SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 9727 / February 20, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74344 / February 20, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4028 / February 20, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31461 / February 20, 2015

Admin. Proc. File No. 3-14684

In the Matter of

ANTHONY FIELDS, CPA d/b/a
ANTHONY FIELDS & ASSOCIATES and d/b/a
PLATINUM SECURITIES BROKERS

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Registration Violations

Respondent, the founder, chief executive officer, chief compliance officer, and sole control person of a registered investment adviser and a formerly registered broker-dealer, made material misrepresentations and omissions in the offering for sale of fictitious "prime bank" instruments via social media websites. Respondent also registered his firm as an investment adviser without satisfying the requirements for Commission registration

and made material misstatements in registration filings and other communications. *Held*, it is in the public interest to: (i) enter a cease-and-desist order; (ii) bar respondent from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; (iii) revoke the investment adviser's registration; and (iv) assess a $150,000 third-tier civil money penalty.

APPEARANCES:

Anthony Fields, pro se.

Duane K. Thompson and *Donna K. Norman*, for the Division of Enforcement.

Appeal filed: December 27, 2012
Last brief received: April 4, 2013

I.

This administrative proceeding presents a new twist (the use of social media websites such as LinkedIn and TradeKey to reach potential victims) on an old scam (the offering of fictitious "prime bank" securities promising impossibly high returns at no risk). Anthony Fields appeals from an administrative law judge's initial decision finding that he had committed numerous violations of the securities laws.[1] Conducting an independent review of the record with respect to the findings challenged on appeal, we find that Fields fraudulently offered nonexistent "bank guarantees" and "medium-term notes." We find also that Fields acted as an unregistered broker, registered one of his sole proprietorships as an investment adviser without satisfying the requirements for Commission registration, operated that firm without a compliance manual, and made material misstatements in his filings with the Commission and in other communications. For these violations, we conclude that it is in the public interest to impose rigorous sanctions, including a bar and a $150,000 civil money penalty.

II.

A. Fields and his sole proprietorships, Anthony Fields & Associates and Platinum Securities Brokers

Fields resides in Illinois and is an accountant whose license as a Certified Public Accountant lapsed in 2003. With the exception of $100 in U.S. Treasury bills that he purchased

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[1] *Anthony Fields, CPA d/b/a Anthony Fields & Associates and d/b/a Platinum Securities Brokers*, Initial Decision Release No. 474, 2012 WL 6042354 (Dec. 5, 2012).

on TreasuryDirect in 2009 or 2010 to, in his words, "see how the system worked," he has never owned any publicly traded stocks or bonds.[2]

Fields did business as two sole proprietorships, Anthony Fields & Associates ("AFA"), a registered investment adviser, and Platinum Securities Brokers ("Platinum"), a formerly registered broker-dealer. Fields was AFA's founder, chief executive officer, chief compliance officer, and control person. In years past, AFA provided accounting and tax preparation services and, in that connection, employed a number of accountants, bookkeepers, and secretaries. However, as of March 2010, when Fields registered AFA as an investment adviser with the Commission, AFA had no paid employees and operated out of Fields's personal residence. AFA's sole employee was Fields's ex-wife, who was AFA's titular vice president but performed no services. AFA did not have (and never has had) any investment advisory clients, assets under management, or revenues from investment advisory services. Fields testified that two entities, "First Traders Group" and another one whose name Fields could not recall, supposedly made overtures about signing up with AFA. It is undisputed that neither entity received any investment advice from, deposited any funds for management by, or paid any fees to AFA.

Also in March 2010, Fields registered Platinum as a broker-dealer with the Commission. He withdrew Platinum's registration in September 2010 when FINRA informed him that Platinum—which had at most $5,000 in capital—did not meet the net capital requirements. Although Fields testified that he later resubmitted Platinum's application to the Commission, he offered no evidence in support of this assertion and the Commission's records do not reflect any re-application. As with AFA, Fields is Platinum's founder, chief executive officer, chief compliance officer, and control person. Platinum was operated out of Fields's residence and has never had any employees besides Fields's ex-wife, who was listed as Platinum's secretary but did no work. Platinum had no revenue and never provided brokerage services to any client.

B. Prime bank investment schemes

An overview of prime bank investment schemes will help situate the remainder of this discussion.[3] Prime bank schemes have attracted significant attention from regulators, in part

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[2] The TreasuryDirect website allows individuals to buy and redeem Treasury securities directly from the government in paperless electronic form.

[3] We discuss prime bank schemes in more detail *infra* at pages 10-15. *See also* U.S. Securities and Exchange Commission, *How Prime Bank Frauds Work*, *available at* http://www.sec.gov/divisions/enforce/primebank/howtheywork.shtml (last visited Feb. 19, 2015). Both here and elsewhere, we (like the law judge) have taken official notice of statements published by federal agencies pursuant to Rule of Practice 323. *See* 17 C.F.R. § 201.323; *520 S. Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1137 n.14 (7th Cir. 2008) ("A court may take judicial notice of . . . documents contained in the public record[] and reports of administrative bodies . . . .") (quotation marks omitted); *Interstate Natural Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (holding that judicial notice of "records and reports

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because their victims collectively have lost billions of dollars worldwide. Although the details of these schemes vary, the broad outlines are the same. Potential investors are told that their money will be used to purchase instruments supposedly representing obligations of well-known international banks—which the promoters call "prime banks"—at a steep discount. The schemes derive their credibility from supposed association with reputable financial institutions, while at the same time their promoters often insist on secrecy, thereby making it impossible to verify the claims with the banks themselves. Other common features of prime bank schemes include the use of complex-sounding jargon (*e.g.*, "rolls," "tranches," "fresh cut," "slightly seasoned"); the involvement of many layers of participants and intermediaries; and the very large size of the purported transactions (often running into the hundreds of millions and billions of dollars).

Prime bank instruments promise implausibly high returns at no risk. The purported instruments go by many different names; for example, the Division's expert had encountered prime bank schemes peddling "bank guarantees," "letters of credit," "bank notes," "bank debentures," and a "hodgepodge of similar-sounding" products. He explained that the perpetrators of prime bank frauds frequently change the names of the instruments offered to avoid regulatory scrutiny. As we shall explain, whatever the nomenclature, the prime bank instruments offered in these fraudulent schemes are imaginary, as is the secondary market on which they purportedly trade.

