Initial Decision Release No. 1384
Administrative Proceeding
File No. 3-17352

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

In the Matter of

Saving2Retire, LLC, and
Marian P. Young

Initial Decision
August 26, 2019

Appearances: Jennifer D. Reece for the Division of Enforcement, Securities and Exchange Commission

Marian P. Young, *pro se*, and for Saving2Retire, LLC

Before: Brenda P. Murray, Chief Administrative Law Judge

Marian P. Young, the sole owner and employee of Saving2Retire, LLC, an investment adviser with few clients, tried to start an internet investment advisory business.

In 2011, Saving2Retire registered with the Securities and Exchange Commission under the internet investment adviser exemption and maintained its registration for four years despite never having any internet clients, which violated the Investment Advisers Act of 1940. Additionally, Saving2Retire failed to follow recordkeeping requirements that became obligatory once it registered with the Commission, violating the Advisers Act's rules. Finally, when Young was confronted by the Commission with these deficiencies, she failed to provide Saving2Retire's records for examination, which amounts to a third violation. I find that Young caused the first of Saving2Retire's violations and aided, abetted, and caused the latter two.

Although these violations are serious, the evidence does not show that any client was defrauded or harmed. I order Respondents to cease and desist from further violations of the Advisers Act and its rules, bar Young from the

securities industry with a right to reapply after two years, and impose a $13,000 civil penalty on Young.

Procedural Background

On July 19, 2016, the Commission issued an order instituting proceedings (OIP) pursuant to Sections 203(e), 203(f), and 203(k) of the Advisers Act. The OIP alleges that Saving2Retire is an investment adviser owned by Young and that Young willfully aided, abetted, and caused Saving2Retire's willful violations of Advisers Act Sections 203A and 204 and Rule 204-2. OIP at 3-4.

A hearing was held on May 16, 2017. The Division of Enforcement called two witnesses: Young, and Javier Villarreal, the Commission's lead examiner for Saving2Retire. Respondents called no witnesses. Forty-three of the Division's exhibits were admitted, as were 16 of Respondents'. An initial decision was issued by a different administrative law judge on October 19, 2017, and Respondents subsequently petitioned the Commission for review. *Saving2Retire*, Initial Decision Release No. 1195, 2017 SEC LEXIS 3348 *Saving2Retire*, Advisers Act Release No. 4887, 2018 SEC LEXIS 919 (Apr. 17, 2018) (granting petition for review and scheduling briefs).

On August 22, 2018, in light of the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Commission ordered that this proceeding be remanded and reassigned for a new hearing before an administrative law judge who had not previously participated in the matter. *See Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058. The proceeding was assigned to me on September 12, 2018. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264.

The parties agreed that the prior record—including the transcript of the 2017 hearing and all of the admitted exhibits—would remain in evidence. *Saving2Retire*, Admin. Proc. Rulings Release No. 6309, 2018 SEC LEXIS 3125, at *1 (ALJ Nov. 7, 2018). I admitted an additional exhibit into evidence at the request of Respondents—a recording of a phone conversation between Young and the Commission staff. *Saving2Retire*, Admin. Proc. Rulings Release No. 6479, 2019 SEC LEXIS 302, at *6-7 (ALJ Mar. 4, 2019). I granted Respondents' request to conduct further discovery, but no discoverable documents were uncovered. *See Saving2Retire*, Admin. Proc. Rulings Release No. 6518, 2019 SEC LEXIS 629 (ALJ Mar. 26, 2019). The parties filed new briefs and proposed findings of fact and conclusions of law; the last brief was filed on May 29, 2019. On June 17, 2019, the Division submitted the Form ADV-W by which Saving2Retire withdrew its registration with the Commission. *See* Notice to Court Regarding

Registration Status of Saving2Retire, LLC. I allowed Respondents to submit evidence concerning their inability to pay a civil penalty by June 21, 2019, but they did not submit anything. Accordingly, briefing is now completed.

Findings of Fact

My factual findings and legal conclusions are based on the entire record. I applied preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this decision. In deciding this matter, I have proceeded under the Commission's instruction not to give weight to or otherwise presume the correctness of any opinions, orders, or rulings issued by the prior administrative law judge. *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at *4.

1. Respondents

Young is in her early 60s, and has worked in the securities industry since the mid-1980s. Tr. 67-68. Until 1995 or 1996, she sold financial services products for Hancock Financial Services as a registered representative. Div. Ex. 9 at 19-20 (Young deposition). In 1997, she formed Young Capital Growth Company, an investment advisory firm. Tr. 68. She operated Young Capital Growth until forming the investment adviser Saving2Retire in 2011. Tr. 68. Saving2Retire's clients rolled over from Young Capital Growth; it never attracted any new clients. Div. Ex. 9 at 26.

Young operated Saving2Retire out of her home in Sugar Land, Texas. Div. Ex. 9 at 18. She is the sole owner and managing member of Saving2Retire, and its chief compliance officer. Tr. 67. The firm never had any other employees. Div. Ex. 9 at 28-29.

From 2011 to 2015, Saving2Retire had approximately $4 to 4.5 million in assets under management. *Id.* at 33-34; Tr. 69. Beginning from at least late-2011 and until 2015, all of Saving2Retire's clients' brokerage accounts were held by Scottrade Advisor Services. Tr. 69; Div. Ex. 9 at 22, 26-27; *see* Div. Ex. 23 (Scottrade advisory contracts). Clients were generally charged monthly fees for the services provided by Saving2Retire. Div. Ex. 9 at 29; *see, e.g.*, Div. Ex. 27 at PDF pages 88 & 90 of 132. Young invested most of Saving2Retire's clients' funds with Dimensional Fund Advisors, which one can only invest in through an investment adviser. Tr. 49.

2. Saving2Retire's recordkeeping practices

Young maintained Saving2Retire's financial records using QuickBooks software. Div. Ex. 9 at 23. She did not keep current bank statements, cancelled checks, cash flow statements, cash reconciliations, or trade blotters for Saving2Retire, but instead accessed information online through Scottrade when she needed it. Tr. 81-82, 103; Div. Ex. 9 at 24, 109. She did not keep a current version of a balance sheet, trial balance, general ledger, or cash receipts and disbursements journal for Saving2Retire; she only reconciled those items at the end of the year. Tr. 80-81; Div. Ex. 9 at 106-07.

At the hearing, Respondents produced a photocopy of a portion of the handwritten check register for Saving2Retire; it appears to be maintained in the way an individual might keep a personal checkbook—with columns for the date, the identity of the transaction, and the amount transacted. *See* Resp. Ex. 3. Young testified that this was how she kept track of money coming in and out of Saving2Retire's account, and that she could go to Scottrade's website to retrieve the statements to "back it up." Tr. 104. Periodically, she would incorporate these records into QuickBooks. Tr. 107. She only had a few checks related to Saving2Retire each month. Tr. 101, 104.

