UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69036 / March 5, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3562 / March 5, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30414 / March 5, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3448 / March 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14979

In the Matter of	:	
	:	ORDER MAKING FINDINGS AND
PEAK WEALTH OPPORTUNITIES, LLC, and	:	IMPOSING SANCTIONS BY
DAVID W. DUBE, CPA	:	DEFAULT

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Administrative Proceedings (OIP) on August 10, 2012, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 (Exchange Act), Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), Sections 9(b) and 9(f) of the Investment Company Act of 1940 (Investment Company Act), and Rule 102(e) of the Commission's Rules of Practice (Commission Rules).

I held a telephonic prehearing conference on September 27, 2012, at which time I found that Respondents were served with the OIP no later than September 10, 2012. Commission Rule 220(b) requires Respondents to file their Answers to the OIP within twenty days after service. OIP at 7; 17 C.F.R. § 201.220(b). At the prehearing conference, the parties represented that they were actively engaged in settlement discussions, and I postponed sine die the due date for Respondents to file their Answers. I held a second telephonic prehearing conference on October 24, 2012. Respondents represented that they were still interested in pursuing settlement discussions, and I ordered Respondents to file their Answers by November 16, 2012.

Respondents failed to file Answers to the OIP, and on November 19, 2012, I ordered Respondents to show cause why they should not be deemed in default and have the proceeding determined against them. See 17 C.F.R. §§ 201.155(a)(2), .220(f). Respondents failed to respond to the show cause order. On January 15, 2013, I held a third telephonic prehearing

conference, in which Respondents failed to participate. Respondents are therefore in default for failing to answer the OIP, respond to the show cause order, participate in a prehearing conference, or otherwise defend the proceeding. See 17 C.F.R. §§ 201.155(a), .220(f), .221(f). Accordingly, the allegations in the OIP are deemed true and this proceeding is determined against them by default.

On December 5, 2012, I issued an order finding Respondents in default and directing the Division of Enforcement (Division) to file a motion requesting relief and supported by sufficient evidence consistent with Rapoport v. SEC, 682 F.3d 98 (D.C. Cir. 2012). On December 26, 2012, the Division filed a Motion for Sanctions Against Respondents Peak Wealth Opportunities and David W. Dube (Motion), to which was attached 13 exhibits (Exhs. 1-13). At the January 15, 2013 prehearing conference, I expressed concern about the strength and nature of the case against Respondents, and directed the Division to file additional legal authority and evidentiary support. Post Third Prehearing Conference Order (unpublished). On January 30, 2013, the Division filed a Supplement to its Motion for Sanctions (Supplement), to which was attached a Declaration of Roda Johnson (Johnson Decl.) and the transcript of investigative testimony of Edward Cofrancesco (Cofrancesco Tr.).

FINDINGS OF FACT

Peak Wealth Opportunities, LLC (Peak Wealth), a Florida limited liability company located in Largo, Florida, has been registered with the Commission as an investment adviser since October 2007. OIP, p. 2. From April 2008 to June 2010, Peak Wealth was the investment adviser to StockCar Stocks Index Fund (Fund), the sole series of the StockCar Stocks Mutual Fund, Inc. (Company), formerly a registered investment company. Id. Although the Fund terminated Peak Wealth's advisory agreement in June 2010, Peak Wealth remains registered with the Commission as an investment adviser. Id., p. 5. Peak Wealth has not filed a Form ADV since September 2008, nor has it filed a Form ADV-W or annually amended Forms ADV for its fiscal years ended September 30, 2009, 2010, or 2011. Id., p. 5; Motion, Exh. 13. Peak Wealth's September 2008 Form ADV states that its basis for registration with the Commission is its status as an investment adviser to a registered investment company. Id., p. 5. Peak Wealth is a wholly owned subsidiary of Peak Capital Corporation (Peak Capital), which also owns Peak Securities Corporation, a former broker-dealer (which withdrew its broker-dealer registration in March 2010), and a publishing and debt collection business. Id., p. 2.