C. Fields's social media postings offering prime bank instruments

The fictitious prime bank instruments at issue in this proceeding are "bank guarantees" (or BGs) and "mid-term notes" (or MTNs) offered by Fields in postings on the social media websites LinkedIn and TradeKey.[4]

LinkedIn is a social networking site. After establishing a profile on LinkedIn, an individual or company can join discussion groups and post messages that will be disseminated to all of the groups' members. Fields began using LinkedIn to make postings about bank guarantees and mid-term notes in October 2010 and continued to do so until "[s]ometime in 2011." The LinkedIn postings were undated, and Fields does not recall when exactly in 2010 or 2011 he made them.

For example, Fields posted a message with the subject "FRESH CUT BGs" to the LinkedIn group "Trade Platforms – Private Placement Programs (PPPs) – High Yield." This message stated:

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of administrative bodies" is proper). We also have drawn upon the hearing testimony of the Division's expert.

[4] During the hearing, Fields admitted that he also advertised that he had access to BGs and MTNs on E-2/Commerce, an online business-to-business marketplace. He claimed that his failure to produce copies of those postings to the Division during the investigation was an unintentional "oversight."

> Bank Guarantees, Cash Backed, Deutsche Bank, Credit Suisse, HSBC, JP Morgan Chase, BNP Paribas, UBS, RBS or Barclays. One (1) year and one (1) day, Fresh Cut USD 500 Billion (USD 500,000,000,000) with Rolls and Extensions 40% or better plus 1% commission fee to be paid, to buy side and sell side consultants 50/50. First Tranche: 500M USD. If you are interested you can email for particulars at [Fields's email address].

Fields explained that a price quoted as "40% plus 1%" meant that the purported instrument—in this case, $500 billion in bank guarantees in "tranches" (or batches) of $500 million each—was available for purchase at 40% of the face value of the instrument, plus a commission of one percent to be paid to "consultants," including himself.

Another of Fields's postings to the same LinkedIn discussion group with the subject "FRESH CUT MTNs 30+1" stated:

> Medium Term Notes, Cash Backed, Deutsche Bank, Credit Suisse, HSBC, JPMorgan Chase, BNP Paribas, UBS, RBS or Barclays, Ten (10) years and one (1) day. Fresh Cut 7.5% coupon. USD 500 Billions (USD 500,000,000,000) with Rolls and Extensions. 30% or better plus 1% Commission Fees to be paid, to Buy Side and Sell Side consultants 50/50. First Tranche 500 M USD. All interested parties can email me for particulars at [Fields's email address].

Fields testified that this posting was intended to advertise the availability of $500 billion in mid-term notes paying 7.5% interest rate for purchase at "better" than (*i.e.*, less than) 30% of their face value, plus a one percent commission.

Fields also posted a notice to the over 1,000 members of a LinkedIn discussion group named "Real Deals for MTN's and BG's" that advertised that he was:

> [D]irect to seller of fresh cut BGs 40+1 and slightly seasoned BGs at 57+1, cash backed, top 10 world banks, 50B contracts.

According to Fields, this message was meant to convey that $50 billion in bank guarantees was available for purchase at 40% of face value (for "fresh cut" bank guarantees) or 57% of face value (for "slightly seasoned" bank guarantees), and that there would be a one percent commission.

TradeKey is an online business-to-business marketplace that allows companies to connect with and do business with one another. As with LinkedIn, members of TradeKey create profiles and then post messages that can be viewed by other TradeKey users. On October 13, 2010, Fields posted an advertisement on TradeKey that read:

> My name is Anthony Fields. I'm a CPA in the United States and I have a client interested in buying $50 billion bank guarantees. If this is something that you are interested in, please call me at [Fields's telephone number.]

The "From" indicator of the message read "Company: Anthony Fields & Associates." Fields testified that he expected to receive one-third of one percent of $50 billion—*i.e.*, over $166 million—in commissions upon the completion of this proposed transaction.

Fields received a total of approximately twenty to forty responses to his postings on LinkedIn and TradeKey. No purchases or sales of BGs or MTNs were ever actually carried out, and Fields never obtained any funds from potential investors.

D. Fields's statements regarding AFA and Platinum

In AFA's filings with the Commission, Fields made a number of representations regarding AFA's assets under management, clients, and other operational characteristics. Both AFA and Platinum also had websites that were publicly accessible until at least May 2011. The content of these websites, which were designed and controlled by Fields, is described below. Fields testified that these statements were intended to reach potential clients and reflected his "marketing concept" about AFA and Platinum.

1. AFA's Form ADV

Form ADV is the uniform form used by investment advisers to register with the Commission. The effective version of AFA's Form ADV, which Fields filed with the Commission on July 15, 2010, stated that AFA had four clients and more than $25 million in assets under management. It also stated that AFA had $400 million under management, half in discretionary accounts and half in non-discretionary accounts, and that AFA's clients included high-net-worth individuals, pooled investment vehicles, and hedge funds. Attached to the Form ADV was AFA's brochure, which similarly stated that AFA "provides discretionary and nondiscretionary advisory services . . . to high net worth individuals and institutional investors." The brochure described AFA's affiliation with Platinum, and asserted that Platinum was a "broker/dealer registered with the U.S. Securities and Exchange Commission."

2. AFA's website

AFA's website stated that "Anthony Fields & Associates is Registered with the Securities And Exchange Commission as Investment Advisors." Its "About Us" page asserted that AFA was "organized to take advantage of the need to fulfill a gap in the Government securities market" and a supposed "$2.5 billion contract." That page also stated that "[o]ur group of investment professionals are on hand when you need them!" On the left-hand side of every page

was the text "Anthony Fields & Associates has acquired a $50 billion contract."[5] Below that was the text "Anthony Fields has established a securities brokerage firm 'Platinum Securities Brokers' in a bold effort to reduce brokerage fees!" AFA's website also touted its "arrangement with the 45th primary dealer"—which Fields testified was intended to be a reference to Platinum—through which AFA's clients supposedly could purchase U.S. Treasury securities.[6]

3. Platinum's website

Platinum's website described itself as a "top institutional brokerage firm" that was "registered with the Securities and Exchange Commission." It stated that Platinum had "a dedicated team of Government securities researchers waiting for your call 24 hours a day." According to the website, Platinum had "a portfolio of over 25,000 U.S. Government securities."

