Initial Decision Release No. 1243
Administrative Proceeding
File No. 3-18252

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

In the Matter of

Joseph Vitale

Initial Decision
March 12, 2018

Appearance: Amie Riggle Berlin for the Division of Enforcement, Securities and Exchange Commission

Before: Jason S. Patil, Administrative Law Judge

Joseph Vitale sold investments to victims who were advised he received no commissions, then underhandedly paid himself more than a third of their money. Vitale was convicted, imprisoned, and ordered to pay two million dollars in restitution. This initial decision imposes the further sanction of an associational and penny stock bar against Vitale.

Procedural Background

On October 16, 2017, the Securities and Exchange Commission issued an order instituting proceedings (OIP) against Vitale, pursuant to Section 15(b) of the Securities Exchange Act of 1934. The OIP alleges that on June 6, 2017, Vitale pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 before the United States District Court for the Southern District of Florida, in *United States v. Joseph Vitale*, No. 17-cr-60102. OIP at 2. Judgment was entered against Vitale on August 22, 2017. *Id.* On January 26, 2018, I found Vitale in default for his failure to answer the OIP or appear at the prehearing conference, of which he had been notified. *Joseph Vitale*, Admin. Proc. Rulings Release No. 5540, 2017 SEC LEXIS 284, at *1-2.

On February 2, 2018, the Division of Enforcement filed a motion for sanctions, seeking to permanently bar Vitale from associating with a broker,

dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization, as well as a penny stock bar. Vitale did not file an opposition to the motion.

Findings of Fact

Because Vitale is in default, I deem the allegations in the OIP to be true. 17 C.F.R. § 201.155(a). The OIP's allegations are predicated on the federal criminal complaint, guilty plea, conviction, and sentence appended to the Division's motion. 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 federal criminal and civil cases against Vitale. *See* 17 C.F.R. § 201.323. All filings and all documents and exhibits of record have been fully reviewed and carefully considered.

On March 27, 2017, a federal criminal complaint was filed against Vitale. *See* Ex. 1.[1] On June 6, 2017, Vitale pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341. *See* Ex. 2. On August 22, 2017, the court sentenced Vitale to a prison term of 57 months and ordered him to make restitution, which was later set at two million dollars. Ex. 3. An amended judgment was entered on October 24, 2017. *See United States v. Joseph Vitale*, No. 17-cr-60102, ECF No. 36. Vitale did not appeal his criminal conviction.

In connection with his plea in the criminal case, Vitale admitted that:

a. From approximately 2015 to 2017, he worked as a broker soliciting investments in LottoNet;[2]

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[1] All citations to exhibits in this initial decision refer to the exhibits attached to the Division's motion.

[2] LottoNet Operating Corporation, Central Index Key No. 1656051, was allegedly "in the business of facilitating the purchase of lottery tickets from lotteries in various states online." Complaint ¶ 2, *SEC v. LottoNet Operating Corp.*, No. 17-21033 (S.D. Fla. Mar. 20, 2017). In 2015, LottoNet filed a Form D with the Commission, seeking to raise a total of $5,000,000 by selling 40,000 shares of common stock at $125 per share. LottoNet Operating Corp., Notice of Exempt Offering (Form D) (Oct. 21, 2015) (amended Nov. 23, 2015); Report & Recommendation on Pl.'s Request for Entry of Preliminary Inj. at 5, *SEC v. LottoNet Operating Corp.*, No. 17-21033, 2017 U.S. Dist. LEXIS 51390 (S.D. Fla. Mar. 31, 2017) ("R. & R."), *adopted by* 2017 U.S. Dist. LEXIS 53840

(continued...)

b. He frequently used the alias of "Donovan Kelly" when speaking to potential investors in LottoNet;

c. He sent the LottoNet private placement memorandum to prospective investors, which explicitly stated that: "[n]o commissions or any other form of remuneration will be paid on sales made directly to the public by the company";[3]

d. In or around December 2016, Vitale met with a Federal Bureau of Investigation cooperating witness. Vitale told the witness that he received 35% commissions on investor money raised. On a conference call with an undercover agent posing as a potential investor, Vitale instructed the witness to falsely represent that no commissions were paid to the witness as a broker;

e. At least one investor that Vitale solicited mailed a $250,000 check to LottoNet's offices for an investment in LottoNet. Vitale did not tell the investor that he was receiving a 35% commission on the transaction and the investor would not have invested had he known of this commission;

f. LottoNet made at least $700,000 in payments to Vitale or his companies; and

g. Vitale was responsible for soliciting more than ten investors in LottoNet.

Ex. 2 at Factual Proffer (alteration in original).

(S.D. Fla. Apr. 5, 2017). LottoNet sought to raise an additional $10,000,000 through offerings by subsidiaries in Peru, Guatemala, and Colombia. R. & R. at *7.

[3] Vitale "drafted scripts for soliciting investors" to be used by sales agents in LottoNet's boiler room. R. & R. at *9. Although Vitale's scripts assured investors that the sales agents would not receive commissions and that the funds invested would be used "for advertising and Technical Support on the backside," *id.* at *14, much of the funds were used to pay agents, for personal expenses, and "to produce a pornographic film at LottoNet's offices," *id.* at *16.

Conclusions of Law

Exchange Act Section 15(b)(6)(A) authorizes the Commission to impose an associational and penny stock bar against Vitale, if: (1) at the time of the alleged misconduct, he was associated with a broker; (2) he has been convicted of any offense specified in Exchange Act Section 15(b)(4)(B) within 10 years of the commencement of the proceedings; and (3) the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(6)(A).

