Initial Decision Release No. 1242
Administrative Proceeding
File No. 3-18209

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

In the Matter of

Hui Feng and
Law Offices of Feng & Associates, P.C.

Initial Decision
March 12, 2018

Appearances: Donald W. Searles for the Division of Enforcement, Securities and Exchange Commission

Hui Feng*, pro se*

Before: Cameron Elliot, Administrative Law Judge

Respondents, a lawyer and his firm, defrauded their overseas clients by recommending investments within the EB-5 immigrant investment program without disclosing the referral commissions they were receiving from the regional centers managing the investments. Respondents also defrauded the centers by failing to disclose the scheme to them. A district court imposed an injunction against Respondents as a result of their misconduct. This initial decision imposes a full associational and penny stock bar against Respondents.

Procedural Background

On September 25, 2017, the Securities and Exchange Commission issued an order instituting administrative proceedings (OIP) against Respondents pursuant to Section 15(b) of the Securities Exchange Act of 1934. The OIP alleges that the district court in *SEC v. Feng*, No. 2:15-cv-9420 (C.D. Cal. Aug. 10, 2017), permanently enjoined Respondents from future violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. OIP at 2.

The Law Offices of Feng & Associates, P.C. (the Law Offices), was served with the OIP on October 2, 2017, and Hui Feng was served on November 3, 2017. *Hui Feng*, Admin. Proc. Rulings Release Nos. 5222, 2017 SEC LEXIS 3547, at *1 (ALJ Nov. 8, 2017); 5215, 2017 SEC LEXIS 3486, at *1 (ALJ Nov. 2, 2017). Respondents are aware of this proceeding; Feng has included my office on numerous emails regarding his opinion of the judgment against him in district court, his pending appeal, and other matters. Nonetheless, neither Respondent filed an answer as directed by the OIP. Respondents also failed to attend a prehearing conference held on October 30, 2017. I issued Respondents an order to show cause by January 5, 2018, but they have not responded to that either. *Hui Feng*, Admin. Proc. Rulings Release No. 5315, 2017 SEC LEXIS 3926 (ALJ Dec. 7, 2017). The only communication Respondents directed to my office specifically was an email sent on October 19, 2017, in which Feng represented that he had no money to formally defend this proceeding. Email from Hui Feng to Office of Administrative Law Judges, SEC (Oct. 19, 2017) (Oct. 19 email); *see Hui Feng*, Admin. Proc. Rulings Release No. 5195, 2017 SEC LEXIS 3358, at *1 (ALJ Oct. 20, 2017).

The Division of Enforcement submitted a motion for the entry of default and sanctions against Respondents on January 16, 2018, along with a supporting declaration from Donald W. Searles and twelve exhibits. Among the Division's exhibits is the district court's amended order granting the Division's motion for summary judgment (Div. Ex. 3); the court's final judgment against Respondents (Div. Ex. 4); several pages from the Division's deposition of Feng dated December 15, 2016 (Div. Ex. 5); a spreadsheet Feng attached to his declaration in the district court case detailing his clients' investments and the referral fees he received (Div. Ex. 6); and emails sent by Feng to various recipients (Div. Exs. 7-12). Some of the emails predate the OIP, but others were sent to my office and other recipients.

Legal Standards

Although Respondents have not meaningfully participated in this proceeding, I will not find them in default. Feng has made email submissions related to Respondents' underlying conduct, and I construe Feng's October 19 email, in which he declines to defend the proceeding but disputes the district court's finding that he acted as a broker, as Respondents' answer. *See, e.g.*, Oct. 19 email; Div. Exs. 10-12. I also therefore construe the Division's motion as one for summary disposition.

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). 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. *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); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5 & n.21 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009).

The Division's motion and the district court record provide sufficient basis to decide this proceeding. In particular, the district court's order granting summary judgment made factual and legal findings that satisfy the prerequisites for granting the relief requested by the Division. Div. Ex. 3. I also take official notice of Feng's declaration found in the district court docket, as it provides relevant background material. *Hui Feng*, No. 2:15-cv-9420 (Jan. 31, 2017), ECF No. 69 (Feng Decl.); 17 C.F.R. § 201.323. I have not relied on Feng's declaration insofar as he makes statements against his interest, unless such findings were also made by the district court.