D. Proceedings below

We issued an Order Instituting Proceedings on January 4, 2012.[7] The law judge held a two-day hearing on May 21 and 22, 2012. Fields testified in the Division's case and in his own case. The Division also presented the testimony of John Stark, whom the law judge accepted as an expert on prime bank frauds.[8] There were no other witnesses. The Division introduced a

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[5] The purported $50 billion contract was introduced into evidence at the hearing and specified AFA as the seller and "East West Trading, LLC" as the purchaser of $50 billion of U.S. Treasury Strips (with "possible rolls and extension[s]") to be sold in initial "Minimum Test Tranche[s]" of $1 million and then followed by additional tranches ranging from $500 million to $2.504 billion. The price was indicated as 22% of the face value of the instruments plus a one percent commission, and the contract specified that the purchaser's funds were to be wired to AFA's bank account. Fields did not do any due diligence on East West Trading or its representative, a man named Vincent Bach. Fields testified that he believed that Bach was a banker in Washington, D.C. and that Bach's grandfather owned a diamond mine in South Vietnam. AFA did not have any securities to sell East West and never received any funds from East West.

[6] Primary dealers trade government debt directly with the Federal Reserve Bank and purchase the majority of the U.S. Treasury securities sold at auction. *See* Federal Reserve Bank of New York, *Administration of Relationships with Primary Dealers*, *available at* http://www.newyorkfed.org/markets/pridealers_policies.html (last visited Feb. 19, 2015). Currently there are 21 primary dealers; Platinum is not (and never has been) a primary dealer. *See* Federal Reserve Bank of New York, *Primary Dealers List*, *available at* http://www.newyorkfed.org/markets/pridealers_current.html (last visited Feb. 19, 2015).

[7] *Anthony Fields, CPA d/b/a Anthony Fields & Associates and d/b/a Platinum Securities Brokers*, Exchange Release No. 66091, 2012 WL 19759 (Jan. 4, 2012).

[8] Stark is a lawyer with Stroz Friedberg, an international risk management and consulting firm. Prior to joining Stroz Friedberg, Stark was the chief of the Office of Internet Enforcement at the Commission from 1998 to 2009. In that capacity, he oversaw hundreds of investigations

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number of documents into evidence, including Fields's social media postings, printouts of Fields's websites, and copies of the purported contracts that Fields arranged. For his part, Fields introduced a purported bank guarantee issued by Credit Suisse and a purported Bloomberg screenshot of a mid-term note issued by Deutsche Bank. On December 5, 2012, the law judge issued an initial decision finding violations and imposing sanctions on Fields. This appeal followed.

III.

A. Antifraud violations

We find that Fields willfully committed violations of the antifraud provisions of the Securities Act and the Investment Advisers Act.

1. Securities Act Sections 17(a)(1) and 17(a)(3)

Securities Act Section 17 makes it unlawful for any person to engage in certain conduct in the "offer or sale of any securities" by the use of any means or instrumentality of interstate commerce. Specifically, Section 17(a)(1) prohibits "employ[ing] any device, scheme, or artifice to defraud" and Section 17(a)(3) prohibits "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[9] For the reasons that follow, we find the Fields willfully violated both these subsections.

a. *Fictitious prime bank instruments are "securities."*

The bank guarantees and mid-term notes that Fields offered are, notwithstanding their fictitious character, securities subject to the antifraud provisions of the securities laws.[10] The "fraud provisions are not defeated by the fact that a security purportedly traded is nonexistent or fictitious"[11] and "apply even though the securities at issue [are] a sham."[12] This must be so, lest it be the case that "the worse the securities fraud, the less applicable the securities laws."[13]

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into fraudulent prime bank schemes and created the Prime Bank Fraud Information Center, an initiative designed to educate investors about such schemes.

[9] 15 U.S.C. § 77q(a). Reliance is "not an element of an administrative proceeding alleging violation" of the antifraud provisions. *E.g.*, *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363-64 (9th Cir. 1993); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985).

[10] *See, e.g.*, *Brian A. Schmidt*, Exchange Act Release No. 45330, 2002 WL 89028, at *6 (Jan. 24, 2002); *Martin R. Kaiden*, Exchange Act Release No. 41629, 1999 WL 507860, at *1, *3 (July 20, 1999) (finding that fictitious prime bank guarantees and standby letters of credit were securities).

[11] *First Nat'l Bank of Las Vegas, N.M. v. Russell's Estate*, 657 F.2d 668, 673 n.16 (5th Cir. 1981); *see also United States v. Schlei*, 122 F.3d 944, 972-73 (11th Cir. 1997).

Thus, for "purposes of determining whether the instruments offered are securities," we look to Fields's "representations with respect to their characteristics," regardless of whether the instruments in fact exist.[14] Viewed in that light, it is plain that the instruments offered by Fields are indeed securities. Section 2(a)(1) of the Securities Act defines the term "security" to include a "note" or other "evidence of indebtedness."[15] The bank guarantees and mid-term notes were represented by Fields to be evidence of a debt: They promised payment of a definite sum of money with interest at a specified time in the future, and there is no suggestion that they fall within any exception to the presumption that notes are securities.[16]

b. *Fields offered prime bank instruments through a means or instrumentality of interstate commerce.*

It is settled that the use of the Internet—such as making postings on a website—is *per se* sufficient to satisfy the interstate jurisdictional element of the securities laws.[17] Fields nonetheless argues that he never claimed to be the actual seller of the prime bank instruments, that he merely passed information from potential buyers to potential sellers (and vice versa), and that no money ever changed hands as a result of his postings. None of this affects our conclusion that Fields "offered" the prime bank instruments through his LinkedIn and TradeKey postings.

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[12] *SEC v. Graulich*, Civ. No. 2:09-cv-04355 (WJM), 2013 WL 3146862, at *5 (D.N.J. June 19, 2013); *see also SEC v. Milan Trading Grp., Inc.*, 962 F. Supp. 2d 182, 200 (D.D.C. 2013) ("The fact that the 'securities' offered . . . did not actually exist does not . . . remove the fraud from coverage of U.S. securities laws.").

