

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

Administrative Proceedings Rulings
Release No. 5665 / March 30, 2018

Administrative Proceeding
File No. 3-15514

In the Matter of

**Donald J. Anthony, Jr.,
Frank H. Chiappone,
Richard D. Feldmann,
William P. Gamello,
Andrew G. Guzzetti,
William F. Lex,
Thomas E. Livingston,
Brian T. Mayer,
Philip S. Rabinovich, and
Ryan C. Rogers**

**Order Revising and Ratifying
Prior Actions**

Procedural Posture

The Securities and Exchange Commission issued an order instituting administrative and cease-and-desist proceedings (OIP) on September 23, 2013.¹ I issued an initial decision on February 25, 2015. *Donald J. Anthony, Jr.*, Initial Decision Release No. 745, 2015 SEC LEXIS 707 (Initial Decision).²

¹ This proceeding was instituted pursuant to Section 8A of the Securities Act of 1933; Sections 15(b) and 21C of the Securities Exchange Act of 1934; Section 203(f) of the Investment Advisers Act of 1940; and Section 9(b) of the Investment Company Act of 1940. Richard D. Feldmann settled the allegations. *Donald J. Anthony, Jr.*, Securities Act Release No. 9571, 2014 SEC LEXIS 1223 (Apr. 3, 2014).

² The initial decision found that Guzzetti had failed to reasonably supervise and the other Respondents had violated the antifraud and registration provisions of the Securities Act and Exchange Act. I assessed

(continued...)

Subsequently, I found it was a material error to include in the disgorgement amount commissions earned for sales before February 1, 2008, and thus reduced the disgorgement of Frank H. Chiappone, William F. Lex, Thomas E. Livingston, Brian T. Mayer, and Philip S. Rabinovich. *Donald J. Anthony, Jr.*, Admin. Proc. Rulings Release No. 2528, 2015 SEC LEXIS 1327 (ALJ Apr. 9, 2015).

The Commission issued a notice on June 17, 2015, that the initial decision had become final as to Donald J. Anthony, Jr., William P. Gamello, and Ryan C. Rogers. *Donald J. Anthony, Jr.*, Securities Act Release No. 9810, 2015 SEC LEXIS 2450. Chiappone, Andrew G. Guzzetti, Lex, Livingston, Mayer, and Rabinovich (collectively Respondents) petitioned for Commission review. Briefs were filed, and oral argument occurred on August 15, 2017. *See Frank Chiappone*, Securities Act Release No. 10382, 2017 SEC LEXIS 2008 (June 30, 2017).

On November 30, 2017, the Commission ratified my administrative law judge appointment, remanded the proceeding as to Respondents with directions to reconsider the record, including all substantive and procedural actions, and gave the parties an opportunity to submit any new evidence they considered relevant. *Pending Admin. Proc.*, Securities Act Release No. 10440, 2017 SEC LEXIS 3724. I ratified my designation as presiding administrative law judge on December 4, 2017. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5247, 2017 SEC LEXIS 3780. I ordered the parties to file by January 31, 2018, any new evidence that they consider relevant to my reexamination of the record. *Donald J. Anthony, Jr.*, Admin. Proc. Rulings Release No. 5431, 2018 SEC LEXIS 4 (ALJ Jan. 2, 2018).

one third-tier penalty of \$130,000 on each Respondent; I assessed disgorgement; and I permanently barred Lex and Livingston and suspended Chiappone, Guzzetti, Mayer, and Rabinovich for twelve months from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in any offering of penny stock. In addition, I permanently prohibited Lex and Livingston and prohibited Chiappone, Guzzetti, Mayer, and Rabinovich for twelve months from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. I ordered Respondents, except Guzzetti, to cease and desist from committing or causing violations of the registration and antifraud provisions of the Securities Act and Exchange Act. Initial Decision at 116-18.

Respondents and the Division filed letter briefs and incorporated previous filings made to the Commission.

The matter is fully briefed, and the following constitutes my reconsideration of the record and the parties' positions. As set forth below, I ratify in part and revise in part my previous actions.

Positions of the Parties

Philip S. Rabinovich and Brian T. Mayer

In a January 19, 2018 filing, Rabinovich and Mayer argue that: (1) dismissal with prejudice is the only cure for the constitutional deprivation that Respondents have suffered; and (2) if the proceeding is not dismissed, the Commission must consider significant recent developments. Rabinovich and Mayer set out several reasons why they believe the ratification process is invalid. Rabinovich & Mayer (R&M) Br. 2-3, 6. They argue that "reexamination" of the record is insufficient and that the proceeding must be started anew, but they also argue that the proceeding is barred by the five-year statute of limitations, 28 U.S.C. § 2462, because "every claim in the OIP 'first accrued' before September 23, 2008 (i.e., more than five years prior to the date the OIP was filed)." *Id.* at 3, 4 n.1. They claim reconsideration deprives them of procedural rules put in place after the hearing that allow respondents to depose up to five individuals and provide for up to ten, rather than four, months to prepare for a hearing. *Id.* at 3-4; see 17 C.F.R. §§ 201.233(a)(1)-(3), .360(a)(2)(ii).

Rabinovich and Mayer maintain that this proceeding is the only remanded proceeding briefed and argued to the Commission and that its complexity makes the appropriateness of reexamination dubious at best. *Id.* at 5. They maintain that the Commission has acknowledged that retroactively fixing the constitutional infirmities in its administrative process might cause problems. *Id.* They cite a letter by the Commission to the court in *Duka v. SEC*, No. 1:15-cv-00357 (S.D.N.Y. June 15, 2015), ECF No. 41, in which it stated that "the Commission should not act precipitously to modify its ALJ scheme" due to the difficulties of this remedy in light of the number of pending proceedings and the "highly-regulated competitive service system that Congress created for the selection, hiring and appointment of ALJs." R&M Br. 5-6, Ex. 1, at 2.