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

Feng graduated from Columbia Law School in 1997. Feng Decl. at 2. The Law Offices is Feng's law firm, which he incorporated in October 2011. *Id*. His legal practice has focused primarily on immigration law. *Id.*

In approximately 2010, Feng became involved in the EB-5 Immigrant Investor Program administered by the United States government. *Id.*; Div. Ex. 3 at 14; Div. Ex. 6 at 1. Under the EB-5 program, entrepreneurs who make a certain level of investment in a commercial enterprise in the United States and plan to create or preserve ten permanent full-time jobs for United States workers are eligible to apply for permanent residence in the United States. 8 U.S.C. § 1153(b)(5); EB-5 Immigrant Investor Program, https://www.uscis.gov/eb-5 (last visited Mar. 5, 2018); *see* Div. Ex. 3 at 1-2. United States Custom and Immigration Services, the government agency responsible for administering the EB-5 program, pre-approves many entities, called "regional centers," to pool investors' funds together to invest in job-creating projects. Feng Decl. at 1; *see* Div. Ex. 3 at 1-2. Feng represented roughly 150 clients, who invested in approximately thirty separate projects carried out through ten separate regional centers. Div. Ex. 5 at 119; Feng Decl. at 4. Feng's clients sought to become legal United States residents through their participation in the EB-5 program. Feng Decl. at 6.

Respondents did research on behalf of their clients, gave them advice regarding which regional centers' programs to invest in, and negotiated with the regional centers on their clients' behalf. Div. Ex. 3 at 14. But Feng also received transaction-based compensation as commissions or referral fees for referring his clients to the regional centers. *Id.* Before February 2015, Feng told his clients he received referral fees only if they asked him. *Id.* at 16; Feng Decl. at 9. Respondents did not tell their clients about the referral fees because they did not want to have to return a portion of them to their clients. Div. Ex. 3 at 19.[1] Also, Respondents never registered as brokers with the Commission. *Id.* at 15.

On these facts, the district court found that Respondents acted as unregistered broker-dealers in violation of Section 15(a) of the Securities Exchange Act of 1934. *Id.* The district court further found that Respondents' failure to disclose to their clients that they received commissions was a material misrepresentation in connection with the offer or sale of a security, and that Respondents acted with scienter. *Id.* at 17-19.

In addition, Feng told regional centers that he was working with individuals in China to procure investors and that those individuals were demanding the referral fees. Div. Ex. 3 at 21. Feng made it look like the referral fees were not going to him. *See id.* In reality, at Feng's direction, his relatives purported to be the overseas individuals demanding the referral fees and signed agreements with the regional centers on behalf of Atlantic Business Consulting Limited (ABCL), a Hong Kong entity Feng formed in April 2014. *Id.*; Feng Decl. at 8. Feng is the sole beneficial owner of ABCL and has sole control over its bank account. Div. Ex. 3 at 20-21. ABCL's employees were all employees of the Law Offices. *Id.* at 21.

Feng failed to disclose to the regional centers that ABCL was his company, that his relatives had no role in finding investors, and that they had no actual role in ABCL. *Id.* at 21-22. At least one regional center would likely have ceased doing business with Feng if it had known about this arrangement. *Id.* at 22. Respondents offered no evidence that the regional centers were aware of Feng's real relationship with ABCL. *Id.* The district court therefore found that this conduct was a scheme to defraud the regional centers, and that the Commission proved that Respondents had violated

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[1] Feng sometimes rebated a portion of the referral fee to his clients, but made it appear as if the rebate was coming from the regional center so that his clients thought he was negotiating on their behalf. Div. Ex. 3 at 20; *see* Div. Ex. 6 at 1-2.

Securities Act Section 17(a)(1) and Exchange Act Rule 10b-5(a) and (c). *Id.* at 19, 23.

The district court ordered Respondents to jointly and severally disgorge the $1,268,000 in commissions that they received, in addition to $130,517.09 in prejudgment interest. *Id.* at 23. The district court imposed $160,000 in civil penalties against Feng and $800,000 against the Law Offices. *Id.* at 24. The court permanently enjoined Respondents from violating Section 17(a) of the Securities Act, and Sections 10(b), 15(a), and Rule 10b-5 of the Exchange Act. Div. Ex. 4 at 1-3.