[13] *E.g.*, *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (Posner, J.) (applying antifraud provisions to fraudulent "program . . . to invest in 'Prime Bank Instruments,' a nonexistent high-yield security").

[14] *Kaiden*, 1999 WL 507860, at *3; *accord Schmidt*, 2002 WL 89028, at *6 ("representations made by a promoter can be sufficient to invoke the antifraud provisions ").

[15] 15 U.S.C. § 77b(a)(1).

[16] *Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); *Kaiden*, 1999 WL 507860, at *3-4.

[17] *E.g.*, *SEC v. GMC Holding Corp.*, No. 6:08-cv-275, 2009 WL 506872, at *4 (M.D. Fla. Feb. 27, 2009) (holding that use of the "[I]nternet . . . in connection with the offer or sale of securities . . . satisfie[s] the jurisdictional element of a violation of . . . section 17(a)"); *SEC v. Phoenix Telecom, LLC*, 239 F. Supp. 2d 1292, 1298 (N.D. Ga. 2000) (holding that use of an Internet web site "satisfies the jurisdictional means requirement"); *see also United States v. Lewis*, 554 F.3d 208, 214-16 (1st Cir. 2009) (holding that use of the Internet, "standing alone," constitutes "interstate commerce"); *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (holding that "the Internet is an instrumentality and channel of interstate commerce").

Section 2(a)(3) of the Securities Act defines "offer" to include "every attempt or offer to dispose of, or *solicitation of an offer to buy*, a security or interest in a security, for value."[18] This statutory language, which has been given an "expansive interpretation" by the courts and by the Commission,[19] extends "beyond the common law contract concept of an offer."[20] Of particular relevance here, the term is broad enough "to encompass the entire selling process, including the seller/agent transaction,"[21] and even a person who is not the "actual owner" may nonetheless "offer" securities by locating potential buyers for the owner, so long as he or she is "motivated at least in part by a desire to serve his own financial interests or those of the securities owner."[22]

Here, it is plain on the face of Fields's postings that he sought to locate potential buyers of bank guarantees and mid-term notes. Fields invited "[i]nterested parties" to email him to receive "particulars" about the contemplated transaction. Indeed, Fields admits that his purpose in making the postings was to "provide the seller with buyers of the financial instruments." Furthermore, Fields expected to receive substantial financial compensation—typically, a third of a percent of the face value of the purported instruments, which would amount to billions of dollars—for his role in facilitating these transactions. To be sure, the prime bank instruments in question did not actually exist. But that means only that the offered transactions could not successfully have been consummated—not that there was never an offer in the first place.

c. *Fields employed a scheme to defraud and engaged in transactions and practices that would operate as a fraud.*

The Commission and the federal courts have uniformly held that participation in prime bank frauds violates the Securities Act.[23] We adhere to that conclusion here and find that Fields employed a "device, scheme or artifice to defraud" and engaged in a "transaction, practice, or

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18 15 U.S.C. § 77b(a)(3) (emphasis added).

19 *Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *14 n.51 (Dec. 19, 2009); *see also SEC v. Tambone*, 550 F.3d 106, 122 (1st Cir. 2006) ("[T]he SEC need not base its claim of liability on any completed transaction at all."), *reinstated in relevant part on rehearing*, 597 F.3d 436, 450 (1st Cir. 2010) (en banc).

20 *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998).

21 *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

22 *Pinter v. Dahl*, 486 U.S. 622, 643, 647 (1988); *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1525-26 (11th Cir. 1991); *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989).

23 *Schmidt*, 2002 WL 89028, at *7-8; *Kaiden*, 1999 WL 507860, at *5-6; *see also SEC v. Gottlieb*, 88 F. App'x 476, 477 (2d Cir. 2004); *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 194-98; *Graulich*, 2013 WL 3146862, at *5; *SEC v. Wilde*, Case No. SACV 11–0315 DOC(AJWx), 2012 WL 6621747, at *4-5 (C.D. Cal. Dec. 17, 2012); *SEC v. Milan Capital Grp., Inc.*, Case No. 00 Civ. 108(DLC), 2000 WL 1682761, at *4, *8 (S.D.N.Y. Nov. 9, 2000); *SEC v. Norton*, Case No. 95 Civ. 4451(SHS), 1997 WL 611556, at *3 (S.D.N.Y. Oct. 3, 1997).

course of business which . . . would operate as a fraud" and, in so doing, willfully violated Securities Act Sections 17(a)(1) and 17(a)(3).

We begin with Fields's offers to transact in fictitious prime bank instruments.[24] His LinkedIn and TradeKey postings contained what we have called the "most fundamental" misrepresentation of all: "[T]hat these instruments exist[ed]," when in fact they were entirely fictitious.[25] Such "misrepresentations were obviously material," for there can be "'no question a reasonable investor would consider important the fact that the security at issue did not exist.'"[26]

On appeal, Fields disputes neither that he made the statements at issue nor that the existence of the offered prime bank instruments is material. Instead, he challenges the law judge's finding of falsity and argues that he provided "clear and convincing evidence that Bank Guarantees did exist as well as Mid Term Notes." Based on an independent review of the record, we find that the Division has met its burden of establishing by a preponderance of the evidence that the securities offered by Fields did not exist.[27]

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[24] We impute Fields's conduct to AFA and Platinum—sole proprietorships that Fields founded, owned, and controlled—and vice versa. Fields admitted that he was responsible for everything that was said and done in their name. *See, e.g.*, *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972); *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 WL 4731652, at *13 n.80 (Dec. 10, 2009). Moreover, Fields's LinkedIn profile referenced and linked to the AFA and Platinum websites and Fields's TradeKey profile likewise provided Fields's affiliation with AFA and noted AFA's registration with the Commission.

[25] *Kaiden*, 1999 WL 507860, at *5; *see also United States v. Dazey*, 403 F.3d 1147, 1157 (10th Cir. 2005) ("The prime bank financial instruments that [the defendant] purported to invest in do not exist. The secretive, exclusive market in which such instruments are traded . . . is also purely imaginary."); *Lauer*, 52 F.3d at 670 ("Prime Bank Instruments do not exist.").

