SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 10119 / August 10, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 78532 / August 10, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4476 / August 10, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32210 / August 10, 2016

Admin. Proc. File No. 3-15737

In the Matter of the Application of

THOMAS C. GONNELLA

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Aiding and Abetting Books and Records Violations

Respondent, who was associated with a dually registered broker-dealer and investment adviser, committed fraud when he prearranged to sell and then quickly repurchase aged bonds in his trading book to convey a false appearance of compliance with his firm's aged inventory policy and avoid nonrefundable charges to his trading profits he would have incurred had he held onto the aged bonds. Respondent also aided, abetted, and caused his firm's recordkeeping violations. *Held,* it is in the public interest to impose an industry bar, including a penny stock bar and bar from serving or acting in certain capacities with respect to an investment company, with a right to reapply after five years; to enter a cease-and-desist order; and to assess a civil money penalty of $82,500.

APPEARANCES:

Andrew J. Frisch and Jeremy B. Sporn, of The Law Offices of Andrew J. Frisch, for Thomas C. Gonnella.

Nicholas A. Pilgrim and Daniel Michael, for the Division of Enforcement.

Appeal filed: December 4, 2014
Last brief received: March 20, 2015
Oral argument: July 22, 2016

This case concerns a series of trades executed in 2011 by Thomas C. Gonnella, a proprietary trader at Barclays who was responsible for trading about $300 million of Barclays's capital. Gonnella agreed with another trader to sell to that trader—and then quickly repurchase from him, at an increased price—certain aged, illiquid asset-backed securities ("ABS"). Gonnella arranged these transactions to convey to Barclays a false appearance of compliance with the firm's policy that ABS should not be held for long periods of time, and to circumvent the firm's rule that imposed nonrefundable charges on traders' trading book profits when ABS were held for longer than seven months.

The law judge found that Gonnella's prearranged sale-and-repurchase transactions violated the antifraud provisions of the federal securities laws and aided, abetted, and caused Barclays's violations of books and records provisions. The law judge suspended Gonnella from the securities industry and from participation in penny stock offerings for twelve months, entered a cease-and-desist order, and assessed a civil money penalty of $82,500.[1] The Division appeals the suspension, and Gonnella cross-appeals the findings of violations and sanctions imposed.

Based on our independent review of the record, we find that Gonnella willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5.[2] We also find that Gonnella willfully aided, abetted, and caused Barclays's failure to keep accurate books and records, in violation of Exchange Act Section 17(a) and Exchange Act Rule 17a-3(a)(2).[3] We find that it is in the public interest to bar Gonnella from the securities industry and from participation in penny stock offerings with a right to reapply in five years, impose a cease-and-desist order, and assess $82,500 in civil money penalties.

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1 *Thomas C. Gonnella*, Initial Decision Release No. 706, 2014 WL 5866859 (Nov. 13, 2014).

2 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

3 15 U.S.C. § 78q(a); 17 C.F.R. § 240.17a-3.

I. Facts

A. Gonnella traded esoteric ABS.

From October 2008 until his termination in November 2011, Gonnella worked as a bond trader in Barclays's New York City office where he specialized in trading esoteric ABS.[4] These securities are traded over-the-counter by a limited number of market participants. Because they are relatively illiquid, and there is little price transparency in the market, the spreads between the bid and ask prices for these securities are not easily definable and are relatively wide.

Barclays entrusted Gonnella to invest up to $300 million of the firm's capital. His trading profits for Barclays in 2011, before he was terminated, were approximately $17 million. Gonnella's annual compensation consisted largely of a bonus that was based in part on the profitability of his trading book and his ability to manage risk. In 2009, Gonnella received a base salary of $85,000 and a bonus of $365,000. In 2010, he received a base salary of $95,000 and a bonus of $900,000. In 2011, Gonnella's base salary was $105,000, and he did not receive a bonus before he was terminated.

B. Barclays maintained and enforced an aged inventory policy intended to reduce risk.

Barclays maintained an aged inventory policy (the "Policy") intended to deter proprietary traders from holding securities for long periods of time. The Policy served an important risk-management function: It ensured both that traders did not engage in long-term strategies that were inconsistent with firm objectives or applicable regulations, and that a trader's securities valuations reflected prevailing market prices. Gonnella's supervisor explained that a trader's failure to accurately value a security could expose Barclays to hidden losses and cause it to violate rules governing valuations.

The Policy did not require traders to sell securities after they were held past a certain date; rather, it encouraged these sales by providing that traders would incur charges to their trading book's profits if they held onto aged securities. After three months, a trader would be charged a monthly fee equivalent to 0.5% of the aged security's market value. The charges would be refunded and added back to the profits reflected on the trading book if the trader sold the security within seven months, but the charges became irreversible at the end of the seventh month.

Gonnella testified that he was familiar with the Policy and understood how it worked. He confirmed that, throughout the relevant period, he understood that he would incur irreversible charges if he held onto bonds for more than seven months. He also confirmed that he was

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[4] The Exchange Act defines ABS as "a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, lease, mortgage, or other secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset." 15 U.S.C. § 78c(a)(79). Esoteric ABS are ABS backed by unusual assets such as timeshare rentals, shipping containers, and entertainment royalties.

familiar with the age of the bonds he had purchased: Each month, he received and reviewed an email detailing how long he had held each security and itemizing the charges he would incur at the end of that month.

Gonnella also understood that Barclays prohibited its traders from executing prearranged trades. Barclays referred to such trades as "parking," which Barclays defined as —"[h]olding or hiding securities in a trading account, customer account, a fictitious account, or another firm" and engaging in "[t]rades that lack a real shift in ownership risk or benefit, with the purpose of concealing the true ownership of the securities, particularly at the end of a reporting period." The firm's policy provided that:

> A trader or salesperson shall not pre-arrange the availability of bonds or the specific repurchase price of a security in order to re-establish a position for a customer or the Trading Desk. Any sale or purchase of bonds that includes an agreement to repurchase or resell a security must be completely documented at the time of the initial transaction. In any such transaction, an agreement to a price for a second leg of the trade, which is not a market price, will be presumptively improper. . . .
>
> If the circumstances of a proposed transaction appear to involve questions that give rise to concerns of impropriety, the transaction must not be undertaken until it has been reviewed by the Trading Manager and by Compliance.

Other Barclays policies prohibited traders from guaranteeing a customer against loss in any securities transaction without obtaining management approval or representing to a customer that Barclays would resell or repurchase securities in order to induce a customer to buy a security. Gonnella testified that he was aware of these policies, had access to them on the firm's intranet, and certified annually that his business activities fully complied with all of Barclays's policies and applicable laws and regulations.

C. Gonnella prearranged to sell and then quickly repurchase aged bonds in order to convey the false impression that he unloaded his inventory within seven months.