David W. Dube (Dube), age 55, owns Peak Capital and its subsidiary businesses. OIP, p. 2. He is the president and sole managing member of Peak Wealth. Id. He was also the acting chief compliance officer of the Fund from October 2009 until June 2010. Id. Dube is a certified public accountant licensed in New Hampshire and, as of December 31, 2012, Florida. Id.; Motion, Exh. 2. Dube registered with the Public Company Accounting Oversight Board in January 2010, indicating that he may conduct or play a substantial role in an audit in the future. OIP, p. 2. A recent public company filing in September 2011 indicates that Dube has been engaged to prepare the company's audited financial statements. Id., p. 2; Motion, Exh. 3, p. 8. Other public filings from 2001 and 2002 indicate that Dube has also served on at least two public company audit committees. OIP, p. 2. Dube has a disciplinary history with the Financial Industry Regulatory Authority (FINRA) in connection with his formerly registered broker-

dealer, and has twice had FINRA arbitration awards imposed against him. Id.; Motion, Exhs. 4-6.

The Company was a Maryland corporation that operated as an open-end diversified management investment company. OIP, p. 2. The Company was registered with the Commission from September 1998 until March 2011, when it formally deregistered. Id. The Company is now defunct. Id.

The Fund was an open-end management company that invested in companies of the StockCars Stocks Index (Index), the Fund's proprietary index consisting of approximately 40 companies that support NASCAR racing events. OIP, pp. 2-3. The Fund reported net assets of approximately $3.9 million in its most recently filed annual report, for the fiscal year ended September 30, 2009. Id., p. 3. Edward Cofrancesco (Cofrancesco) was one of the Fund's directors. Cofrancesco Tr., p. 17.

A. Peak Wealth's Relationship with the Fund

Peak Wealth became the investment adviser to the Fund in April 2008, pursuant to a vote by a majority of the Company's shareholders approving Peak Wealth's written advisory agreement. OIP, p. 3. The advisory agreement was for an initial term of two years and was subject to the Fund board's annual review and approval thereafter. Id. Peak Wealth also served as the Fund's administrator pursuant to a separate administration agreement. Id. Dube had previously done business with Cofrancesco and arranged to have him serve as a director of the Fund. Cofrancesco Tr., pp. 18-19, 24.

For its advisory services, Peak Wealth charged an annual fee of 0.65% of the Fund's average daily net assets. OIP, p. 3. Peak Wealth contractually agreed to waive fees and/or reimburse the Fund for all expenses it incurred to the extent necessary to maintain the Fund's total operating expenses at 1.5% of the Fund's average daily net assets for a two-year period ending April 15, 2010. Id. Throughout the period of the reimbursement agreement, the expenses paid by the Fund, exclusive of advisory fees, exceeded the 1.5% cap. Id. This was largely because assets under management were low, which in turn was partly the result of poor economic conditions and partly the result of poor marketing efforts by Dube and Peak Wealth. See Cofrancesco Tr., pp. 59-61, 65. Thus, due to the waiver agreement, Peak Wealth did not collect advisory fees while it served as adviser to the Fund, and indeed, paid approximately $80,000 to the Fund. OIP, p. 3; Cofrancesco Tr., pp. 87, 129.

In late 2008, the Fund's board began to raise concerns about Peak Wealth's ability to meet its expense reimbursement obligation to the Fund. OIP, p. 3. Peak Wealth had failed to reimburse the Fund for expenses it owed under the advisory agreement, which resulted in the Fund delaying the filing of its annual report for the fiscal year ended September 30, 2008. Id.; Cofrancesco Tr., pp. 51, 54. By September 2009, the Fund had accumulated another receivable for expenses owed from Peak Wealth of approximately $50,000. OIP, p. 3; Cofrancesco Tr., pp. 66, 82. Dube repeatedly promised the board that he would repay the Fund, but he never did. OIP, p. 3. The Fund's auditor refused to release its audit opinion without repayment of the outstanding obligation, resulting in the Fund delaying the filing of its 2009 annual report. Id.;

Cofrancesco Tr., pp. 90-91. Ultimately, the board liquidated Dube's personal holdings in the Fund in order to satisfy the outstanding receivable. OIP, p. 3; Cofrancesco Tr., pp. 90-91.