3. Saving2Retire's internet advisory business and its registration with the Commission

Young registered Saving2Retire with the Commission as an investment adviser on April 8, 2011. Saving2Retire Answer at 2. She understood that typically an adviser could not register with the Commission unless it met a specified threshold in assets under management, but that there was an exemption for internet investment advisers, and she registered under that exemption. Div. Ex. 9 at 34; Tr. 70. She knew that to qualify for the exemption, an internet adviser needed an interactive website and could not advise 15 or more clients outside of the site. *See* Div. Ex. 9 at 35-36.

Young wanted to create an internet advisory business "so the smaller guy could have good investment advice, because people were always trying to take advantage of him, charge him high fees." Tr. 91; *see also* Div. Ex. 12 at 134; Resp. Ex. 8 ("The business was formed to help the African American community have access to good low cost investment advice."). Young "never had a lot of capital" so she decided to set up the adviser herself. Tr. 89-91. She did not consult an attorney or hire any professionals to help determine whether Saving2Retire was eligible to register. Tr. 70. Instead, she did research online, communicated with the Commission staff, and read through the Commission's rules. Tr. 90; Resp. Ex. 12 (emails between Young and

Commission staff from early 2011); Resp. Ex. 20 (telephone communications between Young and Commission staff). She believed she was eligible to register with the Commission, so she set out to register and then build a website afterwards. Tr. 91; Div. Ex. 9 at 123.

The website was not completed until September 2013, more than two years after Saving2Retire registered. Tr. 70-71. Young testified that it took her so long because she laid out the site herself and then had to find a coder who would not charge her a lot to build it. Tr. 92; Div. Ex. 9 at 36. She saw no problem with the time that elapsed because she "never saw anything that said I had to have this website at a certain date." Tr. 71. And she stated at her deposition that "there was nothing to make me want to believe that the website had to be up and going at the time of registration." Div. Ex. 9 at 125.

Although Saving2Retire's website eventually went live as described, *see* Resp. Ex. 18 (screenshots of Saving2Retire's website), the firm never advised a single internet client. Tr. 74, 85. On January 2, 2015, Saving2Retire filed an amended Form ADV stating that the firm was no longer eligible for Commission registration. Tr. 86. Young took down Saving2Retire's website in August 2015. Tr. 85. On November 17, 2017, Saving2Retire filed a Form ADV-W, and it is no longer registered with the Commission. Saving2Retire, LLC, Form ADV-W (Nov. 17, 2017); Decl. of Javier Villarreal, at 1 (June 17, 2019).

4. Saving2Retire's non-internet clients

It is unclear how many non-internet clients Saving2Retire had at any given time or during any particular year. Young testified that each year, she checked to make sure that Saving2Retire had less than 15 clients so as not to violate the internet exemption she was relying on to maintain Saving2Retire's Commission registration. Tr. 99-100. She stated that she counted people in the same household with multiple accounts as one client, and did not count family members as separate clients because she was "not doing any services for them." Tr. 76, 99. There were accounts open under Saving2Retire's auspices that Young did not consider client accounts because the individuals were not being billed for any services. Div. Ex. 9 at 136-40.

Presumably in support of their position that they advised no more than 14 non-internet clients during any 12 month period, Respondents introduced a document from TD Ameritrade dated May 31, 2011, which lists consolidated account balances for a number of individuals with 20 unique last names. Resp. Ex. 15. Handwritten notations designate some of those listed as "not a client." *Id.* The Division introduced an additional document Young had provided to it from TD Ameritrade with a date of June 1, 2011, which

appears to be an invoice billing clients for fees. Div. Ex. 45; *see* Tr. 52-54.[1] Thirteen unique last names appear on the list, but handwritten notations identify a total of 12 clients. Div. Ex. 45.

At the hearing, the Division introduced 20 exhibits purporting to show that Saving2Retire advised 20 non-internet clients over a 12 month period ending in November 2014. Div. Exs. 24-43; Tr. 22, 46, 48. Each exhibit contains an "investment advisor limited trading and advisory fee authorization"—which is part of new account paperwork—signed by Young and one or more individuals, and it authorizes Scottrade to debit the account for advisory fees and remit them to the advisor. *E.g.*, Div. Ex. 24 at 1; Tr. 49-50. According to Villarreal, this means that Young was "holding herself out as the investment adviser of these accounts, and . . . her clients were agreeing to pay her advisory fees." Tr. 51. Each exhibit also includes Scottrade account statements for that client showing balances, debits, and credits. *E.g.*, Div. Ex. 24. Some—but by no means all—of the account statements indicate that Scottrade debited the account for management fees paid to Saving2Retire during the 12 month period preceding November 2014. *See, e.g.*, Div. Ex. 27 at PDF page 88 of 132; *but see, e.g.*, Div. Ex. 25 (statements contain no debits for management fees).[2]

The Division also introduced a chart it prepared summarizing some of the material in Exhibits 24-43. Div. Ex. 44. There are more than 20 different accounts in the exhibits, and the chart groups them into 20 distinct clients that the Division argues Saving2Retire advised during the 12 month period. *Id.* Although for the most part the chart groups individuals with the same last name together and considers those individuals a single client, sometimes it considers people with the same last name to be distinct clients. *Id.* The chart does not provide any rationale for its groupings, nor did any testimony address the matter. *See id.*

5. The Commission's examination of Saving2Retire and the subsequent Division investigation

At the hearing, Villarreal testified as to the particulars of the examination of Saving2Retire. At the time of the hearing, he had been

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[1] Division Exhibit 45 is also in evidence as Exhibit B to Respondents' December 9, 2016, motion for summary disposition.

[2] By my calculation, only 11 of the 20 exhibits indicate that management fees were remitted to Saving2Retire between December 2013 and November 2014. *See* Div. Exs. 24, 27-29, 31-33, 36, 39, 41, 42.

employed with the Commission for about five years, and had been involved in roughly 40 to 50 examinations. Tr. 24, 62-63.

The Commission's examination of Saving2Retire beginning in November 2014 was part of a national initiative to ensure that registrants who were relying on the internet adviser exemption were qualified to use it and were following its requirements. Tr. 26-27. First, an examiner called Young and told her that Saving2Retire was subject to examination and that the Commission would be sending her a document request. Tr. 29-30.

Then, on November 19, 2014, an email went out to Young and Saving2Retire. Div. Ex. 2. The email explains the purposes of the examination and details the Commission's authority to conduct the examination and obtain documents and records. *Id.* at 14, 18-20. It states that "[a] willful failure to permit inspection by authorized Commission personnel of the records and documents described . . . may result in legal proceedings." *Id.* at 14.

The email requested that Saving2Retire produce 28 categories of documents by December 3, 2014. *Id.* at 10-13. Among other things, the Commission asked for Saving2Retire's financial records (such as a balance sheet), a client list, the number of clients who obtained investment advice through an interactive website during the last 12 months, and detailed account information for all current clients—whether or not they were internet clients—including names, account numbers, and current balances. *Id.*

Young's response to the Commission's request was missing a lot of information. Tr. 32-33; Div. Ex. 3. For many items, she referred to Saving2Retire's Form ADV without providing any additional explanation. Div. Ex. 3 at 23-24. For other requests, such as the ones asking for Saving2Retire's financial records, she wrote "N/A" for "not applicable." *Id.* at 23; *see* Tr. 33. She indicated that the number of clients Saving2Retire had advised through its website was "non-material" because "Saving2Retire is still in the startup mode." Div. Ex. 3 at 23.

Although Young provided a list of Saving2Retire's advisory clients, the list does not include the clients' names or account numbers. Instead, it identifies the clients by the letters A through H and appears to provide rounded account balances. Tr. 33-34, 76; Div. Ex. 15; Resp. Ex. 16. Villarreal characterized the client list as "wholly inadequate and incomplete," and said that he had "never seen an advisor provide a client list that just included rounded account balances like this." Tr. 34-35.

Towards the end of her response to the Commission's request, Young wrote that she would not gather more specific information because it "would be burdensome to my business in time and income lost." Div. Ex. 3 at 24. She also shared her belief and that of her clients "that additional specificity violates the protections our Constitution provides its citizens." *Id.*

At her deposition, Young provided additional information regarding her responses to the Commission's requests. She testified that she did not produce any financial documents for Saving2Retire and its clients because she believed that she only had to provide information relevant to Saving2Retire's internet advisory business, which had never gotten off the ground. Div. Ex. 9 at 78-82. She also said she talked to her clients and that they felt uncomfortable sharing their personal financial information with the Commission, so she decided to act in what she believed was their best interest and she did not send the records. *Id.* at 91-96. It is also clear that Young did not keep many of the records requested, so complying with the Commission's letter would have required her to create them. *Id.* at 104, 106-07, 109; Tr. 81, 106-08.

Even if Young was initially confused about what the Commission wanted from her, her confusion could not have lasted long, as Commission staff followed up with her to clarify the scope of its request. On December 11, 2014, Villarreal and two other Commission staff members called Young to discuss what she was required to produce and to learn a little more about Saving2Retire. Tr. 37; Resp. Ex 19 (recording of December 11, 2014, phone call). Villarreal told Young that as a registered investment adviser, Saving2Retire was required to keep certain records and was subject to examination. Tr. 37-38. Villarreal characterized Young's demeanor on the call as "[v]ery defensive and evasive," and thought that it raised red flags. Tr. 39.

After the call, Linda Hoffman, a supervisory staff accountant at the Commission who had been on the call, emailed Young a request for eight categories of documents that had not yet been provided, including Saving2Retire's balance sheet, trial balance, general ledger, cash receipts and disbursement journal, income and cash flow statements, trade blotter, bank statements, brokerage statements for all clients, and a description of how far along clients were in the process of registering for internet investment advice. Div. Ex. 4; Tr. 40. The email asked Young to provide the records "on a rolling basis, but no later than December 19, 2014." Div. Ex. 4.

Young never provided any of the documents. Tr. 40-41, 80-82, 106, 109. The next day, on December 12, she emailed Hoffman and stated that she was ill and would not be able to respond until the following week. Div. Ex. 5; Tr.

42. Villarreal then spoke with Young by phone again on the afternoon of December 19, and Young said she would be withdrawing Saving2Retire's registration. Tr. 42; Div. Ex. 6 at 27. According to Villarreal, Young "went on a bit of a rant," complaining about over-regulation, that not enough regard was being given to her as a small business owner, and that she was unaware of the regulatory requirements. Tr. 42-43. Villarreal again explained to her that her firm was still registered as an investment adviser and subject to examination; that she had to maintain certain documents; and that once the examination was opened, it needed to be seen through to completion. Tr. 43. When Villarreal tried to see if he could schedule a follow-up call between her and Commission managers or get a manager on the line, Young "abruptly ended the call and said, no, I'm not providing anything else." Tr. 43; Div. Ex. 6 at 27.

From Young's perspective, the Commission examiners seemed aggressive from the get-go; they immediately mentioned the possibility of an enforcement action, which Young considered a threat. Tr. 92; Div. Ex. 9 at 57-60, 117. By the time she spoke with Villarreal on December 19, 2014, she had come to realize that she could not afford to hire attorneys and continue with Saving2Retire, so "it just made sense to close it down and move on." Div. Ex. 9 at 103. Because she was sick, overwhelmed, and did not see a point in "re-creating and retracing all of these documents" for an adviser that "never had any revenues and never had any clients," she suggested that Saving2Retire just be allowed to withdraw its registration. *Id.* at 104-05.

On January 5, 2015, Marshall Gandy, the associate regional director for the Commission's Fort Worth office, sent Young a letter summarizing what had occurred so far and made a final request that she produce the documents by January 12, 2015, or have her case referred to the Division for a possible enforcement action. Div. Ex. 6 at 27-28.

On January 12, 2015, Young replied to Gandy. Resp. Ex. 5. She reiterated her concerns about the privacy of her clients' financial information were she to send it to the Commission,[3] stated that she was closing her internet business, and asked to be allowed to withdrawSaving2Retire's registration "without penalty." *Id.* at 2.

On February 6, 2015, Villarreal emailed and mailed Young a deficiency letter. Div. Ex. 8. The letter stated that due to Young's actions, the

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[3] A few days before, Young had sent a letter to her congressman voicing her concerns about the document requests and privacy laws, and indicating that she wanted to withdraw her registration without penalty. Div. Ex. 7.

examination of Saving2Retire had not been completed. *Id.* at 31. The letter further stated that it was bringing several "violations and weaknesses" to Young's attention "for immediate corrective action," and listed the matters at issue in detail. *Id.* at 31, 33-40. The deficiency letter required her response within 30 days. *Id.* at 32.

On March 6, 2015, Young responded to the deficiency letter by saying that Saving2Retire was "too small of a firm without the resources necessary to be under the requirements of the SEC" and that she would be closing her internet business and transferring to state regulation. Resp. Ex. 6. She said she would withdraw Saving2Retire's Commission registration once state registration was approved. *Id.*

At this point, the Division began an investigation. It sent a document subpoena to Saving2Retire on May 6, 2015, but Young did not produce any documents. Div. Ex. 16 at 185; Tr. 83-84. On June 3, 2015, Young replied by letter, reiterating her intent to withdraw Saving2Retire's Commission registration, but stating that doing so before completing registration with the State of California—for which her examination was ongoing—would "pose risks" for her firm. Resp. Ex. 7 at 1; *see also* Tr. 96. Young testified that she did not withdraw her Commission registration because her advisory business was her livelihood. Tr. 96.

On July 30, 2015, the Division sent Young a subpoena requiring her to appear for investigative testimony in Fort Worth on August 26, 2015, but Young replied on August 18, 2015, that she could not travel to Dallas "due to medical and financial constraints." Div. Ex. 11; Div. Ex. 12 at 134; Resp. Ex. 8; Tr. 84. The Division then sent Young another letter asking her to appear for testimony on August 31, 2015. Div. Ex. 13. Subsequently, when she did not attend, the Division asked her to appear on September 14, 2015. Div. Ex. 14. Young replied by email on September 11, 2015, reiterating that she had no additional disclosures, that Saving2Retire was her "sole source of livelihood," and that she was "overwhelmed with trying to figure out how I will survive, keep a roof over my head for the immediate future, and battle my health issues." Div. Ex. 17.

During this period, Young attempted to register Saving2Retire with the states of Texas and California. Tr. 86-87. She testified that Texas never got back to her; she assumes that because of this proceeding, they "were not going to approve me" and therefore "the application was abandoned." Tr. 87. On November 23, 2015, California's Commissioner of Business Oversight issued a notice of intent to deny Saving2Retire's investment adviser application and bar Young from association with any investment adviser, broker-dealer, or commodity adviser. Div. Ex. 10 at 110. Young was given 30

days to request a hearing, but she claims not to have received notice. Div. Ex. 10 at 111; Tr. 97-98. On March 14, 2016, Saving2Retire's application was denied and Young was barred. Div. Ex. 10 at 111; Tr. 87-89.

Arguments

1. The Division's arguments

The Division argues that Saving2Retire willfully violated Section 203A of the Advisers Act by improperly registering with the Commission and that Young willfully aided, abetted, and caused the violation. Div. Br. 3-7 (Apr. 16, 2019). In support, the Division states that Saving2Retire did not have $100 million in assets under management—the current minimum threshold for registration—and did not meet the internet adviser exemption because it never advised any internet clients. *Id.* at 3-5. The Division maintains that Saving2Retire additionally did not satisfy the exemption's requirements because it advised more than 14 non-internet clients during a 12 month period when it was registered. *Id.* at 6-7.

The Division next argues that Saving2Retire willfully violated Advisers Act Section 204(a) because it failed to provide required records to the Commission during the course of an examination, and that Young willfully aided, abetted, and caused the violation. *Id.* at 8-11.

Finally, the Division argues that Saving2Retire willfully violated Rule 204-2(a)(1), (2), (4) and (6) of the Advisers Act because it failed to keep required financial records, and that Young willfully aided, abetted, and caused the violation. *Id.* at 8-13.

In light of these alleged violations, the Division requests that Saving2Retire's registration be revoked, that Young be barred from the securities industry, that Respondents be ordered to cease and desist from further violations, and that Respondents be ordered to pay second-tier civil penalties. *Id.* at 13-19.

2. Respondents' arguments

Respondents argue that the Division presented no evidence that Saving2Retire was required to set up an interactive website and obtain internet clients by a certain date to maintain its registration under the internet adviser exemption. Resp. Br. 12-13, 15, 45 (May 28, 2019). Respondents further argue that the Division never established that Saving2Retire advised more than 14 non-internet clients during a 12 month period, particularly since some clients had several accounts, and additionally,

the rules do not require an adviser to count someone who receives services for free as a client. *Id.* at 11-12, 15.

Regarding the allegations of impeding the investigation, Respondents claim that they decided not to provide additional documents to the Division after their initial production because they would have had to create the records, which "would take months at best." *Id.* at 18, 44. They decided it was better not to respond to the "overwhelming demands" and to withdraw Saving2Retire's registration instead. *Id.* at 18-19, 44. Respondents also maintain that they had privacy concerns about turning over client information to the Division. *Id.* at 19-20, 44.

Respondents push back against the Division's allegations of recordkeeping violations by arguing that the "size and simplicity" of its business simply did not warrant "elaborate record keeping." *See id.* at 18, 40-41.

Respondents also state that their actions were not willful, and that Young could not have aided and abetted the violations because her recordkeeping was sufficient and she relied on Commission and staff guidance when registering Saving2Retire. *Id.* at 40-41.

Respondents further argue that the civil penalties requested are excessive given Young's income and when compared to what has been imposed in other proceedings. *Id.* at 37-38. Young maintains that she has lived a life of integrity and has been in no previous trouble with regulators. *Id.* at 41.

Lastly, Respondents argue throughout that the Division was biased against Young because she is African-American, and therefore acted hostilely towards her, singled her out for enforcement, and treated her with excessive force. *See id.*, *passim*.

Conclusions of Law

1. *Saving2Retire violated Section 203A by registering with the Commission as an internet adviser but never advising any internet clients.*

Generally, Advisers Act Section 203A and its rules prohibit an investment adviser that is regulated or required to be regulated in the state in which it has its principal office and place of business from registering with the Commission unless it has a certain amount of assets under management (hereafter called the registration threshold) or advises a registered investment company. 15 U.S.C. § 80b-3a(a); 17 C.F.R. § 275.203A-1(a)(1).

This prohibition, first enacted in 1996, was designed to divide regulatory responsibility between the Commission and state securities regulators to ensure sufficient resources and avoid overlapping responsibilities. S. Rep. No. 104-293, at 3-4 (1996); *see* National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 303(a), 110 Stat. 3416, 3437 (1996). The registration threshold was $25 million in assets under management when Saving2Retire registered with the Commission in April 2011, but it was increased to $100 million for most advisers later that year. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 410, 419, 124 Stat. 1376, 1576-77, 1580 (2010); Rules Implementing Amendments to the Investment Advisers Act of 1940, 76 Fed. Reg. 42,950 (July 19, 2011).

In 2002, the Commission exempted internet investment advisers from the registration threshold. *See* Exemption for Certain Investment Advisers Operating Through the Internet, 67 Fed. Reg. 77,620, 77,620 (Dec. 18, 2002). The Commission explained that internet advisers—who rely on an interactive website to generate investment advice for clients—would often not be able to meet the threshold for Commission registration, and because web traffic could come to the site from any state, the adviser could be forced to register with every state. *Id*. at 77,620-21. To address this, the Commission carved out an exemption allowing investment advisers who advise clients almost exclusively through an interactive website to register with the Commission. *Id.* at 77,621.

The exemption defines an internet investment adviser as one that "[p]rovides investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding twelve months." 17 C.F.R. § 275.203A-2(e)(1)(i).[4]

As established at the hearing, Saving2Retire never had more than $5 million in assets under management. Tr. 69; Div. Ex. 9 at 33-34. And at no point did it claim to advise any registered investment company. Likewise, Respondents have never contested that Saving2Retire was or would have been required to be regulated by a state. *See* Div. Ex. 9 at 80 (Young stated that Saving2Retire was registered with both Texas and California); Resp. Br.

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[4] The rule further provides that the internet adviser must maintain a record demonstrating that it provides advice to clients through an interactive website, and it allows the internet adviser to rely on the definition of "client" elsewhere in the Advisers Act's rules for determining whether it advises fewer than 15 non-internet clients. 17 C.F.R. § 275.203A-2(e)(1)(ii), (e)(3).

at 4-5 (same). Thus, Saving2Retire did not qualify for Commission registration unless it met an exemption. But it did not satisfy the internet adviser exemption because it never advised a single internet client through an interactive website. Tr. 74, 85.