Between May 31, 2011 and November 3, 2011, Gonnella engaged in 12 prearranged sets of trades—sales to, followed by repurchases from, the same counterparty—to circumvent the Policy. In each set of trades, Gonnella prearranged to sell bonds nearing the seven-month deadline to a trader at a different firm on the understanding that (using Barclays's capital) he would then quickly repurchase the bonds at a higher price.[5] Gonnella testified that he arranged

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[5] Nine of the bonds were issued by Bayview Commercial Trust ("BAYC") and generally were backed by small balance commercial mortgage loans. One of the bonds was issued by CBA Trust ("CBAC") and was backed by small balance mortgage loans. Another bond was issued by Lehman Brothers ("LBSBC") and was backed by small balance commercial real estate loans. A final bond was issued by Pegasus Aviation Lease Securitization Trust ("PALS") and was backed by aircraft leases.

these transactions for "the sole purpose" of making it appear that none of his bonds had been on his book longer than seven months, thereby avoiding the irreversible charges he would have otherwise incurred.

Gonnella's counterparty for these trades was Ryan King, a trader at the now-defunct broker-dealer Gleacher & Company Securities, Inc. ("Gleacher"). Apart from trading with Gonnella, King had no experience or interest in trading esoteric ABS. He testified that his knowledge of the esoteric ABS market was "surface at best" and that he lacked access to information about market participants and pricing. He was not in a position to negotiate bond pricing, and Gonnella always dictated pricing for both legs of each transaction.

While King was "technically" free to sell the bonds to a third-party, he understood that, pursuant to his agreement with Gonnella, he was to hold the bonds until Gonnella repurchased them. He explained that the agreement worked as a "two-way street": Gonnella "sells [the bonds] to me, and I have the understanding he's going to buy them back, but it's also he's selling them to me under the impression that I will sell them back to him." King testified that, practically speaking, he did not think he could have resold the bonds to anyone other than Gonnella. His lack of familiarity with the market did not concern him; as long as he knew Gonnella would "buy[]them back, [he] didn't even think about it." Indeed, he viewed the trades as "essentially riskless": Because Gonnella committed to repurchase the bonds for more than what King had paid to buy them, regardless of market prices, the transactions effectively allowed King to earn a quick—and guaranteed—profit.

1. The May 2011 trades

On May 31, 2011, Gonnella contacted King via Bloomberg instant message. Gonnella wrote that he had "4 small bonds that i'm looking to turnover today for good ol' month end/aging purposes." Gonnella admitted that he offered the bonds to King because he wanted to avoid the aged inventory charges.

King agreed to the transaction. He testified that he was "[i]ncredibly sure" Gonnella would repurchase the bonds. King was also "100 percent certain" that the repurchase prices would be higher than the original sale prices.

King explained that he and Gonnella used "coded language" when arranging these trades because they knew their firms could monitor their work phones, e-mails, and Bloomberg chats. King understood that by using this language, Gonnella sought to "avoid the appearance that this was a predetermined trade or a roundtrip trade, when, in fact, it was."

As he was arranging the transaction, Gonnella received an e-mail from his supervisor instructing him to reduce his exposure to small loan ABS, which included the very bonds he was discussing with King. Although Gonnella notified his supervisor of the trade after King agreed to purchase the bonds, he did not disclose the repurchase arrangement. Gonnella's supervisor testified that had he been aware of this arrangement, he would have told Gonnella not to execute the trade.

A day later, Gonnella repurchased the bonds from King for one point more than King had paid. The trades resulted in a gain to Gleacher of approximately $23,000,[6] and enabled Gonnella to avoid approximately $22,000 in irreversible aged inventory charges. King confirmed that the timing of and higher prices for the repurchases were "entirely what [he] expected" given his understanding of how these "essentially riskless" transactions would work.

2. The August and September 2011 trades

Gonnella initiated eight more sets of prearranged trades while his supervisor was on a two-week vacation at the end of August 2011. His supervisor had reminded Gonnella to continue to reduce risk in his trading book before he left.

On August 29, Gonnella contacted King via Bloomberg chat to offer "some aged bonds . . . if you're game . . . maybe do what we did a few months ago." King understood that Gonnella wanted "to reset the clock" on some of his bonds. The following day, August 30, Gonnella presented him with three bonds that were approaching Barclays's seven-month deadline. King asked Gonnella when he expected "to purchase something similar"—*i.e.* when did he intend to repurchase the bonds. Gonnella confirmed that he would "[m]ost likely" repurchase by the end of the week. King was "100 percent" certain that he and Gonnella had a "gentleman's agreement" whereby Gonnella would again repurchase the bonds at higher prices within a short time period. Later on August 30, King agreed to an additional purchase. As to the terms of the transaction, Gonnella told King, "Same situation . . . thx."

The next day, August 31, Gonnella contacted King via Bloomberg chat, offering "a swap prop for you." That "swap," King learned, entailed Gonnella repurchasing two bonds from King while selling King five additional bonds. King agreed to the "swap" understanding that Gonnella would buy back each of the five additional bonds at a higher price "when the month changed." As before, King and Gonnella did not negotiate the price for either the sale or the repurchase. The repurchases netted Gleacher approximately $49,000 and allowed Gonnella to avoid an estimated $113,000 in charges. Two days later, Gonnella repurchased the additional five bonds King had bought in the "swap." Gleacher netted another $84,000, and Gonnella avoided approximately $190,000 in charges.

Four of the five bonds Gonnella sold to King on August 31 and repurchased on September 2 triggered alerts in Barclays's internal monitoring system. That system generated an alert if, near the end of a month, transactions occurred in which "approximately the same quantity" of a security was bought and sold "with the same counterparty." After a Barclays compliance officer investigated, Gonnella falsely claimed that he had sold the bonds to Gleacher because "Gleacher deals with many regional counterparties" and Gonnella had been "hoping to

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[6] Gonnella's trading book did not incur a corresponding loss even though he repurchased the bonds at a higher price from King. As Gonnella testified, when he sold the bonds to King, his trading book recorded a profit based on the difference between the sale price and the price he had marked the bonds in his book. But, when he repurchased the bonds, he simply marked them at the new purchase price.

get more individuals involved in the bonds." Gonnella also falsely told the compliance officer that he decided to repurchase the bonds on September 2, 2011 because he was "confident that [he] could package some of them together and make them attractive to investors." Gonnella did not disclose his arrangement with King or the fact that the sales were made to avoid aged inventory charges.

The compliance officer testified that, had Gonnella provided full and accurate information about the August trades, Gonnella would have been terminated. The compliance officer confirmed that a trader was not permitted to make a trade at month's end only "to get [a] bond off of his book, and then . . . bring it back onto the book to restart the clock for the aged inventory policy." Such an arrangement would constitute prohibited "parking" under Barclays's policy. Gonnella's supervisor also saw no legitimate reason for the August trades. While Gleacher "made money at Barclays's expense," the supervisor testified, Barclays "was left with the same securities."

In early September, King still held a $19.65 million bond that Gonnella had sold to him on August 30, 2011 ("the August Bond"). On September 7, Gonnella repurchased $12 million of the August Bond, resulting in a profit to Gleacher of approximately $14,000.

