Initial Decision Release No. 1346
Administrative Proceeding
File No. 3-18129

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

In the Matter of

Brian Michael Berger

Initial Decision of Default
February 5, 2019

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 default and sanctions. Respondent Brian Michael Berger 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.

Procedural Background

The Securities and Exchange Commission initiated this proceeding in August 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.[1] This is a follow-on proceeding based on a final judgment entered in February 2017 after Berger pleaded guilty to three counts of wire fraud.[2] The Division alleges that Berger admitted that from

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1 OIP at 1; *see* 15 U.S.C. §§ 78*o*(b), 80b-3(f).

2 *See United States v. Berger*, No. 9:16-cr-80167 (S.D. Fla.).

April 2013 through September 2015 he perpetrated a scheme to defraud three of his clients and engaged in misconduct with client accounts.

A different administrative law judge originally presided over this proceeding and issued an initial decision of default.[3] But the Commission vacated that decision following the Supreme Court's decision in *Lucia v. SEC*,[4] and the matter was reassigned to me to provide Berger with the opportunity for a new hearing.[5] Berger was directed to propose how further proceedings should be conducted,[6] but he never submitted a proposal or filed an answer.[7] I ordered Berger to show cause why the proceeding should not be determined against him due to his failure to answer the OIP or otherwise defend the proceeding.[8] Only the Division of Enforcement participated in the telephonic prehearing conference that I held on November 29, 2018.[9] The Division then filed a motion for default and sanctions, supported by five exhibits.[10] Berger did not file an opposition to the Division's motion. In conducting this proceeding and considering the Division's motion, I gave no weight to the opinions, orders, or rulings issued by the prior administrative law judge.[11]

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[3] *Brian Michael Berger*, Initial Decision Release No. 1203, 2017 SEC LEXIS 3399 (ALJ Oct. 25, 2017).

[4] 138 S. Ct. 2044 (2018); *see Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at *2–3 (Aug. 22, 2018).

[5] *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *2–3 (ALJ Sept. 12, 2018).

[6] *Brian Michael Berger*, Admin. Proc. Rulings Release No. 6001, 2018 SEC LEXIS 2419, at *1 (ALJ Sept. 18, 2018).

[7] *Brian Michael Berger*, Admin. Proc. Rulings Release No. 6246, 2018 SEC LEXIS 2950, at *1 (ALJ Oct. 23, 2018).

[8] *Id.*

[9] *Brian Michael Berger*, Admin. Proc. Rulings Release No. 6378, 2018 SEC LEXIS 3377, at *1 (ALJ Nov. 30, 2018).

[10] The exhibits are cited as "Div. Ex. _" using the documents' internal pagination.

[11] *See Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4.

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed.[12] Because Berger is in default, I have deemed true the allegations in the OIP and, consistent with Commission precedent, will rely on those allegations in conjunction with other evidence in the record developed since the proceeding was reassigned to me.[13] That other evidence includes the stipulated factual proffer in support of Berger's plea. In making the findings below, I have applied preponderance of the evidence as the standard of proof.[14]

Berger was a financial advisor for fifteen years, holding multiple Financial Industry Regulatory Authority, Inc. (FINRA), licenses.[15] He was also registered with the Commission as an investment adviser for about one year.[16]

During the period covered by the OIP, a client of Berger's noticed that money was missing from the account at Wells Fargo the client held in trust for his grandmother and for which Berger was the account representative and financial advisor. Wells Fargo discovered that the money had been transferred to Berger's personal credit card, without his client's knowledge or consent. Wells Fargo reimbursed the client for the missing $102,500, plus interest.[17]

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12 17 C.F.R. § 201.323.

13 *See Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4; *see also* 17 C.F.R. § 201.155(a); *David E. Lynch*, Exchange Act Release No. 46439, 2002 WL 1997953, at *1 & n.12 (Aug. 30, 2002) (instructing that, "if additional evidence is adduced in a proceeding against a respondent" who is in default, "the decisionmaker properly should consider that evidence in the determination of the proceeding").