Respondents argue that an internet adviser must be entitled to a grace period after registration to set up a website and establish a client base. *See* Resp. Br. at 12-13, 15; Div. Ex. 9 at 125; Tr. 71. Indeed, the adopting release for the exemption contemplates as much, suggesting that internet advisers "must typically register early in their development and testing phase in order to obtain venture capital, and many may not even be fully operational 120 days later." 67 Fed. Reg. at 77,622. According to Respondents, although Saving2Retire never succeeded, it was allowed to register and maintain its registration for several years while it built a website and tried to drum up business.

However, the Commission recently rejected this argument. In February 2019, it canceled the registration of an internet investment adviser that had been registered for over three years but had never created an interactive website or provided any investment advice over the internet. *Ajenifuja Investments, LLC*, Advisers Act Release No. 5110, 2019 SEC LEXIS 157, at *19, *24-25 (Feb. 12, 2019). In its decision, the Commission stated that, depending on the facts and circumstances, it might not commence deregistration proceedings of an internet adviser that does not have a website or clients 120 days after its registration "if the adviser reasonably expects to have a fully functional interactive website within a relatively short period of time thereafter, and if the adviser can provide evidence of substantial efforts and progress toward developing an interactive website." *Id.* at *22.[5] Yet, the Commission held that the failure to have an interactive website more than three years after registration is "well over any reasonable grace period for newly-registered advisers" and it therefore canceled the adviser's registration. *Id.* at *23-25.

Here, although Saving2Retire finally developed an interactive website two years after registering, Tr. 70-71, it never advised any internet clients thereafter. Saving2Retire's failure to become operational after four years lies

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[5] A registrant may rely on an exemption allowing for preemptive registration if one expects to qualify for registration within 120 days. 17 C.F.R. § 275.203A-2(c). Although the Commission noted in the adopting release that internet advisers might not be able to meet the 120-day deadline, it explained in *Ajenifuja* that any additional grace period would be a matter of discretion. *Ajenifuja*, 2019 SEC LEXIS 157, at *6-10, 22-23.

well outside any reasonable grace period. *See Ajenifuja*, 2019 SEC LEXIS 157, at *23. Certainly by the time the Commission began its examination in November 2014, Saving2Retire was in violation of Section 203A.

Still, Respondents have a point: during the period Saving2Retire was registered, there was no explicit guidance from the Commission on when an internet adviser had to start advising internet clients. *See* Tr. 72-73 (noting that the adopting release said "there will be some advisors that will not have the site" but "ended the discussion really without saying anything definitive about it"); Resp. Br. 12-13, 15; *but see* 17 C.F.R. § 275.203A-2(c) (allowing an investment adviser only a 120 day grace period to become eligible after registration). I have taken this and other factors into account in finding below that it would be inappropriate to order a civil penalty for Saving2Retire's Section 203A violation.

The Division also argues that Saving2Retire did not satisfy the internet adviser exemption because it advised more than 14 non-internet clients in a 12 month period. Div. Br. at 6-7. However, because I find that Saving2Retire violated Section 203A by registering in reliance on the internet adviser exemption but not advising any internet clients for several years, I need not decide whether it also advised more than 14 non-internet clients during a 12 month period while registered.[6]

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[6] I am not sure I could decide the matter on the current record, at least not in the Division's favor. First, it is not clear which 12 month period I should consider. The OIP alleges that Saving2Retire advised 15 clients between April 2012 and April 2013, OIP at 3, but at the hearing, the Division focused on a different time period—the 12 months preceding and including November 2014—and argued that 20 clients were advised. Tr. 48. Second, the Division never sufficiently explained what advising a client entails. The Division argues that since at least 20 accountholders authorized Scottrade to debit their accounts for management fees paid to Saving2Retire, that makes them clients, Div. Br. at 6, but I am not sure. Notably, only 11 of the 20 accounts were actually debited for management fees between December 2013 and November 2014. *See* Div. Exs. 24, 27-29, 31-33, 36, 39, 41, 42. *See also* 15 U.S.C. § 80b-2(a)(11) (defining an investment adviser as one who advises others "for compensation"); *but see* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, 76 Fed. Reg. 39,646, 39,675 (July 6, 2011) (indicating that a person still counts as a client for the purpose of certain exemptions even if they were not advised for compensation). Third, the Division argues that the very fact that Saving2Retire invested client funds in Dimensional Fund Advisors, a mutual

(continued…)

2. Saving2Retire violated Section 204(a) by failing to provide documents required by the Commission during its examination.

Advisers Act Section 204(a) provides that the records of registered "investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 80b-4(a). "An advisory firm is not entitled to delay a reasonable inspection sought by our staff during regular business hours." *Hammon Capital Mgmt. Corp.*, Advisers Act Release No. 744, 1981 SEC LEXIS 2326, at *4-5 (Jan. 8, 1981).

Young failed to make Saving2Retire's records available for examination, and in fact substantially impeded the Commission's efforts to obtain them. Her initial production was deficient; she did not provide any financial records for Saving2Retire, and her client list for Saving2Retire only identified clients with the letters A through H and gave rounded account balances. *See* Div. Exs. 2, 3, 15. Commission staff followed up with her and asked for Saving2Retire's balance sheet, trial balance, general ledger, cash receipts and disbursement journal, income and cash flow statements, trade blotter, bank statements, and brokerage statements for all clients, but Young never provided any of those documents. Div. Ex. 4; Tr. 40-41, 80-82, 106, 109. When Villarreal called her on the day the documents were due, Young "went on a bit of a rant" and eventually abruptly ended the call. Tr. 42-43. The Commission still gave her an additional three weeks to comply with the examination requests, but she did not even attempt to do so; instead she argued that she should just be allowed to withdraw Saving2Retire's registration. *See* Div. Ex. 6; Resp. Ex. 5. And when the Division began its

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fund company whose funds can be purchased only though an investment adviser, is sufficient evidence that more than 14 clients were advised. Div. Br. at 6; Tr. 49. Yet the Division never proved that more than 14 of Saving2Retire's clients were invested in Dimensional Fund Advisors. Villarreal testified that Young used Dimensional Fund Advisors "for *most* of her clients," Tr. 49 (emphasis added), but did not define what he meant by most, which arguably could be as few as 11 of 20 clients. Finally, the Division relies on its own summary chart to show that Saving2Retire had 20 clients, but I am not sure of its basis for grouping the accounts into 20 units. *See* Div. Ex. 44. As noted above, most individuals sharing a last name are grouped together, but some who share last names are still identified by the Division as distinct clients. Arguably, if the Division's groupings are wrong, Saving2Retire could have had fewer than 20 clients and maybe even fewer than 15. *See id.*

investigation, Young did not respond to its subpoena request and failed to appear for testimony on at least two occasions. *See* Tr. 84; Div. Ex. 12 at 134; Div. Ex. 14; Div. Ex. 16 at 185; Resp. Ex. 8.

Young is Saving2Retire's sole principal and employee, so her actions are attributed to the firm. *A. J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977) ("A firm . . . can act only through its agents, and is accountable for the actions of its responsible officers."). Accordingly, Saving2Retire violated Section 204 by failing to make its records available for examination by the Commission.