3. The October and November 2011 trades

In response to King's inquiries about when Gonnella would repurchase the remaining $7.65 million of the August Bond, Gonnella acknowledged his obligation and assured King that he would do so in October. On October 11, King asked Gonnella via Bloomberg chat if he could complete the repurchase by October 13. Gonnella sent King a text from his personal cell phone[7] in which he proposed a "package" bid: King would buy more aged bonds that Gonnella would later repurchase along with the remainder of the August Bond. Although Gonnella proposed to repurchase the remainder of the August Bond at a loss to Gleacher, he offered to make other trades at prices that would offset Gleacher's loss. King agreed and confirmed the prearranged trades and told Gonnella he would need them to take place by October 28.

On October 11, 2011, King bought two bonds set to incur irreversible charges at the end of October, believing that those bonds and the outstanding August Bond would be repurchased by October 28. On October 26, Gonnella offered to repurchase one of the two new bonds and assured King that he would soon turn to the other repurchases. King agreed. Gleacher realized a profit of approximately $216,000 on the repurchase and Gonnella avoided an estimated $30,000 in aged inventory charges.

That same day, October 26, Gonnella's supervisor noticed Gonnella's repurchase of the bond. He told Gonnella that the trade "didn't look good" and asked for an explanation, since the

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[7] Barclays prohibited the use of personal cell phones to conduct firm business, and Gonnella testified that he knew that his use of his personal cell phone to contact King was prohibited by Barclays.

repurchase contravened his prior instruction to reduce risk by selling these bonds. Gonnella repeated to his supervisor what he previously had told Barclays's compliance officer—that he repurchased the bond because he thought he could sell it to another customer at a higher price. Gonnella omitted that he had made the trade (and others) to avoid Barclays's aged inventory charges and that he had arranged additional trades as part of a package deal to make King whole for Gleacher's loss on the August Bond. Gonnella's supervisor accepted Gonnella's false explanation but cautioned that he would be monitoring Gonnella's trading to make sure that Gonnella sold the bond that Gonnella had repurchased on October 26.

That evening, Gonnella and King spoke on their personal cell phones. King testified that Gonnella said that "somebody at Barclays had noticed" the trade and "was asking questions" and that he might not be able to buy back the remaining bonds. King was "stunned" by this news.

Gonnella testified that, the following morning, his supervisor told him that, on second thought, the trades were "fine," but Gonnella should not "do it again." Gonnella interpreted this instruction to mean that he should not sell seven-month-old bonds and then buy them back shortly thereafter from the same counterparty. Gonnella did not believe that this instruction precluded him from repurchasing the remaining bonds that King was holding.

Meanwhile, that same morning, King spoke to his supervisor and "told him everything," *i.e.*, the full nature of his prearranged trades with Gonnella, and that Gonnella was no longer certain he could repurchase the two remaining bonds. King's supervisor was upset and instructed King to give Gonnella an ultimatum: repurchase the two bonds or King's supervisor would call Gonnella's supervisor and "then you guys are both going to be out of business." King's supervisor also directed that the repurchases be routed through an intermediary. Minutes later, King conveyed the ultimatum to Gonnella via their personal cell phones.

Later that day, Gonnella repurchased one of the two remaining bonds that King held. This repurchase netted Gleacher approximately $227,000 and allowed Gonnella to avoid an estimated $79,000 in irreversible charges. Several days later, on November 3, Gonnella repurchased from King his last outstanding bond—the remainder of the August Bond. He avoided an estimated $292,000 in charges in the process. Each of the last two repurchases was routed through an interdealer broker.

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After the October 26 repurchase, Gonnella's supervisor reviewed Gonnella's trading history and discovered the prearranged trades that had occurred while he was on vacation. Approximately two weeks later, he and Gonnella attended Barclays's annual compliance training. Barclays's compliance officer testified that the training reiterated to employees that it was "strictly prohibited to avoid [the Policy] by selling a security to a client with an agreement to repurchase later," that this prohibition was not new, and that Barclays had provided similar guidance to employees in prior years.

Following the training session, Gonnella's supervisor alerted Gonnella that he intended to raise his concerns about Gonnella's trades to senior management. Only after learning this,

Gonnella approached Barclays's compliance officer to ask if he recalled the trades that had triggered alerts in Barclays's monitoring system. The compliance officer did; Gonnella then told him that his supervisor was concerned about the trades and asked the compliance officer to speak with the supervisor. Barclays's senior management thereafter interviewed Gonnella, who repeated his explanation that he repurchased the bonds from King because he believed he could sell them to other customers at better prices. Again, Gonnella omitted his arrangement with King and the true purpose of the transaction.

Barclays did not accept Gonnella's explanation and, on November 21, 2011, terminated Gonnella for cause. According to Barclays's Form U5 (Uniform Termination Notice), Gonnella was terminated for "loss of confidence involving activity related to internal policy for inventory holding periods."[8] The following month, King was terminated by Gleacher.

In total, Barclays paid approximately $111,000 more to repurchase the twelve bonds at issue than it received when it originally sold them to Gleacher. By nominally "selling" the bonds at issue before Barclays's seven-month deadline, Gonnella avoided incurring an estimated $726,000 in irreversible aged inventory charges.

II. Analysis

We find that Gonnella violated the antifraud provisions of Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rule 10b-5(a) and (c)[9] and aided, abetted, and caused Barclays's failure to keep accurate books and records in violation of Exchange Act Section 17(a) and Exchange Act Rule 17a-3.[10]

A. Gonnella committed fraud by engaging in prearranged trades in order to convey the false appearance of compliance with Barclays's aged inventory policy.

Securities Act Section 17(a)(1) makes it unlawful for any person "directly or indirectly" in the "offer or sale of any securities" and by the use of any means or instrumentality of interstate commerce to "employ any device, scheme or artifice to defraud."[11] Exchange Act Section 10(b) similarly makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails" "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of" Commission rules.[12] Exchange Act Rule 10b-5 implements Section 10(b).

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8 From February 2012 to February 2014, Gonnella was associated with KGS-Alpha Capital Markets, L.P., a registered broker-dealer, where he worked as the head trader on its ABS desk. Gonnella has not worked in the industry since February 2014.

9 15 U.S.C. §§ 77q(a)(1), 78j(b); 17 C.F.R. § 240.10b-5(a), (c). In light of this finding, we need not determine whether Gonnella also violated Securities Act Section 17(a)(3).

10 15 U.S.C. § 78q(a); 17 C.F.R. § 240.17a-3.

11 15 U.S.C. § 77q(a)(1).

12 15 U.S.C. § 78j(b).

Rule 10b-5(a) prohibits "employ[ing] any device, scheme, or artifice to defraud."[13] And Rule 10b-5(c) prohibits "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[14]

Liability under these provisions requires scienter, "a mental state embracing [an] intent to deceive, manipulate, or defraud."[15] It may be established by recklessness, "an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it."[16] Scienter may be demonstrated by circumstantial evidence.[17]

1. Gonnella employed a deceptive device, scheme, and artifice to defraud and engaged in a deceptive act, practice, and course of business that operated as a fraud.