Rabinovich and Mayer enumerate a list of developments since the initial decision that they believe should be considered. The first is *Kokesh v. SEC*, 137 S. Ct. 1635 (June 5, 2017), which held that disgorgement is a penalty within the meaning of 28 U.S.C. § 2462 and thus subject to § 2462's five-year

statute of limitations. R&M Br. 6. According to Rabinovich and Mayer, *Kokesh* and a district court decision, *SEC v. Gentile*, No. 2:16-cv-1619, 2017 U.S. Dist. LEXIS 204883 (D.N.J. Dec. 13, 2017), make clear that all of the relief that the Division seeks is subject to the five-year statute of limitations and that no evidence of events prior to that period should have been considered. R&M Br. 6.

Next is *SEC v. Bartko*, 845 F.3d 1217 (D.C. Cir. 2017), which found that imposing the collateral industry bars authorized by the Dodd-Frank Act for pre-Dodd-Frank conduct is an impermissibly retroactive penalty. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 925, Pub. L. No. 111-203, 124 Stat. 1375, 1850-51 (2010). Rabinovich and Mayer contend that they operated only as registered representatives of a broker-dealer and thus may not be barred from the other categories. R&M Br. 7.

Rabinovich and Mayer further assert that a new hearing is required because of intervening changes in the Commission's Rules of Practice (Rules). They "would have undoubtedly used" the new rule allowing depositions to depose at least some potential witnesses who were unable to attend the hearing. *Id.* at 8; *see* 17 C.F.R. §§ 201.233, .235. And they argue that the addition of "unreliable" to the description of inadmissible evidence means that some admitted evidence should not have been considered. *Id.* at 7-8; *see* 17 C.F.R. § 201.320. Rabinovich and Mayer also argue that certain affidavits should have been allowed in evidence. In addition, they argue that it was error for the initial decision to state that Mayer was personally accused of wrongdoing in a complaint that appeared in his BrokerCheck report and that Mayer personally contributed to a settlement. R&M Br. 9. Finally, they argue that the fact that they have been working at a registered investment advisory firm since the hearing was held shows that they pose no danger to the investing public and the suspension imposed by the initial decision is unnecessary. *Id.*

On February 13, 2018, Rabinovich and Mayer filed a letter to reiterate and clarify their positions.

Frank H. Chiappone

On January 19, 2018, Chiappone filed a brief, which adopts positions in the Rabinovich and Mayer brief, subject to certain modifications, and submitted Chiappone's affidavit. Chiappone's brief objects to the ratification process and argues that the proceeding should be considered a nullity. It argues that: my finding that Respondents should have discovered the fraud was incorrect and that Chiappone's affidavit establishes that he poses no danger to the investing public. Chiappone incorporates by reference "all facts

and arguments set forth in the Appeal briefs, the 2017 Letters, and the transcript of oral argument before the Commission,” as well as “his proposed findings of fact and conclusions of law and his post-hearing briefs.” Chiappone Br. 3.

The purpose of Chiappone’s affidavit is to show that he has not participated in the sale of a private placement for nine years; he thus does not pose a danger to the investing public and should not be suspended from the industry for twelve months. Chiappone Aff. at 2. The affidavit also reiterates arguments that the ratification process is improper.

Chiappone submitted a clarification letter dated February 13, 2018, adopting where relevant to him the clarifications submitted by Rabinovich and Mayer in their February 13, 2018, letter.

Andrew G. Guzzetti

Guzzetti’s letter brief filed January 19, 2018, objects to the ratification procedure and the finding that he was a supervisor. It adopts and incorporates the arguments in his prior pleadings and the Rabinovich and Mayer brief.

William F. Lex

Lex faults the proceeding as unconstitutional in a letter brief dated January 18, 2018. Lex Br. 1. Lex claims that evidence was admitted at the hearing that would be inadmissible today and that after the proceeding was initiated and the hearing occurred, the Commission adopted rules recognizing new “[c]oncepts of due process.” *Id.* at 2. Lex also claims that he acted only as a registered representative and that as such the holding in *Bartko* indicates that the collateral bars imposed on him should be vacated. *Id.* at 2 n.1. Lex joins in the arguments made in the Rabinovich and Mayer brief and reiterates the arguments made in his prior pleadings. Lex continues his assertion that the Commission does not have subject-matter jurisdiction because the proceeding was commenced five years after the cause of action first accrued. *Id.* at 2. Lex submitted a clarification letter dated February 14, 2018, adopting Chiappone’s clarification letter dated February 13, 2018.

Thomas E. Livingston

Livingston objects to Commission’s ratification of me as a Commission administrative law judge and to the entire ratification process. Livingston Br. 1. Livingston associates himself with objections and arguments in the Rabinovich and Mayer and Lex briefs and calls attention to the objections and arguments he put forth throughout the process. *Id.* at 1-2.

Division of Enforcement

The Division filed a statement dated January 19, 2018, and a brief dated January 30, 2018. The brief insists that: (1) the Commission's November 30, 2017, order is valid and effectively remedied Respondents' alleged harm; (2) Respondents' additional constitutional claims lack merit; (3) the allegations in the OIP are not time-barred by *Kokesh* or 28 U.S.C. § 2462; and (4) Respondents' additional arguments do not impact ratification.

The Division's brief references its August 7, 2017, letter to the Commission where it acknowledged that *Kokesh* required lowering the disgorgement amount in the initial decision as amended to exclude disgorgement related to conduct outside the five-year period. Div. Br. 4. The Division notes that its August 7, 2017, letter agreed that the collateral bars ordered in the initial decision should be modified but maintains—contrary to Rabinovich, Mayer, and Chiappone—that Respondents should nevertheless be barred and suspended from association with a broker-dealer *and* an investment adviser. *Id.* at 4 & n.3.³

Discussion

This is an unusual situation.

