Initial Decision Release No. 1147
Administrative Proceeding
File No. 3-17856

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

In the Matter of

John Austin Gibson, Jr.

Initial Decision of Default
June 20, 2017

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

Before: James E. Grimes, Administrative Law Judge

Summary

I grant the Division of Enforcement's motion for entry of default. Respondent John Austin Gibson, Jr., is barred from associating with a broker, dealer, or investment adviser.

Procedural Background

The Securities and Exchange Commission initiated this proceeding in February 2017, when it issued an order instituting proceedings (OIP) under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940. OIP at 1; *see* 15 U.S.C. §§ 78*o*(b), 80b-3(f). This is a follow-on proceeding based on Gibson's mail fraud conviction. The Division alleges that in 2008 and 2009, Gibson was associated with a broker-dealer and an investment adviser. OIP at 1. The Division further alleges that Gibson pleaded guilty in 2016 in the United States District Court for the Eastern District of Louisiana to a charge of mail fraud, in violation of 18 U.S.C. § 1341. OIP at 2.

Gibson was served with the OIP in March 2017.[1] During a telephonic prehearing conference held in March, which Gibson did not attend, I set a schedule for filing dispositive motions.[2] Following the conference, I issued an order memorializing that schedule and ordering Gibson to show cause by April 17, 2017, why he should not be found in default due to his failure to file an answer to the OIP or attend the conference.[3] Gibson did not respond to the order to show cause.

The Division filed a timely motion for default supported by five exhibits (cited as "Ex. _").

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed under Rule 323, 17 C.F.R. § 201.323. Because Gibson did not file an answer to the OIP, he is in default. *See* 17 C.F.R. § 201.220(f). In light of Gibson's default, I will deem as true the allegations in the OIP and will rely on those allegations in conjunction with other evidence in the record, including a stipulated factual basis signed by Gibson and entered into the record of the district court as part of his guilty plea.[4] In making the findings below, I have applied preponderance of the evidence as the standard of proof.[5]

From February 2008 through March 2009, Gibson was registered with the State of Louisiana as an investment adviser. OIP at 1. He was associated from October 2007 until March 2009 with MetLife Securities, which is a dually registered broker-dealer and investment adviser. *Id.* Gibson resigned from MetLife in March 2009, but acted as an unregistered investment adviser from then until 2014. *Id.*; Ex. 4 at 1.

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1 *John Austin Gibson, Jr.*, Admin. Proc. Rulings Release No. 4736, 2017 SEC LEXIS 1055, at *1 (ALJ Apr. 6, 2017).

2 *Id.*

3 *Id.* at *1–2.

4 *See* 17 C.F.R. § 201.155(a); *David E. Lynch*, Securities Exchange Act of 1934 Release No. 46439, 2002 WL 1997953, at *1 & n.12 (Aug. 30, 2002).

5 *See John Francis D'Acquisto*, Investment Advisers Act of 1940 Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998) ("preponderance of the evidence … is the standard of proof in [Commission] administrative proceedings").

From 2008 through 2014, Gibson represented to investors that he was a MetLife representative and an Allianz agent who could establish and monitor investment accounts with both firms. Ex. 4 at 1. During this period, Gibson solicited and received nearly $170,000 from five investors who were under the impression that their money would be invested with MetLife or Allianz. *Id.*; OIP at 2.

Gibson approached Investors A and B in 2008 and convinced them to invest $15,000 in a MetLife account Gibson said he would establish for them. Ex. 4 at 1–2. After receiving these funds, Gibson failed to establish a MetLife account for A and B. *Id.* at 2. Instead, he kept their money for his personal use. *Id.* From 2008 through 2011, Gibson mailed fake account statements relating to A's and B's invented MetLife account.[6] In 2010, A and B began asking Gibson for their funds. *Id.* Gibson mailed them several checks as partial payments. *Id.*