Gonnella's conduct—numerous prearranged transactions executed at prices he set, solely to convey a false appearance of compliance with Barclays's aged inventory policy and avoid charges to his trading book—constituted a deceptive device, scheme, and artifice to defraud,[18] as well as a deceptive act, practice, and course of business that operated as a fraud,[19] in violation of Section 17(a)(1) and Rule 10b-5(a) and (c).[20]

Gonnella acted deceptively by conveying a false appearance of compliance with Barclays's aged inventory policy, thereby misleading Barclays about how long he had held a position in the relevant bonds and the degree of risk to the firm as a result of those trading positions.[21] Gonnella made it appear as though he was disposing of positions and acquiring new positions through bona fide trades; what he was actually doing was engaging in prearranged trades at prices he set in order to retain his ownership of the bonds without incurring charges to his trading book's profits or changing his long-term trading strategy for those bonds.

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13 17 C.F.R. § 240.10b-5(a).

14 17 C.F.R. § 240.10b-5(c).

15 *Aaron v. SEC*, 446 U.S. 680, 686 n.5, 691 (1980) (citation omitted).

16 *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) (citation omitted).

17 *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983).

18 *See SEC v. Clark*, 915 F.2d 439, 448 (9th Cir. 1990) (noting the breadth of the terms "'fraud,' 'deceit,' and 'device, scheme, or artifice'").

19 *See In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 504 (S.D.N.Y. 2005) (noting that "acts, practices, or courses of business that would operate as a fraud or deceit" encompass "inventions, projects or schemes with a tendency to deceive").

20 Gonnella does not dispute that his use of the telephone and Bloomberg instant message satisfies the requirement that he used a means or instrumentality of interstate commerce.

21 *See United States v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008) (stating that deceptive conduct "irreducibly entails some act that gives the victim a false impression").

This deception was not, as Gonnella argues, insignificant. The Policy was designed to reduce risk by ensuring that a trader's valuation for a security reflected the prevailing market price at which he could buy and sell the security. Violations of the Policy exposed Barclays to the risk of holding securities that are overvalued or undervalued. When he repurchased the bonds from King, Gonnella marked them at prices that he set— these "purchases" were not bona fide market transactions and did not reflect prices set through arms-length negotiation. Barclays also suffered a loss as a result. Gonnella's conduct, therefore, undermined a crucial risk management tool necessary to mitigate potential losses associated with proprietary trading. His conduct also affected Barclays's regulatory obligations, by rendering it more likely that the bonds would ultimately be valued inaccurately on Barclays's books and records.

Gonnella argues that his conduct was not deceptive and did not effect a fraud on Barclays because he "made no effort to hide" what he was doing and made it "clear . . . that his undisguised purpose was to move securities to comply with" the Policy.[22] We reject this characterization of his conduct.[23] When Gonnella repurchased the bonds at a higher price than King had paid for them, he was essentially paying a fee for King's services. Thus, as a result of Gonnella's course of conduct, Barclays was defrauded into effectively paying a premium to continue to hold onto securities that, by virtue of their age, it discouraged its traders from holding. If he was simply attempting, in good faith, to comply with the Policy, he would have sold the aged bonds without arranging to quickly repurchase those same bonds at a loss to Barclays. The fact that Gonnella's admitted purpose in selling to King was to repurchase—often within days—the very aged bonds the Policy was intended to deter him from holding confirms that his trades did not reflect an attempt to *actually* comply with the Policy. Rather, the trades were an attempt to *appear* to comply with the Policy so that Gonnella could avoid incurring irreversible aged inventory charges while maintaining the bonds in his portfolio.

Gonnella also argues that the transactions were not fraudulent because they were bona fide sales and he was not obligated to repurchase the bonds from King. But the sales were not bona fide; rather, they were "contrived transactions designed to [temporarily] remove securities from the firm's inventory."[24] And whether the sales were bona fide in the sense that the trades settled and the risk of ownership (briefly) passed to Gleacher makes no difference—Gonnella engaged in fraudulent conduct by prearranging to sell and repurchase the bonds, at prices that he

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[22] Gonnella contends that emails to other potential counterparties in which he stated that he was looking to sell bonds to avoid aged inventory charges establish that there was no deception because the emails were subject to monitoring by Barclays. But emails sent to third parties did not alert Barclays to the prearranged nature of the trades that Gonnella executed with King.

[23] Indeed, in a letter submitted to FINRA on or about April 10, 2012, Gonnella's then counsel acknowledged that Gonnella sold bonds "pursuant to an understanding that he probably would repurchase the bonds" and that "his conduct in attempting to evade Barclay's [sic] aged inventory policy was inappropriate and [Gonnella] accepts full responsibility for it."

[24] *Whiteside & Co.*, Exchange Act Release No. 26187, 1988 WL 901551, at *2 (Oct. 14. 1988) (such trades not bona fide), *aff'd*, 883 F.2d 7 (5th Cir. 1989).

set, solely to deceive Barclays into believing he had complied with the Policy. Moreover, King's testimony and the communications between Gonnella and King establish that they both understood Gonnella would repurchase the bonds.[25] King's relief when Gonnella repurchased a portion of the August Bond does not reflect, as Gonnella claims, that there was no "genuine agreement or pre-arrangement." Rather, King was relieved that Gonnella was able to honor their arrangement that he repurchase the bonds and that he would not be left holding them—an outcome he plainly never anticipated when agreeing to Gonnella's scheme.[26]

Importantly, the evidence shows that Gonnella *did* make an effort to hide the nature of his trading. For example, King testified that he and Gonnella used "coded" language in their Bloomberg instant messages. We agree with the law judge's assessment that King meant that they used intentionally vague language so they could claim later that they were not operating pursuant to an agreement.[27] Gonnella also used his personal cell phone, in violation of Barclay's policy, to arrange the trades after certain trades triggered alerts in Barclays's internal monitoring system. Finally, Gonnella provided inaccurate and misleading responses to Barclays's officials when questioned about his trades.[28]

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[25] Having heard and observed the testimony and demeanor of both Gonnella and King, the law judge declined to credit Gonnella's version of events. The law judge also recognized that King testified pursuant to a cooperation agreement, but nevertheless credited his testimony We generally defer to an ALJ's demeanor-based credibility determinations, absent a showing that the substantial weight of the evidence warrants a different finding. *See Steven Altman*, Exchange Act Release No. 63306, 2010 WL 5092725, at *10 n.33 (Nov. 10, 2010) (citation omitted), *petition denied*, 666 F.3d 1322 (D.C. Cir. 2011). The weight of the evidence does not warrant a different finding here.