The case was briefed and argued to the Commission almost three months before the remand. Respondents did not submit any new evidence outside of informing me of their work in the securities industry since the initial decision was issued. Instead, the Respondents collectively: (A) raise constitutional challenges to the ratification procedure; (B) argue that changes to the Rules necessitate changes to evidentiary rulings I made and require a new hearing; (C) disagree about the concessions that the Division has made in view of court decisions regarding the statute of limitations; and (D) assert that associational bars imposed in the initial decision must be modified or removed.

A. Constitutional Challenges to Ratification

Respondents make three constitutional arguments against my position as administrative law judge and the ratification procedure implemented by the Commission. First, they assert that the Commission is unable to ratify my appointment as an administrative law judge. R&M Br. 2. Second, Respondents argue that my reconsideration of the record is insufficient to

³ To the extent any argument is not addressed above or below, I have considered and rejected it.

cure any Appointments Clause defect. *Id.* at 3-4. Third, Respondents argue that limitations on the Commission’s ability to remove me from my position as an administrative law judge are constitutionally infirm. *Id.* at 2-3.

Respondents posit that the Commission is unable to ratify the appointment of its administrative law judges because “the Commission never appointed those ALJs in the first place.” R&M Br. 2. Respondents’ premise is incorrect. The Commissioners, as head of the department, did not personally select the administrative law judges prior to the ratification order. But Commission staff—the Chief Administrative Law Judge and the appointing official in the Office of Human Resources—did select and appoint, respectively, the Commission’s administrative law judges pursuant to the relevant statutes and regulations. *See* 5 U.S.C. § 3105 (“Each agency shall appoint as many administrative law judges as are necessary”); 5 C.F.R. §§ 930.201(e) (“OPM does not hire administrative law judges for other agencies”), .204(a) (“An administrative law judge receives a career appointment”). The Commission has ratified the appointments made by its staff consistent with the basic principle of agency law that a principal may authorize acts of its agents. *See Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (“In general, ‘[r]atification occurs when a principal sanctions the prior actions of its purported agent.’” (alteration in original) (quoting *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998))).

Respondents do not cite any authority in support of their position. The Division, on the other hand, cited a great deal of authority in addition to *Wilkes-Barre Hospital* to support its position that the Commission, acting as the head of a department, can under the Constitution appoint administrative law judges and ratify appointments after the fact. Div. Br. 1-2; *see* U.S. Const. Art. II, § 2, cl. 2; *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512 (2010); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03, (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1186, 1191-92 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2291 (2017); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 118-19 (D.C. Cir. 2015); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996).

Respondents’ second argument is that my reconsideration of the record does not cure any defects in the proceedings, which they claim “must be dismissed and started anew.” R&M Br. 3. The case law, however, allows for reconsideration and ratification to resolve Appointments Clause challenges. For example, “self-ratification”—ratifying one’s own prior decisions—is permissible. *Wilkes-Barre Hosp.*, 857 F.3d at 372. And it is not necessary to restart the administrative process with a new order instituting proceedings or complaint in federal court. “[F]orcing a properly appointed official to start

at the beginning of the process does not necessarily promise a ‘more detached and ‘pure’ consideration of the merits of the case” *Id.* (quoting *Legi-Tech*, 75 F.3d at 709); see *Intercollegiate Broad. Sys.*, 796 F.3d at 119 (rejecting petitioner’s argument that the only way to remedy an Appointments Clause violation was to “conduct a new *hearing*, not merely a *de novo* review of the record assembled by the constitutionally invalid tribunal”).

Respondents also raise a constitutional challenge to the way administrative law judges can be removed from office, asserting that restrictions on removal are a separation-of-powers violation. See R&M Br. 2-3. The Commission has held, however, that the for-cause removal restrictions on its administrative law judges are constitutional. *Timbervest, LLC*, Investment Advisers Act of 1940 Release No. 4197, 2015 SEC LEXIS 3854, at *104-12 (Sept. 17, 2015), *pet. filed*, No. 15-1416 (D.C. Cir. Nov. 13, 2015). Respondents suggest that I should not rely on *Timbervest* because in that decision the Commission also held that administrative law judges were not inferior officers, an issue that is currently before the Supreme Court. See R&M Clarification Ltr. 2. Respondents’ separation-of-powers argument is noted, but *Timbervest* is still Commission precedent and I will follow it.⁴

For these reasons, I agree that the Commission’s ratification of my appointment and my reconsideration of the record should “put to rest any claim” that this proceeding “violate[s] the Appointments Clause.” *Pending Admin. Proc.*, 2017 SEC LEXIS 3724, at *1.

B. Changes to the Rules of Practice and Evidentiary Rulings

Respondents raised objections to certain evidentiary rulings I made during the hearing and argue that amendments to the Rules of Practice after the hearing necessitate different rulings. See Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50,212 (July 29, 2016) (Final Amendments). I find these arguments unpersuasive. The Commission specified the date when the new rules became effective. See *id.* at 50,228-30;

⁴ The Court of Appeals for the District of Columbia Circuit has held *Timbervest* in abeyance pending the Supreme Court’s disposition of *Lucia v. SEC*, No. 17-130 (oral argument scheduled for Apr. 23, 2018). Per Curiam Order, *Timbervest*, No. 15-1416 (D.C. Cir. Aug. 8, 2017). The Supreme Court did not accept the Solicitor General’s invitation to consider the removal question in *Lucia*. See *Lucia v. SEC*, 138 S. Ct. 736 (2018) (granting certiorari without adding additional question presented).

see also Lynn Tilton, Advisers Act Release No. 4495, 2016 SEC LEXIS 2973, at *18 (Aug. 24, 2016) (“Respondents provide no compelling reasons why we should treat their case uniquely from all the other pending cases in our administrative tribunals, and deviate from our decision that the availability of the Amended Rules for litigants in pending proceedings should depend on the stage of their proceeding.”). Adopting new rules did not invalidate proceedings conducted under the old rules. This proceeding is by no means the only one initiated before the adoption of the new rules and concluded after.