The Fund's portfolio manager, who worked for Peak Wealth and handled the trading activity and index rebalancing for the Fund, also encountered problems with Peak Wealth and Dube. OIP, p. 3. Dube failed to respond to multiple letters and emails from the portfolio manager throughout 2008 and 2009 regarding the Fund's compliance obligations, the portfolio manager's concerns about the regularity and substance of his communications with Peak Wealth and Dube, and his compensation. Id., p. 3; Motion, Exh. 7. The portfolio manager raised his concerns about the lack of communication directly with the Fund's board. OIP, p. 3. The portfolio manager was eventually hired and compensated directly by the Fund. Cofrancesco Tr., pp. 44, 101.

In March 2010, prior to the conclusion of Peak Wealth's initial two-year investment advisory agreement with the Fund, the Fund's board requested documents from Peak Wealth and Dube in connection with its review of Peak Wealth's investment advisory contract under Section 15(c) of the Investment Company Act. OIP, pp. 3-4; Motion, Exh. 8; Cofrancesco Tr., pp. 104-05. The board sent a second request in May 2010. OIP, p. 4; Motion, Exh. 8; Cofrancesco Tr., p. 118. Peak Wealth requested an extension of time to respond to the board's requests but failed to provide the board with any of the requested documents. OIP, p. 4; Cofrancesco Tr., pp. 106-08. One reason for this failure, according to Dube, was Dube's health problems. Cofrancesco Tr., p. 121.

In June 2010, the board terminated Peak Wealth's advisory agreement, and voted to liquidate the Fund's assets (approximately $4 million) and to deregister the Company. OIP, p. 4; Cofrancesco Tr., p. 127. The Fund distributed to investors all remaining assets net of liquidation expenses. OIP, p. 4. On March 23, 2011, the Commission's Division of Investment Management issued an order terminating the Company's registration under the Investment Company Act. Id.

B. Examination of Peak Wealth

In April 2010, Commission staff from the Miami Regional Office initiated an examination of Peak Wealth and the Fund. OIP, p. 4. The examination staff faxed its initial document request list to Peak Wealth and the Fund on April 7, 2010, one week before commencement of the examination. Id.; Johnson Decl., p. 1. When the staff arrived on April 14, Dube did not have any documents for Peak Wealth or the Fund. OIP, p. 4; Johnson Decl., p. 1. Dube repeatedly assured examiners that responsive documents would be forthcoming. OIP, p. 4; Johnson Decl., p. 2. He frequently assured examiners that his assistant was making copies, but she never returned with any. Johnson Decl., p. 2.

The examination staff submitted many additional document requests, follow-up requests, and Fail to Produce letters to Peak Wealth. OIP, p. 4; Motion, Exh. 9; Johnson Decl., p. 2. These included requests for financial records relating to Peak Wealth's advisory business, including Peak Wealth's balance sheet, trial balance, income statement, cash flow statements, and cash receipts and disbursements journals. OIP, p. 4; Motion, Exh. 9. Dube and Peak Wealth

did not produce these financial records because they did not exist. OIP, p. 4. Instead, Dube told examiners that he would create the requested financial records relating to Peak Wealth. Id., p. 4.

The examination staff also submitted a document request to Dube, in his capacity as a representative of Peak Wealth and the Fund's acting chief compliance officer, for documents relating to the maintenance of the Index, including the list of eligible issuers and proof of their eligibility, as well as records of daily value computations, the weighting of positions, the annual rebalancing process, and the correlation between the performance of the Fund and the Index. OIP, p. 4; Motion, Exh. 10.

At the conclusion of the field work portion of the examination, the majority of the requests for Peak Wealth's financial records remained outstanding, as did requests relating to the maintenance of the Index. OIP, p. 4; Johnson Decl., p. 2. Examination staff referred the matter to the Division for further review. OIP, p. 4.

