provided that the records defined in rules issued under the authority in Section 204(a) are subject to Commission examination “at any time.”¹⁵⁵ Relying on Section 204(a), the Commission promulgated Advisers Act Rule 204-2.¹⁵⁶ Rule 204-2(a) requires an investment adviser to “make and keep” a “true, accurate[,] and current” set of certain records.¹⁵⁷ These records include:

- (1) A journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger.
- (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income[,] and expense accounts.
- ...
- (4) All check books, bank statements, cancelled checks[,] and cash reconciliations of the investment adviser.
- ...
- (6) All trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser.¹⁵⁸

In January 2017, I granted the Division summary disposition on its allegations that Saving2Retire violated, and Young aided and abetted and caused Saving2Retire's violations of, Section 204(a) and paragraphs (1), (2), and (6) of Rule 204-2(a).¹⁵⁹ The undisputed evidence showed that

¹⁵⁴ 15 U.S.C. § 80b-4(a).

¹⁵⁵ *Id.*

¹⁵⁶ 17 C.F.R. § 275.204-2.

¹⁵⁷ 17 C.F.R. § 275.204-2(a).

¹⁵⁸ 17 C.F.R. § 275.204-2(a)(1), (2), (4), (6).

¹⁵⁹ *Saving2Retire*, 2017 SEC LEXIS 300, at *12–17.

Saving2Retire maintained none of the records required by paragraphs (1), (2), and (6).¹⁶⁰ The undisputed evidence also showed that “Saving2Retire, through Young’s actions and omissions, willfully failed to comply with Section 204(a) by failing to make its records available and by impeding the Commission’s examination and investigation.”¹⁶¹ I did not resolve the allegations as to Rule 204-2(a)(4) on summary disposition.¹⁶²

During the hearing, however, the Division established that Saving2Retire did not maintain bank statements, cancelled checks, or cash reconciliations, all of which it was required by Rule 204-2(a)(4) to maintain.¹⁶³ The Division additionally showed that Saving2Retire failed to provide those documents to the Commission during its examination.¹⁶⁴ And the Division bolstered my determination that Saving2Retire did not produce the items it was required by Rule 204-2(a)(1), (2), and (6) to maintain.¹⁶⁵

As I determined on summary disposition and as the testimony and documentary evidence presented during the hearing demonstrated, Young took affirmative steps to impede the Commission’s examination of Saving2Retire. Young refused to produce documents, answer the Commission’s inquiries in a complete manner, or appear for interviews or depositions. As Saving2Retire’s sole principal and employee, Young’s actions and state of mind are attributed to Saving2Retire.¹⁶⁶

Given the determination on summary disposition and the evidence presented during the hearing, the Division has demonstrated that Saving2Retire violated Section 204(a) and Rule 204-2(a)(1), (2), (4), and (6). And Young aided and abetted and caused those violations. Indeed, her acts

¹⁶⁰ *Id.* at *12–15.

¹⁶¹ *Id.* at *15.

¹⁶² *Id.* at *17 n.7.

¹⁶³ Tr. 81–82, 103. As noted, I have given no weight to the purported check register that Respondents offered into evidence. *See* Tr. 113.

¹⁶⁴ Tr. 81–82.

¹⁶⁵ Tr. 41, 80–82.

¹⁶⁶ *See Bernerd E. Young*, Securities Act Release No. 10060, 2016 WL 1168564, at *19 n.81 (Mar. 24, 2016), *pet. filed*, No. 16-1149 (D.C. Cir. May 24, 2016); *Clarke T. Blizzard*, Advisers Act Release No. 2253, 2004 WL 1416184, at *5 (June 23, 2004).

and omissions are the basis for the determination that Saving2Retire committed primary violations of these provisions.

3. Sanctions.

The Division asserts that I should revoke Saving2Retire’s registration, bar Young from the securities industry, issue Respondents a cease-and-desist order, and impose second-tier civil monetary penalties. Respondents argue that because Young “has suffered enough,” I should impose “a modest fine.”¹⁶⁷ As is discussed below, I revoke Saving2Retire’s registration, bar Young from the securities industry with the right to reapply after five years, order Respondents to cease and desist, and impose monetary penalties on each Respondent.

