INITIAL DECISION RELEASE NO. 990
ADMINISTRATIVE PROCEEDING
FILE NO. 3-16824

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

In the Matter of DANIEL PAEZ	INITIAL DECISION March 30, 2016

APPEARANCES: Andrew O. Schiff for the Division of Enforcement, Securities and Exchange Commission

Daniel Paez, pro se

BEFORE: Jason S. Patil, Administrative Law Judge

Summary

This initial decision grants the Division of Enforcement's motion for summary disposition and permanently bars Respondent Daniel Paez from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (collectively, associational bar), and from participating in an offering of penny stock (penny stock bar).

Procedural Background

On September 21, 2015, the Securities and Exchange Commission issued an order instituting administrative proceedings (OIP) against Paez, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, based on his guilty plea and corresponding judgment in *United States v. Paez*, No. 13-cr-20789 (S.D. Fla.), that he is guilty of one count of securities fraud. The OIP was served on September 25, 2015, and Paez filed a motion for adjournment on October 19, 2015. *Daniel Paez*, Admin. Proc. Rulings Release No. 3253, 2015 SEC LEXIS 4375 (ALJ Oct. 23, 2015).

On November 23, I held a prehearing conference with the parties wherein they agreed to a schedule for summary disposition. *Daniel Paez*, Admin. Proc. Rulings Release No. 3342, 2015 SEC LEXIS 4828. I also denied Paez's motion for adjournment. *Id.* On December 10, the Division filed its motion with four exhibits in support (Exs. 1-4). Paez did not file an opposition, but did file a letter "in Response of the Administrative Proceeding," dated December 1 but received December 21, which I construe as his answer. In his answer, Paez "accept[s] the allegations

brought forth . . . by the Division of Enforcement" but "attempt[s] to explain why it was never [his] intention to defraud [his] clients." Answer at 1. Because Paez did not deny the allegations of the OIP, I deem them admitted. 17 C.F.R. § 201.220(c).

Summary Disposition Standard

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, or by facts officially noticed pursuant to Rule of Practice 323. 17 C.F.R. § 201.250(a).

The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. *See Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *40-41 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *19-20 & nn.21-24 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare." *John S. Brownson*, Exchange Act Release No. 46161, 2002 SEC LEXIS 3414, at *9 n.12 (July 3, 2002), *pet. denied*, 66 F. App'x 687 (9th Cir. 2003).

The findings and conclusions in this initial decision are based on the record and on facts officially noticed pursuant to Rule of Practice 323. *See* 17 C.F.R. § 201.323. In particular, I have taken official notice of the filings in the criminal proceeding, *United States v. Paez*. The parties' filings and all documents and exhibits of record have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this initial decision have been considered and rejected.

Findings of Fact

1. On September 6, 2010, Fly High Investments Inc., was registered as a Florida corporation, with Paez as its sole officer and registered agent. Div. Ex. 2 at 9.[1] Fly High solicited money from investors to invest in stocks and securities related to both precious metals and real estate. *Id.*

2. From September 2010 through April 2012, as Fly High's president, Paez personally solicited investors in at least five states, telling them "he operated a hedge fund valued in excess

[1] For all facts cited here, in his plea agreement, Paez: "(i) confirms that he has reviewed the following facts with legal counsel, (ii) adopts the following factual summary as his own statement, (iii) agrees that the following facts are true and correct, and (iv) stipulates that the following facts provide a sufficient factual basis for the plea of guilty . . . ." Div. Ex. 2 at 9.

of $50 million." *Id.* at 9-10. Paez promised "high rates of return, safety and security of the investments, [and] that investors could take out profits at any time." *Id.* at 9. Paez received "more than $500,000 in investor funds." *Id.*

