Initial Decision Release No. 1158
Administrative Proceeding
File No. 3-17883

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

In the Matter of

Warren D. Nadel

Initial Decision
August 4, 2017

Appearances: Richard Primoff and Jorge G. Tenreiro for the Division of Enforcement, Securities and Exchange Commission

Warren D. Nadel, *pro se*

Before: Cameron Elliot, Administrative Law Judge

As market conditions began to tighten in 2007, rather than adjusting his investment strategy, Respondent Warren D. Nadel decided to cross trade among client accounts, without their consent or knowledge, significantly overstating the amount of assets he managed along the way. A federal district court has already permanently enjoined Nadel from violating the federal securities laws, ordered disgorgement of more than ten million dollars, prejudgment interest of more than two million dollars, and a civil penalty of one million dollars. This initial decision imposes the further sanction of barring Nadel from associating with a broker, dealer, or investment adviser.

Procedural Background

On March 16, 2017, the Securities and Exchange Commission issued an order instituting administrative proceedings (OIP) against Nadel, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940. The OIP alleges that on January 20, 2017, the district court in *SEC v. Nadel*, No. 2:11-cv-215 (E.D.N.Y.), permanently enjoined Nadel from future violations of Section 17(a) of the Securities Act of 1933; Section 10(b) of the Exchange Act and Rule 10b-5

thereunder; Section 206(1), (2), and (3) of the Advisers Act; and from aiding and abetting any violations of Exchange Act Section 10(b) and Rule 10b-10 thereunder. OIP at 2.

After Nadel answered the OIP, I held a telephonic prehearing conference and set a briefing schedule for summary disposition. The Division's motion for a permanent bar from associating with a broker, dealer, or investment adviser, filed June 16, 2017, referred to several exhibits, consisting primarily of items from the record in the civil case. Nadel responded on July 7, 2017; many of his exhibits also came from his civil case. The Division replied on July 17, 2017, closing the briefing.

Summary Disposition Standard

Summary disposition is appropriate where 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). A motion for summary disposition is generally proper in "follow-on" proceedings like this one, where the administrative proceeding is based on a civil injunction. *See, e.g.*, *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *10 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

The findings and conclusions in this initial decision are based on the record and on facts officially noticed pursuant to Rule 323, including the proceedings, docket sheet, and record in the civil case, which Nadel is precluded from contesting. *See Daniel Imperato*, Exchange Act Release No. 74596, 2015 WL 1389046, at *4 nn. 23-24, *5 (Mar. 27, 2015) (giving preclusive effect to a district court's factual findings and legal conclusions in the context of a litigated summary judgment motion), *vacated in part on other grounds*, No. 15-11574, 2017 WL 2829066 (11th Cir. June 30, 2017); 17 C.F.R. § 201.323. All filings and all documents and exhibits of record have been fully reviewed and carefully considered. All arguments and proposed findings and conclusions that are inconsistent with this initial decision have been considered and rejected.

Findings of Fact

The civil case proceeded against (1) Nadel; (2) Registered Investment Advisers, LLC, a Commission-registered investment adviser of which Nadel was president; (3) Warren D. Nadel & Co., a FINRA-registered broker-dealer of which Nadel was president, CEO, and chief compliance officer; and (4) Nadel's then-wife, as a relief defendant. *See SEC v. Nadel*, 97 F. Supp. 3d 117 (E.D.N.Y. 2015) (*Nadel I*). In its order granting summary judgment, the

district court considered the undisputed facts of Nadel's conduct and construed the facts in the light most favorable to Nadel. *Id.* at 119-21.

The district court found that Nadel pursued a preferred stock dividend capture strategy, "which required a high volume of transactions in preferred utility stocks." *Id.* at 120. The strategy was designed to "generate tax-favored dividend income." *Id.* (quoting Nadel's program package, ECF No. 82-1). In late 2007, Nadel "began conducting cross-trades between [Registered Investment Advisers's] own advisory clients instead of executing trades on the open marketplace," without alerting his clients or obtaining their consent.[1] *Id.* Nadel also represented in marketing materials that Registered Investment Advisers managed more than $400 million in investor assets, despite Commission filings between January 2007 and January 2010 in which he reported no more than $150 million in managed assets. *Id.*

The district court granted the Commission's motion for summary judgment, finding that Nadel violated Exchange Act Section 10(b) and Rules 10b-5 and 10b-10 thereunder, Securities Act Section 17(a), and Advisers Act Section 206(1), (2), and (3), and directed the magistrate judge to hold a hearing to decide the appropriate relief. *Id.* at 130. The evidentiary hearing lasted four days in July 2015. *SEC v. Nadel*, No. 11-215, 2016 WL 639063, at *1 (E.D.N.Y. Feb. 11, 2016) (*Nadel II*). Nadel and his then-wife testified, as did a Commission examiner and five clients of Nadel. *Id.* at *4, 9, 11 n.11.