[26] *SEC v. Gallard*, Case No. 95 Civ. 3099(HB), 1997 WL 767570, at *3 (S.D.N.Y. Dec. 10, 1997); *see also SEC v. Asset Recovery & Mgmt. Trust, S.A.*, Case No. 2:02-CV-1372-WKW, 2008 WL 4831738, at *7 (M.D. Ala. Nov. 3, 2008) ("The misrepresentations were material because a reasonable investor would want to know that the investments in question did not exist . . . . 'An elementary form of such misrepresentation is misrepresenting an interest as a security when it is nothing of the kind.'") (quoting *Lauer*, 52 F.3d at 670-71); *Kaiden*, 1999 WL 507860, at *5 n.25 ("We believe a reasonable investor would consider the existence of the instruments . . . material.").

[27] Fields's briefing exhibits confusion about the burden of proof; at times, he insists that *he* has proven the existence of prime bank instruments "beyond a reasonable doubt," while on other occasions, he argues that the *Division* has failed to prove by "clear and convincing evidence" that they do not exist. He is wrong regarding the burden of proof. The "Division is required to demonstrate a violation of the securities law by [a] preponderance of the evidence," which includes showing that the offered prime bank "instruments do not exist by a preponderance of

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As a preliminary matter, we acknowledge that *legitimate* bank guarantees (and similar instruments, such as letters of credit) do exist and often find use in, for example, international sales transactions. The basic function of a bank guarantee or letter of credit is to make it possible for a seller to ship goods to a buyer whose creditworthiness is unknown with the confidence that payment for the goods will be made.[28] In exchange for a fee, the bank, which has conducted due diligence on the buyer, guarantees payment to the seller once the conditions set forth in the guarantee or letter of credit (*e.g.*, delivery of the goods) are satisfied. In effect, the letter of credit "substitut[es] the credit of the bank for that of one of the contracting parties," and allows the seller to look to the bank directly for payment.[29]

But nothing like the prime bank instruments *offered by Fields* actually exists.[30] To begin with, Fields admitted that he did not have any bank guarantees—let alone billions of dollars' worth of them—when he made the postings in question. Likewise, Fields admitted that he did not have any mid-term notes and had never brokered a transaction involving them. Further, there is no secondary market for such instruments, so they cannot be bought and sold in the manner that Fields represented. Fields's LinkedIn postings advertised that he was "direct to [the] seller" of the bank guarantees, and that any buyer who could "PROVIDE MT103.32"[31] could "GET THE PAPER." Yet legitimate bank guarantees and letters of credit are the product of private, negotiated transactions between a buyer and its bank; thus, it is not possible to transfer

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the evidence." *Kaiden*, 1999 WL 507860, at *5 (citing *Steadman v. SEC*, 450 U.S. 91, 102 (1981)). The Division need not "conclusively prove" their nonexistence. *Id.* Fields additionally accuses the Division of changing its position about the existence of prime bank instruments. We have reviewed the record and find this argument to be without merit. From the Order Instituting Proceedings onwards, the Division has consistently argued that the bank guarantees and mid-term notes offered by Fields were fictitious—not that there is no such thing as a "bank guarantee." *E.g.*, *Anthony Fields*, 2012 WL 19759, at *1, 5-6.

28 *See, e.g.*, James J. White & Robert S. Summers, *Uniform Commercial Code* § 26-1 (5th ed. 2008); *see also Tudor Dev. Grp., Inc. v. U.S. Fid. & Guar. Co.*, 968 F.2d 357, 360 (3d Cir. 1992) ("In short, a letter of credit is an engagement by an issuer, usually a bank, made at the request of a customer for a fee, to honor a beneficiary's drafts or other demands for payment upon satisfaction of the conditions set forth in the letter of credit."); *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278, 282 (D.C. Cir. 1988).

29 *Am. Ins. Ass'n*, 865 F.2d at 282.

30 Fields's postings referred to "bank guarantees" and "mid-term notes," and did not use the precise phrase "prime bank instruments." As noted above, the purported instruments traded in prime bank schemes go by different names, but whether called prime bank guarantees, bank guarantees, letters of credit, mid-term notes, bank debentures, or some variation thereof, they all purport to represent bank obligations that are wholly fictitious.

31 Fields testified that this was meant to convey that the buyer would commit to transferring money conditional upon transfer of the securities.

them on a secondary market. Fields himself acknowledged that any potential purchaser would be subject to due diligence by the bank and would need to obtain the bank's authorization. In short, Fields's admissions at the hearing are inconsistent with the representations made in his postings.

The testimony of the Division's expert,[32] who explained that Fields's LinkedIn and TradeKey postings displayed all the indicia of fraudulent prime bank schemes, also independently supports our finding that the securities he offered are fictitious.[33] These indicia include: (1) the use of jargon typically associated with prime bank frauds, such as "tranches" of securities, "SWIFT 760" bank transfers, "Top 10 world banks," and "fresh cut" and "slightly seasoned" instruments; (2) the implausibly large size of the described transactions, which in Fields's case ran into the hundreds of millions or billions of dollars; (3) the existence of mysterious foreign counterparties whom Fields never met; (4) the insistence on secrecy; and (5) the promise of extraordinary large and risk-free profits. The Division's expert concluded that the securities offered by Fields are "wholly fictional" and a "complete and utter fraud." We unreservedly agree. To state the obvious, the described transactions are patently irrational from an economic perspective—there is no reason that an established bank would agree to repay a dollar (plus interest) for something for which it received only 30 or 40 cents on the dollar—and could not possibly exist.[34]

Finally, our finding that the bank guarantees and mid-term notes offered by Fields do not exist is confirmed by the "various regulatory alerts issued by the Commission and federal financial institution supervisory agencies . . . warning of Prime Bank schemes" and other

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[32] Over Fields's objection, the law judge accepted the Division's expert on the subject of prime bank schemes. "Law judges have broad discretion in deciding whether to admit evidence, including expert testimony," and having reviewed the testimony in question, "we conclude that the law judge did not abuse her broad discretion in admitting" it. *Steven Altman, Esq.*, Exchange Act Release No. 63306, 2010 WL 5092725, at *18 (Nov. 10, 2010). As the law judge explained, Fields's challenge to the Division's expert was premised essentially on his disagreement with the expert's conclusions, which is not a proper basis for an expert's exclusion. Thus, in resolving the issues here, we have "given such weight to the expert testimony as we consider is indicated." *Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *13 n.63 (Dec. 11, 2009) (quotation marks omitted).

[33] *See Dazey*, 403 F.3d at 1171 (affirming admission of testimony by expert who "carefully explained the source of his extensive knowledge of prime bank frauds and explained what attributes these schemes . . . often share"); *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 194 (relying on expert testimony that the "investments described in the materials . . . are not legitimate but resemble and are classic instances of Prime Bank . . . Schemes"); *Graulich*, 2013 WL 3146862, at *4 (relying on "thorough expert report" to grant summary judgment in favor of the Commission in prime bank case).

[34] *Cf. Richard D. Hicks*, Exchange Act Release No. 70165, 2013 WL 4076842, at *3 (Aug. 13, 2013) (settled proceeding) ("claim of a guaranteed 12% return was too good to be true").

"judicial determinations . . . finding that such instruments were fraudulent and fictitious."[35] The Commission and other federal agencies, including the Federal Bureau of Investigation, the U.S. Treasury, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, have issued alerts warning of prime bank schemes.[36] Fields's postings contain many of the "warning signs" and "red flags" that these alerts have identified, including promises of "unrealistic returns at no risk,"[37] the trading of supposed financial instruments "in manners that are not realistic,"[38] and the use of confusing terms and opaque jargon.[39]

In arguing otherwise, Fields relies upon a purported "Letter of Guarantee" from Credit Suisse. The law judge considered this document to be a clumsy fake, and we agree. Testimony at the hearing established that the text of the purported "Letter of Guarantee" was based on a template from the website of an entity called "KYC Consultants," which has no connection to Credit Suisse. Moreover, as the Division's expert testified, the KYC Consultants website itself

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[35] *Kaiden*, 1999 WL 507860, at *5 (relying on the same types of evidence in finding that the respondent offered nonexistent prime bank instruments); *see supra* notes 23, 25 (collecting cases).

[36] *See* Securities and Exchange Commission, *How Prime Bank Fraud Works*, *available at* http://www.sec.gov/divisions/enforce/primebank/howtheywork.shtml (last visited Feb. 19, 2015); Federal Bureau of Investigation, *Common Fraud Schemes*, *available at* http://www.fbi.gov/scamssafety/fraud (last visited Feb. 19, 2015); U.S. Dep't of the Treasury, *Prime Bank Investment Fraud*, *available at* http://www.treasury.gov/about/organizational-structure/ig/Pages/Scams/Prime-Bank-Investment-Fraud.aspx (last visited Feb. 19, 2015); TreasuryDirect, *Prime Bank Instrument Fraud*, *available at* http://www.treasurydirect.gov/instit/statreg/fraud/fraud_primebank.htm (last visited Feb. 19, 2015); Board of Governors of the Federal Reserve System, *Fictitious Instrument Fraud*, *available at* http://www.federalreserve.gov/oig/oig_hotline_fictitious.htm (last visited Feb. 19, 2015); Board of Governors of the Federal Reserve System, *Supervisory and Regulatory Letter 02-13: "Prime Bank" and Other Investment Fraud Schemes* (May 20, 2002), *available at* http://www.federalreserve.gov/Boarddocs/srletters/2002/sr0213.htm (last visited Feb. 19, 2015); Office of the Comptroller of the Currency, *Types of Consumer Fraud*, *available at* http://www.occ.gov/topics/consumer-protection/fraud-resources/types-consumerfraud.html (last visited Feb. 19, 2015); Interagency Advisory, *Warning Concerning "Prime Bank" Notes, Guarantees, and Letters of Credit and Similar Financial Instruments* (Oct. 21, 1993), *available at* http://www.occ.gov/static/news-issuances/ots/ceo-memos/ots-ceo-memo-17.pdf (last visited Feb. 19, 2015).

[37] *See* Securities and Exchange Commission, *How Prime Bank Fraud Works*, *supra* note 36.

[38] *See* Board of Governors of the Federal Reserve System, *Supervisory and Regulatory Letter 02-13: "Prime Bank" and Other Investment Fraud Schemes*, *supra* note 36.

[39] *See* U.S. Dep't of the Treasury, *Prime Bank Investment Fraud*, *supra* note 36.

had all the hallmarks of involvement in a prime bank scheme, including references to the supposed availability of "fresh cut" mid-term notes. Additionally, the letter is littered with typographical errors and internal inconsistencies that would not be present in a genuine bank guarantee. For example, it is dated "Nov. 4 201" (in the heading) and "04nd day of October 201" (in the body) and states that it "shall by [sic] duly honoured" by the bank.

Fields also relies upon a purported Bloomberg screenshot of a mid-term note issued by Deutsche Bank. This, too, has a highly untrustworthy provenance. As the Division's expert explained, the same International Securities Identification Number[40] depicted in the screenshot, XS0422717727, is found on many "lists" of purported prime bank instruments distributed on the Internet, which contain many of the hallmarks (*e.g.*, characteristic jargon and implausibly large transaction sizes) of prime bank schemes.[41] And in any event, the note depicted in the purported screenshot paid only 4.78% interest—not the implausibly high returns promised by the instruments that Fields's LinkedIn and TradeKey postings offered. All in all, Fields's documentary evidence fails to convince us that the bank guarantees and mid-term notes that he offered were real. Indeed, its suspect nature reinforces our finding that they do not exist.

The Division argued to the law judge that Fields's fraudulent misrepresentations about the existence of the offered prime bank instruments by themselves suffice to establish liability under Securities Act Sections 17(a)(1) and 17(a)(3). In particular, the Division urged that it was not required to show that Fields engaged in deceptive or fraudulent conduct apart from making the misrepresentations. Fields did not challenge the Division's argument regarding the applicable legal standard before the law judge; the initial decision—which found that Fields committed antifraud violations "by his material misrepresentations and omissions *and* by his involvement in a scheme to defraud"[42]—does not make clear whether the law judge endorsed in all respects the Division's interpretation of Section 17(a); and Fields does not raise the issue on appeal. For all these reasons, there ordinarily would be no need to go further; we could simply stop here and

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[40] An International Securities Identification Number, or ISIN, is a code that uniquely identifies a security. "ISIN and CUSIP are interrelated designations, since CUSIP numbers can be converted into ISIN numbers by adding the United States or Canada's country code to the beginning of each particular CUSIP code and digital designation of the instrument at the end of such CUSIP." *Murakush Caliphate of Amexem Inc. v. New Jersey*, 790 F. Supp. 2d 241, 256 n.14 (D.N.J. 2011).