3. Paez used more than two-thirds of the investor funds for "his immediate personal benefit" and "to gamble at casinos and obtain large amounts of cash for his own personal use." *Id.* at 9-10. For example, on June 9, 2011, an investor sent Paez $100,000 to invest in certain securities, but "[i]n reality Paez used the majority of these funds to make cash withdrawals and purchases at Seminole Hard Rock Casino . . . ." *Id.* at 9. Of the more than $500,000 in investor funds obtained, Paez only invested $158,000, and this sum was invested in "penny stocks" and "other high risk investments . . . materially different than the specific investments promised . . . ." *Id.*

4. When investors asked about their funds, Paez falsely told them the "investments had been profitable" and "payments would be forthcoming." *Id.* at 10. Paez told investors to "call back" or "complete certain paperwork, as a means of delaying the ultimate return of funds." *Id.* Paez never returned the funds to investors, leaving behind approximately seventeen victims who all lost their entire investment. *See id.* at 9-10.

5. On October 15, 2013, the United States Attorney for the Southern District of Florida filed a one-count information against Paez, charging him with securities fraud, in violation of Exchange Act Sections 10(b) and 32(a) and Rule 10b-5. Div. Ex. 1 at 2-4.

6. On November 26, 2013, Paez entered into a plea agreement, in which he agreed to plead guilty to "one count of securities fraud," in violation of Exchange Act Sections 10(b) and 32(a) and Rule 10b-5. Div. Ex. 2 at 1.

7. On February 21, 2014, based on Paez's guilty plea, the district court entered judgment finding Paez guilty of securities fraud under Exchange Act Sections 10(b) and 32(a), sentenced him to thirty-seven months imprisonment followed by three years of supervised release, and ordered $476,545 in restitution to victims. Judgment, *Paez* (Feb. 24, 2014), ECF No. 32 at 1-3, 5.

Conclusions of Law

Under the Exchange and Advisers Acts, the Commission may impose an associational bar against a respondent under certain circumstances, including where: 1) the respondent was convicted of a felony or misdemeanor offense within ten years from the date of the OIP, 2) such offense involves the purchase or sale or any security, arises out of the conduct of the business of an investment adviser or broker-dealer, or involves the misappropriation of funds; 3) the respondent was associated with a broker-dealer and investment adviser at the time of the misconduct; and 4) such bar would serve the public interest. 15 U.S.C. §§ 78*o*(b)(4)(B)(i)-(iii), (6)(A)(ii); 80b-3(e)(2)(A)-(C), (f). Section 15(b) of the Exchange Act also authorizes a penny stock bar under the same circumstances. 15 U.S.C. § 78*o*(b)(6)(A).

Paez was convicted in February 2014 of felony securities fraud and the OIP issued in September 2015, well within the ten-year statute of limitations. Finding of Fact (FOF) No. 7.

His felony conviction arose from the purchase or sale of securities, his conduct as a broker and investment adviser, and his misappropriation of investor funds. FOF Nos. 2-4.

Paez was acting as an investment adviser at the time of his misconduct. OIP at 1 ("Respondent acted as an investment adviser"); Answer at 1 ("accepting the allegations" in the OIP); 17 C.F.R. § 201.220(c) ("Any allegation not denied [in an answer] shall be deemed admitted."). An investment adviser includes "any person who, for compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). Paez controlled Fly High, solicited investments which he promised would be invested in specific investments, and then invested a portion of client money in "penny stocks or other high risk investments." Div. Ex. 2 at 9. His control over the purchases and sales made with investor funds qualifies as "advising others . . . as to the advisability of investing." *United States v. Ogale*, 378 F. App'x 959, 960 (11th Cir. 2010); *see also Abrahamson v. Fleschner*, 568 F.2d 862, 871 (2d Cir. 1977) (finding that "many investment advisers 'advise' their customers by exercising control over what purchases and sales are made with their clients' funds"). Paez's misappropriation of investor funds constitutes "compensation" within the meaning of Advisers Act Section 202(a)(11). *Alexander V. Stein*, Investment Advisers Act Release No. 1497, 1995 SEC LEXIS 3628, at *8 (June 8, 1995) (diversion of investor funds for personal use qualifies as "compensation"). Paez therefore qualifies as an investment adviser, and accordingly was "associated" with an investment adviser. *See Anthony J. Benincasa*, Investment Company Act of 1940 Release No. 24854, 2001 SEC LEXIS 2783, at *6 (Feb. 7, 2001) (individual acting as investment adviser meets definition of "person associated with an investment adviser").