[26] Gonnella contends that the law judge erred in finding that the trading at issue constituted a "parking scheme,"—*i.e.*, "a person 'sells' securities to a purchaser subject to an agreement or understanding that the seller will repurchase the securities at a later time at a price that leaves the economic risk with the seller." *David E. Lynch*, Exchange Act Release No. 46439, 2002 WL 1997953, at *2 n.14 (Aug. 30, 2002). Gonnella's trading meets this definition as well as the definition of parking in Barclays's policy prohibiting such trading. In any case, Gonnella is liable because he committed fraud—he employed a deceptive device, scheme, and artifice to defraud and engaged in a deceptive act, practice, and course of business that operated as a fraud—regardless of the term used to describe his trading.

[27] *Gonnella*, 2014 WL 5866859, at *4 n.13.

[28] Gonnella also argues that "[e]mployment disputes and mundane violations of internal policies do not become securities fraud merely because they occur at a broker dealer." The entire object of Gonnella's fraud was to retain certain securities in his trading book through prearranged sale-and-repurchase transactions involving those securities. Gonnella, therefore, is liable not because his conduct was in connection with his employment by a broker-dealer but because he effectuated a fraud on his employer through trading in securities. And courts have long held that the antifraud provisions of the securities laws at issue here "prohibit[] frauds against brokers as well as investors." *United States v. Naftalin*, 441 U.S. 768, 770 (1979). In *Naftalin*, the Court held that Securities Act Section 17(a) "does not require that the victim of the fraud be an

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2. Gonnella acted with scienter.

We find that Gonnella acted with scienter because he knew or was reckless in not knowing that his prearranged transactions would deceive Barclays into believing that he was complying with the Policy when, in fact, he was not.[29] Gonnella also took numerous steps to conceal what he was doing from his supervisors: he used intentionally vague language to arrange the transactions, placed calls on a personal cell phone to schedule transactions once he realized Barclays had become suspicious, executed the majority of the trades while his supervisor was on vacation, and repeatedly gave false explanations for his conduct. These steps all confirm that he knew or must have known that his conduct would deceive Barclays.[30]

We reject Gonnella's contention that he did not receive "any personal benefit from the trades" and therefore lacked scienter. According to Gonnella, the $726,000 in aged inventory charges that he avoided would "not have had any material effect on his compensation, for which the amount of trading profit was only one (and not an especially critical) consideration." Nonetheless, the record establishes that Gonnella stood to benefit from the transactions. Gonnella knew that the profitability of his trading was a component in determining his bonus, and that aged inventory charges would be deducted from his trading book's profits. He increased the chance of a larger bonus by maximizing his trading profits. As his supervisor testified, a "trader would want to maximize" his profits and not "forfeit" money by incurring aged inventory charges. In any case, securities fraud does not require a motive.[31]

Gonnella tries to minimize the effect of his actions on Barclays, claiming that the "estimation of what Barclays 'lost' as a result of the trades" was "immaterial." Although Gonnella deceived Barclays into paying approximately $111,000 so he could avoid an estimated

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investor—only that the fraud occur 'in' an offer or sale." *Id.* at 772. The Court stated that one of the purposes of the Securities Act was "'to achieve a high standard of business ethics . . . *in every facet of the securities industry*'" and that "the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and the economy as a whole." *Id.* at 775, 776 (emphasis in original) (citation omitted). The lower courts have applied similar reasoning to find that Exchange Act Section 10(b) and Rule 10b-5 reach frauds against brokers. *Graham v. SEC*, 222 F.3d 994, 1002-1003 (D.C. Cir. 2000) (citing *Naftalin*); *see, e.g., Orlando Joseph Jett*, Exchange Act Release No. 49366, 2004 WL 2809317, at *21 (Mar. 5, 2004) (*Naftalin* "laid to rest any doubt that schemes directed against brokers can constitute securities fraud").

[29] Gonnella argues that he lacked scienter since Barclays "need[ed] to clarify [the Policy] subsequent to [his] trading activity." But Barclays's compliance officer testified that the prohibition on avoiding the Policy by selling a security with an agreement to repurchase later was not new and that Barclays had provided guidance to this effect to employees in prior years.

[30] *See, e.g., Phillip J. Milligan*, Exchange Act Release No. 61790, 2010 WL 1143088, at *5 (Mar. 26, 2010) (stating that "attempts to conceal misconduct indicate scienter").

[31] *SEC v. Koenig*, 557 F.3d 736, 740 (7th Cir. 2009).

$726,000 in charges to his trading profits, our concern about his conduct does not hinge on whether Barclays lost money or how much.[32] A fraud finding does not require any showing of monetary loss to Barclays.[33] The point is that, over a series of months, Gonnella engaged in a course of conduct intended to deceive Barclays without considering how Barclays might be harmed.[34]

We conclude, based on a preponderance of the evidence, that Gonnella violated Securities Act Sections 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5(a) and (c).[35]

B. Gonnella aided, abetted, and caused Barclays's violations of the books and records provisions of Exchange Act Section 17(a) and Exchange Act Rule 17a-3(a)(2).

Exchange Act Section 17(a) requires that broker-dealers registered with the Commission make and keep current certain books and records.[36] Rule 17a-3(a)(2) thereunder requires registered broker-dealers to "make and keep current . . . [l]edgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts."[37] "The obligation to make and keep records current embodies the requirement that such records be accurate."[38]

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[32] Gonnella challenges the law judge's determination that Barclay's loss on the trades was $111,000, the difference between the sales and repurchase prices of the bonds at issue. We find no error in and use this same approach. Gonnella also argues that this loss calculation represents "an alarmingly simplistic view of how real markets operate and true loss and gain are calculated." According to him, the profits that he made on other trades "overwhelmingly dwarfed" Barclays's "purported losses." Whether Gonnella made up for Barclays's losses through his other trading activities does not alter his liability under the antifraud provisions.

[33] *See, e.g.*, *Graham*, 222 F.3d at 1001 n.15 (noting that "unlike a plaintiff in a private damages action, the SEC need not prove actual harm").

[34] Gonnella argues that he "self-reported" his conduct to Barclays when he asked Barclays's compliance officer to speak to his supervisor about the trades that triggered alerts in Barclays's internal monitoring system. However, Gonnella approached the compliance officer only after his supervisor told Gonnella that he planned to speak with senior management about the trades.

[35] Gonnella argues that Barclays's letter to FINRA providing notification of his termination exonerated him of fraud. It did not. The letter, without reaching any conclusions regarding whether Gonnella committed fraud or otherwise violated the securities laws, stated "that it was likely Mr. Gonnella structured certain trades for the primary purpose of evading Barclays aged inventory policy and that he was not forthright during his interview when asked to explain his trades."

[36] 15 U.S.C. § 78q(a)(1).

[37] 17 C.F.R. § 240.17a-3(a)(2).

[38] *Jett*, 2004 WL 2809317, at *23.