[41] For example, one such list advertises "369 . . . available offers of BG, MTN, SBLC [standby letters of credit], CD [certificates of deposit], and bonds," and describes "seasoned" mid-term notes supposedly available for 57 cents on the dollar.

[42] The law judge found, and Fields does not dispute, that a program to trade non-existent prime bank instruments would "clearly [be] a scheme to defraud within the meaning of Securities Act Section 17(a)." As discussed above, Fields's only defense was that the offered prime bank instruments were, in fact, real.

affirm the initial decision's bottom-line finding of liability.[43] Given the importance of providing clear interpretative guidance regarding the securities laws, however, and the fact that we recently and at length announced our considered views as to the proper construction of Section 17(a) in *John P. Flannery*,[44] we will explain in detail why we have concluded that Fields's conduct triggers liability under both Section 17(a)(1) and 17(a)(3).[45]

We have long recognized that the subsections of Section 17(a) are "mutually supporting rather than mutually exclusive."[46] As the Supreme Court has explained, "each subparagraph of § 17(a) 'proscribes a distinct category of misconduct. Each succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections.'"[47] In *Flannery*, we held that Section 17(a)(1)'s prohibition against "employ[ing] any device, scheme, or artifice to defraud" reaches any defendant who (with scienter) makes, drafts, or devises a material misstatement or uses a misstatement made by others to defraud investors.[48] We specifically rejected as inapplicable to our analysis of claims arising under Section 17(a)(1) any requirement—found in some of the case law considering claims arising under Rule 10b-5(a) and (c)—that the misconduct be inherently manipulative or deceptive or that the misconduct involve more than a simple misstatement.[49] Because (as we find elsewhere) Fields acted with scienter, Fields's material misrepresentations as to the availability and characteristics of the nonexistent prime bank instruments in his LinkedIn and TradeKey posts offering those securities are alone enough to support our finding that Fields violated Section 17(a)(1).

Although Section 17(a)(2) also allows liability to be premised upon a material misstatement or omission—and does not require scienter—it adds the proviso that money or property be obtained "by means of" the misstatement or omission.[50] Accordingly, as we

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[43] *See* Rule of Practice 410(b), 17 C.F.R. § 201.410(b) ("Any exception to an initial decision not stated in the petition for review . . . may, at the discretion of the Commission, be deemed to have been waived by the petitioner.").

[44] *John P. Flannery*, Exchange Act Release No. 73840, 2014 WL 7145625 (Dec. 15, 2014).

[45] *See generally Kamen v. Kemper Fin. Servs.,, Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *United States v. Berry*, 618 F.3d 13, 17 (D.C. Cir. 2010).

[46] *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 40 SEC 907, 1961 WL 60638, at *4 (Nov. 8, 1961).

[47] *Aaron*, 446 U.S. at 697 (quoting *Naftalin*, 441 U.S. at 774).

[48] *Flannery*, 2014 WL 7145625, at *17-18.

[49] *Id.* at *16-17 & n.90.

[50] 15 U.S.C. § 77q(a)(2); *see also Aaron*, 446 U.S. at 696 ("[T]he language of § 17(a)(2) . . . is devoid of any suggestion whatsoever of a scienter requirement.").

explained in *Flannery*, liability under Section 17(a)(2) is proper only when the respondent has used or employed a material misstatement or omission to directly or indirectly obtain money or property.[51] In this case, Fields was not charged with a violation of Section 17(a)(2), presumably because no money or property ever changed hands as a result of his misstatements.

Finally, Section 17(a)(3) makes it unlawful to "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[52] Scienter is not necessary to find a violation of Section 17(a)(3); nor is it necessary that the respondent obtain money or property.[53] Yet as we held in *Flannery*, an isolated misstatement unaccompanied by other conduct does not give rise to liability under this provision.[54] This follows from the ordinary meaning of the operative words in the phrase "transaction, practice, or course of business." We would be hard pressed to say that a single misstatement, without more and never acted upon, constitutes a "transaction."[55] Likewise, the ordinary meaning of "practice" and "course of business" denotes routine, customary, or repeated conduct, and therefore would exclude liability based upon a single, isolated misstatement.[56] Having said that, we also noted in

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51 *Flannery*, 2014 WL 7145625, at *11; *see also SEC v. Tambone*, 597 F.3d 436, 444 (1st Cir. 2010) (en banc). In *Flannery*, we explained that the test for liability under Section 17(a)(2) is broader than that which applies under Rule 10b-5(b). In particular, like the First Circuit in *Tambone*, we interpreted the "by means of" requirement to mean that an individual may be primarily liable under Section 17(a)(2) if he uses a misstatement to obtain money or property, even if he or she has not personally "'made a false statement in connection with the offer or sale of a security.'" *Flannery*, 2014 WL 7145625, at *11 (quoting *Tambone*, 550 F.3d at 127-28).

52 15 U.S.C. § 77q(a)(3).

53 *See Aaron*, 446 U.S. at 697 ("[T]he language of § 17(a)(3) . . . quite plainly focuses upon the effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible."); *Kaiden*, 1999 WL 507860, at *6 n.35 (lack of pecuniary loss immaterial to violation of Section 17(a)(3), which prohibits conduct in the "*offer* or sale" of securities that operates or "*would* operate as a fraud or deceit") (emphasis added).

54 *Flannery*, 2014 WL 7145625, at *18.

55 *Id.* at *18 & n.97 (citing Webster's New International Dictionary 2688 (def. 2a) (2d ed. 1934)). To be sure, a single misstatement or omission made in connection with (or otherwise used to induce) a contract, exchange, or other kind of business dealing could well constitute engaging in a "transaction." *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 589 (D.C. Cir. 2001) ("As it is generally understood, the word 'transactions' conveys a reciprocity, a mutual exchange . . . ."); *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 1998) ("The ordinary meaning of 'transaction' necessarily implies some type of business dealing between parties. In other words, when we speak of 'transactions,' we refer to consensual or contractual arrangements . . .") (citations omitted).