Vitale's misconduct occurred while he worked as a broker soliciting investments in LottoNet. Ex. 2. A respondent who meets the definition of a broker is "a 'person associated with a broker' for purposes of Exchange Act Section 15(b)(6)." *James S. Tagliaferri*, Securities Act Release No. 10308, 2017 WL 632134, at *5 (Feb. 15, 2017). Vitale's mail fraud conviction constitutes a "felony . . . which . . . involves the violation of section . . . 1341 . . . of Title 18," a predicate to the Commission's ability to sanction him under the Exchange Act. *See* Exchange Act Sections 15(b)(4)(B)(iv), 15(b)(6)(A)(ii), 15 U.S.C. §§ 78*o*(b)(4)(B)(iv), 78*o*(b)(6)(A)(ii). Vitale pleaded guilty in 2017, the same year the OIP issued, so the matter was filed within the limitations period.

Sanctions

Whether an administrative sanction is in the public interest turns on 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, recognition of the wrongful conduct, and the likelihood that the respondent's occupation will present future opportunities for violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Toby G. Scammell*, Investment Advisers Act of 1940 Release No. 3961, 2014 WL 5493265, at *5 (Oct. 29, 2014). 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 WL 231642, at *8 & n.46 (Jan. 31, 2006); *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *2 (July 25, 2003).

1. The egregious and recurrent nature of the misconduct

Vitale's 57-month prison sentence, Ex. 3 at 2, and the order of two million dollars in restitution, *id.* at 5, underscore the egregiousness of his misconduct. *See Scammell*, 2014 WL 5493265, at *6 n.44. The Commission considers conduct involving fraud and dishonesty, like Vitale's, to be

particularly serious and subject to severe sanctions. *See, e.g.*, *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *7 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

Vitale's fraud persisted for over a year-and-a-half, and he personally solicited investments from more than ten different victims. Ex. 2, at 1, 2. Of over $4.8 million taken, less than $4,000 has been returned to investors. Ex. 2, at 2. By contrast, Vitale and "his companies" took in $700,000. *Id.*

2. Scienter

In the context of this proceeding, scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). The statute to which Vital pleaded guilty, 18 U.S.C. § 1341—"Frauds and swindles"—requires, as an element of the offense, a "scheme or artifice to defraud." His conviction for mail fraud—like a conviction for violation of the antifraud provisions of the federal securities laws—thus shows that he acted with scienter. *See United States v. Vilar*, 729 F.3d 62, 89 (2d Cir. 2013); *United States v. Suba*, 132 F.3d 662, 673 (11th Cir. 1998).

Indeed, Vitale's misconduct evinced a high degree of scienter. He frequently used the false name "Donovan Kelly" when soliciting investments. Ex. 2, at 1. He used the alias to conceal his criminal and disciplinary history for securities-related infractions, which included (1) a bar from associating with any FINRA member firm in any capacity based on his failure to cooperate with a FINRA investigation of allegations that Vitale had engaged in excessive trading in a customer account; (2) a cease-and-desist order issued by the Pennsylvania Securities Commission based on Vitale's solicitation of investments in unregistered securities; and (3) a state securities law conviction for "unlawful operation of a boiler room," for which he was on probation when he committed the additional criminal conduct that gave rise to the conviction relevant here. Ex. 2 at 1; R. & R. at *21-23; *Dep't of Enforcement v. Vitale*, Discip. Proc. No. 2009017585202, (Sept. 21, 2011), https://www.finra.org/sites/default/files/fda_documents/2009017585202_FDA_VC24455.pdf; *LADP Acquisition, Inc.*, Admin. Proc. Dkt. No. 2009-12-16, Summary Order to Cease and Desist (Pa. Sec. Comm'n Jan. 5, 2010). The LottoNet private placement memorandum provided to customers explicitly stated that no commissions were paid on sales. Ex. 2, at 1. Yet in conning one victim into making a $250,000 investment, Vitale concealed the fact that he "was receiving a 35% commission." *Id.* Vitale also directed at least one of his

agents to conceal the 35% commission and instead "to falsely represent that the no commissions were paid." *Id.*

3. Lack of assurances against future violations and recognition of the wrongful nature of the 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 (5th 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 WL 6208750, at *9 (Dec. 13, 2012) (quoting *Aaron*, 446 U.S. at 701), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 WL 3030847 (May 27, 2016). 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 WL 3864511, at *6 n.50 (July 26, 2013) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)) (alteration in internal quotation omitted).

In this proceeding, Vitale has not provided any assurance against future violations, nor recognized the wrongful nature of his conduct. Moreover, he has a lengthy history of securities law violations. *Supra* at 5. "[P]ast . . . prologue . . . ." William Shakespeare, *The Tempest* act 2, sc. 1.

4. Opportunities for future violations

Vitale is a young man, and his sentence—though justifiably weighty—will end in less than five years. *See* Ex. 3 at 2. Once Vitale is released from prison, if he were to reenter the securities industry, he would have considerable opportunities for future violations. *See Korem,* 2013 WL 3864511, at *6 n.50. Unless he is barred from the industry, he will have the chance to again harm investors.

5. Other considerations

Associational bars have long been considered effective deterrence. *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *19 & n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). A full associational and penny stock bar, as opposed to a more limited bar, will prevent Vitale "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). 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.

Lawton, 2012 WL 6208750, at *11 (internal footnote omitted). For all these reasons, the public interest factors justify an associational and penny stock bar against Vitale.

Order

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

It is ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Joseph Vitale is BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.[4]

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

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[4] Thus, he is barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging 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, pursuant to Exchange Act Section 15(b)(6)(A), (C).

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.

Vitale is again notified that he may move to set aside the default. Pursuant to 17 C.F.R. § 201.155(b), a default may be set aside by the Commission, at any time, for good cause, 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.

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Jason S. Patil
Administrative Law Judge