These recordkeeping requirements are fundamental to the regulation of the securities industry and as "a keystone of surveillance of brokers and dealers by our staff and by the security industry's self-regulatory bodies."[39] We have explained that "a broker-dealer should have current books and records to enable it to fulfill its obligations and responsibilities to other broker-dealers with whom business is transacted."[40] Scienter is not required to establish a primary violation of Exchange Act Section 17(a)(1) and the rules thereunder.[41]

"To establish that a respondent aided and abetted a books and records violation, we must find that (1) a violation of the books and records provisions occurred; (2) the respondent substantially assisted in the violation; and (3) the respondent provided that assistance with the requisite scienter."[42] "The scienter requirement for aiding and abetting liability . . . may be established by evidence that the respondent knew of, or recklessly disregarded, the wrongdoing and his or her own role in furthering it."[43] "[O]ne who aids and abets a primary violation is necessarily 'a cause of' that violation."[44] "An individual can be a cause of a broker-dealer's violation of books and records provisions if he was responsible for an act or omission that he knew or should have known would contribute to the violation."[45]

Barclays committed primary violations of Exchange Act Section 17(a) and Rule 17a-3(a)(2) thereunder because it maintained books and records that did not reflect Gonnella's agreement with King. Moreover, Barclays's policies required that "[a]ny sale or purchase of bonds that includes an agreement to repurchase or resell a security must be completely documented at the time of the initial transaction." Gonnella's supervisor testified that if prearranged trades were made, they should have been recorded when the agreement to repurchase was made, *i.e.*, during the initial leg of the trade. The supervisor testified further that "[i]f trades . . . have been legally executed but aren't recorded, all of the books and records that flow off of the trading log would not be accurate."

Gonnella substantially assisted Barclays's violations. In each of his roundtrip trades with King, Gonnella booked the sale and repurchase as two separate transactions in Barclays's internal

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39 *Id*. at 3 (quoting *Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 1997 WL 173385, at *5 n.39 (May 6, 1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979)).

40 *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, Exchange Act Release No. 10756, 1974 WL 161408, at *1 (Apr. 26, 1974).

41 *Jett*, 2004 WL 2809317, at *23.

42 *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *11 (Feb. 27, 2012), *petition denied sub nom.*, *Collins v. SEC*, 6 F.3d 521 (D.C. Cir. 2013).

43 *Id.*

44 *Id.*

45 *Id.* (internal quotations and citation omitted).

trading system without documenting his agreement to repurchase the bonds. This improper booking of the trades caused the firm's books and records to be inaccurate. [46]

Gonnella acted with the requisite scienter because he knew or must have known that by entering his prearranged trades as separate trades, and without documenting his agreement with King, they would not be recorded properly in Barclays's books and records. Accordingly, we conclude that Gonnella aided, abetted, and caused Barclays's violations of Exchange Act Section 17(a) and Rule 17a-3(a)(2) thereunder.[47]

C. The record does not establish that the law judge was biased against Gonnella or that the proceeding against him violates due process or separation of powers principles.

Gonnella's remaining arguments lack merit. First, Gonnella claims that the law judge was biased against him. According to Gonnella, the law judge took "the approach of an advocate" and had "an overarching agenda other than resolving a dispute between two litigants." As an example, Gonnella points to "the Initial Decision's reliance on authorities not at all cited by the Division." That the law judge cited relevant case law not identified by the parties does not demonstrate bias.[48] In any event, Gonnella has had a full opportunity to challenge the law judge's analysis, and we have carefully considered the entire record in reaching our determination.

Second, Gonnella argues that the Division's cooperation agreement with King violated his due process rights and separation of powers principles because "the entity fixing Mr. King's penalty after the hearing is the same agency (in fact, the very same Division attorneys) prosecuting Mr. Gonnella, creating an incentive to accommodate the Division's agenda, not to tell the truth."[49] Gonnella does not cite, and we are unaware of, any authority in support of this

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[46] *See* 17 C.F.R. § 240.17a-3(a)(2).

[47] *See, e.g., Jett*, 2004 WL 2809317, at *24 (finding that respondent willfully aided and abetted firm's recordkeeping violations because fictitious profits generated by respondent's forward exchanges were reflected in firm's books and records); *Lynch*, 2002 WL 1997953, at *3 (finding that respondent willfully aided and abetted recordkeeping violations by causing firm's books and records to show incorrect valuations of the firm's liabilities and inaccurate net capital computations, resulting in firm's failure to disclose net capital deficiencies).

[48] Gonnella notes that the law judge also "found and cited commentators from relatively obscure law reviews." We need not address Gonnella's belief that this was improper. We have not relied on any of the cited law review articles in reaching our decision in this case.

[49] King entered into a cooperation agreement in which he agreed to testify truthfully about the trades at issue. *See generally* 17 C.F.R. § 202.12 (setting forth Commission policy regarding cooperation by individuals during investigations and related enforcement actions).

King also entered into two settlements with the Commission relating to the events at issue. In the first settlement, *Ryan C. King*, Exchange Act Release No. 71471, 2014 WL 409322, at *6 (Feb. 4, 2014), King agreed to a cease-and-desist order, a disgorgement order, and an industry bar with the right to reapply after three years. As part of this settlement, King "agree[d]

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proposition; quite the opposite, the argument has no legal merit.[50] That the Commission both instituted proceedings against Gonnella and did not impose a civil penalty on King does not establish a denial of due process or other procedural impropriety.

III. Sanctions

A. Bars

Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) authorize us to bar Gonnella from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if we determine that his violations were willful and that doing so is in the public interest.[51] Investment Company Act Section 9(b) also authorizes us to prohibit any person from serving or acting in certain capacities with respect to an investment company when similar conditions are satisfied.[52]

We find that Gonnella's violations were willful. Willfulness is shown where a person intends to commit an act that constitutes a violation; there is no requirement that the person also be aware that he is "breaking the law."[53] There is no question that Gonnella intended to enter into the arrangement with King and to execute the trades pursuant to that agreement.

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to additional proceedings . . . to determine what, if any, civil penalties . . . are in the public interest." *Id.* at 5. On January 28, 2015, following his testimony in this proceeding, we accepted King's offer to settle in which we did not impose civil penalties based on his cooperation. *Ryan C. King*, Exchange Act Release No. 74162, 2015 WL 351406, at *2 (Jan. 28, 2015).

[50] *See Porter County Chapter of Izaak Walton League of Am., Inc. v. NRC*, 606 F.2d 1363, 1371 (D.C. Cir. 1979) (stating that "as to adjudications, the combination in one administrative body of adjudicative with other functions violates constitutional guarantees only when the combination 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented'") (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) (rejecting argument that Commissioner had prejudiced non-settling respondent's case by participating in decision to accept another respondent's settlement offer that set forth facts stipulated by settling respondent and Division of Enforcement).

[51] 15 U.S.C. §§ 78*o*(b)(6), 80b-3(f).

[52] 15 U.S.C. § 80a-9(b). Although the Division below did not request a bar from serving or acting in certain capacities with respect to an investment company, and the law judge did not impose one, the order instituting proceedings against Gonnella sought relief under Investment Company Act Section 9(b), 15 U.S.C. § 80a-9(b), which authorizes such a sanction. *See Thomas C. Gonnella*, Exchange Act Release No. 71472, 2014 WL 409329, at *1, 8 (Feb. 4, 2014) (order instituting proceedings).