By operation of Rule 220(c), Paez was also operating as a broker during the time of his misconduct. OIP at 1 ("Respondent acted . . . as a broker-dealer"); Answer at 1 ("accepting the allegations" in the OIP); 17 C.F.R. § 201.220(c). The Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). Paez actively solicited at least seventeen investors, recommended investments in certain categories of securities, and conducted transactions on behalf of those investors. *See* FOF Nos. 1-4. This activity constitutes acting as a broker. *See SEC v. Hansen*, No. 83-cv-3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) (listing, as factors indicating broker status, active solicitation of investors and providing advice as to the merit of an investment); *see also Anthony Fields, CPA*, Securities Act of 1933 Release No. 9727, 2015 SEC LEXIS 662, at *77 (Feb. 20, 2015) (finding that Respondent's solicitation of investors and execution of transactions on their behalf necessitated registration as a broker).

Accordingly, the remaining issue is whether barring Paez from the securities industry serves the public interest.

Sanction

The Division seeks permanent industry bars against Paez. The appropriateness of any remedial sanction in this proceeding is guided by the *Steadman* factors: 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); *see Gary M. Kornman*, 2009 SEC LEXIS 367, at *22. The Commission's inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. *Gary M. Kornman*, 2009 SEC LEXIS 367, at *22. The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006); *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003).

After analyzing the public interest factors in light of the protective interests served, I have determined that it is appropriate and in the public interest to bar Paez from participation in the securities industry to the fullest extent possible. *See Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-8 (Mar. 7, 2014).

1. The egregious and recurrent nature of Paez's misconduct

Over the course of two years, Paez defrauded seventeen unwitting victims of more than half a million dollars. They believed his lies that their money would be safe and secure, while producing high rates of return, and that they could withdraw funds when needed. When the victims asked how their investments were doing, or tried to withdraw money, Paez answered with more lies and dilatory tactics. When Paez received new investor money, he converted the lion-share of it to immediate personal use, like gambling. In his answer, Paez claims that he only gambled with investor money to recover the money lost after a series of increasingly high-risk investments went south. Answer at 2. Paez's story conflicts with the narrative in the plea agreement, which stated that "nearly all" of the investor funds were used for his own personal use, including gambling. Div. Ex. 2 at 9-10. Moreover, as the answer confirms, the funds that Paez actually invested were in high-risk investments like penny stocks, which were totally at odds with his assurances of safe, secure investments. Answer at 1-2; Div. Ex. 2 at 9. And regardless of the motive, gambling investor money at a casino is certainly egregious behavior.

Paez's thirty-seven-month prison sentence underscores the egregiousness of his misconduct. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 SEC LEXIS 4193, at *28 n.44 (Oct. 29, 2014); FOF No. 7. The Commission considers conduct involving fraud, like Paez's, to be particularly serious and subject to severe sanctions. *See, e.g.*, *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013) (the Commission has "repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws" (internal quotation marks omitted)), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). As shown, his misconduct was egregious and recurrent.

2. Scienter

Paez pled guilty to criminal violations of Exchange Act 10(b) and Rule 10b-5, both of which are scienter-based violations. Div. Ex. 2 at 1; *United States v. Vilar*, 729 F.3d 62, 89 (2d

Cir. 2013) (a criminal action under Section 10(b) requires, among other things, a showing of scienter). His conduct involved misappropriating investor money for his personal use and falsely representing to investors that their investments had been profitable and return payments were forthcoming. Accordingly, Paez's misconduct evinced a high degree of scienter—an intent to defraud. *See Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (scienter refers to "a mental state embracing intent to deceive, manipulate, or defraud" (citation omitted)).