The Company, the Fund (through its board), and the former portfolio manager subsequently produced documents in response to a subpoena from the enforcement staff. OIP, p. 4. However, Peak Wealth and Dube never responded to the staff's document subpoenas, and Dube failed to appear for investigative testimony pursuant to a subpoena. Id.; Motion, Exhs. 11-12.

During the examination, Dube spoke to Cofrancesco, the only remaining board member of the Fund, one time. Cofrancesco Tr., pp. 111-12, 122. Respondents' inaction and dearth of communication may have been because of Dube's health problems, including a bad skiing accident and HIV infection. Id., pp. 112-13, 133. In part, however, it was because Dube was making money in other ways, including teaching overseas. Id., pp. 66-67, 122. In any event, Dube represented to the board that the Commission examination was "going fabulously well." Id., p. 125.

CONCLUSIONS OF LAW

Peak Wealth violated Section 15(c) of the Investment Company Act. That provision makes it the duty of an investment adviser of a registered investment company to furnish such information as may reasonably be necessary for fund directors to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company. 15 U.S.C. § 80a-15(c). The Fund requested documents from Peak Wealth twice, in March 2010 and May 2010. Peak Wealth requested an extension of time to respond to these requests, but ultimately did not furnish the requested documents.

Peak Wealth violated Section 204 of the Advisers Act and Rules 204-1(a)(1) and 204-2(a)(1), (2), (4), (5), and (6) thereunder. Section 204 of the Advisers Act requires investment advisers to make and keep certain records specified by rule, which are subject to examination by the Commission. 15 U.S.C. § 80b-4(a). Rule 204-1(a)(1) requires an investment adviser to file a Form ADV annually, within 90 days of the end of its fiscal year. 17 C.F.R. § 275.204-1(a)(1). Rule 204-2(a) requires a registered investment adviser to make and keep true, accurate, and

current copies of certain books and records relating to its investment advisory business, including:

- 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;
- General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts;
- All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser;
- All bills or statements (or copies thereof), paid or unpaid, relating to the business of the investment adviser as such; and
- 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)(1), (2), (4), (5), (6). Peak Wealth did not make and keep many of the records requested by the Commission's examination staff in April 2010. It did not timely file any Forms ADV for its fiscal years ended September 2009, 2010, or 2011. The examination revealed that it did not make and keep, in their entirety, the five categories of books and records alleged in the OIP.

Peak Wealth violated Section 203A of the Advisers Act and Rule 203A-1(b)(2) thereunder. Section 203A of the Advisers Act generally prohibits an investment adviser from registering unless it has assets under management of not less than $25,000,000 or it is an investment adviser for a registered investment company. 15 U.S.C. § 80b-3a(a)(1). Rule 203A-1(b)(2) requires a registered investment adviser to file a Form ADV-W within 180 days of the end of its fiscal year if it becomes ineligible for registration. 17 C.F.R. § 275.203A-1(b)(2).[1] Peak Wealth's most recently filed Form ADV, for the period ended September 30, 2008, stated

[1] This relatively recent regulation, entitled "Eligibility for SEC registration; Switching to or from SEC registration," is somewhat obscure. 17 C.F.R. § 275.203A-1 (stating an effective date of September 19, 2011). It has two sections, the second of which is entitled "Switching to or from SEC registration." 17 C.F.R. § 275.203A-1(b). Subsection (2), entitled "SEC-registered advisers – switching to State registration," reads in pertinent part: "If you are registered with the Commission and file an annual updating amendment to your Form ADV reporting that you are not eligible for SEC registration . . . you must file Form ADV-W to withdraw your SEC registration within 180 days of your fiscal year end." 17 C.F.R. § 275.203A-1(b)(2). Read literally, it appears to require the filing of a Form ADV-W only if ineligibility for Commission registration is reported on an associated annual Form ADV, all for the purpose of switching to state registration. So read, Peak Wealth was under no obligation to file a Form ADV-W, because it had not also filed an associated annual Form ADV. Such a construction is wholly unreasonable, however; surely the duty to file a Form ADV-W is not excused by the failure to properly file an annual Form ADV. Consequently, I interpret Rule 203A-1(b)(2) to read, in effect: "If you are registered with the Commission and [are no longer] eligible for SEC registration . . . you must file Form ADV-W to withdraw your SEC registration within 180 days of your fiscal year end."

that its only basis for registration was its status as investment adviser to a registered investment company, a status that ended in June 2010. Peak Wealth never filed a Form ADV-W to withdraw its registration.

Peak Wealth's violations are not of anti-fraud provisions, and do not require a showing of scienter. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) ("When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances . . . we are quite unwilling to extend the scope of the statute to negligent conduct."). Where no scienter is required, aiding and abetting liability requires proof that: 1) another party has committed a securities law violation; 2) the accused aider and abetter had a general awareness that his role was part of an overall activity that was improper; and 3) the accused aider and abetter knowingly and substantially assisted the principal violation. Investors Research Corp. v. SEC, 628 F.2d 168, 178 (D.C. Cir. 1980). The knowledge or awareness requirement can be satisfied by a finding of recklessness when the alleged aider and abettor is a fiduciary. See Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990). An associated person of an investment adviser is a fiduciary to his investment advisory clients. See Flickinger v. Harold C. Brown, Inc., 947 F. 2d 595, 599 (2d Cir. 1991). Recklessness is "highly unreasonable" conduct, "which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)). A respondent who aids and abets a violation also is a cause of the violation under the federal securities laws. See Sharon M. Graham, Exchange Act Release No. 40727 (Nov. 30, 1998), 53 S.E.C. 1072, 1085 n.35, aff'd, 222 F.3d 994 (D.C. Cir. 2000). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. See KPMG Peat Marwick LLP, Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C. 1135, 1175 (2001), recon. denied, 55 S.E.C. 1, aff'd, 289 F.3d 109 (D.C. Cir. 2002).

Peak Wealth is controlled by Dube; he is its owner, president, and sole managing member. He therefore substantially assisted Peak Wealth's primary violations, and was a fiduciary to Peak Wealth's investment advisory clients. He was also at least reckless regarding Peak Wealth's primary violations, as demonstrated by, for instance, his request for an extension of time to respond to the Fund's Section 15(c) requests, his assurances to the examination staff that he would comply with document requests, and his filing of a Form ADV on behalf of Peak Wealth in 2008, one year after initially registering with the Commission, but not thereafter. Therefore, he aided and abetted all of Peak Wealth's violations, and also caused them.[2]

[2] An associated person may be charged as a primary violator, where the investment adviser is an alter ego of the associated person. John J. Kenny, Securities Act Release No. 8234 (May 14, 2003), 56 S.E.C. 448, 485 n.54, aff'd, 87 F. App'x 608 (8th Cir. 2004). Although Peak Wealth is apparently Dube's alter ego, I need not reach this issue because Dube is only charged with secondary liability. OIP, pp. 5-6.

SANCTIONS

The Division requests that I: (1) order Respondents to cease and desist from violating Sections 204 and 203A of the Advisers Act, and Rules 203A-1(b)(2), 204-1(a)(1), 204-2(a)(1), (2), (4), (5), and (6) thereunder;[3] (2) revoke Peak Wealth's investment adviser registration; (3) permanently bar Dube from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization (NRSRO); (4) permanently deny Dube the privilege of appearing or practicing before the Commission as an accountant; and (5) order Respondents to pay second-tier civil penalties. Motion at 6-16.

A. Willfulness and the Public Interest Factors

Some of the requested sanctions are only appropriate if Respondents' violations were willful. 15 U.S.C § 80b-3(e)(5), (6) (revocation of investment adviser registration); 15 U.S.C. § 80b-3(e)(6), (f) (associational bar pursuant to the Advisers Act); 17 C.F.R. § 201.102(e)(1)(iii) (bar on appearing or practicing before the Commission pursuant to Commission Rule 102(e)(1)(iii). A finding of willfulness does not require intent to violate the law, but merely intent to do the act which constitutes a violation of the law. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976).

Where, as here, the violations are omissions, they may be willful even though inadvertent. Oppenheimer & Co., Exchange Act Release No. 16817 (May 19, 1980), 47 S.E.C. 286, 288. Some cases suggest that an omission is willful if a respondent knew or should have known of the required action. Id. at 287; Herbert Moskowitz, Initial Decision Release No. 163 (Apr. 26, 2000), 72 SEC Docket 912, 925. Other cases state that the "failure to make a required report, even though inadvertent, constitutes a willful violation," with no knowledge requirement. Robert G. Weeks, Initial Decision Release No. 199 (Feb. 4, 2002), 76 SEC Docket 2609, 2662; see also Jesse Rosenblum, Advisers Act Release No. 913 (May 17, 1984), 47 S.E.C. 1065, 1067 (failure to file form required by Section 204 of Advisers Act and Rule 204-1 thereunder held willful), aff'd, 760 F.2d 260 (3d Cir. 1985); Amaroq Asset Management, LLC, Initial Decision Release No. 351 (Jul. 14, 2008), 93 SEC Docket 7932, 7943 (failure to file amended Form ADV held willful).

For the reasons explained above regarding aiding and abetting, Dube knew or should have known of the requirements to respond to the Fund's Section 15(c) requests, comply with the examination staff's document requests, and file a Form ADV-W. Thus, whether or not the "knew or should have known" standard is applicable here, it is satisfied. Respondents' violations were therefore willful.

[3] The Division does not cite to the Investment Company Act in arguing for a cease-and-desist order, and therefore no such order will be entered under that Act. Motion, p. 6.

When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981): 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 or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (Steadman factors). Gary M. Kornman, Advisers Act Release No. 2840 (Feb. 13, 2009), 95 SEC Docket 14246, 14255, pet. denied, 592 F.3d 173 (D.C. Cir. 2010). The Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. Id.

Respondents' conduct was not particularly egregious. Admittedly, there is at least a likelihood that Respondents' overall misfeasance contributed to the failure of the Fund. Cofrancesco Tr., pp. 117-18. However, this is not alleged in the OIP, nor is the evidence supporting this conclusion entirely clear. What is clear is that Respondents violated what are essentially only record keeping and reporting statutes and regulations.

Respondents violated Section 15(c) of the Investment Company Act only twice, but the violations were part of a course of conduct that involved a notable lack of communication with the Fund, as demonstrated by Cofrancesco's investigative testimony. I conclude that this violation was recurrent. Respondents' violations of Section 204 of the Advisers Act, and the applicable Rules thereunder, were plainly recurrent. Respondents violated Section 203A of the Advisers Act, and Rule 203A-1(b)(2) thereunder, only once, and it was therefore isolated.

Although I have concluded that Dube aided and abetted Peak Wealth's violations recklessly, this demonstrates only the lowest degree of scienter. See David Disner, Exchange Act Release No. 38234 (Feb. 4, 1997), 52 S.E.C. 1217, 1222 & n.20; Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991) (citing eleven circuits holding that recklessness satisfies scienter in Section 10(b) and Rule 10b-5 actions). Because both Respondents have defaulted, they have offered no assurances against future violations and they have shown no recognition of the wrongful nature of their conduct. Dube's occupation and Peak Wealth's registration present opportunities for future violations.

Although I consider each form of requested relief individually below, I place considerable weight on the strikingly recurrent nature of Respondents' infractions, and on Respondents' opportunities for future violations in light of their occupation and registration status. On balance, the public interest factors generally weigh in favor of the requested sanctions.

B. Cease-and-Desist Order

Section 203(k) of the Advisers Act authorizes the Commission to impose a cease-and-desist order on any person who "is violating, has violated, or is about to violate" any provision of the Advisers Act or rules thereunder. 15 U.S.C. § 80b-3(k). The Commission may also impose a cease-and-desist order against any person that "is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation."

Id. While some likelihood of future violation must be present, the required showing is "significantly less than that required for an injunction." KPMG Peat Marwick LLP, 54 S.E.C. at 1183-91. Indeed, absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations. Id. at 1191. In evaluating the propriety of a cease-and-desist order, the Commission considers the Steadman factors, as well as the recency of the violation, the resulting degree of harm to investors or the marketplace, and the effect of other sanctions. Id. at 1192.

Respondents' violations of the Advisers Act were, as noted, strikingly recurrent, the Steadman factors otherwise weigh in favor of the requested relief, and the violations were relatively recent. Although there is no demonstrated harm to investors or the marketplace, and the other sanctions discussed below are serious, a cease-and-desist order is still warranted under the totality of the circumstances. Accordingly, Respondents will be ordered to cease and desist from violating Sections 204 and 203A of the Advisers Act and Rules 204-1(a)(1), 204-2(a)(1), (2), (4), (5), and (6), and 203A-1(b)(2) thereunder.

C. Registration Revocation

Section 203(e) of the Advisers Act authorizes the Commission to revoke an investment adviser's registration if it, or any person associated with it, has willfully violated, or willfully aided and abetted the violation of, any provision of the Advisers Act, and the revocation is in the public interest. 15 U.S.C. § 80b-3(e)(5), (6). Based on the Steadman factors, Peak Wealth has no business serving as an investment adviser; it is plainly in the public interest to revoke its registration.

D. Associational Bar

Section 203(f) of the Advisers Act and Section 15(b)(6) of the Exchange Act authorize the Commission to bar a person from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and NRSRO, if that person has willfully violated, or willfully aided and abetted the violation of, any provision of the Advisers Act, and the bar is in the public interest. 15 U.S.C. § 80b-3(f); 15 U.S.C. § 78o(b)(6)(A). Based on the Steadman factors, Dube has no business operating or working for an investment adviser, or any other member of the securities industry. Dube will be permanently barred from association with an investment adviser. The Commission has held that the requested collateral bars are not impermissibly retroactive, and they will be imposed, as well. John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61737.

E. Commission Rule 102(e)(1)(iii) Bar

Commission Rule 102(e)(1)(iii) allows the Commission to censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to any person who has willfully violated, or willfully aided and abetted the violation of, any provision of the federal securities laws or the rules and regulations thereunder. 17 C.F.R. § 201.102(e)(1)(iii). The Steadman factors are considered in evaluating any sanction under Commission Rule 102(e). Altman v. SEC, 666 F.3d 1322, 1329 (D.C. Cir. 2011). As with the sanctions discussed above,

the Steadman factors point directly at the need to permanently bar Dube from practicing before the Commission as an accountant.

F. Civil Penalties

In administrative cease-and-desist proceedings, the Commission is authorized to impose a civil monetary penalty if a respondent has violated or caused any violation of the Investment Company Act or rules thereunder, or has violated or caused any violation of the Advisers Act or rules thereunder. 15 U.S.C. § 80a-9(d)(1)(B); 15 U.S.C § 80b-3(i)(1)(B). A three-tier system identifies the maximum amount of a civil penalty. 15 U.S.C. § 80a-9(d)(2); 15 U.S.C § 80b-3(i)(2). Respondents' violative conduct occurred in 2010 and 2011, except for the failure to timely file the Form ADV for the fiscal year ending September 2009, which was due December 29, 2009. For each act or omission by a natural person in that period, the maximum penalty in the first tier is $7,500; in the second tier, $75,000; and in the third tier, $150,000.[4] 15 U.S.C. § 80a-9(d)(2); 15 U.S.C § 80b-3(i)(2). A first-tier penalty is imposed for each statutory violation. 15 U.S.C. § 80a-9(d)(2)(A); 15 U.S.C § 80b-3(i)(2)(A). A second-tier penalty is permissible where the conduct involves fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. 15 U.S.C. § 80a-9(d)(2)(B); 15 U.S.C § 80b-3(i)(2)(B). A third-tier penalty involves conduct where such state of mind is present and where the conduct directly or indirectly (i) resulted in substantial losses, (ii) created a significant risk of substantial losses to other persons, or (iii) resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. § 80a-9(d)(2)(C); 15 U.S.C § 80b-3(i)(2)(C).