3.1 Industry bars.

The Commission may suspend, revoke, or otherwise limit an investment adviser’s registration if the public interest supports imposing a sanction.¹⁶⁸ The public interest similarly informs the decision whether to suspend or bar from the securities industry a person associated with an adviser.¹⁶⁹ Specifically, if the public interest supports imposing a bar or suspension, an individual associated with an investment adviser who willfully violates any provision of the Advisers Act or its Rules may be barred or suspended from associating with an “investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.”¹⁷⁰

In considering the public interest, the Commission starts with the factors set out in *Steadman v. SEC*.¹⁷¹ These factors include:

¹⁶⁷ Resp. Post-hr’g Br. at 3–4. Respondents also request that I “remonstrat[e]” the Division “on the subject of judicial economy.” Resp. Post-hr’g Br. at 3. That request is denied.

¹⁶⁸ 15 U.S.C. § 80b-3(e); *Schild Mgmt. Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *6 (Jan. 31, 2006).

¹⁶⁹ 15 U.S.C. § 80b-3(f).

¹⁷⁰ 15 U.S.C. § 80b-3(e)(5), (f).

¹⁷¹ 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981); *see Schild Mgmt.*, 2006 WL 231642, at *8 & n.45.

the egregiousness of a 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.¹⁷²

The Commission also considers “the public-at-large,” “the welfare of investors as a class[. . . standards of conduct in the securities business generally,” and “the threat [a respondent] poses to investors and the markets in the future.”¹⁷³ The “inquiry into the appropriate sanction to protect the public interest is . . . flexible . . . and no one factor is dispositive.”¹⁷⁴

Contrary to their assertions, Respondents' conduct involved more than minor mistakes, and was egregious and recurrent.¹⁷⁵ The recordkeeping requirements in Rule 204-2(a) are a “keystone of the [Commission's] investment adviser surveillance” system.¹⁷⁶ And as a securities professional, Young was “required to be knowledgeable about, and to comply with,” these recordkeeping requirements.¹⁷⁷ Further, Respondents owed their clients a fiduciary duty to exercise utmost care in their professional conduct.¹⁷⁸ And

¹⁷² *Schild Mgmt.*, 2006 WL 231642, at *8.

¹⁷³ *Christopher A. Lowry*, Advisers Act Release No. 2052, 2002 WL 1997959, at *6 (Aug. 30, 2002), *pet. denied*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 WL 163472, at *15 (Oct. 24, 1975), *penalty modified, pet. otherwise denied*, 547 F.2d 171 (2d Cir. 1976); *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 (July 26, 2013).

¹⁷⁴ *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008).

¹⁷⁵ *See* Resp. Post-hr'g Br. at 2–4.

¹⁷⁶ *Hammon Capital Mgmt. Corp.*, Advisers Act Release No. 744, 1981 WL 36244, at *2 (Jan. 8, 1981).

¹⁷⁷ *Abraham & Sons Capital, Inc.*, Exchange Act Release No. 44624, 2001 WL 865448, at *8 (July 31, 2001).

¹⁷⁸ *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963).

Respondents' fiduciary duty matters because the record-keeping requirements serve in part to protect an investment adviser's clients.¹⁷⁹

Respondents, however, ignored these principles. Before speaking to Commission staff, Young was unaware of Saving2Retire's recordkeeping responsibilities.¹⁸⁰ Respondents thus kept none of the client records that Rule 204-2(a)(1), (2), (4), and (6) required them to keep.¹⁸¹ Worse, Young admitted that she commingled her personal funds with those of Saving2Retire's clients.¹⁸² Although there is no evidence that any client suffered losses because of Respondents' acts and omissions, Saving2Retire's failure to keep current, accurate records put its clients' investments at risk.¹⁸³