Respondents argue they should have a new hearing because the new rules permit depositions. The new ability of respondents to depose a limited number of witnesses does not automatically translate into admissibility of those depositions. *See* 17 C.F.R. § 201.235(a)(5). In addition to their own testimony, Respondents collectively presented fourteen witnesses and there was no limit on the number they could call. Mayer was allowed to put affidavits from several supporting witnesses into evidence. Initial Decision at 52; Tr. 5838-39.

The old rule allowed the admission of “relevant evidence” and directed the exclusion of evidence that is “irrelevant, immaterial or unduly repetitious.” 17 C.F.R. § 201.320 (2016). The new rule allows the admission of “relevant evidence” and directs the exclusion of evidence that is “irrelevant, immaterial, unduly repetitious, or unreliable.” 17 C.F.R. § 201.320(a). I do not consider the addition of the adjective “unreliable” to Rule 320 to be a significant change in the criteria for evidence because Section 556(d) of the Administrative Procedure Act already required that sanctions may not be imposed unless they are supported by “reliable” evidence. 5 U.S.C. § 556(d); *see* Final Amendments, 81 Fed. Reg. at 50,226 & n.41; Amendments to the Commission’s Rules of Practice, 80 Fed. Reg. 60,091, 60,095 & n.31 (Oct. 5, 2015).

Respondents cite to questions about statements Mr. Smith made in notes as an example of “unreliable evidence” that would have been excluded under the new rules.⁵ R&M Br. 7-8. I disagree; the notes are not unreliable. There was no doubt that Mr. Smith was the author. Tr. 4574-77. Law enforcement took the material from Smith’s home. Tr. 4574. The notes contained hearsay, but—in contrast to federal criminal proceedings—hearsay has always been allowed in Commission administrative hearings and is specifically allowed by the new rules, if certain conditions are met. *See* 17

⁵ Smith’s handwritten notes and a transcription are in evidence. Tr. 2948, 4574-75; Livingston Exs. 31-32.

C.F.R. § 201.320(b). In any event, I did not cite Mr. Smith’s notes, which predated the allegations in the OIP and did not involve any of the Respondents, in the initial decision, and the notes did not form the basis of my conclusions. *Accord United States v. McGinn*, 787 F.3d 116, 128 (2d Cir. 2015) (finding that, although manifestly erroneous to admit portions of the Smith notes in McGinn’s criminal trial “without context and without any limiting instruction”—neither of which was a defect in the admission of the notes in this administrative proceeding—the admission was nevertheless harmless error given the weight of the evidence).

A fuss about telephone testimony and affidavits from non-present witnesses arose early in the proceeding.⁶ Prehr’g Tr. 4-6 (Jan. 21, 2014); Tr. 6-7, 5837-38. Where there was opposition, my concern was that the opposing side have an opportunity to cross-examine the witness, which is reflected in the Rules.⁷ *See* 17 C.F.R. 201.235 (2016); Tr. 5837-38.

Mayer claims that the initial decision committed prejudicial error by stating in a footnote that “Mayer settled a customer complaint with FINRA for \$20,000” in 2003, implying that Mayer was responsible for the alleged violation and paid the settlement himself. Initial Decision at 48 n.63; *see* R&M Br. 9. But the initial decision accurately summarized the contents of Mayer’s BrokerCheck report with FINRA, which states a complaint for failure to supervise was settled on November 24, 2003, when Mayer was employed by Mercer Partner and McGinn, Smith & Company, Inc., for \$20,000 with an “individual contribution amount” of \$0. Div. Ex. 484 at 15. Omitting the amount of Mayer’s contribution—and Mayer’s explanation of the settlement, *see* Tr. 3248-52—was not prejudicial because the initial decision’s findings as to Mayer and the imposition of a sanction on him do not rely on the complaint or settlement. *See* Initial Decision at 105-06. I relegated the detail to a footnote precisely because I placed no weight on it for the reasons that Mayer urged. On these facts, I find Respondents’ claim of prejudicial error unpersuasive.

In summary, Respondents have not shown that the old rules or evidentiary rulings hindered them from mounting a defense to the allegations

⁶ Respondents wanted the affidavits introduced to show that they had many satisfied customers. Prehr’g Tr. 4-5 (Jan. 21, 2014). I took that as a given. Tr. 5837.

⁷ Affidavits were allowed into evidence where the affiants also testified at the hearing. *See* RMR Exs. 606, 609, 610, 616, 625; Tr. 4405-06, 4537-38, 5159-61, 5527-28, 5540-42, 5838-39.

or that the new rules would give them a significantly better opportunity to do so. A new hearing is not warranted, and I affirm my evidentiary rulings.

C. Statute of Limitations Issues

The Entire Proceeding Is Not Barred

After the initial decision was issued, the Supreme Court decided *Kokesh*, which held that the five-year statute of limitations in 28 U.S.C. § 2462 applies to SEC enforcement actions seeking disgorgement. In light of *Kokesh*, Respondents reiterate their claim, which I previously rejected, that the entire proceeding must be dismissed because “it is now clear that all of the relief sought by the Division is subject to Section 2462,” and the entire proceeding must be dismissed because every claim “first accrued” more than five years before the order instituting proceedings was issued.⁸ R&M Br. 4 n.1, 6; see Initial Decision at 89.

I found that Respondents had the requisite scienter to violate the antifraud provisions of the securities laws by February 1, 2008. Initial Decision at 115. Citing this conclusion, Respondents argue that “every claim in the [order instituting proceedings] is barred by Section 2462, because every claim first accrued before September 23, 2008.” Comm’n Oral Argument Tr. 6-7 (Aug. 15, 2017). The Court of Appeals for the Tenth Circuit addressed this issue in *Kokesh* after remand. The court held that, when violative conduct occurs both within and without the limitations period, the case turns on whether the conduct is “properly viewed as a continuing violation or as a number of discrete wrongs.” *SEC v. Kokesh*, No. 15-2087, 2018 U.S. App. LEXIS 6166, at *7 (10th Cir. Mar. 5, 2018).

Respondents continued to recommend and sell the fraudulent products after September 23, 2008. These sales were not a continuing omission or a violation dependent on cumulative conduct; each sale was a discrete wrong. The claims arising from Respondents’ violations are therefore not barred by § 2462. *Kokesh*, 2018 U.S. App. LEXIS 6166, at *14; see *Birkelbach v. SEC*, 751 F.3d 472, 479 (7th Cir. 2014) (“[A]ny violative conduct that falls within the statute of limitations is independently sanctionable, regardless of whether there was additional violative conduct which occurred before that time.”). Respondents apparently believe that as long as someone has been

⁸ Respondents had a standing objection throughout the hearing to any mention of transactions that occurred before September 23, 2008. Tr. 16; Initial Decision at 2 n.2.

committing the same violation of the securities laws for more than five years, that person is free to continue violating the law in the same manner indefinitely without fear of sanction. This is a nonsensical result and contrary to limitations periods' purposes of eliminating stale claims, promoting certainty, and avoiding surprise and unfairness. *See Gabelli v. SEC*, 568 U.S. 442, 448 (2013); *Kokesh*, 2018 U.S. App. LEXIS 6166, at *14-15.

The Impact of Kokesh on Disgorgement

The initial decision, as modified, ordered disgorgement of all commissions on sales made after February 1, 2008, the date by which Respondents had the requisite scienter to violate the antifraud provisions of the securities laws. Initial Decision at 115; *Anthony*, 2015 SEC LEXIS 1327, at *8-9. In my correction order, I rejected the Division's argument that disgorgement should be based simply on commissions received within the relevant period. *Anthony*, 2015 SEC LEXIS 1327, at *2-3.

The parties agree that *Kokesh* requires a reduction to the amount of disgorgement ordered in the initial decision, but they disagree about how to calculate the reduction, as shown in the following table:

	Chiappone	Mayer	Rabinovich	Lex	Livingston
Initial Decision (as modified)	\$59,471	\$29,518	\$109,695	\$169,375	\$700
Respondent's Proposal	\$23,329	\$16,591	\$53,119	No proposal	No proposal
Division's Proposal	\$44,328	\$22,429	\$90,529	\$88,926	\$700

Div. Ltr. 2, 5-7 (Aug. 7, 2017); Chiappone Ltr. 1 (July 17, 2017); R&M Ltr. 2 (July 10, 2017); *Anthony*, 2015 SEC LEXIS 1327, at *8-9. The Division argued that claims for disgorgement accrued when Respondents received their ill-gotten gains, which would include commissions received after September 23, 2008, for sales made before that date. Div. Ltr. 1-2 (Aug. 7, 2017). Respondents take the position that the date of sale is the only relevant date. *See, e.g.*, R&M Ltr. 1-2 (Aug. 9, 2017).

I agree with Respondents that disgorgement should be based on commissions earned on sales completed on or after September 23, 2008. The violations were completed—and the claims accrued—when the sales based on untrue statements or material omissions occurred. Receiving commissions is

not an element of the antifraud provisions of the securities laws. *See* 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

The initial decision used Division Exhibit 2 to calculate disgorgement. Exhibit 2 contains information on when commissions were received and when investor funds were paid into escrow. *See* Div. Ex. 2, at 57-69, 82-123. Because the hearing predated *Kokesh*, the focus was not on sale dates but some facts can be found in the record.

As noted, the Division proposed reducing Chiappone's disgorgement to \$44,328, while Chiappone proposed a reduction to \$23,329. Div. Ltr. 5 (Aug. 7, 2017); Chiappone Ltr. 1 (July 17, 2017). The difference between the parties is \$21,000 in commissions paid on October 15, 2008, related to sales of Fortress Trust.⁹ *See* Div. Ex. 2, at 69. As noted, the relevant date is the date of sales, and the parties dispute whether the sales were before or after September 23, 2008. Per the Division's Exhibit 2, the offering date of the Fortress Trust was September 24, 2008. *Id.* at 47. The Division's summary of sales chart shows that investor money for the Fortress Trust sales was deposited into the issuer's escrow account on September 23, 25, 26, 29, and 30, and October 1 and 7. *Id.* at 66; *see* Hr'g Tr. 239-40. Chiappone argues that the date the investor money was deposited does not reflect when a Respondent presented or sold a security to an investor. Chiappone Ltr. 2 (Aug. 10, 2017).

I agree with Chiappone. The Exchange Act defines purchase and sale broadly. Unless context otherwise requires, *buy* and *purchase* "include any contract to buy, purchase, or otherwise acquire" and *sale* and *sell* "include any contract to sell or otherwise dispose of." 15 U.S.C. § 78c(a)(13), (14). Liability under Exchange Act Section 10(b) and Rule 10b-5 may be premised on a valid, binding contract of sale; the actual transaction need not be consummated, and no money need change hands. *See Yoder v. Orthomolecular Nutrition Inst., Inc.*, 751 F.2d 555, 559 (2d Cir. 1985) (Friendly, J.). For this reason, the claims accrued when the subscription agreements were signed, not when the funds were deposited in escrow.

Some Fortress Trust subscription agreements, although none involving Chiappone's clients, were entered into evidence at hearing. *See* RMR Exs. 428, 446. These agreements show that the date of the funds in escrow lagged behind the signing of the subscription agreement. For example, Vincent de Paul O'Brien signed his Fortress Trust subscription agreement on September

⁹ The Division appears to have made an arithmetical error of one dollar. The result of the adding up the payments on the Chiappone table at page 5 of the Division's August 7 letter is \$44,329, not \$44,328.

23, 2008, but the corresponding entry on the Division's Exhibit 2 shows the funds were deposited on September 30, a week later. *Compare* RMR Ex. 428, at 12513, *with* Div. Ex. 2, at 112. Because so many of Chiappone's client's Fortress Trust deposits occurred within a week of September 23, *see* Div. Ex. 2, at 66, I cannot determine, on this record, whether the subscription agreements for Chiappone's Fortress Trust sales were signed on or after September 23, 2008, that is, within the five-year window for disgorgement. Therefore, I will not include the \$21,000 in Fortress Trust commissions in the disgorgement, and I accept Chiappone's figure of \$23,329.

As noted, the Division proposed that Mayer disgorge \$22,429; Mayer proposed \$16,591. Div. Ltr. 5 (Aug. 7, 2017); R&M Ltr. 2 (July 10, 2017). Mayer did not provide a calculation for his proposal, but the difference likely arises from \$6,000 in Fortress Trust commissions paid on October 15, 2008, an \$800 correction to commissions dated January 15, 2009, and \$638 from MSTF sales. *See* Div. Ltr. 5 (Aug. 7, 2017); Div. Ex. 2, at 114. The Division acknowledged that the MSTF sales occurred before September 23, 2008. Div. Ltr. 2 (Aug. 7, 2017). Thus \$638 must be excluded from the disgorgement amount.

In arguing against the inclusion of commission from the Fortress Trust sales, Mayer points to an email he sent an investor client on September 22, 2008, attaching the Fortress Trust private placement memorandum. R&M Ltr. 3 (Aug. 9, 2017); *see* RMR Ex. 178. This particular investor, however, signed the subscription agreement for \$50,000 on September 23, 2008, which is within the limitations period. *See* RMR Ex. 428, at 12513. The commissions based on this sale should be included in the disgorgement figure. There is insufficient evidence in the current record that the other two Fortress Trust sales for \$50,000 each took place on or after September 23, 2008. *See* Div. Ex. 2, at 112; Div. Ltr. 5 (Aug. 7, 2017). Accordingly, I will exclude \$4,000 of the \$6,000 in Fortress Trust commissions paid on October 15, 2008, account for these two sales.¹⁰ The end result reduces Mayer's disgorgement to \$17,791.

The Division's revised disgorgement for Rabinovich is \$90,529. Rabinovich has it at \$53,119. Div. Ltr. 6 (Aug. 7, 2017); R&M Ltr. 2 (July 10, 2017) Although Rabinovich does not explain how his calculation differs from

¹⁰ There is no evidence that the \$800 correction or reduction to Mayer's commissions, which occurred in January 2009, was related to these September 2008 transactions. Unlike Mayer, I do not remove this reduction from the calculation.

the Division's, it appears to be related to \$37,500 in Fortress Trust commissions based on sales for which investor money was deposited in the issuer's escrow account on September 29, 2008. *See* Div. Ltr. 2, 6 (Aug. 8, 2017). Those deposits occurred within a week of the limitations cutoff. Because there is no evidence in the record about when those sales were consummated, but there is evidence that it could take a week for funds to be deposited in escrow, I will not include those commissions in disgorgement.¹¹ Thus Rabinovich's disgorgement is reduced to \$53,029.

The Division proposed that Lex should disgorge \$88,926. Div. Ltr. 6 (Aug. 8, 2017). Lex did not argue to the Commission on appeal or to me on remand that this amount should be lowered further. But, since the Commission instructed me reconsider the entire record and all actions taken by me, I find that *Kokesh* requires that this amount be reduced for the reasons raised by Chiappone, Mayer, and Rabinovich. The Division's Exhibit 2 shows that Lex received \$16,200 in commissions from Fortress Trust sales in September 2008. Div. Ex. 2, at 102, 105. From the current record, it is not possible to determine whether the subscription agreements giving rise to these commissions were signed before or after September 23. Therefore I will exclude that amount from the disgorgement ordered and reduce Lex's disgorgement to \$72,726.

Livingston was ordered to disgorge \$700. This commission was well within the limitations period, no party has argued for any changes, and no revision is required. *See* Div. Ltr. 7 (Aug. 8, 2017).

I order Respondents to disgorge the following:

Chiappone	\$23,329
Mayer	\$17,791
Rabinovich	\$53,029
Lex	\$72,726
Livingston	\$700

¹¹ Given the Division's concession regarding the sale date for Mayer's MSTF commissions in February and September 2009, the period of uncertainty is actually far more than seven days. *See* Div. Ltr. 2 (Aug. 7, 2017). But Rabinovich's challenge appears limited to the October 15, 2008, Fortress Trust commissions, even though it is unclear from the record why he challenged only \$16,110 out of the \$16,200 in commissions.

These amounts are a reasonable approximation of profits causally connected to the violations and a reasonable approximation of Respondents' unjust enrichment during the limitations period. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

Kokesh Does Not Prohibit a Cease-and-Desist Order

Finally, I disagree with what I understand to be Respondents' position that *Kokesh* prohibits a cease-and-desist order because, in their view, it is a penalty based on actions that occurred before September 23, 2008. R&M Br. 6. The injunction is imposed based on Respondents' actions after September 23, 2008. Even if this were not the case, Respondents' reliance on the *Gentile* decision is misplaced. *See Gentile*, 2017 U.S. Dist. LEXIS 204883, at *8-11. The holding of this single district court that an "obey the law" injunction is a penalty is not persuasive and is at odds with the weight of authority on this issue. *See SEC v. Collyard*, 861 F.3d 760, 764-65 (8th Cir. 2017) (holding that the obey-the-law injunction imposed by the district court was not a penalty); *SEC v. Graham*, 823 F.3d 1357, 1360-62, 1364 (11th Cir. 2016) (holding, prior to *Kokesh*, that disgorgement is subject to § 2462 but a cease-and-desist injunction is not).

D. Securities Industry Bars and Suspensions

Impact of Bartko on the Sanctions Ordered

As noted, the initial decision barred Lex and Livingston and suspended Chiappone, Guzzetti, Mayer, and Rabinovich from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. Initial Decision at 113. This broad associational bar, called a collateral or industry bar, was authorized by the Dodd-Frank amendments to the securities laws. *See* Dodd-Frank § 925, 124 Stat. at 1850-51. After the initial decision was issued, the Court of Appeals for the D.C. Circuit held that this collateral bar cannot be imposed based on conduct that took place before Dodd-Frank's effective date of July 22, 2010. *Bartko*, 845 F.3d at 1223-24. Prior to Dodd-Frank, bars or suspensions were available only when the Commission could establish an "industry-specific nexus." *Teicher v. SEC*, 177 F.3d 1016, 1020 (D.C. Cir. 1999).

The parties agree that, under *Bartko*, Respondents may not be barred or suspended from the municipal securities dealer, municipal advisor, transfer agent, or statistical rating organization categories. *See* Div. Ltr. 3 (Aug. 7, 2017). And, although Respondents argue that no bars or suspensions are necessary and in the public interest, the parties agree that the holding of *Bartko* does not alter the analysis for the broker-dealer category. *See* R&M

Ltr. 3 (July 10, 2017); Chiappone Ltr. 2 (July 17, 2017). In dispute is whether a bar or suspension from associating with an investment adviser may be imposed.

Rabinovich and Mayer assert that the allegations in the order instituting proceedings and the evidence presented at the hearing concerned securities law violations in their capacities as registered representatives of a broker-dealer and not as registered investment advisers. R&M Ltr. 3 (July 10, 2017); R&M Ltr. 3-4 (Aug. 9, 2017). They are correct that in the initial decision I found violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Initial Decision at 97. Although the OIP instituted the proceeding under Section 203(f) of the Advisers Act and authorized sanctions under that statute, it did not allege independent violations of the Advisers Act. *See* OIP at 1, 13-14.

But contrary to Respondents' assertion, it is not necessary for the securities law violation to be causally connected to activity as an investment adviser. Under even the pre-Dodd-Frank version of Section 203(f) of the Advisers Act, a sanction may be imposed on a person, who was, "at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser," and who "has willfully violated any provision of . . . the Securities Exchange Act of 1934." 15 U.S.C. § 80b-3(e)(5), (f) (2006). And it is not even a requirement that the person was associated with an investment adviser at the time of the Exchange Act violation. A person associated or seeking to become associated with an investment adviser can face discipline for misconduct prior to the association. *Id.* § 80b-3(f); *see Teicher* 177 F.3d at 1020-21 (noting that the statutory scheme leads "in the aggregate to a tailoring of sanctions fitted either to a looming menace (the person's being in or seeking to get into a branch of the industry), or to a malfeasance committed while in a branch").

Rabinovich, Mayer, and Guzzetti were associated with McGinn, Smith Advisors, LLC, a registered investment adviser, during the time of the misconduct. Rabinovich was an investment adviser representative with McGinn, Smith Advisors from 2006 to 2009. Tr. 1912; Div. Ex. 485, at 7. Mayer was also associated with McGinn, Smith Advisors from 2006 to about October 2009. Tr. 3241-42; *see* Div. Ex. 484, at 7.¹² Guzzetti testified that he headed McGinn, Smith Advisors and had passed the Series 65 investment adviser law examination. Tr. 2963; *see* Div. Ex. 481, at 7 (listing his

¹² Mayer and Rabinovich's clients also considered them their investment advisers. *See, e.g.,* Tr. 892 (Mayer); Tr. 4388 (Rabinovich).

employment dates with McGinn, Smith Advisors as February 2006 to April 2009). Rabinovich, Mayer, and Guzzetti were therefore associated persons during the time of the wrongful conduct and within the limitations period.¹³ In October or November 2009, Rabinovich and Mayer formed their own registered investment adviser, RMR Wealth Management, and this association continues to the present. See Tr. 1912-13, 3241-42; Div. Ex. 484, at 7; Div. Ex. 485, at 7; R&M Br. 9; FINRA, *BrokerCheck Report Philip S. Rabinovich CRD# 3232299*, at 5 (2017), https://files.brokercheck.finra.org/individual/individual_3232299.pdf; FINRA, *BrokerCheck Report Brian Todd Mayer CRD# 2640631*, at 5 (2017), https://files.brokercheck.finra.org/individual/individual_2640631.pdf.¹⁴ Guzzetti is currently registered with DLG Wealth Management. See Div. Ex. 481, at 7; FINRA, *BrokerCheck Report Andrew Gregory Guzzetti CRD# 1222508* at 4 (2017), https://files.brokercheck.finra.org/individual/individual_1222508.pdf. The required industry nexus to an investment adviser is satisfied for Guzzetti, Mayer, and Rabinovich.