14 *See John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998).

15 Div. Ex. 5 at 2; *see* Brian Michael Berger BrokerCheck, FINRA, https://brokercheck.finra.org/individual/summary/3208127.

16 Brian Michael Berger (CRD# 3208127), Investment Adviser Public Disclosure, SEC, https://www.adviserinfo.sec.gov/IAPD/IAPDIndvlSummary.aspx?INDVL_PK=3208127.

17 Div. Ex. 5 at 2–3.

Another client of Berger's followed him from brokerage to brokerage, ultimately also moving his account to Wells Fargo. In 2014, Wells Fargo notified the client that Berger had diverted nearly $175,000 of the client's money to pay his own credit card account. Wells Fargo reimbursed this client for the stolen funds plus interest. After these incidents, Wells Fargo fired Berger.[18] Despite the firing, this client followed Berger to MetLife after Berger convinced him the missing money was not Berger's fault.

A third client also followed Berger to multiple brokerages.[19] In 2015, Berger approached that client with an investment opportunity outside their relationship through MetLife. But no such opportunity existed. Instead, Berger kept $25,000 for his personal use.[20] Berger was eventually fired by MetLife as well.[21]

In November 2016, Berger pleaded guilty to three counts of wire fraud.[22] He was sentenced in January 2017 to eighteen months in prison and to pay restitution of $372,643.[23]

Conclusions of Law

The Exchange Act gives the Commission authority to impose collateral and penny stock bars[24] against Berger if, as is relevant here, (1) he was associated with or seeking to become associated with a broker or dealer at the time of his misconduct; (2) he was convicted within ten years before the issuance of the OIP of an offense "involv[ing]" a violation 18 U.S.C. § 1343; and (3) imposing a bar is in the public interest.[25] The Advisers Act gives the

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[18] *Id.* at 3.

[19] *Id.* at 4.

[20] *Id.* at 4–5.

[21] *Id.* at 5.

[22] Div. Ex. 3 at 1.

[23] Div. Ex. 4 at 2, 5.

[24] A collateral bar, also referred to as an industry bar, is 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 Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *1 & n.1 (Oct. 29, 2014).

[25] 15 U.S.C. § 78*o*(b)(4)(B)(iv), (b)(6)(A)(ii).

Commission similar authority with respect to a person associated with or seeking to be associated with an investment adviser, but only to impose a collateral bar, not a penny stock bar.[26]

The first element is satisfied because, according to Berger's stipulated proffer and his FINRA BrokerCheck report, he was associated with broker-dealers and investment advisers during the time of his misconduct.[27] He was associated with three different brokerages during that time, and indeed the people he defrauded were clients at those brokerages.

As to the second element, Berger's guilty plea was entered less than ten years before the Commission issued the OIP.[28] All three of the counts to which Berger pleaded guilty involved a violation of 18 U.S.C. § 1343, thus meeting the requirements of both Exchange Act Section 15(b) and Advisers Act Section 203(f).[29]

That leaves the public interest. To determine whether to impose a bar, I must consider the public-interest factors discussed in *Steadman v. SEC*.[30] 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

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[26] 15 U.S.C. § 80b-3(e)(2)(D), (f).

[27] Div. Ex. 5 at 2.

[28] 15 U.S.C. §§ 78*o*(b)(4)(B); *see* Div. Ex. 3.

[29] The Advisers Act defines *convicted* to include a plea of guilty. *See* 15 U.S.C. § 80b-2(a)(6). The Commission applies this definition for purposes of the Exchange Act. *See* Delegation of Authority to the Secretary of the Commission, 67 Fed. Reg. 30,326, 30,326 n.5 (May 6, 2002); *see also Alexander Smith*, Exchange Act Release No. 3785, 1946 WL 24891, at *6 (Feb. 5, 1946) (holding that a plea of guilty constitutes a conviction for purposes of Exchange Act Section 15(b)).