[53] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

In assessing the public interest, we consider the factors set forth in *Steadman v. SEC*.[54] Those factors include: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations.[55]

The *Steadman* factors support significant remedial action here. Gonnella committed fraud through prearranged securities transactions and deceived Barclays about his compliance with a policy intended to reduce risk. In doing so, he repeatedly hid his conduct from his supervisor and misled his superiors about the nature of his trading, used intentionally vague language in his communications with his counterparty on the trades, and used his personal cell phone to arrange the trades with his counterparty. In addition to concealing his scheme, he deceived Barclays by not recording his repurchase arrangement with King in the firm's trade entry system. This was not an isolated incident of misconduct, and Gonnella's scienter is amply demonstrated.

Gonnella has not recognized the wrongful nature of his actions (other than acknowledging that he should not have used his personal cell phone). He has characterized his actions as, at most, an "ordinary and mundane workplace peccadillo." Nor does he offer assurances against future misconduct. Gonnella's cavalier attitude raises serious concerns about the likelihood of future misconduct.[56] Further, Gonnella's occupation presents opportunities for future violations. He has expressed a desire to remain in the securities industry, which, coupled with his hiring by KGS-Alpha[57] within three months of his termination, demonstrates that he may have the opportunity to commit similar misconduct in the future.

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[54] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[55] *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009) (citing *Steadman*, 603 F.2d at 1140), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[56] *See, e.g.*, *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *5 (Mar. 7, 2014) (stating that respondent's "attempts to deflect responsibility for his fraudulent scheme demonstrate either a fundamental misunderstanding of his responsibilities as a securities professional or that he 'hold[s] those obligations in contempt.' In either case, these attempts reveal a serious risk he would commit further misconduct if permitted in any area of the industry") (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 (Sept. 26, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008)); *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *12 (stating that respondent's "attempts to minimize [his] conduct" "present[] a significant risk that, given the opportunity, he would commit further misconduct in the future") (internal quotations and citation omitted); *Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at *6 (Jan. 16, 2007) (stating that respondent's "failure to acknowledge guilt or show remorse indicates that there is a significant risk that, given the opportunity, [respondent] would commit further misconduct in the future").

[57] *See supra* note 8.

Like the law judge, we have considered other circumstances present in this case, including Gonnella's age (26 years) at the time of his misconduct, his lack of a disciplinary record, and testimony by KGS-Alpha's chief executive officer that Gonnella was an "exemplary employee."[58] Ultimately, however, the egregiousness of Gonnella's misconduct, his scienter, and his failure to appreciate the seriousness of his violations outweigh these circumstances and indicate that we must take significant remedial action to protect the public and provide a meaningful deterrent against future misconduct.

Accordingly, we determine that an industry bar, including a penny stock bar and bar from serving or acting in certain capacities with respect to an investment company, with a right to reapply after five years, is necessary for the public interest.[59] This sanction will protect investors and the markets, help to ensure Gonnella's compliance with the applicable securities laws if subsequently permitted to return to the industry, and deter other market professionals from engaging in similar misconduct.[60]

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[58] KGS-Alpha's CEO also testified that he called "everybody" at Barclays who worked with Gonnella before hiring him and they said that Gonnella was a "good guy." The law judge relied on this testimony and found that Gonnella "continues to enjoy the respect of his former superiors at Barclays." *Gonnella*, 2014 WL 5866859, at *30. The law judge also stated that he could not "ignore the fact that [Gonnella's] former superiors at Barclays—his victim—continue to "hold [him] in high regard, thereby suggesting that Gonnella's violations are less serious than might otherwise be the case when a fiduciary violates the trust reposed in him." *Id.* at *33.

Gonnella argues that the Division's view of what the public interest requires is "overly paternalistic" given that KGS-Alpha hired him notwithstanding his misconduct. But our determination of what is an appropriate sanction in the public interest "extends beyond the consideration of particular investors [or firms] to the public at large." *Christopher A. Lowry*, Advisers Act Release No. 2052, 2002 WL 1997959, at *6 (Aug. 30, 2002), *aff'd*, 340 F.2d 501 (8th Cir. 2003).

[59] *See, e.g.*, *Irfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL 3199181, at *10 (Nov. 3, 2006) (imposing a bar from association with any broker or dealer, with a right to reapply after five years, on trader who engaged in wash sales and matched trades that allowed him to receive $50,000 in rebate fees from Nasdaq that he otherwise would not have received), *petition denied*, 269 F. App'x 217 (3d Cir. 2008); *cf. Jett*, 2004 WL 280913, at *26 (imposing a bar from association with any broker or dealer, without a right to reapply, on trader who engaged in a scheme that exploited his firm's computer system to create the illusion of profitable securities trading and "deceiv[ed] [his] firm into believing that his reported trading profits derived from real securities trading"); *Lynch*, 2002 WL 1997953, at *3 (imposing a bar from association with any broker or dealer, without a right to reapply, on trader who engaged in parking scheme that enabled his office to purchase bonds and secretly hold them "off the books," while maintaining control of the securities, resulting in transactions being effected at "non-bona fide prices" and customers being charged excessive markups).

[60] Gonnella also argues that the Division fails to explain how the public interest requires a bar where the victim was his employer and not investors. We have held, however, that

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Gonnella argues that barring him is "a nuclear option in response to throwing a few small rocks." According to Gonnella, he already has suffered enough, losing his job, millions of dollars in compensation, and the ability to work in the securities industry while this matter has been pending. In support of the 12-month suspension ordered by the law judge, he asserts that the Commission typically affords "a more deferential review" of a law judge's determination of an appropriate sanction, and claims that the Division cited no authority for increasing a sanction imposed by a law judge.

We disagree with Gonnella's benign characterization of his actions, and, as to his claim that he has already suffered for his actions, we have repeatedly stated that the collateral consequences of misconduct, including the loss of employment, reputation, and income, are not mitigating.[61] Nor do we find persuasive his suggestion that we should defer to the law judge's determination. To the contrary, it is well-established that our review of such decisions is based on our independent review of the record, which leads us to impose the sanctions we describe as necessary to protect the public interest.[62]

Finally, Gonnella argues that the Division improperly "attempt[s] to buttress its argument" for imposing a bar by referring to the sanction "that King consented to, a three-year bar." According to Gonnella, King's bar with a right to reapply after three years "was a contrivance of the Division's; it was not the product of a reasoned assessment by an independent hearing officer or the Commission itself, both of which may well have concluded that a shorter period of suspension was in order." Gonnella is mistaken. We issued the order barring King from the industry with a right to reapply after three years after finding it "appropriate and in the public interest" to do so.[63] And we find that a bar with a right to reapply after five years is an appropriate sanction commensurate with Gonnella's misconduct.