The purported association of Chiappone, Lex, and Livingston with an investment adviser is more tenuous. The Division argues industry nexus requirement is satisfied because they were registered representatives of McGinn, Smith & Company, and it was a dual registered broker-dealer and investment adviser from April 2009 to March 2010. Div. Ltr. 3 (Aug. 7, 2017). But no testimony was elicited at the hearing about Chiappone, Lex, or Livingston acting as investment advisers and no evidence was submitted regarding McGinn, Smith & Company's dual registration as a broker-dealer and investment adviser. The only support the Division points to are the answers of Rabinovich, Mayer, and Chiappone, which admitted the allegation in the OIP that McGinn, Smith & Company was an investment adviser. Rabinovich Answer at 12; Mayer Answer at 12; Chiappone Answer at 3; see OIP at 3. But Lex and Livingston's answers denied that allegation. Lex

¹³ In the initial decision, I noted that associational bars are subject to 28 U.S.C. § 2462, "when, as here, the bars would be imposed punitively rather than remedially." Initial Decision at 89 (citing *Johnson v. SEC*, 87 F.3d 484, 489-92 (D.C. Cir. 1996)). The same is true for a suspension. See *Johnson*, 87 F.3d at 488-92. Therefore, any associational bar or suspension imposed herein is based on violations occurring on or after September 23, 2008.

¹⁴ I may take official notice of the records of the Financial Industry Regulatory Authority, Inc., including these BrokerCheck reports. See *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. denied*, 575 F. App'x 1 (D.C. Cir. 2014); 17 C.F.R. § 201.323.

Answer at 1-2; Livingston Answer at 3; *see* 17 C.F.R. § 201.220(c) (2016) (“A statement of lack of information shall have the effect of a denial.”). The Advisers Act defines “person associated with an investment adviser” to include “any employee of such investment adviser.” 15 U.S.C. § 80b-2(a)(17). Chiappone’s admission is enough to bring him within that definition. *See* 17 C.F.R. § 201.220(c). But the admissions of other Respondents are scant evidence that Lex or Livingston acted as investment advisers or were employed by one. On this record, I am unwilling to impose an associational bar on Lex or Livingston under Section 203(f).

Public Interest Factors

In light of the changes required by *Bartko* and considering the evidence produced by some Respondents that they have worked in the securities since the initial decision without incident or further violations, it is appropriate to reconsider my public interest analysis. The *Steadman* factors are useful to determine whether a sanction is in the public interest. They are the egregiousness of the respondent’s actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent’s assurances against future violations; the respondent’s recognition of the wrongful nature of his conduct; and the likelihood that the respondent’s occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981).

Respondents stress that sanctions limiting their activities in the securities industry are not required because their activities after the events at issue show that they do not present a danger to the investing public. Chiappone has not sold a private placement since late 2009. Chiappone Br. 3, *Aff.* at 2. Lex claims to no longer be in the securities business. *See* Lex Post-hr’g Br. 102. Mayer and Rabinovich have been running a registered investment advisory firm that does not sponsor private placements or mutual funds. R&M Br. 9.

I reject Respondents’ argument because the likelihood that a respondent’s occupation will present opportunities for future violations is but one of the *Steadman* factors. Respondents emphasize that they no longer sell private placements. The type of security is not determinative; what is determinative is that Respondents violated the antifraud provisions of the securities statutes. All aspects of the securities industry present opportunities for fraud, not just private placements. Without some restraint on their activities there is nothing to prevent Respondents from reverting to the activities that caused considerable harm to investors. *See SEC v. Youmans*, 729 F.2d 413, 415-16 (6th Cir. 1984) (recognizing that “change of occupation, without more,”

does not preclude injunctive relief because the enjoined individual “may change jobs at any time”); *Thomas J. Donovan*, Exchange Act Release No. 52883, 2005 SEC LEXIS 3126, at *22 (Dec. 5, 2005) (noting that, where respondent “has significant securities experience,” he could “consider returning to the industry if permitted to do so”). In this remand process, no evidence or argument has disproved my conclusion in the initial decision that Respondents’ violations were “recurrent” and that, “[d]espite the blatant failures by Respondents, no Respondent evidenced an understanding that their” his failure to investigate or supervise “involved wrongdoing.” Initial Decision at 113.

Ruling

I have reconsidered the record, including all my substantive and procedural actions, and have fully considered the parties’ submissions. Except for the changes indicated above and ordered below, I RATIFY all the actions that I have taken in this proceeding. The process contemplated by the Commission’s November 30, 2017, order is complete.

I AMEND the ordering paragraphs in the Initial Decision, as modified, to reflect the following changes. The other ordering paragraphs remain unchanged.

I ORDER that pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, and Section 203(f) of the Investment Adviser Act of 1940:

William F. Lex and Thomas E. Livingston are barred from association with a broker or dealer;

Frank H. Chiappone, Andrew G. Guzzetti, Brian T. Mayer, and Philip S. Rabinovich are suspended for twelve months from association with an investment adviser, broker, or dealer.

I FURTHER ORDER that, pursuant to Section 8A(e) of the Securities Act of 1933, and Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, that:

Frank H. Chiappone shall disgorge \$23,329; William F. Lex shall disgorge \$72,726; Thomas E. Livingston shall disgorge \$700; Brian T. Mayer shall disgorge \$17,791; and Philip S. Rabinovich shall disgorge \$53,029.

Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), shall be compounded quarterly, and shall run from

November 1, 2009, through the last day of the month preceding the month in which payment of disgorgement is made.¹⁵ 17 C.F.R. § 201.600.

Brenda P. Murray
Chief Administrative Law Judge

¹⁵ I deem the last violation as having occurred no later than October 15, 2009—the date of the last relevant commission payment. *See* Div. Ex. 2, at 69, 105-06, 109, 115, 123. Prejudgment interest shall run from the first day of the following month. 17 C.F.R. § 201.600(a). I deem this appropriate and less burdensome than calculating prejudgment interest separately for each violation.