3. Saving2Retire violated Rule 204-2(a) by failing to maintain required books and records.

Advisers Act Rule 204-2(a) provides in relevant part as follows:

> (a) Every investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) shall make and keep true, accurate and current the following books and records relating to its investment advisory business;
>
> > (1) A journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger.
> >
> > (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.
> >
> > . . .
> >
> > (4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.
> >
> > . . .
> >
> > (6) All trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser.

17 C.F.R. § 275.204-2(a).

Young admitted that Saving2Retire did not keep cancelled checks, cash reconciliations, or current bank statements. Tr. 80-82; 17 C.F.R. § 275.204-2(a)(4). She further admitted that Saving2Retire did not keep a current cash

receipts or disbursements journal, general ledger, or trial balances. Tr. 80-81, 106-07; 17 C.F.R. § 275.204-2(a)(1), (2), (6).

Young has stated that she could readily download some of the required records from Scottrade when she needed them. Tr. 81, 103. However, the Commission has "consistently held that, even if required data can be derived from other records, a firm is not relieved thereby of its obligation to maintain the records specified by recordkeeping provisions." *Hammon*, 1981 SEC LEXIS 2326, at *6. Young also argues that because of Saving2Retire's small size, it should be exempt from Rule 204-2(a)'s recordkeeping requirements. Resp. Br. at 18, 40-41. But no such exemption exists. Accordingly, Saving2Retire violated subparts (1), (2), (4), and (6) of Rule 204-2(a).

4. Young aided, abetted, and caused Saving2Retire's violations of Section 204(a) and Rule 204-2(a) and caused its violation of Section 203A.

To establish an aiding and abetting violation, it must be shown that (1) a primary violation of the securities laws was committed; (2) the alleged aider and abettor provided substantial assistance to the primary violator; and (3) the alleged aider and abettor provided such assistance with the necessary scienter, *i.e.*, he or she rendered such assistance knowingly or recklessly. *See Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000); *Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 4597, at *70 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015); *Eric J. Brown*, Securities Act Release No. 9299, 2012 SEC LEXIS 636, at *33 (Feb. 27, 2012), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

For causing liability, three elements must be established: (1) a primary violation was committed; (2) an act or omission by the respondent was a cause of the primary violation; and (3) the respondent knew, or should have known, that his or her conduct would contribute to the violation. *Robert M. Fuller*, Securities Act Release No. 8273, 2003 SEC LEXIS 2041, at *13-14 (Aug. 25, 2003), *pet. denied*, 95 F. App'x 361 (D.C. Cir. 2004). One who aids and abets a primary violation is necessarily a cause of that violation. *Montford & Co.*, 2014 SEC LEXIS 4597, at *71; *Brown*, 2012 SEC LEXIS 636, at *33. The reverse is not always true because negligence is sufficient to establish that a respondent caused a violation of a provision that does not require scienter. *See KPMG Peat Marwick LLP*, Securities Exchange Act of 1934 Release No. 43862, 2001 SEC LEXIS 98, at *81-82 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002).

The first factor for aiding, abetting, and causing liability is met. As established above, Saving2Retire committed three primary violations: of

Advisers Act Sections 203A and 204, and of Advisers Act Rule 204-2. Turning to the second factor under both tests, Young, being the sole owner, managing member, and employee of Saving2Retire, Tr. 67; Div. Ex. 9 at 28-29, provided substantial assistance to the primary violator, and it was her acts and omissions that caused the violations. Specifically, she was the one who improperly registered the firm, impeded the Commission's examination, and failed to keep required records for the firm.

The third factor for aiding and abetting liability requires a showing of scienter, and Young was reckless in failing to comply with the Commission's examination and in failing to follow the books and records requirements. Recklessness is "'highly unreasonable behavior'" that "'represents an extreme departure from the standards of ordinary care,'" and includes an "'egregious refusal to see the obvious.'" *Chill v. General Elec. Co.*, 101 F.3d 263, 269 (2d Cir. 1996) (quoting *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978), and *Goldman v. McMahan, Brafman, Morgan & Co.*, 706 F. Supp. 256, 259 (S.D.N.Y. 1989)). When it comes to the Commission's examination, Young was told she had to comply with the examiners' requests and was provided many opportunities to do so. Yet, she still failed to produce any documents after her initial deficient production. This is highly unreasonable behavior.

Turning to recordkeeping, the Advisers Act's rules plainly spell out an investment adviser's recordkeeping obligations, and Young has presented little defense to the allegations that she ignored them. Although it is possible she believed that they should not apply to a small firm like hers or that they only applied to her internet business, she had no basis for such assumptions. *See* Div. Ex. 9 at 78-82; Resp. Br. at 18, 40-41. As the sole owner and managing member of Saving2Retire, Young was an associated person of an adviser and thus a fiduciary. *See* 15 U.S.C. § 80b-2(a)(17); *Fundamental Portfolio Advisors, Inc.*, Securities Act Release No. 8251, 2003 SEC LEXIS 1654, at *54 (July 15, 2003) (investment advisers and associated persons are fiduciaries), *pet. dismissed*, 167 F. App'x 836 (2d Cir. 2006). As a fiduciary, it was highly unreasonable and thus reckless for her to contravene or be ignorant of the recordkeeping requirements. *See Abraham & Sons Capital, Inc.*, Exchange Act Release No. 44624, 2001 SEC LEXIS 2773, at *27 (July 31, 2001) ("Securities professionals are required to be knowledgeable about, and to comply with, the regulatory requirements to which they are subject. Failure to meet this requirement constitutes an extreme departure from the standards of ordinary care and establishes recklessness." (internal quotation marks and ellipsis omitted)).

Young therefore aided, abetted, and caused Saving2Retire's Section 204 and Rule 204-2 violations.

However, Young did not provide knowing or reckless assistance to Saving2Retire when she improperly registered it as an internet investment adviser. She registered the firm in good faith after reading the Commission's adopting release contemplating a grace period. *See* Tr. 72-73. She believed she could maintain her registration while she set up a website and tried to find clients. *See* Tr. 71-72; Div. Ex. 9 at 125-26. No further Commission guidance existed during the time period when Saving2Retire was registered. Therefore, Young did not aid and abet Saving2Retire's Section 203A violation.

Nonetheless, Young was also aware that the internet adviser exemption did not specifically identify any grace period. *See* Tr. 72-74. The plain language of the Advisers Act and its rules require a registrant to be eligible for registration immediately upon registering or no more than 120 days after registering. *See* 15 U.S.C. § 80b-3a(a) (prohibiting registration unless the investment adviser meets the assets under management requirements); 17 C.F.R. § 275.203A-2(c) (allowing an investment adviser a 120 day grace period to become eligible after registration). Young's belief that she could stay registered for four years without any internet clients was unreasonable. Young also chose not to consult any securities professionals or attorneys when deciding to register Saving2Retire. Tr. 70. She was therefore negligent in maintaining Saving2Retire's registration for years without having any internet clients. Since causing liability requires only negligence, I find that Young caused Saving2Retire's Section 203A violation.