Young compounded these failures by impeding the Commission's examination, which Congress specifically authorized the Commission to conduct.¹⁸⁴ She rebuffed the Commission's initial request for information, characterizing information that Saving2Retire was required to maintain and the Commission was entitled to review—trial balances and a journal of cash receipts and disbursements—as “N/A.”¹⁸⁵ Notwithstanding the requirement that Saving2Retire maintain records showing that it provided advice exclusively through an interactive website, Young asserted that the number of clients who obtained advice through Saving2Retire's website during the previous twelve months was “non-material” and produced nothing to show

¹⁷⁹ See *Hammon Capital Mgmt. Corp.*, Advisers Act Release No. 989, 1985 WL 548332, at *4 (Sept. 24, 1985).

¹⁸⁰ Tr. 38.

¹⁸¹ Tr. 38, 80–82, 103; Div. Ex. 9 at 23–24, 106–07; see *Saving2Retire*, 2017 SEC LEXIS 300, at *14–17.

¹⁸² Div. Ex. 9 at 25.

¹⁸³ Young testified that certain records were maintained by Scottrade or Saving2Retire's bank and were accessible on-line. Tr. 81, 103. But an investment adviser cannot satisfy its recordkeeping obligations by virtue of on-line access to records it does not maintain. See *Hammon Capital Mgmt.*, 1981 WL 36244, at *2 (“even if required data can be derived from other records, a firm is not relieved thereby of its obligation to maintain the records specified by recordkeeping provisions”).

¹⁸⁴ See 15 U.S.C. § 80b-4(a).

¹⁸⁵ Div. Ex. 3 at 23; see Div. Ex. 2 at 11; see also 15 U.S.C. § 80b-4(a); 17 C.F.R. § 275.204-2(a)(1), (6).

how Saving2Retire provided investment advice.¹⁸⁶ And when asked for Saving2Retire's clients' names, their account numbers, and their account balances, Young thumbed her nose by producing a chart that described eight clients as clients A through H and which listed account balances using rounded figures such as \$1,000,000 and \$400,000.¹⁸⁷

Young's uninformative response to the Commission's request for information prompted Commission staff to call her.¹⁸⁸ On that call, Young was defensive and evasive and questioned why Saving2Retire had to produce the requested records.¹⁸⁹ During a second call a week later, Young "went on a bit of a rant," flatly refused to provide the requested information, and hung up.¹⁹⁰ And Young followed that refusal by refusing to comply with four subpoenas the Division sent to her or Saving2Retire from May through September 2015.¹⁹¹

As the foregoing reflects, Young engaged in a months-long pattern of evading and impeding the Commission's examination. Young's actions amount to "serious misconduct" justifying strong sanctions."¹⁹² Because Saving2Retire is Young's alter ego, her acts and omissions are attributed to it.¹⁹³

Young has neither made assurances, sincere or otherwise, against future violations nor shown that she recognizes the wrongful nature of her conduct. Respondents' post-hearing brief focuses on Saving2Retire's registration violation while ignoring the worst of Respondents' misconduct.¹⁹⁴ Doubling down, Respondents chastise the Division for bringing this action, as if

¹⁸⁶ Div. Ex. 3 at 23–24; see Div. Ex. 2 at 11–13; Tr. 35; see also 17 C.F.R. § 275.203A-2(e)(1)(ii).

¹⁸⁷ See Div. Ex. 15; Tr. 34–35.

¹⁸⁸ Tr. 36–37.

¹⁸⁹ Tr. 37–38.

¹⁹⁰ Tr. 42–43.

¹⁹¹ See Div. Exs. 11–14, 16–17.

¹⁹² *Schild Mgmt. Co.*, 2006 WL 231642, at *9 (quoting *Barr Fin. Grp.*, Advisers Act Release No. 2179, 2003 WL 22258489, at *7 (Oct. 2, 2003)).

¹⁹³ *Bernerd E. Young*, 2016 WL 1168564, at *19 n.81.