The magistrate judge made detailed findings regarding the "high degree of scienter" with which Nadel acted. *Id.* at *6-9. She found that Nadel knowingly failed to provide accurate trading confirmations for more than eighteen months and failed to alert his clients to the inaccuracies in the confirmations. *Id.* at *6. She also found that the "magnitude, duration and persistent and ongoing misrepresentation" about the amount of assets under management demonstrated a high degree of scienter. *Id.* at *7. Indeed, "[e]ven an investigatory inquiry by the Commission . . . —which sought substantiation for the statement on Defendants' website claiming that Defendant [Warren D. Nadel & Co.] was managing over $400 million—did not dissuade Defendants from continuing to misrepresent [assets under management] to clients." *Id.* Moreover, Nadel "was not truthful in written correspondence to the Commission," which stated that he did not correspond with clients via email, when in fact he misrepresented assets under

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[1] Cross trading occurs when a broker "fills a customer's order by buying or selling a security from an account in which the broker has an interest." *D'Alessio v. SEC*, 380 F.3d 112, 114 (2d Cir. 2004).

management in numerous client emails. *Id.* at *8. Finally, the magistrate judge found that the "overall scope and duration" of Nadel's failure to provide proper notice and obtain consent to cross trading among client accounts "evidenced a knowing disregard for Defendants' fiduciary obligations to their clients." *Id.*

The magistrate judge also made findings regarding the recurrent nature of Nadel's conduct. She found that the cross trading lasted at least three years; assets under management were misrepresented for more than three years; and Nadel knew for almost two years that the trade confirmations were inaccurate but did not correct them or alert his clients. *Id.* at *9.

Having watched Nadel testify, the magistrate judge found that he displayed "both indifference and a somewhat cavalier attitude regarding the underlying violations." *Id.* He "appeared dismissive" about some of the allegations against him, and evinced a "lackluster attitude" about others. *Id.*

Concluding her analysis, the magistrate judge recommended granting the permanent injunction requested by the Commission. *Id.* at *10. She also recommended ordering disgorgement and prejudgment interest of more than ten million dollars to be imposed on the defendants jointly and severally, and imposing a one-million-dollar third-tier civil penalty on Nadel. *Id.* at *30; *see SEC v. Nadel*, 206 F. Supp. 3d 782, 785 n.1 (E.D.N.Y. 2016) (*Nadel III*).

After the magistrate judge's report issued, Nadel filed objections, but not, notably, to the findings regarding the permanent injunction and civil penalty. *Nadel III*, 206 F. Supp. 3d at 784-85. The district court reviewed the record *de novo* and adopted the magistrate judge's recommendations in full. *Id.* at 784, 789. The district court entered final judgment against Nadel on January 20, 2017. Div. Ex. 5 (ECF No. 145).

Conclusions of Law

Exchange Act Section 15(b)(6) authorizes the Commission to impose a bar on Nadel if: (1) at the time of the alleged misconduct, he was associated with a broker or dealer; (2) he has been enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C); and (3) the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(4)(C), (b)(6)(A)(iii). The Advisers Act gives the Commission similar authority with respect to a person associated

with or seeking to be associated with an investment adviser at the time of the misconduct. 15 U.S.C. § 80b-3(e)(4), (f).[2]

There is no dispute that, at the time of his misconduct, Nadel was associated with an investment adviser, Registered Investment Advisers, which he controlled, and a broker-dealer, Warren D. Nadel & Co., which he also controlled. Nor is there any dispute that Nadel has been found to have willfully violated, and been permanently enjoined from violating, the antifraud provisions of the Exchange Act and Advisers Act, within the meaning of Exchange Act Section 15(b)(4)(C) and Advisers Act Section 203(e)(4).

That leaves the question of whether barring Nadel from acting as or associating with a broker, dealer, or investment adviser is in the public interest. The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in *Steadman v. SEC*, namely: 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. 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *5 & n.14 (May 27, 2016); *Gary M. Kornman*, 2009 WL 367635, at *6. This is a "flexible" inquiry, and "no one factor is dispositive." *Kornman*, 2009 WL 367635, at *6. The Commission has also considered 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 WL 231642, at *8 & n.46 (Jan. 31, 2006); *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 WL 21729839, at *2 (July 25, 2003).