Conclusions of Law

Exchange Act Section 15(b)(6) authorizes the Commission to impose a bar on Respondents if: (1) at the time of the alleged misconduct, they were associated with a broker or dealer; (2) had 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 legal prerequisites have been met. The district court concluded that the EB-5 investments were securities. Div. Ex. 3 at 5-11. The court likewise found that Respondents acted as unregistered brokers within the meaning of the Exchange Act for their role in promoting the EB-5 investments to their clients and receiving transaction-based compensation from the regional centers. *Id.* at 11, 13-15.[2] "A person who acts as an unregistered broker-dealer is 'associated' with a broker dealer for the purposes of Section 15(b)." *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *1 n.2 (Apr. 23, 2015). And Respondents have been permanently enjoined from

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[2] In some of his emails to my office, Feng challenges the district court's finding that Respondents acted as brokers. *See, e.g.*, Oct. 19 email ("I am not a stock broker or provide any broker service[s]."); Div. Ex. 11 at 1. But Respondents are precluded from attacking in this proceeding the "factual and procedural issues actually litigated and necessary to the district court's decision." *Daniel Imperato*, Exchange Act Release No. 74596, 2015 WL 1389046, at *4 & nn.23-24 (Mar. 27, 2015) (considering the respondent's argument that he did not act as a broker an unauthorized attempt to relitigate the district court's determination), *recons. denied*, Exchange Act Release No. 74886, 2015 WL 2088435 (May 6, 2015), *vacated in part on other grounds*, 693 F. App'x 870 (11th Cir. 2017). That Respondents acted as brokers was crucial to the district court's determination that they violated Section 15(a) and defrauded their clients and the regional centers. *See generally* Div. Ex. 3.

"conduct . . . in connection with the purchase or sale of any security" because of the district court's injunction against violating the antifraud provisions of the Securities Act and the Exchange Act. 15 U.S.C. § 78*o*(b)(4)(C); *see* Div. Ex. 4 at 1-3.

That leaves the question of whether a full collateral bar 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 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 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*, Investment Advisers Act of 1940 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 based on the *Steadman* factors, I have determined that it is appropriate and in the public interest to impose a full collateral bar on Respondents.

Respondents' conduct was egregious. Respondents defrauded their legal clients, with whom they had an attorney-client relationship and to whom they owed fiduciary duties. *See* Div. Ex. 3 at 15-19. Their fraud caused actual harm; the district court found that Respondents' clients would have chosen cheaper investments or asked to receive a portion of the commissions had they known what Respondents were really doing. *Id.* at 16-17. Respondents enabled their fraudulent scheme by also defrauding the regional centers, creating the false appearance that ABCL was an independent entity that could properly receive referral fees. *Id.* at 19-23. The fact that Respondents were ordered to disgorge more than one million dollars and to collectively pay nearly one million in civil penalties quantifies the egregiousness of their conduct. *Id.* at 23-24.

The fraud was also recurrent, as evidenced by the fact that Respondents had around 150 EB-5 clients and did not disclose their receipt of referral fees to the vast majority of them. Div. Ex. 5 at 119; *see* Div. Ex. 3 at 16 n.24 (Feng only disclosed fees to clients that asked, and only about ten to twenty percent asked); Div. Ex. 6 at 1-2 (detailing the many transactions with multiple clients for which Respondents received referral fees). And Respondents' fraud was relatively recent, lasting from 2010 until at least early 2015. Div. Ex. 6 at 1-2 (detailing transactions from 2010 until 2015); *see* Div. Ex. 3 at 16 (beginning in February 2015, Feng disclosed to his clients that he was receiving commissions).

The district court further found that Respondents acted with a high degree of scienter. Div. Ex. 3 at 19. They consciously refrained from telling their clients about the referral fees because they did not want to have to negotiate about rebating portions of those commissions. *Id.*

Respondents have not shown any remorse for their actions; to the contrary, Feng has called the lawsuit against him "frivolous," the district court's opinion "ludicrous," and the whole case "treasonous enforcement activity." *E.g.*, Div. Ex 7 at 1; Div. Ex. 8 at 1. Feng simply believes that he was "contribut[ing] to the interest of the United States through providing immigration services to EB-5 programs." Div. Ex. 10 (second page, email from Oct. 18, 2017, 9:49 p.m, to my office and others); *see also* Div. Ex. 8 at 1 (Feng stating that he contributed to job creation and was protecting the interests of his overseas clients).

Respondents have likewise made no assurances against future violations. Rather, Feng has indicated that he intends to continue to advise clients who hope to immigrate to the United States through the EB-5 program. Div. Ex. 7 at 3 (email from July 3, 2017, to undisclosed recipients). If Respondents continue in the same line of work, which they say they intend to do, their past violations raise the inference that they will repeat those 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))). And Respondents' complete lack of remorse also raises substantial concerns that they will continue to violate the law and put investors and clients at risk.

Weighing all the factors, there is substantial need to protect investors from Respondents 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 [Respondents] 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

The Division's motion for default and sanctions, which I have construed as a motion for summary disposition, is GRANTED.

It is ORDERED that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Hui Feng and the Law Offices of Feng & Associates, P.C., are BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.

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 any 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.

Cameron Elliot
Administrative Law Judge