¹⁹⁴ Resp. Post-hr'g Br. at 2–4.

impeding the Commission’s lawful examination and failing to maintain client records for years are minor matters about which no one should be concerned.¹⁹⁵ But by refusing to cooperate with the Commission’s examiners and later with the Division during its investigation, Respondents practically dared the Division to bring this action.

The fact of Respondents’ misconduct “raises an inference that” they will repeat it.¹⁹⁶ And that inference is supported by Young’s failure to recognize the wrongful nature of her conduct.¹⁹⁷

Advisers that are subject to examination should be discouraged from following Respondents’ example.¹⁹⁸ The Commission cannot properly regulate investment advisers and protect the investors they serve if advisers are permitted to evade Commission examinations after failing to maintain client records.¹⁹⁹ Sanctioning Respondents will thus serve an important deterrent function.

¹⁹⁵ *Id.* at 3–4.

¹⁹⁶ *Tzemach David Netzer Korem*, 2013 WL 3864511, at *6 n.50 (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)).

¹⁹⁷ *See Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730, at *4 (Aug. 26, 2011) (“unwillingness to acknowledge the wrongfulness of [respondent’s misconduct] . . . raises serious concerns about the likelihood that he will engage in similar misconduct if presented with the opportunity”); *cf. Scott B. Gann*, Exchange Act Release No. 59729, 2009 WL 938033, at *6 (Apr. 8, 2009) (“Gann’s claims that he will ‘[a]lways hold the belief that [he] did not have the intent to defraud any mutual fund company’ and that ‘[he] cannot admit [his] personal actions were wrong’ reveal a fundamental misunderstanding of the duties of a securities industry professional that presents a significant likelihood that he will commit similar violations in the future.” (alterations in original)), *pet. denied*, 361 F. App’x 556 (5th Cir. 2010).

¹⁹⁸ *See PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *4 (Apr. 11, 2008) (discussing the need to deter examinees who might otherwise be inclined not to cooperate with examiners), *pet. denied*, 566 F.3d 1172 (D.C. Cir. 2009).

¹⁹⁹ *Cf. Schield Mgmt. Co.*, 2006 WL 231642, at *10 (“The industry cannot tolerate an investment adviser that, holding a fiduciary position, would undermine the regulatory system by deliberately thwarting a Commission examination.”).

Respondents argue that they do not deserve serious punishment. This argument is facially appealing, as far as it goes; Respondents are small players who did not defraud or harm anyone.²⁰⁰ But Respondents' argument is undercut by their failure to address the most serious aspects of their misconduct—impeding the Commission's examination and failing to keep current, accurate client records. The Commission has observed that similar misconduct combined with a "refusal to acknowledge wrongdoing," showed either that the respondents "fundamentally misunderstand the regulatory obligations to which they are subject or that they hold those obligations in contempt."²⁰¹ Such is the case here.

Weighing the foregoing, I find that it is in the public interest to revoke Saving2Retire's registration as an investment adviser. Balancing the serious nature of Young's misconduct against the lack of evidence of fraud or harm, I find that the public interest favors barring Young from the securities industry with the right to reapply after five years.

3.2. Cease-and-desist order.

Advisers Act Section 203(k) gives the Commission the authority to impose a cease-and-desist order on any person who has violated any provision of the Advisers Act or its rules, or on any person who was a cause of the violation, due to an act or omission the person knew or should have known would contribute to such a violation.²⁰² The public interest factors discussed above similarly inform the decision whether to impose a cease-and-desist order.²⁰³ In addition to the public interest factors, the Commission:

consider[s] whether the violation [at issue] is recent, the degree of harm to investors or the marketplace resulting from the violation, . . . the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings[, and] . . . the risk of future violations.²⁰⁴

²⁰⁰ Resp. Post-hr'g Br. at 3–4.

²⁰¹ *Barr Fin. Grp.*, 2003 WL 22258489, at *7.

²⁰² 15 U.S.C. § 80b-3(k).

²⁰³ *Thomas C. Gonnella*, Exchange Act Release No. 78532, 2016 WL 4233837, at *14 (Aug. 10, 2016), *pet. filed*, No. 16-3433 (2d Cir. Oct. 7, 2016).