Sanctions

The Division requests that I revoke Saving2Retire's registration, bar Young from the securities industry, order Respondents to cease and desist from violating the Advisers Act and rules thereunder, and assess second-tier civil penalties against both Respondents. Div. Br. at 13-19. I consider each sanction in turn.

1. Revocation of registration

Advisers Act Section 203(e) allows the Commission to suspend or revoke the registration of an investment adviser if it willfully violated the Advisers Act and the sanction is in the public interest. 15 U.S.C. § 80b-3(e)(5).

However, I am unable to grant the relief the Division seeks because Saving2Retire filed a Form ADV-W in late 2017 and is no longer registered with the Commission. Saving2Retire, LLC, Form ADV-W; Decl. of Javier Villarreal, at 1.

2. Industry bar

Advisers Act Section 203(f) authorizes the Commission to bar or suspend any person from the securities industry if such person was associated with an investment adviser at the time of the alleged misconduct, such sanction is in the public interest, and the person has willfully aided and abetted a violation of the Advisers Act or rules thereunder. 15 U.S.C. §§ 80b-3(e)(6), (f).

In making a public interest determination, the Commission considers: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of the conduct; (6) and the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Montford & Co.*, 2014 SEC LEXIS 4597, at *77. The Commission's inquiry is flexible, and no one factor is dispositive. *Montford & Co.*, 2014 SEC LEXIS 4597, at *77; *see Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-9, *14 (Mar. 7, 2014), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 SEC LEXIS 1886 (May 26, 2016). The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and deterrence. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006); *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003).

I consider whether Young should be barred or suspended in light of the two violations she aided and abetted. Both those violations were willful, and in fact, reckless. *See Wonsover v. SEC*, 205 F.3d 408, 413-14 (D.C. Cir. 2000) (willfulness means the intentional commission of the act that constitutes the violation of the securities laws; there is no requirement that the actor be aware that he or she is violating any statutes or regulations); *accord Robare Grp., Ltd. v. SEC*, 922 F.3d 468, 479 (D.C. Cir. 2019).

Investors were not harmed and there was no fraud. However, books and records requirements are "a keystone of the investment adviser surveillance with which we are charged in order to protect the investing public," *Hammon*, 1981 SEC LEXIS 2326, at *5, and Young's recordkeeping violations were not trivial and persisted for several years. Her failure to comply with the examination was far more serious; even after she understood the Commission's requests, she failed to produce documents, impeding the Commission's examination and the Division's investigation for nearly a year. Young's violations were recent. In terms of scienter, she was at least reckless

as noted above. And Young has done or said little to indicate that she recognizes the wrongfulness of her actions. Instead, she mostly places blame on the Commission staff and the Division. *See* Resp. Br., *passim*. Young has likewise made no assurances against future violations. If she were allowed to remain in the industry, it is possible, and perhaps even likely, that she would behave with the same disregard to another examination as she did here.

Young does not intend to register an entity with the Commission again. *See* Div. Ex. 9 at 154-55 (Young stated that operating under Commission registration "was out of my league" and that she intended to return to state supervision, which "was not as overwhelming"); Tr. 74. Nevertheless, "[t]he industry cannot tolerate an investment adviser that, holding a fiduciary position, would undermine the regulatory system by deliberately thwarting a Commission examination." *Schield*, 2006 SEC LEXIS 195, at *44; *see Phlo Corp.*, Exchange Act Release No. 55562, 2007 SEC LEXIS 604, at *61 (Mar. 30, 2007) ("the failure to cooperate with an examination is serious misconduct that justifies strong sanctions because of its potential to thwart the protection of shareholders and market participants").

Balancing all the factors, I find it appropriate to bar Young from the securities industry with a right to reapply after two years.

3. Cease-and-desist order

Advisers Act Section 203(k) authorizes a cease-and-desist order against any person who has violated the Advisers Act or its rules, or has caused a violation due to an act or omission the person knew or should have known would contribute to such a violation. 15 U.S.C. § 80b-3(k)(1). In determining whether to issue a cease-and-desist order, the Commission considers the *Steadman* factors as well as "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *KPMG*, 2001 SEC LEXIS 98, at *116. The Commission weighs these factors in light of the entire record, and no one factor is dispositive. *Id.* Although there must be some likelihood of future violations whenever the Commission issues a cease-and-desist order, the required showing is "significantly less than that required for an injunction." *Id.* at *114.

As discussed in the above *Steadman* analysis, there was no direct harm to investors or the marketplace. On the other hand, the public interest factors weigh in favor of a sanction. I am unconvinced that Young has really learned that she needs to comply with Commission examinations, and she likely would be similarly unresponsive if subject to a future examination.

Although I do not think Young intends to register an entity with the Commission again, there is still risk of future violations if she remains in the industry. *See id.* at *102-03 (the risk of future violations "need not be very great to warrant issuing a cease-and-desist order" and "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits . . . ordering him to cease and desist"). Furthermore, a cease-and-desist order will send a message to the public and thus serve a remedial purpose. *See id.* at *116 n.148; *Fundamental Portfolio Advisors*, 2003 SEC LEXIS 1654, at *68 (considering "the function a cease-and-desist order will serve in alerting the public that a respondent has violated the securities laws"). A cease-and-desist order is therefore appropriate.

4. Civil penalties

Advisers Act Section 203(i) authorizes the Commission to impose a civil money penalty in a cease-and-desist proceeding under Section 203(k) where, as here, a respondent violated, or caused violations of, the Advisers Act or rules thereunder. 15 U.S.C. § 80b-3(i)(1)(B). The statute sets out a three-tiered system for determining the maximum civil penalty. Here, the Division asks for second-tier penalties, which are permitted if the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and in this case, can be imposed up to a maximum of $75,000 for a natural person and $375,000 for an entity for each act or omission. 15 U.S.C. § 80b-3(i)(2)(B); 17 C.F.R. § 201.1001, Table I.[7] The Commission has discretion to determine the amount of penalties appropriate within a given tier. *See S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *48 (Dec. 5, 2014).

I agree with the Division that penalties are appropriate for Young's reckless aiding-and-abetting violations of Section 204 and Rule 204-2. As discussed below, however, Respondents' improper registration is not deserving of a monetary penalty, and I choose not to impose monetary penalties on Saving2Retire at all.

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[7] The $75,000 and $375,000 upper limits apply to violations committed from March 4, 2009, to March 5, 2013. Adjustments to Civil Monetary Penalty Amounts, 84 Fed. Reg. 5122, 5124 (Feb. 20, 2019) ("For violations that occurred on or before November 2, 2015, the penalty amounts in Table I to 17 CFR 201.1001 continue to apply."); 82 Fed. Reg. 5367, 5372 (Jan. 18, 2017). A higher upper limit applies to more recent violations, but the Division does not ask me to consider the higher range. *See* Div. Br. at 18.

The public interest factors in Section 203(i) provide helpful guidance in determining an appropriate civil penalty. I consider: (1) whether the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm caused to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. 15 U.S.C. § 80b-3(i)(3).