[30] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Scammell*, 2014 WL 5493265, at *5.

> the likelihood that the respondent's occupation will present opportunities for future violations.[31]

The Commission also considers the deterrent effect of administrative sanctions.[32] This public interest inquiry is "flexible … and no one factor is dispositive."[33] 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.[34]

In considering the public interest, I am mindful that "in most" cases involving fraud, the public-interest analysis will weigh in favor of a "severe sanction."[35] And because "[t]he securities industry presents continual opportunities for dishonesty and abuse," it "depends heavily on the integrity of its participants and on investors' confidence."[36]

Turning to the *Steadman* factors, it is evident that the public interest and the Commission's interest in protecting the public weigh in favor of an industry bar. Berger's conduct was egregious. He diverted two clients' funds

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

[32] *Peter Siris*, Exchange Act Release No. 71068, 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).

[33] *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009) (quoting *David Henry Disraeli*, Securities Act Release No. 8880, 2007 WL 4481515, at *15 (Dec. 21, 2007), *pet. denied*, 334 F. App'x 334 (D.C. Cir. 2009)), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

[34] *Mark Feathers*, Exchange Act Release No. 73634, 2014 WL 6449870, at *1 (Nov. 18, 2014); *see Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

[35] *Siris*, 2013 WL 6528874, at *11 n.71 (quoting *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *7 (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009)).

[36] *Feathers*, 2014 WL 6449870, at *3 (alteration in original) (quoting *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 & n.53 (July 26, 2013)).

to his personal credit card for his own personal use, causing loss to his employer who reimbursed the clients. Berger induced a third client to give him $25,000 outside of their formal relationship for an investment that never existed. The egregious nature of his conduct is underscored by the $372,643 in restitution for which he is liable and his term of imprisonment. Berger's conduct was also recurrent, as he took advantage of three clients over two-and-a-half years.

Berger's conduct showed a high degree of scienter. His clients' funds did not end up in his account by mistake. Further, he lied to a client about the reason he was fired from Wells Fargo and lied to another client about a purported investment opportunity. Furthermore, the wire fraud offense to which he pleaded guilty necessarily involved intent to defraud.[37]

Berger's guilty plea shows some recognition of wrongdoing. However, he has not appeared in this proceeding to express any remorse or give assurances as to his future conduct. Moreover, his firing from Wells Fargo did little to deter his later misconduct at MetLife. Given Berger's violations, the egregiousness of those violations, the level of scienter shown by his conduct, his relatively short period of incarceration, and his lack of any assurances against future violations, if Berger remains in the securities industry, it is likely he will engage in future misconduct.[38]

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

In sum, Berger's egregious conduct harmed investors and if he were allowed to remain in the industry, he would have the opportunity to cause additional harm. The Commission's interest in protecting the investing public would be served by imposing an industry and penny stock bar.

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[37] *See* 18 U.S.C. § 1343; *United States v. Caldwell*, 560 F.3d 1202, 1207 (10th Cir. 2009); Div. Exs. 1–3.

[38] See *Korem*, 2013 WL 3864511, at *6 n.50 ("[T]he existence of a violation raises an inference that it will be repeated." (alteration in original) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004))); *cf. John A. Carley*, Securities Act Release No. 8888, 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 be repeated'" (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 default and sanctions is GRANTED.

Under Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Brian Michael Berger is BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Under Section 15(b) of the Securities Exchange Act of 1934, Brian Michael Berger is 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 of trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[39] 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.[40] 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.

Berger may move to set aside a default. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate.[41] A motion to set aside a default shall be made within a reasonable time, state the reasons

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[39] *See* 17 C.F.R. § 201.360.

[40] *See* 17 C.F.R. § 201.111.

[41] 17 C.F.R. § 201.155(b).

for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. Such motion, if filed, should be directed to the Commission, as the hearing officer may only set aside a default "prior to the filing of the initial decision."[42]

James E. Grimes
Administrative Law Judge

[42] *Id.*