In March 2009, Gibson approached Investors C and D. Ex. 4 at 2. C and D were Gibson's wife's aged grandparents, one of whom served in World War II and the other of whom suffered from Parkinson's disease. *See* Ex. 5 at 12–16. Gibson told C and D that they would benefit from moving their investments from Prudential to MetLife. Ex. 4 at 2. Gibson told C and D that if they moved their money, he would establish an account for them and monitor it. *Id.* Based on Gibson's assurances, C and D gave Gibson $75,000.[7] *Id.* Gibson did not create an investment account for C and D. *Id.* Instead, he kept their money for his own use. *Id.* Gibson mailed C and D fake account statements from 2009 to 2014. *Id.* When C and D began asking Gibson in 2014 to release some of their funds, he said he would do so. *Id.* In the end, however, he failed to release any money to C and D. *Id.*

Gibson approached Investor E in October 2009, asserting that E would be better off if he moved his investments from Prudential to Allianz. Ex. 4 at 2. Based on this assertion and Gibson's assurance that he would establish and monitor E's account at Allianz, E gave Gibson over $79,000. *Id.* at 2–3. This amount represented E's retirement savings. Ex. 5 at 18. Gibson did not place E's money in an Allianz account and instead kept E's money for his own use. *Id.* at 3. Gibson mailed E fake account statements from 2009 to 2014. *Id.*

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[6] Exhibit 4 is the factual basis for Gibson's guilty plea. It indicates that Gibson mailed the fake statements to Investor E, whose connection to A and B is not explained.

[7] Investor E delivered to Gibson a check for $75,000 on behalf of Investors C and D. Ex. 4 at 2.

After E asked Gibson in 2014 to release his funds, Gibson mailed E money orders as partial payments. *Id.*

In June 2016, Gibson was charged with one count of mail fraud in violation of 18 U.S.C. § 1341. Ex. 1. He pleaded guilty the following month. Ex. 2 at 2. The district court sentenced Gibson in March 2017 to eighteen months' imprisonment and ordered him to pay over $213,000 in restitution.[8] Ex. 3 at 2, 6.

Conclusions of Law

Under the Exchange Act, the Commission may bar Gibson from acting as a broker, dealer, or investment adviser if, as is relevant here, (1) he was associated with or seeking to become associated with a broker or dealer at the time of the misconduct at issue; (2) he was convicted within ten years before the issuance of the OIP of violating 18 U.S.C. § 1341; and (3) imposing a bar is in the public interest. 15 U.S.C. § 78*o*(b)(4)(B)(iv), (6)(A)(ii). The Advisers Act gives the Commission similar authority with respect to a person associated with or seeking to be associated with an investment adviser.[9] 15 U.S.C. § 80b-3(e)(2)(D), (f). In addition, the Advisers Act permits imposition of a bar for any conviction, so long as the offense in question "is punishable by imprisonment for 1 or more years." 15 U.S.C. § 80b-3(e)(3)(A), (f).

Taking these three factors in turn, Gibson was charged with engaging in a fraudulent scheme that lasted from 2008 to 2014. Ex. 1. In pleading guilty, he agreed that his scheme encompassed this time frame. Ex. 4. During

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[8] Relying on Rule of Practice 323, 17 C.F.R. § 201.323, I have taken notice of Gibson's sentencing transcript and the district court's judgment.

[9] Both the Exchange Act and the Advisers Act permit imposition of a full collateral bar—a bar that prevents an individual from participating in the securities industry in capacities in addition to those in which the person was participating at the time of his or her misconduct. *See* 15 U.S.C. §§ 78*o*(b)(6)(A), 80b-3(f). Congress conferred the authority to impose a collateral bar in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). *See Bartko v. SEC*, 845 F.3d 1217, 1220–21 (D.C. Cir. 2017). A collateral bar cannot be imposed for wrongdoing committed before July 22, 2010, the effective date of Dodd-Frank. *Id.* at 1224. After I ordered supplemental briefing to address whether imposing a full collateral bar would be impermissibly retroactive, *see John Austin Gibson, Jr.*, Admin. Proc. Rulings Release No. 4791, 2017 SEC LEXIS 1355, at *2–3 (ALJ May 8, 2017), the Division withdrew its request that I bar Gibson from acting in capacities other than those in which he was acting at the time of his misconduct, Division Suppl. Br. at 2.

this period, Gibson was associated with a broker-dealer and with an investment adviser. OIP at 1; Ex. 4 at 1–3.