3. Lack of assurances against future violations and recognition of the wrongful nature of his conduct

"If [a respondent] doesn't know right from wrong in this industry, how can he avoid wrongdoing in the future?" *Gann v. SEC*, 361 F. App'x 556, 560 (2d Cir. 2010). "[A]s the Supreme Court has recognized, the 'degree of intentional wrongdoing evident in a defendant's past conduct' is an important indication of the defendant's propensity to subject the trading public to future harm." *John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *33 (Dec. 13, 2012) (quoting *Aaron*, 446 U.S. at 701), *called into question on other grounds by Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015). Thus, although "the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it will be repeated.'" *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *23 n.50 (July 26, 2013) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)) (alteration in internal quotation omitted).

In his answer, Paez expresses contrition and admits that what he "did was very wrong." Answer at 3. He further claims that during his prison sentence, he "began to make wiser decisions," including taking vocational classes and obtaining his G.E.D. *Id.* at 2-3. He also states that he pled guilty because he "could no longer live with the shame" of what he had done. *Id.* at 2. However, at both prehearing conferences, Paez insinuated that he pled guilty to escape the risk of a longer-term prison sentence and that he disputed the factual allegations he admitted. Tr. 4-5, 8-9, 50-51.[2] Accordingly, I am unable to place great weight on the expressions of contrition in Paez's answer. I also note that, even in his answer, Paez does not explicitly provide any assurances against future violations.

4. Opportunities for future violations

Paez is scheduled to be released around late April 2016. Tr. 11. If he is not barred, Paez intends to continue working in the securities industry after his release, though he argues that he would be working in order to pay back his former investors. Tr. 31; Answer at 3. Paez indicated that if he was prevented from speaking to investors or raising capital, he would seek work trading as a subcontractor for a company with a trading platform. Tr. 33. If Paez were to reenter or continue working in the securities industry, his occupation would present considerable opportunities for future violations. *See Tzemach David Netzer Korem*, 2013 SEC LEXIS 2155, at *23 n.50.

[2] Citation ("Tr.") is to the prehearing conference transcript.

5. Other considerations

Industry bars have long been considered effective deterrence. *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 SEC LEXIS 4166, at *81 & n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (Dec. 28, 2010). An industry bar, as opposed to a more limited bar, will prevent Paez "from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct." *Montford and Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *86-87 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015). This is because:

> The proper functioning of the securities industry and markets depends on the integrity of industry participants and their commitment to transparent disclosure. Securities industry participation by persons with a history of fraudulent conduct is antithetical to the protection of investors. . . .
>
> We have long held that a history of egregious fraudulent conduct demonstrates unfitness for future participation in the securities industry even if the disqualifying conduct is not related to the professional capacity in which the respondent was acting when he or she engaged in the misconduct underlying the proceeding. The industry relies on the fairness and integrity of all persons associated with each of the professions covered by the collateral bar to forgo opportunities to defraud and abuse other market participants.

John W. Lawton, 2012 SEC LEXIS 3855, at *42-43 (internal footnote omitted).

Furthermore, "absent extraordinary mitigating circumstances" not presented here, a person like Paez, "who has been convicted of securities fraud[,] cannot be permitted to remain in the securities industry." *Charles Trento*, Securities Act Release No. 8391, 2004 SEC LEXIS 389, at *11 (Feb. 23, 2004). For all these reasons, the public interest factors justify a permanent associational bar and penny stock bar against Paez.

Ruling

It is ORDERED that, pursuant to Rule of Practice 250, 17 C.F.R. § 201.250, the Division of Enforcement's motion for summary disposition against Respondent Daniel Paez is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Daniel Paez is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Daniel Paez is permanently BARRED from participating in an offering of 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.

This initial decision shall become effective in accordance with and subject to the provisions of Rule of Practice 360, 17 C.F.R. § 201.360. Pursuant to that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule of Practice 111, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

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Jason S. Patil
Administrative Law Judge