²⁰⁴ *Id.*

The fact that a respondent has once violated the law suggests that the respondent will do so again and “merits . . . ordering [her] to cease and desist.”²⁰⁵

The public interest factors, which weigh in favor of industry bars, similarly weigh in favor of cease-and-desist orders. Although neither any investor nor the marketplace was harmed, Respondents’ violations are recent and imposing cease-and-desist orders will serve an important remedial function. I therefore order Respondents to cease and desist.

3.3. Civil monetary penalties.

In cases initiated under Advisers Act Section 203(e) or (f), the Commission may impose a civil monetary penalty if it determines that a respondent willfully violated a securities statute or rule and the public interest supports imposing the penalty.²⁰⁶ By contrast, in cease-and-desist proceedings—cases initiated under Section 203(k)—the Commission may impose civil monetary penalties based simply on the determination that a respondent has violated any provision of the Advisers Act or rules promulgated under it.²⁰⁷ This proceeding was initiated under subsection (k) and I have already determined that Respondents violated provisions of the Advisers Act and rules promulgated under it. I therefore move to consideration of the appropriate monetary penalty.

The Advisers Act sets out a three-tiered system for determining the maximum monetary penalty for each act or omission constituting a violation of that act and its rules.²⁰⁸ The statute does not define the precise unit of violation referenced in the phrase “each act or omission.”²⁰⁹ For the time period from March 4, 2009, to March 5, 2013, the maximum first-, second-,

²⁰⁵ *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *24 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002); *see Thomas C. Gonnella*, 2016 WL 4233837, at *14 (“Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation.”) (quoting *KPMG Peat Marwick LLP*, 2001 WL 47245, at *24).

²⁰⁶ 15 U.S.C. § 80b-3(i)(1)(A).

²⁰⁷ *See* 15 U.S.C. § 80b-3(i)(1)(B).

²⁰⁸ 15 U.S.C. § 80b-3(i)(2).

²⁰⁹ *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1440–41 (1979).

and third-tier penalties for each violation are \$7,500, \$75,000, and \$150,000 for a natural person, and \$75,000, \$375,000, and \$725,000 for entities.²¹⁰ For violations from March 6, 2013, to November 2, 2015, the figures are \$7,500, \$80,000, and \$160,000, respectively, for a natural person, and \$80,000, \$400,000, and \$775,000, respectively, for entities.²¹¹ Because the Division relies on the former, lower figures, there is no need to resolve which set of figures applies to Respondents' misconduct, which straddled the two time periods.

First-tier penalties may be imposed simply based on the showing of a violation.²¹² Second-tier penalties are permitted if a respondent's violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.²¹³ Because the Division does not request third-tier penalties and has not attempted to make the necessary additional showing,²¹⁴ I limit this discussion to the first two tiers.

I agree with the Division's argument that second-tier penalties are appropriate based on "Respondents' reckless disregard of regulatory requirements."²¹⁵ At a minimum, Respondents' failure to maintain current, accurate client records and their efforts to impede the Commission's examination evidence a reckless disregard of the statutes and regulations that governed Saving2Retire.

Although I have discretion in determining the appropriate penalty within a given tier,²¹⁶ neither party has argued in favor of any specific penalty. The Division merely says that I should impose "appropriate" second-

²¹⁰ Adjustments to Civil Monetary Penalty Amounts, 82 Fed. Reg. 5367, 5372 (Jan. 18, 2017) (to be codified at 17 C.F.R. § 201.1001, tbl.D); *see* 15 U.S.C. § 80b-3(i)(2); 28 U.S.C. § 2461 note.

²¹¹ Adjustments to Civil Monetary Penalty Amounts, 82 Fed. Reg. at 5372.

²¹² 15 U.S.C. § 80b-3(i)(2)(A).

²¹³ 15 U.S.C. § 80b-3(i)(2)(B).

²¹⁴ *See* 15 U.S.C. § 80b-3(i)(2)(C)(ii).