In this regard, the facts alleged in the OIP, which I have deemed true, show that Gibson was associated with MetLife, a dually registered broker-dealer and investment adviser, from October 2007 to March 2009. OIP at 1. Gibson resigned from MetLife in March 2009; in October, he solicited and received Investor E's investment, after promising to establish and monitor an investment account for E. Ex. 4 at 1–3. With respect to these latter actions, the term investment adviser includes one who, for compensation, advises others about the "advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). This is what Gibson did when he told Investor E to move E's investment to an account Gibson would establish and monitor.[10] And Gibson's conversion of Investor E's money and use of that money for his own purposes meets the "for compensation" requirement.[11] Gibson thus acted as an investment adviser until at least October 2009.[12]

With respect to the second factor, Gibson was convicted in July 2016, less than ten years before the Commission issued the OIP in this case.[13] *See* Ex. 3 at 1. And Gibson was convicted of mail fraud in violation of 18 U.S.C. § 1341. The combination of these two facts satisfies the second requirement of

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10 *See United States v. Miller*, 833 F.3d 274, 280–82 (3d Cir. 2016).

11 *Id.* at 282; *Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 658791, at *3 (Sept. 15, 1998).

12 The definition of the term investment adviser applies regardless of whether an adviser is registered. *Dennis J. Malouf*, Securities Act of 1933 Release No. 10115, 2016 WL 4035575, at *13 (July 27, 2016); *Martin A. Armstrong*, Advisers Act Release No. 2926, 2009 WL 2972498, at *3 n.7 (Sept. 17, 2009). As a result, the fact that Gibson was not registered after March 2009 as an investment adviser is irrelevant to the determination that he was an investment adviser or associated with an investment adviser.

13 The Advisers Act defines the term "convicted" to include a guilty verdict. 15 U.S.C. § 80b-2(a)(6). The Commission applies this definition for purposes of the Exchange Act. *See Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *8 n.40 (Mar. 7, 2014), *pet. granted in part on other grounds*, 845 F.3d 1217 (D.C. Cir. 2017).

both Exchange Act Section 15(b) and Advisers Act Section 203.[14] *See* 15 U.S.C. §§ 78*o*(b)(4)(B)(iv), (6)(A)(ii), 80b-3(e)(2)(D), (f).

Determining whether imposing a bar would be in the public interest requires consideration of the factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).[15] The public interest 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.[16]

The Commission also considers the deterrent effect of administrative sanctions.[17] The public interest inquiry is "flexible" and "no one factor is dispositive."[18] Before imposing a bar, an administrative law judge must specifically determine why the Commission's interests in protecting the investing public would be served by imposing an industry bar.[19]

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[14] Gibson's offense was punishable by imprisonment for more than one year, thus meeting the alternative requirement in the Advisers Act. *See* 15 U.S.C. § 80b-3(e)(3)(A), (f); 18 U.S.C. § 1341.

[15] *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *5 (Oct. 29, 2014).

[16] *David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016).

[17] *Peter Siris*, Advisers Act Release No. 3736, 2013 WL 6528874, at *11 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). Although relevant, general deterrence is not determinative in assessing whether the public interest weighs in favor of imposing a bar. *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007).