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fraudulent conduct is no less serious because a firm, instead of investors, is harmed. *See, e.g., Mayer A. Amsel*, Exchange Act Release No. 37092, 1996 WL 169430, at *5 (Apr. 10, 1996) (stating that respondent's misconduct "was no less serious because the firm was his victim rather than investors"); *Richard Dale Grafman*, Exchange Act Release No. 21648, 1985 WL 548687, at *2 n.2 (Jan. 14, 1985) (stating that "we do not agree with [respondent] that his misconduct was somehow less serious because it did not involve public customers. The fact that he defrauded a brokerage firm instead is hardly a factor in his favor").

61 *See, e.g., Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *16 n.116 (July 12, 2013). On July 18, 2016, Gonnella filed a "Motion to Consider New Post-Hearing Information" requesting that we consider the adverse impact of this proceeding on his career, first in the securities industry and later as a real estate broker. We have considered this information but find that the need to protect the public outweighs any collateral consequences from Gonnella's misconduct.

62 *See Kornman*, 2009 WL 367635, at *9 n.44 (review of sanctions is de novo), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

63 *King*, 2014 WL 409322, at *6.

B. Cease-and-desist order

Securities Act Section 8A(a), Exchange Act Section 21C, and Advisers Act Section 203(k) authorize us to impose a cease-and-desist order on any person who has violated any provision of those Acts and on any person 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.[64] In determining whether a cease-and-desist order is appropriate, we consider the same *Steadman* factors described above. We also consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and 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.[65] Furthermore, we consider the risk of future violations.[66] Although "'some' risk is necessary, it need not be very great to warrant issuing a cease-and-desist order."[67] "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[68]

Gonnella's violations, coupled with our consideration of the *Steadman* factors, amply support the imposition a cease-and-desist order. As described above, Gonnella intentionally committed repeated acts of deception which resulted in at least $111,000 in losses to Barclays. Gonnella has refused to recognize any wrongdoing and would like to continue working in the securities industry, which presents an opportunity for future misconduct. For these reasons, we find it appropriate in the public interest to order Gonnella to cease-and-desist from committing or causing violations or future violations of Securities Act Section 17(a), Exchange Act Sections 10(b) and 17(a), and Exchange Act Rules 10b-5 and 17a-3.

C. Civil money penalties

Securities Act Section 8A(g), Exchange Act Section 21B(a), Advisers Act Section 203(i), and Investment Company Act Section 9(d) authorize us to impose civil money penalties in the public interest.[69] In determining whether a civil penalty is in the public interest, we may consider whether (1) the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm, directly or indirectly, to other

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64 15 U.S.C. §§ 77h-1(a), 78u-3(a), 80b-3(k).

65 *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

66 *Id.*

67 *Id.* at *24.

68 *Id.*

69 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i), 80a-9(d) (providing the Commission with the authority to assess civil penalties if it finds willful violations).

persons; (3) any unjust enrichment and prior restitution; (4) the respondent's prior regulatory record; (5) the need for deterrence; and (6) such other matters as justice may require.[70]

Imposing a civil penalty against Gonnella is in the public interest in light of his fraud, the harm to Barclays, and the need to deter Gonnella from engaging in similar conduct. Although Gonnella has no prior disciplinary history and may not have received a direct monetary benefit from his conduct, the egregiousness of his conduct outweighs those considerations here.

Under the three-tier system that establishes the maximum penalty that may be imposed for each violation, we, like the law judge, impose a second-tier penalty of $75,000 for the antifraud violations and a first-tier penalty of $7,500 for the aiding, abetting, and causing books and records violations, for a total civil penalty of $82,500.[71] Gonnella did not make any arguments concerning this penalty amount and the Division did not dispute the law judge's penalty calculation or contest the imposition of second-tier penalties.

An appropriate order will issue.[72]

By the Commission (Chair WHITE and Commissioner STEIN); Commissioner PIWOWAR, concurring in part and dissenting in part.

Brent J. Fields
Secretary

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[70] 15 U.S.C. § 78u-2(c); *Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *5 n.39 (Aug. 21, 2014) (stating that the public interest factors in Exchange Act Section 21B(c), Advisors Act Section 203(i), and Investment Company Act Section 9(d) are applied in determining whether civil penalties are appropriate).

[71] First-tier penalties require no additional statutory showing. 15 U.S.C. §§ 77h-1(g)(2)(A), 78u-2(b)(1), 80b-3(i)(2)(A), 80a-9(d)(2)(A). Second-tier penalties require a showing that the act or omission giving rise to the penalty "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 77h-1(g)(2)(B), 78u-2(b)(2), 80b-3(i)(2)(B), 80a-9(d)(2)(B). The law judge found that third-tier penalties were not warranted because Barclays did not suffer "substantial" losses, Gonnella was not unjustly enriched, and he did not reap "substantial pecuniary gain." *Gonnella*, 2014 WL 5866859, at 32.

[72] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Commissioner PIWOWAR, concurring in part and dissenting in part:

I concur with the opinion's findings that Respondent Gonnella willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5, and that he willfully aided, abetted, and caused Barclays's failure to keep accurate books and records, in violation of Exchange Act Section 17(a) and Exchange Act Rule 17a-3(a)(2). I also concur that it is in the public interest to impose certain sanctions, including a cease-and-desist order and civil money penalties. However, I dissent from Section III.A. of the opinion, in which the majority of the Commission, among other things, imposed a permanent investment company bar, with a right to reapply after five years.

As acknowledged in the opinion at footnote 53, the Division of Enforcement ("Division") did not request a bar from serving or acting in certain capacities with respect to an investment company, and the administrative law judge did not impose one. Nonetheless, the majority of the Commission finds that it is in the public interest to impose such a sanction. I have serious concerns, on due process and other grounds, about the Commission imposing sanctions that are neither requested by the Division nor found by the administrative law judge to be appropriate.[1] Given the record in this matter, I find no compelling reason for going beyond the Division's request and imposing a permanent bar from serving or acting in certain capacities with respect to an investment company, with a right to reapply after five years.

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[1] *See, e.g., In the Matter of John J. Aesoph, CPA and Darren M. Bennett, CPA*, Exchange Act Rel. No. 78490 (Aug. 5, 2016), *available at* https://www.sec.gov/litigation/opinions/2016/34-78490.pdf#page=32 (separate opinion, concurring in part and dissenting in part).

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1933
Release No. 10119 / August 10, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 78532 / August 10, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4476 / August 10, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32210 / August 10, 2016

Admin. Proc. File No. 3-15737

In the Matter of

THOMAS C. GONNELLA

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Thomas C. Gonnella cease and desist from committing or causing any violations or future violations of Sections 17(a) of the Securities Act of 1933, Sections 10(b) and 17(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 10b-5 and 17a-3; and it is further

ORDERED that Thomas C. Gonnella be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, with the right to reapply after five years; and it is further

ORDERED that Thomas C. Gonnella be prohibited 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 investment company, investment adviser, depositor, or principal underwriter, with the right to reapply in five years; and it is further

ORDERED that Thomas C. Gonnella be barred from participating in any offering of a penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, with the right to reapply in five years; and it is further

ORDERED that Thomas C. Gonnella pay $82,500 in civil money penalties.

Payment of the civil penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary