SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Release No. 3961 / October 29, 2014

Admin. Proc. File No. 3-15271

In the Matter of

TOBY G. SCAMMELL

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violating antifraud provisions of the federal securities laws. *Held*, it is in the public interest to bar Respondent from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

APPEARANCES:

Leo P. Cunningham and *Charlene Koski*, of Wilson Sonsini Goodrich & Rosati, for Toby G. Scammell.

David J. Van Havermaat and *Teri M. Melson*, for the Division of Enforcement.

Appeal filed: November 27, 2013
Last brief received: March 17, 2014

Toby G. Scammell appeals from the decision of an administrative law judge barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO")—generally known as a collateral[1] or an industry-wide bar—based on his having been enjoined from violating antifraud provisions of the federal securities laws.[2] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

I.

A. During the relevant period, Scammell was associated with Madrone Advisers, an unregistered investment adviser.

From August 3, 2009 to February 12, 2010 (the "Relevant Period"), Scammell worked as an associate at Madrone Advisors, LLC, an unregistered investment adviser, where he performed due diligence reviews of potential investment opportunities and engaged in financial analyses of existing and potential portfolio companies. His work was for the benefit of Madrone Advisors and a related firm, Madrone Capital Partners, LLC (collectively, "Madrone"), also an unregistered investment adviser.

Madrone is affiliated with the family of Samuel Moore Walton, the late founder of Wal-Mart Stores, Inc. Madrone provides investment advice to certain "family clients" in exchange for compensation, and considers itself a "family office" within the meaning of Rule 202(a)(11)(G)-1 of the Investment Advisers Act of 1940 (the "Family Office Rule"),[3] adopted in 2011 pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").[4]

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[1] A collateral bar excludes an associated person of a regulated entity not only from the type of business the person was in when the violations of the federal securities laws occurred, but also from any aspect of the securities business. *See* Thomas Lee Hazen, 6 Law Sec. Reg. § 16.2 (Jan. 2014).

[2] *See Toby G. Scammell*, Initial Decision No. 516, 2013 WL 5960707 (Nov. 7, 2013). By order of January 28, 2014, we granted the Division of Enforcement's cross-petition for review regarding certain evidentiary issues. *Toby G. Scammell*, Securities Exchange Act Release No. 71432, 2014 WL 296089, at *1 (Jan. 28, 2014).

[3] 17 C.F.R. § 275.202(a)(11)(G)-1 (defining "family offices" excluded from the definition of an "investment adviser" under the Advisers Act and thus not subject to any of the Advisers Act's provisions); *see generally Family Offices*, Investment Advisers Act Release No. 3220, 2011 WL 2482889 (June 22, 2011) (adopting release); *Family Offices*, Advisers Act Release No. 3098, 2010 WL 3994796 (Oct. 12, 2010) (proposing release).

[4] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

The Advisers Act generally requires the registration of all "investment advisers,"[5] which it defines as "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities . . . ."[6] During the relevant period, Madrone provided advice about securities to certain investment funds and, in exchange for those services, received fees based on a percentage of the investment funds' returns. Madrone was not registered, however, based on an exemption from the registration requirement applicable to any investment adviser that, during the preceding twelve months, had fewer than fifteen clients, and neither held itself out as an investment adviser nor advised a registered investment company or a business development company.[7] Although Madrone did not register as an investment adviser, it declined to seek, and never obtained, an order exempting it from the definition of an "investment adviser," as permitted by the Advisers Act[8] and rules.[9]

B. Scammell was permanently enjoined for violating antifraud provisions.

On August 11, 2011, we filed a civil action alleging that, in August 2009, Scammell engaged in unlawful insider trading in the securities of Marvel Entertainment, Inc., in violation of

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[5] See 15 U.S.C. § 80b-3(a) (stating that, "[e]xcept as provided in subsection (b) and [Advisers Act] Section 203A, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser").

[6] 15 U.S.C. § 80b-2(a)(11).

[7] 15 U.S.C. § 80b-3(b)(3). The Dodd-Frank Act repealed this exemption, effective July 21, 2011, and replaced it with, among other things, the exclusion for "family offices." *Family Offices*, 2011 WL 2482889, at *1.

[8] 15 U.S.C. § 80b-2(a)(11)(G) (authorizing the Commission to exclude, by order, other persons or firms not within the intent of the definition of "investment adviser") (redesignated as Advisers Act Section 202(a)(11)(H) by the Dodd-Frank Act); *see* 15 U.S.C. § 80b-6a (authorizing the Commission to grant exemptions from any provisions of the Advisers Act where "necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter").

[9] Persons or firms seeking exemptive relief under the Advisers Act must file an application for exemption and follow certain procedures and guidelines. *See* Advisers Act Rules 0-4 through 0-6, 17 C.F.R. §§ 275.04-.06, and *Commission Policy and Guidelines for Filing of Applications for Exemptions*, Advisers Act Release No. 969, 1985 WL 61498 (Apr. 30, 1985). We have granted exemptive relief, on application, to a number of family office advisers. *See*, *e.g.*, *Gates Capital Partners, LLC*, Advisers Act Release No. 2599, 2007 WL 1001551 (Mar. 20, 2007); *Riverton Mgmt., Inc.*, Advisers Act Release No. 2471, 2006 WL 119133 (Jan. 6, 2006); *Bear Creek Inc.*, Advisers Act Release No. 1935, 2001 WL 327593 (Apr. 4, 2001); *Moreland Mgmt. Co.*, Advisers Act Release No. 1705, 1998 WL 102669 (Mar. 10, 1998).

Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5.[10] Specifically, the complaint alleged that Scammell "knowingly or recklessly" misappropriated material, nonpublic information regarding The Walt Disney Company's impending acquisition of Marvel, "in breach of a fiduciary duty or similar relationship of trust or confidence owed to his girlfriend."

According to the complaint, Scammell's girlfriend worked on the Marvel acquisition while she was an extern in Disney's corporate strategy department. Beginning in June 2009, she learned confidential information about the Marvel acquisition, including that Disney would pay $50 per share and that the acquisition would be announced around Labor Day 2009. By the end of June 2009, she had emailed Scammell and described the acquisition in detail without mentioning Marvel by name. By no later than August 13, 2009, the complaint alleged, Scammell "had obtained the identity of the acquisition target from his girlfriend, whether through overhearing one or more of his girlfriend's Marvel-related conversations, by seeing electronic or paper documents in her possession related to the Marvel acquisition, or through her conversations with him."

From August 13, 2009 through August 28, 2009, Scammell, who had never before invested in Marvel, purchased 659 Marvel call options for $5,465, using his own money and money that he "secretly" took from his brother's account over which he had trading authority.[11] Scammell purchased the Marvel call options at strike prices between $40 and $50, even though he knew Marvel's stock had never traded above $41.74. Nearly all of the Marvel call options were set to expire on September 19, 2009, just weeks after the acquisition was to be announced. The complaint alleged that Scammell was "familiar with insider trading laws based upon his experience, as well as his work and training at a consultant company," and that he had "researched the law regarding insider trading prior to making most of his Marvel trades."

On August 31, 2009, the day on which Disney publicly announced the Marvel acquisition, Marvel's shares closed at $48.37, up more than 25% from the closing price of $38.65 on August 28, 2009, the previous trading day. Over the next week, Scammell sold all of the Marvel call options he purchased, realizing a profit of $192,497. Scammell did not tell his girlfriend or brother about his Marvel trades and, in fact, took steps to conceal approximately $100,000 in

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[10] 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. "Illegal insider trading generally occurs when a security is bought or sold in breach of a fiduciary duty or other relationship of trust and confidentiality while in possession of material nonpublic information." http://www.sec.gov/answers/insider.htm.

[11] "A call option is a financial contract between two parties that gives the buyer the right, but not the obligation, to buy an agreed quantity of stock during a specified time period for a specified price, known as the strike price. A buyer pays a fee, or premium, to purchase this right. A buyer of a call option generally stands to gain if the price of the stock increases." *Scott Reiman*, Exchange Act Release No. 69379, 2013 WL 1562522, at *2 n.2 (Apr. 15, 2013) (settled order).

trading profits in his brother's account by transferring the $100,000 to a new account.[12] The complaint alleged that Scammell "exploited his personal relationship [with his girlfriend] for monetary gain, and his misuse of confidential information gave him an illegal advantage over other traders in the market."

On June 15, 2012, Scammell consented, without admitting or denying the allegations, to the entry of a permanent injunction prohibiting him from violating Exchange Act Section 10(b) and Exchange Act Rule 10b-5.[13] In addition to entering the injunction, the district court ordered Scammell to disgorge his trading profits of $192,497, plus prejudgment interest of $30,997, and to pay a civil money penalty of $557,491, for a total of $800,985.[14] In his consent agreement, Scammell specifically agreed that he would not contest the factual allegations of the complaint in any administrative proceeding before the Commission. Scammell also agreed not to make or permit to be made "any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis."[15]

C. Scammell's injunction provided the basis for this follow-on proceeding.

On April 10, 2013, we instituted these "follow-on" administrative proceedings pursuant to Advisers Act Section 203(f) based on the injunction that was entered against Scammell to determine, among other things, whether it was in the public interest to impose sanctions on him.[16] The parties filed timely motions for summary disposition, oppositions, and replies with supporting exhibits pursuant to Rule 250(a) of the Commission's Rules of Practice.[17] The law

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[12] According to the complaint, Scammell's brother did not learn about the Marvel trades or $100,000 in profits in his account until months later when Commission staff contacted him as part of its investigation of Scammell's trading.

[13] *SEC v. Scammell*, No. 2:11-cv-6597 (C.D. Cal. June 15, 2012) (consent agreement).

[14] *SEC v. Scammell*, No. 2:11-cv-6597 (C.D. Cal. Mar. 17, 2014) (final judgment). We take official notice of this judgment pursuant to 17 C.F.R. § 201.323.

[15] Scammell further acknowledged that the district court's entry of a permanent injunction "may have collateral consequences [for him] under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations."

[16] 15 U.S.C. § 80b-3(f). An administrative proceeding that seeks to impose sanctions after an individual is enjoined from acts involving securities or investment fraud is commonly called a follow-on proceeding. *Chris G. Gunderson*, Exchange Act Release No. 61234, 2009 WL 4981617, at *5 n.39 (Dec. 23, 2009) (citing *Gibson v. SEC*, 561 F.3d 548, 550 n.1 (6th Cir. 2009)).

[17] *See* 17 C.F.R. § 201.250(a) (providing that a motion for summary disposition may be granted "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law"). We have repeatedly upheld the use of summary disposition in circumstances where a respondent has been enjoined or convicted

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judge admitted four of the Division's fifty exhibits—the injunctive complaint, Scammell's consent, the district court's order entering the injunction, and a declaration from a Madrone official—but excluded the remainder of the Division's exhibits and all of Scammell's forty-nine exhibits. The law judge determined that there was no genuine dispute as to any material fact and granted summary disposition in favor of the Division. Finding that Scammell's conduct was "egregious and recurrent and involved at least a reckless degree of scienter," among other things, the law judge concluded that the public interest weighed in favor of a collateral bar.[18] The law judge observed that a bar was supported by established precedent and consistent with sanctions imposed by the Commission in other follow-on proceedings based on antifraud injunctions.

D. During the pendency of this appeal, Scammell pled guilty in a parallel criminal case.

On April 21, 2014, while this appeal was pending, Scammell signed a plea agreement in connection with a parallel criminal case in which he admitted that he "knowingly and with intent to defraud" engaged in a fraudulent scheme involving purchases of Marvel call options.[19] In particular, Scammell admitted that he "knowingly obtained, possessed, and misappropriated material nonpublic information" about the Marvel acquisition and "used the material nonpublic information for his own personal benefit and profit," "in breach of his relationship and duty of trust and confidence with" his girlfriend. He admitted that he "took steps to conceal approximately $100,000 in trading profits from his brother . . . by opening another account . . . and transferring the $100,000 to avoid questions about the funds." And he admitted that he was pleading guilty to securities fraud because he "is, in fact, guilty of" that offense. As with his earlier settlement of the civil action, Scammell agreed not to contest facts agreed to in the plea agreement and acknowledged that his criminal conviction could subject him to collateral consequences.

On April 25, 2014, the Division moved for leave to adduce Scammell's plea agreement into evidence pursuant to Rule of Practice 452.[20] We have determined to grant the Division's motion. Rule 452 permits a party to submit additional evidence "at any time prior to issuance of a decision by the Commission" as long as the party can "show with particularity that such

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and the sole determination concerns the appropriate sanction. *See, e.g., Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5 (Feb. 4, 2008), *petition denied*, 561 F.3d 548 (6th Cir. 2009).

[18] *Scammell*, 2013 WL 5960707, at *5.

[19] *United States v. Scammell*, No. 2:13-cr-00733-SJO-1 (C.D. Ca. Apr. 21, 2014). We have held that, for purposes of follow-on proceedings under the Exchange Act and Advisers Act, a "conviction" includes a plea of guilty. *See Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *8 (Mar. 7, 2014), *appeal filed* No. 14-1070 (D.C. Cir. May 6, 2014). Subsequently, Scammell was sentenced to three months in prison followed by four years on supervised release.

[20] 17 C.F.R. § 201.452. Scammell declined to respond to the Division's motion.

additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."[21] Those requirements have been met. We find that Scammell's plea agreement is material to our consideration of what, if any, remedial sanction is appropriate in the public interest. Although this follow-on proceeding was instituted based on the injunction and before Scammell's guilty plea in the parallel criminal action, we have previously considered a respondent's subsequent criminal conviction in assessing the public interest.[22] We also find that Scammell's plea agreement could not have been adduced earlier because Scammell signed it only after briefing in this proceeding had been completed.

II.

A. The Advisers Act authorizes sanctions based on Scammell's injunction.

Section 203(f) of the Advisers Act authorizes the Commission to bar a person from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO[23] if the person has been, among other things, enjoined from any conduct or practice in connection with the purchase or sale of a security and if, at the time of the alleged misconduct, the person was associated with an investment adviser.[24]

We find that the statutory requirements for remedial sanctions have been satisfied. Scammell was enjoined from conduct in connection with the purchase or sale of securities, and

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[21] *Id.*

[22] *See*, *e.g.*, *Korem*, 2013 WL 3864511, at *5 & n.39 (considering in a follow-on administrative proceeding a respondent's subsequent criminal conviction, which was not included in the order instituting proceedings, in assessing the public interest); *Don Warner Reinhard*, Advisers Act Release No. 3139, 2011 WL 121451, at *5 (Jan. 14, 2011) (considering a subsequent criminal conviction as part of the public interest analysis in proceedings originally instituted in connection with a civil injunction); *see generally Robert Bruce Lohmann*, Exchange Act Release No. 48092, 56 SEC 573, 2003 WL 21468604, at *5 n.20 (June 26, 2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions").

[23] The Dodd-Frank Act expanded the categories of associational bars authorized by Advisers Act Section 203(f) to include collateral bars. We have held that a collateral bar resulting from conduct predating the Dodd-Frank Act provides prospective relief from harm to public investors and the markets and is not "impermissibly retroactive." *See*, *e.g.*, *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *13 (July 12, 2013); *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *10 (Dec. 13, 2012). Accordingly, the imposition of a collateral bar on Scammell, despite the fact that his alleged misconduct ended in 2009, before the Dodd-Frank Act, is an appropriate sanction if it is in the public interest. Scammell does not raise any retroactivity argument.

[24] 15 U.S.C. § 80b-3(f). The phrase "at the time of the alleged misconduct" means the time of the wrongful activity. *Kornman v. SEC*, 592 F.3d 173, 183-84 (D.C. Cir. 2010).

that conduct occurred while he was associated with Madrone, an investment adviser.[25] Scammell does not dispute that he was enjoined from violating antifraud provisions or that he was associated with Madrone during the Relevant Period, but argues that Madrone was exempt from investment adviser status because it was a "family office" at the time of Scammell's trades.[26] In support, Scammell notes that the declaration from a Madrone official admitted into evidence by the law judge showed that Madrone had no clients other than "family clients," was wholly owned by "family clients," was exclusively controlled by one or more family members and/or family entities, and did not hold itself out to the public as an investment adviser. Although Scammell concedes that Madrone "otherwise fit the definition of an investment adviser," he suggests that the Commission has not previously exercised jurisdiction over "family offices,"[27] that this reflects a recognition that there is "not a public interest sufficient to afford jurisdiction" where, as here, the firm is not offering services to the public, and that this approach was codified in 2010, shortly after the Relevant Period, when the Dodd-Frank Act amended the Advisers Act to exclude "family offices" from the definition of "investment adviser."[28]

We agree that it was possible for family offices to be exempt from the provisions of the Advisers Act during the Relevant Period. But the way to obtain such exemptive status, before the 2010 Dodd-Frank Act, was through an application for an exemptive order. As Scammell concedes, Madrone never obtained such an order and was therefore still subject to the Advisers Act's provisions, except for the registration requirement, which, as noted, it avoided based on its

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25 Advisers Act Section 202(a)(17) defines a "person associated with an investment adviser" to include "any employee" of an investment adviser. 15 U.S.C. § 80b-2(a)(17).

26 "'Family offices' are entities established by wealthy families to manage their wealth, plan for their families' financial future, and provide other services to family members." *Family Offices*, 2010 WL 3994796, at *2. We have stated that, absent an exemption, family offices generally meet the definition of "investment adviser" because they are in the business of providing advice about securities for compensation. *Id.* & n.5.

27 Even if this suggestion were true, we have held that the absence of prior action by a regulatory authority does not operate as an estoppel against later action. *See, e.g., William H. Gerhauser, Sr.*, Exchange Act Release No. 40639, 53 SEC 933, 1998 WL 767091, at *4 (Nov. 4, 1998) (rejecting argument that Applicants were not liable for net capital violations because NASD found no such violations when it audited firm; stating that, even if there had been an audit that found no violations, "a broker-dealer cannot shift its responsibility for compliance with applicable requirements to the NASD or to us. A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation.").

28 To qualify for this exclusion under the Family Office Rule, a "family office" must: (1) provide advice about securities only to "family clients"; (2) be wholly owned by "family clients" and exclusively controlled by "family members" or "family entities"; and (3) not hold itself out to the public as an investment adviser. 17 C.F.R. § 275.202(a)(11)(G)-1.

limited number of its clients.[29] Although Madrone might have obtained an exemptive order had it sought one, and might be excluded from the definition of "investment adviser" under current law,[30] that does not affect Scammell's associational status during the Relevant Period, given the legal requirements in effect at the time and Madrone's failure to seek exemptive relief.[31]

B. The public interest requires that Scammell be barred.

We next turn to what sanctions, if any, are in the public interest.[32] In analyzing the public interest, we consider, among other things, 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

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[29] *See supra* note 7 and accompanying text. Pursuant to Advisers Act Section 203(f), 15 U.S.C. § 80b-3(f), we can impose sanctions for wrongdoing committed by persons associated with an investment adviser, even if the adviser is not registered under the Advisers Act. *See, e.g.*, *Teicher v. SEC*, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999) (affirming the Commission's authority to bar persons from association with investment advisers, whether registered or unregistered), *cert. denied*, 529 U.S. 1003 (2000); *Korem*, 2013 WL 3864511, at *8 (stating that "[i]t is well-established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding") & n.68 (collecting cases).

[30] Although the Family Office Rule was enacted on June 22, 2011, the Commission provided entities with over nine months, or until March 30, 2012, either to meet the requirements of the Family Office Rule or to register with the Commission. *See Family Offices*, 2011 WL 2482889, at *14. Throughout these proceedings, Scammell's position has been that "to determine that Madrone was a family office in 2009, it is not necessary to apply the [Family Office] Rule at all, let alone retroactively."

[31] *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (stating that "'[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal'") (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

We reject Scammell's argument that the Commission lacks jurisdiction to sanction him because his trading in Marvel stock was unrelated to his employment at Madrone. Advisers Act Section 203(f) contains no requirement that there be such a nexus. Indeed, we have held that sanctions may be appropriate against associated persons whose functions are solely clerical or ministerial in nature (which is not the case here) and do not relate to the operations of the investment adviser. *See Michael Batterman*, Advisers Act Release No. 2334, 57 SEC 1031, 2004 WL 2785527, at *3-4 (Dec. 3, 2004); *cf. Bartko*, 2014 WL 896758, at *9 (stating that "[t]he securities laws authorize follow-on proceedings based on a variety of 'crimes that suggest a lack of fitness' for the industry; the predicate misconduct is not limited to one's action as a broker-dealer") (footnotes omitted).

[32] 15 U.S.C. § 80b-3(f).

nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (the "*Steadman* factors").[33] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[34] We also consider the extent to which sanctions will have a deterrent effect.[35] Our "determination that a remedial sanction is in the public interest is based on the particular circumstances and entire record of the case."[36]

We have stated that conduct that violates the antifraud provisions of the federal securities laws, including insider trading, is "subject to the severest of sanctions."[37] "'Fidelity to the public interest' requires a severe sanction when a respondent's misconduct involves fraud because the 'securities business is one in which opportunities for dishonesty recur constantly.'"[38] "[O]rdinarily, and in the absence of evidence to the contrary," it will be in the public interest to bar from participation in the securities industry a respondent enjoined from violating antifraud provisions,[39] and, based on our consideration of the *Steadman* factors, we find that a bar is appropriate here.[40]

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[33] *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *4 & n.18 (Apr. 20, 2012) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).

[34] *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *15 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam), *cert. denied*, 559 U.S. 1008 (2010).

[35] *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 58 SEC 1197, 2006 WL 231642, at *8 & n.46 (Jan. 31, 2006) (stating that "[w]e also consider the extent to which the sanction will have a deterrent effect"); *see also PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (noting that "'[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry'") (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)); *Steadman*, 603 F.2d at 1142 (stating that "the Commission also may consider the likely deterrent effect its sanctions will have on others in the industry").

[36] *Marshall E. Melton*, Advisers Act Release No. 2151, 56 SEC 695, 2003 WL 21729839, at *2 (July 25, 2003).

[37] *Gunderson*, 2009 WL 4981617, at *5 (quoting *Justin F. Ficken,* Exchange Act Release No. 58802, 2008 WL 4610345, at *3 (Oct. 17, 2008)).

[38] *Id.* (quoting *Ficken*, 2008 WL 4610345, at *3).

[39] *Ficken*, 2008 WL 4610345, at *3.

[40] "We give considerable weight to the injunctive allegations in assessing the public interest in administrative proceedings based on consent injunctions." *Schield Mgmt. Co.*, 2006 WL 231642, at *6 & n.35; *see Melton*, 2003 WL 21729839, at *2 ("[A]s we have stated in a number of decisions, we have adopted the policy in administrative proceedings based on consent

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Scammell's conduct was egregious, recurrent, and involved a high degree of scienter.[41] Over a two-week period, Scammell repeatedly traded in Marvel call options based on material nonpublic information about Disney's impending acquisition of Marvel, in breach of a duty of trust or confidence he acknowledged he owed to his girlfriend.[42] As we have observed,

> [t]he prohibitions against insider trading play an essential role in maintaining the fairness, health, and integrity of our markets. We have long recognized that the fundamental unfairness of insider trading harms not only individual investors, but also the very foundations of our markets, by undermining investor confidence in the integrity of the markets.[43]

As noted, Scammell was familiar with prohibitions against insider trading and had researched insider trading law before making most of his trades. His conduct was the direct result of his knowing decision to violate insider trading laws in an attempt to enrich himself. Indeed, Scammell's insider trading turned out to be highly profitable for him. He made illegal profits of $192,497 on an initial investment of $5,465—a 3,000% return in less than one month.[44] Scammell's intentional acts of concealment, which enabled his scheme to go undetected for months, provide further evidence that he acted with a high degree of scienter.[45] Scammell secretly used money entrusted to him by his brother to purchase the Marvel call options, and then

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injunctions that the injunctive allegations may be given considerable weight in assessing the public interest.").

[41] "Scienter is a mental state consisting of an intent to deceive, manipulate, or defraud, and includes recklessness, commonly defined as 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'" *Clifton*, 2013 WL 3487076, at *10 n.67 (quoting *Makor Issues & Rights, Ltd. v. Tellabs, Inc*., 513 F.3d 702, 704 (7th Cir. 2008)).

[42] Scammell contends that his insider trading was a "one-time violation related to a single deal," but his contention ignores the entirety of the scheme, which lasted at least two months.

[43] *Selective Disclosure and Insider Trading*, Exchange Act Release No. 42259, 1999 WL 1217849, at *17 (Dec. 20, 1999); *see also* H.R. Rep. No. 98-355, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2274, 2275 (finding that insider trading destroys the integrity of the marketplace "by undermining the public's expectations of honest and fair securities markets where all participants play by the same rules").

[44] "[T]he degree of harm to investors and the marketplace resulting from the violation" is measured by Scammell's unlawful profits, *Melton*, 2003 WL 21729839, at *2, which we consider to be substantial, notwithstanding his claim that "the amount of profit was out of [his] control and not so significant as to warrant a bar."

[45] *See, e.g., Korem*, 2013 WL 3864511, at *6 (finding that concealment of misconduct demonstrates scienter).

concealed the scheme from his girlfriend and brother, including diverting $100,000 of his trading profits from his brother's account to a new account to avoid detection.[46]

While Scammell has provided some assurances against future violations,[47] the high degree of scienter involved in his offense and his intentional acts of concealment cause us concern about the sincerity of his assurances.[48] Moreover, Scammell has not fully acknowledged his wrongful conduct. In his opening brief on appeal, for example, he characterizes his egregious insider trading as a mere "lapse in judgment."[49] Scammell's failure to recognize meaningfully the seriousness of his insider trading offense indicates there is a significant risk that, given the opportunity, he would commit further misconduct in the future.[50] Although he asserts that "at this time" he has no intention of working in the securities industry, his asserted involvement in "found[ing]" a start-up company and "helping that company grow,"[51] coupled with his admitted

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[46] Scammell contends that he "has not been convicted of a crime or even found liable in a civil proceeding." As discussed, during the pendency of this appeal, Scammell pled guilty to securities fraud in the parallel criminal action. In the context of a follow-on proceeding, we have held that a guilty plea is the equivalent of a "conviction." *See supra* note 19. As for Scammell's civil liability, Advisers Act Section 203(f) draws no distinction between an injunction entered after litigation or by consent. *Melton*, 2003 WL 21729839, at *8. The Division is not required to prove the allegations of an injunctive complaint in a follow-on proceeding before any disciplinary action can be taken. *Id.*

[47] Scammell states that he has "stopped trading altogether," "has no intention of ever trading on his own behalf again," "has voluntarily stopped managing [his] brother's finances," and "is determined to avoid violating securities laws in the future."

[48] *Korem*, 2013 WL 3864511, at *6.

[49] *See Michael T. Studer*, Exchange Act Release No. 50411, 57 SEC 890, 2004 WL 2104496, at *4 (Sept. 20, 2004) (finding that respondent did not recognize the wrongful nature of his misconduct when he admitted "mistakes in judgment"), *aff'd*, 148 F. App'x 58 (2d Cir. 2005).

[50] *See Christopher A. Lowry*, Advisers Act Release No. 2052, 55 SEC 1133, 2002 WL 1997959, at *5 (Aug. 30, 2002) (stating that "Lowry's refusal to recognize his wrongdoing and his public posture that his behavior was appropriate demonstrate that his conduct poses a future threat of harm"), *aff'd*, 340 F.3d 501 (8th Cir. 2003).

[51] Scammell identifies the start-up technology company as "Oto Analytics, Inc.," which does business as "Womply, Inc." Scammell asserts that Womply currently employs twenty-five people in three states and has received investments from approximately forty private investors. The extent of Scammell's role at this company is unclear from the record.

"fascination" with the markets, indicates that he is likely to return to the securities industry in some capacity and thereby threaten the public interest, if so permitted.[52]

We also believe that Scammell's conduct justifies the law judge's decision to impose not merely a bar from associating with an investment adviser, but a full collateral bar. The antifraud provisions that Scammell violated apply broadly to the conduct of all participants in the securities industry. Brokers, dealers, municipal securities dealers, municipal advisors, and transfer agents, like investment advisers, "routinely gain access to sensitive financial and investment information about investors and other market participants," and they "routinely learn confidential and potentially market-moving information about securities, issuers, and potential transactions."[53] All securities professionals have heightened responsibilities to safeguard such information and not to misuse their access to sensitive or confidential information for their own financial gain.[54] Scammell's misappropriation of material, nonpublic information for his own personal benefit and profit demonstrates that he is unfit to take on such heightened responsibilities in any capacity in the securities industry.[55] Imposing a collateral bar on Scammell will both protect the investing public from the likelihood that he will commit future securities law violations and deter others from engaging in insider trading schemes.[56]

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[52] *See Ficken*, 2008 WL 4610345, at *4 (stating that respondent's failure to recognize the wrongful nature of his actions or to show remorse indicates a significant risk of further misconduct); *Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at *6 (Jan. 16, 2007) (stating that failure to acknowledge guilt or show remorse indicates a significant risk that respondent would commit further misconduct if given the opportunity). If Scammell is sincere in his intent not to work in the securities industry, then a bar will impose no substantial burden on him while prophylactically protecting the investing public. *Korem*, 2013 WL 3864511, at *6.

[53] *Lawton*, 2012 WL 6208750, at *11.

[54] *See id*.

[55] *See, e.g., Lohmann*, 2003 WL 21468604, at *5 (upholding a bar from association with a broker, dealer, or investment adviser, and stating that "[i]nsider trading constitutes clear defiance and betrayal of basic responsibilities of honesty and fairness to the investing public") (internal quotation marks and citation omitted).

[56] Scammell argues that a collateral bar would be unfair "because of the additional reputational harm it would cause him and the collateral harm it would cause to his new company and career." In his consent agreement, however, Scammell acknowledged that the district court's entry of the injunction "may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations." Scammell made a similar acknowledgment in his guilty plea agreement. Under the circumstances, it is hardly unfair for the Commission to hold Scammell to the terms of the agreements that he signed. *Bugarsky*, 2012 WL 1377357, at *4.

C. Scammell's arguments against the imposition of a bar lack merit.

Our well-established policy is that a respondent in a follow-on proceeding may put forward mitigating evidence concerning the circumstances surrounding the underlying misconduct, but is not permitted to contest the allegations of the complaint to which he consented.[57] Relying on this precedent, Scammell argues that the law judge failed to consider his mitigating evidence concerning the circumstances surrounding his insider trading. But Scammell's argument ignores a fundamental difference between facts that mitigate the complaint's allegations and facts that contradict those allegations.

The vast majority of what Scammell characterizes as mitigating facts are actually claims that impermissibly contradict the allegations of the complaint.[58] For instance, Scammell argues that the complaint "failed to identify a single document, conversation, or email that contained the allegedly misappropriated confidential information"; that there was "no direct evidence that [he] obtained nonpublic information"; that "every suspicious circumstance had an explanation"; that "[i]t is particularly difficult to ascribe scienter to [Scammell] given the exotic legal theory the Commission resorted to here"; and that the Division's evidence against him was "circumstantial, weak, and based on a highly questionable legal theory that a boyfriend owes a girlfriend a fiduciary duty even where there is no proof that they have a history of sharing confidential business information with each other." By arguing that he was not in possession of material, nonpublic information and that he did not act with scienter, Scammell is contradicting the allegations in the complaint, in violation of his consent agreement, which prohibited him from "denying, directly or indirectly, [the] allegation[s] in the complaint" and from "creat[ing] the impression that the complaint is without factual basis." Having agreed to be bound by the allegations of the complaint, Scammell cannot now object that "none of the evidence or facts at issue in this case have ever been litigated."

Scammell asserts that other mitigating factors justify a sanction less than a bar, citing his youth (twenty-four years old) and inexperience at the time of his misconduct, his decision to cooperate with the Division's investigation in the civil action and not to exercise his constitutional rights, his agreement to settle the civil action, his lack of prior securities law or other violations, the fact that he "was not a registered investment adviser or broker at the time of the alleged violation," and the hardships he has suffered and will continue to suffer as a result of these proceedings, including the loss of his job at Madrone, the "permanent[] alter[ation]" of his career

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[57] *See Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *8 & nn.52-53 (citing cases) (Dec. 12, 2013), *appeal filed* No. 14-71133 (9th Cir. Apr. 17, 2014); *see also*, *e.g.*, *Kornman*, 592 F.3d at 187 (recognizing Commission ruling that respondent was estopped from making "mitigation arguments" that were "essentially collateral attacks on his conviction"); *Elliot v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (refusing to entertain a collateral attack in a follow-on proceeding).

[58] To the extent that any of these so-called mitigating facts do not directly contradict the allegations of the injunctive complaint, we find that those facts do not diminish the seriousness of Scammell's misconduct.

path, the humiliation from the Division's investigation, and his payment of large sums in disgorgement, civil penalties, and legal fees. We find that the mitigating impact, if any, of these factors is outweighed by the *Steadman* factors discussed above, particularly the egregiousness of Scammell's conduct, his high degree of scienter, and his failure to recognize the seriousness of his violations.[59]

Scammell argues that the law judge's decision "reads as if maximum sanctions are automatic following consent to an antifraud injunction," and that she "fail[ed] to consider whether the *Steadman* factors were satisfied by a preponderance of the evidence." As discussed, under our well-established precedent,[60] we typically have imposed a permanent bar where a respondent has been enjoined from violating antifraud provisions of the securities laws because such injunctions have "especially serious implications for the public interest."[61] In any event, as part of our de novo review,[62] we have considered Scammell's case in light of each of the *Steadman* factors.[63] Our consideration of those factors causes us to agree with the determination to impose a bar.

Scammell also argues that the law judge committed "prejudicial error" by excluding his forty-three exhibits and six declarations "demonstrating the weak nature of the Division's

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[59] *See*, *e.g.*, *Montford & Co.*, *Inc.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *20 (May 2, 2014) (finding that respondent's cooperation and lack of disciplinary history did not outweigh concern that respondent would pose a continued threat to investors if permitted to remain in the industry); *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *21 (May 27, 2011) (finding that respondent's settlements with customers did not mitigate sanctions imposed where settlements were entered into after customers complained and respondent's firm had investigated), *aff'd*, 693 F.3d 251 (1st Cir. 2012); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 n.40 (Feb. 13, 2009) (finding that respondent's age, lack of disciplinary history, and financial loss did not mitigate the gravity of his conduct), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[60] The law judge noted, but did not cite, established Commission precedent, which includes our recent opinions in *Tzemach David Netzer Korem,* Exchange Act Release No. 70044, 2013 WL 3864511 (July 26, 2013), and *Alfred Clay Ludlum, III,* Advisers Act Release No. 3628, 2013 WL 2479060 (July 11, 2013).

[61] *Melton*, 2003 WL 21729839, at *9.

[62] "Once [Scammell] filed his petition for review, the law judge's decision ceased to have any force or effect. As a result, the Commission was free to decide, in the first instance, what remedial sanctions would be appropriate and should be ordered." *Johnny Clifton*, Exchange Act Release No. 7039, 2013 WL 5553865, at *2 (Oct. 9, 2013) (order denying reconsideration).

[63] *See Kornman*, 2009 WL 367635, at *9 n.44 (stating that Commission's de novo review of the record cures any errors, if any, committed by the law judge).

evidence."[64] Rule of Practice 320 provides that "the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious."[65] We have stated that law judges have broad discretion in deciding whether to admit or exclude evidence.[66] We have reviewed Scammell's exhibits and declarations attached as appendices to his opening brief and determined that, with the exception of Exhibit 45, Declaration of Toby G. Scammell in Support of Respondent's Motion for Summary Disposition, they contain irrelevant and immaterial matter,[67] and/or are offered to relitigate the allegations of the complaint, in direct contravention of Scammell's consent.[68] Accordingly, we find that the law judge acted within her discretion in excluding Scammell's exhibits and declarations, with the exception of Exhibit 45,

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[64] We have scrutinized the record to determine whether there is any evidence that Scammell suffered specific prejudice as a result of the exclusion of his exhibits and declarations. We find none. *See, e.g., China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *18 & n.129 (citing cases) (Nov. 4, 2013) (failure to substantiate claim of prejudice).

[65] 17 C.F.R. § 201.320.

[66] *Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *15 (Dec. 11, 2009), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010).

[67] We considered the following exhibits to be irrelevant and immaterial to our consideration of the public interest: the email exchanges (Resp. Exs. 5, 9, 20, 29, 32-37); the web articles on options trading (Resp. Exs. 6-7); a complaint filed by the Commission in an unrelated matter (Resp. Ex. 11); a Senate report (Resp. Ex. 19); various financial records (Resp. Exs. 21, 22, 30, 31); declarations submitted by counsel (Resp. Exs. 44, 47, & 49); and Scammell's declaration submitted in support of his opposition to the Division's motion for summary disposition (Resp. Ex. 48).

We note that three of Scammell's exhibits duplicated exhibits introduced by the Division and admitted into evidence by the law judge: the August 2011 complaint in *SEC v. Scammell* (Resp. Ex. 4); Scammell's June 2012 consent agreement (Resp. Ex. 8); and the declaration of a Madrone official (Resp. Ex. 46). Several other exhibits were already included in the record on appeal or were matters of which we could take official notice: the Order Instituting Administrative Proceedings (Resp. Ex. 1); the May 10, 2013 prehearing order issued by the law judge (Resp. Ex. 2); Scammell's amended answer to the OIP (Resp. Ex. 10); and the Commission's press release in *SEC v. Scammell*. (Resp. Ex. 23).

[68] Those exhibits included Scammell's Wells Submission (Resp. Ex. 3); excerpts from Scammell's deposition testimony (Resp. Exs. 12-15 & 25-27, 38-40); excerpts from Scammell's brother's deposition testimony (Resp. Exs. 16, 28 & 41); excerpts from Scammell's girlfriend's deposition testimony (Resp. Exs. 17-18 & 42-43); and Scammell's Google web history (Resp. Ex. 24).

which we admit into evidence.[69] However, even considering the excluded evidence, we would reach the same conclusion that a collateral bar is warranted.

Scammell's knowing and intentional misappropriation of material, nonpublic information, in breach of a duty of trust and confidence, and his intentional concealment of his misconduct demonstrate his fundamental unfitness to remain in the securities industry in any capacity. A bar from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO is remedial and serves the public interest.

An appropriate order will issue.[70]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioners GALLAGHER and PIWOWAR concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations).

Brent J. Fields
Secretary

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69 We further find that the law judge acted within her discretion in excluding all but four of the Division's exhibits.

70 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3961 / October 29, 2014

Admin. Proc. File No. 3-15271

In the Matter of

TOBY G. SCAMMELL

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Toby G. Scammell be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission.

Brent J. Fields
Secretary