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

[19] *Mark Feathers*, Exchange Act Release No. 73634, 2014 WL 6449870, at *1 (Nov. 18, 2014); *see Ross Mandell*, Exchange Act Release No. 71668, 2014

In deciding whether to impose a bar, I bear in mind the Commission's caution that "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[20] This dependence on the integrity of industry participants is especially the case for investment advisers, who owe their clients "an 'affirmative [fiduciary] duty of utmost good faith.'"[21]

Turning to the public-interest factors, Gibson's conduct was egregious.[22] Although he did not defraud his victims of millions of dollars, Gibson made up for this fact by preying on aged retirees and family members. He thus put his own interest before those of his vulnerable clients who, because of their advanced years, would be unable to make good their losses. Gibson's willingness to prey on vulnerable victims and violate his fiduciary duty shows both that he is not fit to remain in the securities industry and that excluding him from it would best serve the Commission's interest in protecting the investing public.

As to the remaining public-interest factors, given that he defrauded five victims as part of a scheme lasting a number of years, during which he mailed his victims fake account statements to hide what he was doing, Gibson's conduct was not isolated. Gibson also acted with a high degree of scienter. He did not accidentally use his victim's money for his own purposes after promising to invest and monitor his victims' money. Gibson did not accidentally send his victims fraudulent account statements. He did these things intentionally. That Gibson persisted in engaging in a years-long scheme involving multiple victims only adds weight to the determination that he acted with scienter. And the calculated manner in which Gibson went

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WL 907416, at *2 (Mar. 7, 2014), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

[20] *Mark Feathers*, 2014 WL 6449870, at *3 (quoting *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 (July 26, 2013)).

[21] *Timbervest, LLC,* Advisers Act Release No. 4197, 2015 WL 5472520, at *5 (Sept. 17, 2015) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963)).

[22] *See Ralph Calabro*, Securities Act Release No. 9798, 2015 WL 3439152, at *41 (May 29, 2015) (finding a bar in the public interest because the respondent egregiously "put his own financial interests above those of his elderly retired client and caused … devastating financial harm").

about pursuing and concealing his fraud lends additional support to the argument that he should be barred in order to protect the investing public.

Gibson has neither made assurances against future misconduct nor demonstrated that he understands or recognizes the wrongfulness of his criminal acts. He has not participated in this proceeding. And during his sentencing proceeding, the district court remarked that Gibson acted as though "nothing [had] happened." Ex. 5 at 21.

The fact of Gibson's criminal misconduct "raises an inference" that he will repeat it.[23] That inference is supported by my determination that Gibson acted with scienter and that his conduct was egregious.[24] Allowing Gibson to remain in the securities industry would present him with future opportunities for further misconduct and would put the investing public at risk.

Finally, imposing a bar will serve the Commission's interest in deterring others from engaging in similar misconduct.

In light of the factors discussed above, I find that it is in the public interest to bar Gibson from acting as a broker, dealer, or investment adviser.

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

[24] *Id.* at *6; *John A. Carley*, Exchange Act Release No. 57246, 2008 WL 268598, at *22 (Jan. 31, 2008) (determining whether to impose a cease-and-desist order and holding that "[o]ur finding that a violation is egregious 'raises an inference that [the misconduct] will'" recur (quoting *Geiger v. SEC*, 363 F.3d at 489), *remanded on other grounds sub nom. Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009).

Order

The Division of Enforcement's motion for entry of default is GRANTED.

Under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, John Austin Gibson, Jr., is BARRED from associating with a broker, dealer, or investment adviser.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360. *See* 17 C.F.R. § 201.360. Under 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 111. *See* 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 occurs, the initial decision shall not become final as to that party.

Gibson may move the Commission under Rule of Practice 155(b), 17 C.F.R. § 201.155(b), to set aside the determination that he is in default. On a showing of good cause, Rule 155(b) permits the Commission to set aside a default in order to prevent injustice and on such conditions as may be appropriate. A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.* Because I may only set aside a default "prior to the filing of the initial decision," if Gibson files a motion to set aside a default, his motion should be directed to the Commission.

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James E. Grimes
Administrative Law Judge