²¹⁵ Div. Post-hr'g Br. at 13.

²¹⁶ *J.S. Oliver Capital Mgmt., LP*, Securities Act Release No. 10100, 2016 WL 3361166, at *14 (June 17, 2016), *pet. filed*, No. 16-72703 (9th Cir. Aug. 15, 2016).

tier penalties.²¹⁷ Relying on Young’s testimony, Respondents assert that because they have little or no money, no more than a “modest fine” is appropriate.²¹⁸

While Section 203(i)(1)(B) permits imposition of a monetary penalty without explicit mention of the public interest, the public interest factors set out in paragraph (3) of Section 203(i) provide helpful criteria in determining an appropriate penalty.²¹⁹ These factors include: (1) whether a violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) a respondent’s convictions or prior securities violations or injunctions, (5) the need to deter a respondent and other persons, and (6) such other matters as justice may require.²²⁰

Here, Young was reckless in her disregard of applicable statutory and regulatory requirements related to Saving2Retire’s recordkeeping obligations. And she willfully impeded the Commission’s examination of Saving2Retire. The Commission has an important and legitimate interest in deterring other advisers from following Respondents’ example.²²¹

In addition, the March 2016 order issued by California’s Commissioner of Business Oversight denying Saving2Retire’s investment adviser application and barring Young from association with any investment adviser, broker-dealer, or commodity adviser necessarily reflects a finding that both Respondents violated either state or federal securities laws.²²²

²¹⁷ Div. Post-hr’g Br. at 13.

²¹⁸ Resp. Post-hr’g Br. at 3; *see* Tr. 95. Respondents do not cite the record in support of their factual assertions. They are presumably relying on Young’s testimony that “[m]ost of the time by the end of the month, I had a few hundred bucks after expenses, et cetera. I did not have the money to really hire” an attorney or securities regulatory specialist. Tr. 95.

²¹⁹ *See* 15 U.S.C. § 80b-3(i)(1)(B), (3).

²²⁰ 15 U.S.C. § 80b-3(i)(3).

²²¹ *Cf. Hammon Capital Mgmt.*, 1981 WL 36244, at *2 (“An advisory firm is not entitled to delay a reasonable inspection sought by our staff during regular business hours.”).

²²² Div. Ex. 10 at 111; *see* Cal. Corp. Code §§ 25232, 25232.1 (requiring finding that investment adviser or individual violated state or federal

(continued...)

On the other hand, there is no evidence of fraud, deceit, manipulation, harm to investors, or unjust enrichment. And because the California order does not include any specific factual findings regarding how Respondents violated securities laws or whether those violations were distinct from those charged in the OIP, it is difficult to judge the weight to give that order.²²³

In the past, the Commission has found significant the absence of evidence of investor losses or unjust enrichment, even when the misconduct at issue involved “fraud, deceit, and a deliberate or reckless disregard of the antifraud provisions of the securities laws” and “a significant risk of substantial loss” to investors.²²⁴ Considering these factors in *Rockies Fund*, the Commission imposed only mid- to upper-level second tier penalties despite emphasizing the “seriousness of the [respondents] misconduct.”²²⁵ And in *Robert L. Burns*, the Commission imposed modest first-tier penalties after determining that although the respondent was unjustly enriched, the respondent had no disciplinary history and there was no evidence of fraudulent conduct or harm to others.²²⁶

Young’s efforts to impede the Commission’s examination and her disregard of Saving2Retire’s recordkeeping obligations are serious matters. Balancing the seriousness of this misconduct and the need to deter others against the fact that no investor was harmed and Respondents were not unjustly enriched, in combination with the lack of evidence of fraud or deceit, it is appropriate to impose modest second-tier penalties for Respondents’ most serious violations.²²⁷ Young’s aiding and abetting and causing violation of Advisers Act Section 204(a) warrants a \$15,000 civil penalty. Because no investor was harmed, her aiding and abetting and causing violation of Advisers Act Rule 204-2(a)(1), (2), (4), and (6), warrants a \$10,000 civil

securities law to deny or revoke adviser’s registration and to bar the individual from the industry).