The Commission considers misconduct involving fraud to be particularly egregious and requiring a severe sanction. *See Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013) (stating that the

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[2] The bar extends only to the two capacities in which Nadel was active at the time of his misconduct because that misconduct predates the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized the Commission to impose a bar covering multiple industry capacities based on a respondent's misconduct in only one such capacity. Pub. L. No. 111-203, §§ 4, 925, 124 Stat. 1376, 1390, 1850-51 (2010); *Bartko v. SEC*, 845 F.3d 1217, 1221-26 (D.C. Cir. 2017); *Koch v. SEC*, 793 F.3d 147, 157-58 (D.C. Cir. 2015).

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). Where a respondent has been enjoined from violating antifraud provisions of the securities laws, the Commission "typically" imposes a permanent bar. *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *8 (Oct. 29, 2014).

In *Ross Mandell*, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and that the law judge's decision "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (internal quotation marks omitted), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016). After engaging in such an analysis, I have determined that it is appropriate and in the public interest to permanently bar Nadel from associating with a broker, dealer, or investment adviser.

Nadel's conduct was egregious, recurrent, and undertaken with a high degree of scienter, as the magistrate judge found. Nadel engaged in misrepresentations for a period of over three years. Not only did he misrepresent—by more than double—assets under management, he displayed a "knowing disregard" for his fiduciary obligations to his clients. Further, he was untruthful with the Commission. Ultimately, he was ordered, with the codefendants he personally controlled, to disgorge more than ten million dollars and pay a civil penalty of one million dollars. These three factors weigh heavily in favor of a permanent bar.

As to the issue of Nadel's recognition of wrongdoing and assurances against future violations, the magistrate judge variously described Nadel's attitude during his testimony as "indifferent," "cavalier," "dismissive," and "lackluster"—clearly indicating little to no recognition of his wrongdoing at the time. In his response to the motion for summary disposition, Nadel states that he was "understandably nervous, intimidated and simply scared" of the civil proceeding against him. Resp. at 6. He also claims not to have been given an opportunity to express his remorse during his testimony. *Id.* at 6-7.

Although he laments the consequences of the civil case on him, in neither his answer nor his response to the summary disposition motion does he express remorse. However, in a letter to Division counsel, Nadel stated that he "cannot apologize more strenuously" for inflating his assets under

management, and claims to have "learned a most painful and powerful lesson." Div. Ex. 6 at 1-2; *see also id.* at 2 ("I understand and appreciate that what I did was wrong . . . ."); *id.* ("I am truly sorry for my errors and would gladly abide by whatever punishment the SEC judicial system deems appropriate."). Yet, in the same letter he disclaims an "attempt to defraud a client" with regard to the cross trading; instead, he pleads ignorance and the "lack of a knowledgeable compliance staff." *Id.* at 1. As for future violations, in his answer, Nadel offered a "promise to never violate any of the rules and regulations of the securities industry." Answer at 2. He also suggests a sort of settlement, whereby he would forego the ability to obtain licensure in the securities industry, but would not receive a lifetime bar and would be permitted to work within the industry under some sort of supervisory compliance program. *Id.* at 1.

The balance is close, but ultimately, Nadel's statements cannot overcome the inference, raised by the existence of the past violations, that he will repeat his violations. *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 n.50 (July 26, 2013) ("[T]he existence of a violation raises an inference that it will be repeated." (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004))).

Finally, as the magistrate judge noted, Nadel's "long history with, and entrenchment in, the financial industry during the past 35+ years" makes future violations more likely. *Nadel II*, 2016 WL 639063, at *10. Indeed, Nadel has on at least three occasions expressed a "desire to re-enter the securities industry workforce in some capacity." Resp. at 2; *see* Answer at 1; Div. Ex. 6.

Weighing all the factors, there is substantial need to protect investors from Nadel and deter others from engaging in similar conduct. Associational bars have long been considered effective deterrence. *See Guy P. Riordan*, Securities Act Release No. 9085, 2009 WL 4731397, at *19 & n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). A permanent associational bar "will prevent [Nadel] from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct." *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *20 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015).

Order

It is ORDERED that the Division's motion for summary disposition is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Warren D. Nadel is BARRED from associating with an investment adviser.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Warren D. Nadel is BARRED from associating with a broker or dealer.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360. *See* 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 111. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed, 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. 17 C.F.R. § 201.360(d). 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.

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Cameron Elliot
Administrative Law Judge