There was no fraud here, none of Saving2Retire's clients were harmed, Young was not unjustly enriched, and the record does not establish that she engaged in other misconduct.[8] Respondents did, however, recklessly violate the Advisers Act and its rules, and there is a need to deter them and other persons from such conduct.

Advisers Act Rule 204-2 plainly lays out an adviser's recordkeeping obligations, and Young recklessly failed to comply with those requirements, which is deserving of a second-tier penalty. Still, she appears to have honestly believed, although quite wrongly, that Saving2Retire's internet business was separate from its non-internet one, and that the Commission's rules did not apply to the non-internet business she had run under state registration for years. *See* Div. Ex. 9 at 79-80. Because of the industry bar and cease-and-desist orders I impose above, I find in my discretion that a modest penalty of $3,000 for her violations of Rule 204-2(a) is appropriate. *See Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 SEC LEXIS 96, at *41 (Jan. 16, 2008).

Young's failure to participate in the Commission's examination is more serious. Although she may have been confused about her obligations when she initially provided insufficient records to the examiners, her behavior when subsequently interacting with Commission staff does not reflect well on her. Time and again, when she was provided additional opportunities to respond, she chose not to. She rationalized in several ways: claiming that she was sick, or overwhelmed, or that her clients' privacy came first. *See, e.g.*, Tr. 84; Div. Ex. 9 at 91-96, 104-05; Resp. Ex. 8; Resp. Br. at 18-20, 44. She also would have had to create some of the records the Commission wanted, as she did not keep them, but that too is no excuse. *See* Div. Ex. 9 at 104, 106-07,

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[8] Young was barred by the state of California, but the record does not reflect the nature of her misconduct. *See* Div. Ex. 10. It is possible that California's decision was related to the Commission investigation of Young for the conduct at issue here, and therefore, is not relevant to the public interest factor considering prior regulatory misconduct. *See* Resp. Br. at 23-36 (alleging that California barred Young and denied her registration application in part because of communications it had with the Division).

109; Tr. 81, 106-08; Resp. Br. at 18, 44; *see also Hammon*, 1981 SEC LEXIS 2326, at *6. She had an obligation to make her records available, but instead she stonewalled and obstructed the examination.

I am not persuaded by her arguments of bias or misconduct on the part of the Commission staff. There is no indication that she was singled out; Villarreal testified that the Commission was conducting examinations of other internet advisers as well. Tr. 26-27. Once the examiners approached Saving2Retire and received Young's inadequate document response, the deficiencies in her recordkeeping and the fact that she had no internet clients raised obvious red flags. Tr. 33-36 (Villarreal testified that he had "never come across someone who was so evasive in providing the responses"). There was nothing unreasonable about the Commission's follow-up requests, and everything the staff asked her for should have been readily available had she been keeping records properly. Moreover, the Commission gave her numerous chances to comply and several deadline extensions. And in the one phone call Young put in evidence, Commission staff behaved professionally and were respectful toward Young. *See* Resp. Ex. 19.[9] If anything, it would appear there were instances where Young was less than respectful toward them, such as when she abruptly ended Villarreal's call. Tr. 43.

Young acted in reckless disregard of her obligation to comply with the Commission's examination requests. Still, Young did not destroy or alter documents or do anything similarly egregious. *See Schield*, 2006 SEC LEXIS 195 at *9, *14-17, *43-44. Accordingly, I impose a second-tier civil penalty of $10,000 for her violation of Section 204(a).

I find, however, that no civil penalty is warranted for the improper registration of Saving2Retire. Young intended to comply with the internet adviser exemption, and she wanted to run a legitimate business. As noted above, at the time she registered, the guidance available on how long one could remain registered while waiting for business to pick up was ambiguous. Her position—that she could take as long as she wanted—may have been unreasonable, but there is no evidence of harm to anyone. And although there is some question about whether Respondents also advised too many non-internet clients to rely on the exemption—a matter which I have refrained from deciding—I do not think a civil penalty is appropriate regardless. The Commission found in *Ajenifuja* that an appropriate sanction

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[9] At one point during the call, a staff member told Young that she was required to provide documents within 24 hours, which upset her. *See* Resp. Br. at 9-10. However, the staff later backtracked from that request.

for improper registration as an internet adviser is cancelation of the registration. *Ajenifuja*, 2019 SEC LEXIS 157, at *24-25; *see also* 15 U.S.C. § 80b-3(h) (prescribing registration cancelation for advisers prohibited from registering under Section 203A). Deregistration provides sufficient deterrence for those inclined to register improperly. Since Saving2Retire is no longer registered, I see no reason to impose any monetary sanction on Young for the Section 203A violation.

Likewise, the public interest would not be served by imposing civil penalties on Saving2Retire. Young has stated that the firm is defunct, with no clients or revenues. Resp. Br. at 1. Although she has declined to submit evidence concerning Saving2Retire's inability to pay, there is some evidence in the record supporting her assertion that the firm is no longer in business. Notably, Young certified on Saving2Retire's Form ADV-W that the firm is "[n]o longer in business or closing business" and checked the box indicating that it had ceased doing business. Form ADV-W at 3 of 7. Moreover, it seems unlikely Saving2Retire will be able to do any more business given that its registration application was rejected in California and abandoned in Texas. Tr. 87. Finally, Young ran Saving2Retire on her own, and it is hard to meaningfully consider the entity separate from her in anything but a legal sense. Imposing an additional penalty on the firm would be duplicative; any money would either have to come from Young or would remain uncollected.

Accordingly, a total civil penalty of $13,000 will be imposed on Young.

Record Certification

I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on August 5, 2019, and two additional items: (1) email correspondence dated August 21, 2019, between my office and the parties concerning corrections to the record index; and (2) Respondents' Exhibit 20, admitted by order dated August 23, 2019. *See* 17 C.F.R. § 201.351(b); *Saving2Retire*, Admin. Proc. Rulings Release No. 6659, 2019 SEC LEXIS 2207, at *1-2.

Order

I ORDER that pursuant to Section 203(f) of the Investment Advisers Act of 1940, Marian P. Young is BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; provided, however, that she may reapply to the Commission after two years for permission to associate.

I FURTHER ORDER that pursuant to Section 203(k) of the Investment Advisers Act of 1940, Saving2Retire, LLC, and Marian P. Young shall CEASE AND DESIST from committing or causing any violations or future violations of Sections 203A and 204(a) of the Investment Advisers Act of 1940 and Rule 204-2(a)(1), (2), (4), and (6) thereunder.

I FURTHER ORDER that pursuant to Section 203(i) of the Investment Advisers Act of 1940, Marian P. Young shall PAY A CIVIL MONEY PENALTY in the amount of $13,000.

Payment of civil penalties shall be made no later than 21 days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/ofm; or (3) by certified check, bank cashier's check, bank money order, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying Respondent and Administrative Proceeding No. 3-17352: Enterprise Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule of Practice 360, 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 of Practice 111, 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 occur, the initial decision shall not become final as to that party.

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Brenda P. Murray
Chief Administrative Law Judge