²²³ See Div. Ex. 10.

²²⁴ E.g., *Rockies Fund, Inc.*, Exchange Act Release No. 54892, 2006 WL 3542989, at *7 (Dec. 7, 2006), *pet. denied*, 298 F. App’x 4 (D.C. Cir. 2008).

²²⁵ *Id.*

²²⁶ Advisers Act Release No. 3260, 2011 WL 3407859, at *11 (Aug. 5, 2011).

²²⁷ Cf. *Rockies Fund, Inc.*, 2006 WL 3542989, at *7 (refraining from imposing “higher penalties” when, among other factors, “the record fail[ed] to identify any actual losses to investors”).

penalty. Saving2Retire’s primary violation of these same provisions warrants penalties of \$45,000 for the violation of Section 204(a) and \$30,000 for the violation of Rule 204-2(a)(1), (2), (4), and (6).

Respondents’ violation of Advisers Act Section 203A—improper registration—is less serious. The record reveals no evidence that Young intended to harm or defraud anyone when she registered Saving2Retire. Young’s testimony shows that she initially attempted to comply with the requirements attending Saving2Retire’s registration status but soon found herself in over her head. Given the other sanctions imposed in this initial decision, a nominal additional first-tier penalty of \$1,000 for each Respondent is warranted.

4. Constitutional issues.

Respondents assert that this proceeding impairs their right to a jury trial and that the Commission’s administrative law judges are not properly appointed and are improperly insulated from presidential removal.²²⁸ Those constitutional challenges are rejected.²²⁹

Record Certification

I certify that the record includes the items set forth in the revised record index issued by the Secretary of the Commission on September 21, 2017.²³⁰

Order

Under Section 203(e) of the Investment Advisers Act of 1940, the investment adviser registration of Saving2Retire, LLC, is REVOKED.

Under Section 203(f) of the Investment Advisers Act of 1940, Marian P. Young is BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; provided, however, that she may reapply to the Commission after five years for permission to associate.

²²⁸ Resp. Br. at 5; *see* U.S. Const. art. II, §§ 1–3; U.S. Const. amend. VII.

²²⁹ *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 450–55, 460–61 (1977); *optionsXpress, Inc.*, Securities Act Release No. 10125, 2016 WL 4413227, at *47–52 (Aug. 18, 2016).

²³⁰ *See* 17 C.F.R. § 201.351(b).

Under Section 203(k) of the Investment Advisers Act of 1940, Saving2Retire, LLC, and Marian P. Young shall CEASE AND DESIST from committing or causing any violations or future violations of Sections 203A and 204 of the Investment Advisers Act of 1940 and Rule 204-2(a)(1), (2), (4), and (6) thereunder.

Under Section 203(i) of the Investment Advisers Act of 1940, Saving2Retire, LLC, shall PAY A CIVIL MONEY PENALTY in the amount of \$76,000, and Marian P. Young shall PAY A CIVIL MONEY PENALTY in the amount of \$26,000.

Payment of civil penalties shall be made no later than 21 days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/ofm>; or (3) by certified check, bank cashier's check, bank money order, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying Respondent and Administrative Proceeding No. 3-17352: Enterprise Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule of Practice 360.²³¹ Under that rule, a party may file a petition for review of this initial decision within 21 days after service of the initial decision. Under Rule of Practice 111, a party may also file a motion to correct a manifest error of fact within ten days of the initial decision.²³² If a motion to correct a manifest error of fact is filed by a party, then a party shall have 21 days to file a petition for review from the date of the order resolving such motion to correct a manifest error of fact. This 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 a manifest error of fact or the Commission determines on its own initiative to review the initial decision as

²³¹ 17 C.F.R. § 201.360.

²³² See 17 C.F.R. § 201.111.

to a party. If any of these events occur, the initial decision shall not become final as to that party.

James E. Grimes
Administrative Law Judge