The Commission must also find that such a penalty is in the public interest. 15 U.S.C. § 80a-9(d)(3); 15 U.S.C § 80b-3(i)(3). Six factors (not the Steadman factors) are relevant: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 15 U.S.C. § 80a-9(d)(3); 15 U.S.C § 80b-3(i)(3). "Not all factors may be relevant in a given case, and the factors need not all carry equal weight." See Robert G. Weeks, 76 SEC Docket at 2671. "To impose second-tier penalties, the Commission must determine how many violations occurred and how many violations are attributable to each person." Rapoport v. SEC, 682 F.3d 98, 108 (D.C. Cir. 2012).

As explained above, Respondents' omissions involved recklessness, that is, reckless disregard for their various legal and regulatory obligations. Thus, the threshold requirement for second-tier penalties has been met. However, under the totality of the circumstances and particularly in light of the statutory public interest factors, I conclude that no civil penalty is warranted.

As noted, the violations involved reckless disregard of a regulatory requirement. Also, Dube has a FINRA disciplinary record and has been the subject of two FINRA arbitration

[4] These amounts reflect inflationary adjustments, as required by the Debt Collection Improvement Act of 1996, as of March 3, 2009, prior to the time Respondents began their violative conduct. See 17 C.F.R. § 201.1004.

awards. However, there has been no demonstrated resulting harm to other persons and Respondents were not unjustly enriched – quite the opposite, in fact. These four factors roughly balance each other.

The remaining two factors are, in my view, the weightiest. Although a civil penalty of any amount will have a deterrent effect on Respondents and on other persons, I am not convinced that a civil penalty is needed to deter anyone in light of the specific facts of this case. In simple terms, Respondents failed to comply with reporting and record keeping requirements, nothing more. In light of the other sanctions imposed against Respondents, a civil penalty is entirely unnecessary to deter Respondents, or any other investment adviser or accountant, from committing such violations in the future. Revocation of registration, an associational bar, and revocation of the privilege of practicing before the Commission, collectively, are more than sufficient to deter anyone from committing the violations proven in this case.

Additionally, as another matter under the sixth, catch-all factor, Dube's health weighs against a civil penalty. An important question, left unanswered by the record in this case, is exactly why Respondents failed to meet their legal and regulatory obligations. All they had to do to avoid any sanction at all was simply keep proper records, furnish them to persons entitled to them, and file a few Commission forms. Their violations were entirely of omission rather than commission, and the record is utterly silent as to any explanation. There is some evidence that Dube may have neglected the Fund and Peak Wealth because he was making money teaching. Cofrancesco Tr., pp. 66-67, 122. However, it is at least as likely that Dube's omissions were primarily the result of potentially serious health problems. Id., pp. 112-113, 133. If the latter, such health problems are a significant mitigating factor. Taken together with the overdeterrence presented by a civil penalty, and in view of the other public interest factors and the totality of the circumstances, a civil penalty is not appropriate.

ORDER

IT IS ORDERED, pursuant to Section 203(k) of the Investment Advisers Act of 1940, that Peak Wealth Opportunities, LLC and David W. Dube, CPA, CEASE AND DESIST from committing or causing any violations, or any future violations, of Sections 204 and 203A of the Investment Advisers Act and Rules 204-1(a)(1), 204-2(a)(1), (2), (4), (5), and (6), and 203A-1(b)(2) thereunder;

IT IS FURTHER ORDERED, pursuant to Section 203(e) of the Investment Advisers Act of 1940, that the investment adviser registration of Peak Wealth Opportunities, LLC is REVOKED;

IT IS FURTHER ORDERED, pursuant to Section 203(f) of the Investment Advisers Act of 1940, that David W. Dube, CPA, is barred from association with brokers, dealers, investment advisers, municipal securities dealers, transfer agents, municipal advisors, and nationally recognized statistical rating organizations;

IT IS FURTHER ORDERED, pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice, that David W. Dube, CPA, is permanently DENIED the privilege of appearing or practicing before the Commission.

Respondents are notified that they may move to set aside the default in this case. Rule 155(b) of the Commission's Rules of Practice permits me, at any time prior to the filing of the initial decision, and 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. 17 C.F.R. § 201.155(b). 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. Id.

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Cameron Elliot
Administrative Law Judge