56 *Flannery*, 2014 WL 7145625, at *18 & n.99 (citing Webster's New International Dictionary 610, 1937); *see also United States v. Hones*, 57 F.3d 1020, 1024 (11th Cir. 1995) ("Practice is defined as the 'performance or operation of something,' 'performance or application

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Flannery that "one who repeatedly makes or drafts . . . misstatements over a period of time may well have engaged in a fraudulent 'practice' or 'course of business.'"[57]

We need not in this case delimit the outer contours of liability under Section 17(a)(3) because it is clear that Fields's recurrent and systematic misconduct—which went far beyond one-off misstatements—falls squarely within the heartland of that provision's proscription against engaging in "any transaction, practice, or course of business which . . . would operate as a fraud" on potential purchasers.

To begin with, at least four times over a two-year period, Fields posted offers on social media websites to transact in fictitious prime bank instruments. He received twenty to forty responses, corresponded with a number of potential investors, and took other concrete steps to arrange and further these inherently deceptive transactions. For example, his conduct in matching up potential buyers with potential sellers was essential to locating new victims for the fraud and keeping it going.[58] Once someone responded to his postings, Fields took additional steps to advance the fraud. Among other things, he obtained sensitive personal information—including passport numbers and social security numbers—from potential investors and then conveyed it to the sellers of the fictitious securities. And Fields meant to play an integral and ongoing role in the fictitious transactions, as evidenced by the purported contracts that he prepared. One such "Pay Order" specifies that a $200 million bank guarantee would be posted into AFA's account and that Fields would receive $2.5 million "for services rendered in brokerage for participating" in the transaction. In sum, it is not a close question that Fields engaged in a transaction, practice, and course of business that would operate as a fraud on investors in violation of Section 17(a)(3).

(. . . continued)
habitually engaged in,' or 'repeated or customary action.'"); Black's Law Dictionary 404 (9th ed. 2009) (defining "course of business" as the "normal routine in managing a trade or business").

57 *Flannery*, 2014 WL 7145625, at *18.

58 *Schmidt*, 2002 WL 89028, at *8 (finding liability under Section 17(a) where the respondent had, among other things, "introduced" the key players to one another and "participated in telephone calls and transmitted documents" between them); *see also SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287 (2d Cir. 2013) (finding liability under Section 17(a) appropriate when the defendant not only communicated "late trades," but also "[found] brokers and a clearing system that would allow late trades"); *VanCook v. SEC*, 653 F.3d 130, 139 (2d Cir. 2011), *aff'g*, *Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 WL 4026291, at *10 (Nov. 20, 2009).

4. Fields acted with scienter.

We must find scienter—a mental state embracing an intent to deceive, manipulate, or defraud—to conclude that there was a violation of Section 17(a)(1) of the Securities Act.[59] "Scienter includes recklessness, defined as conduct that is '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.'"[60] Thus, the "scienter element can be satisfied by a strong showing of reckless disregard for the truth," as well as actual knowledge of falsity.[61] It may be proven "by inference from circumstantial evidence," which "can be more than sufficient" to establish the requisite state of mind.[62] Scienter is not required to establish a violation of Section 17(a)(3) of the Securities Act.[63]

We find that Fields acted with scienter when he offered bank guarantees and mid-term notes that did not actually exist. In light of his business experience and professional training, Fields must have "understood that he had to verify the existence and legitimacy" of the instruments that he offered.[64] In Fields's briefing to us, for example, Fields touts his 30 years of

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59 *Aaron*, 446 U.S. at 697. Fields asserts that the Division failed to satisfy the pleading standards established in the Private Securities Litigation Reform Act ("PSLRA"), which requires private litigants to state with particularity facts giving rise to a "strong inference" that the defendant acted with scienter in order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This argument misses the mark in two separate respects. First, the pleading standards articulated in the PSLRA apply only to *private* plaintiffs (and are wholly distinct from the pleading standards governing the Division under our Rule of Practice 200(b)). 15 U.S.C. § 78u-4(a)(1) ("The provisions of this subsection shall apply in each private action arising under this chapter."). Second, the PSLRA did not change the substantive law regarding what constitutes scienter under the federal securities laws. *See, e.g.*, *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1064 (9th Cir. 2000); *In re Reserve Fund Sec. & Derivative Litig.*, 732 F. Supp. 2d 310, 318-19 (S.D.N.Y. 2010).

60 *Brown*, 2012 WL 625874, at *9 n.8; *see also Steadman*, 967 F.2d at 641-42.

61 *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2000); *see also Lyttle*, 538 F.3d at 603 (explaining that scienter is present when "the defendants either knew that the representations they made to investors were false or were reckless in disregarding a substantial risk that they were false").

62 *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *see also Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010), *aff'g Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 WL 4936788 (Nov. 14, 2008) (explaining that "[s]cienter can be established by direct or circumstantial evidence" and that "the objective unreasonableness of a defendant's conduct may give rise to an inference of scienter").

63 *Aaron*, 446 U.S. at 697 & 701-02; *Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006); *Steadman*, 967 F.2d at 643 & n.5.

64 *Kaiden*, 1999 WL 507860, at *6.

experience as an accountant (and through 2003, his licensure as a CPA in Illinois), his operation of an accounting business under the AFA name since 1989, and his efforts to prepare for the FINRA Series 7 and Series 63 examinations.[65]

Even taken at face value, Fields's testimony confirms that he recklessly promoted nonexistent securities. We have found that a promoter's failure "to contact any bank or other institution to verify" the existence of the offered prime bank instruments is evidence of recklessness.[66] Here, too, Fields admitted that he never verified the existence of the offered prime bank instruments with the banks that his LinkedIn postings identified as their supposed issuers. For example, he testified that his only contact with HSBC was an alleged conversation with a woman named Alina Pitman, supposedly a "director of HSBC" living somewhere in Chicago, who stated that she had access to bank guarantees and mid-term notes. He had never met Ms. Pitman and he did not recall who introduced her to him. Fields never discussed with Ms. Pitman the instruments offered in his postings. Fields also admitted that he never brought up the topic of prime bank instruments with anyone at any other bank.

Further, Fields never met any of the individuals who supposedly had access to billions of dollars in bank guarantees and mid-term notes. He testified that he believed that the seller in one of his postings to the "Trade Platforms" discussion group on LinkedIn was a man named "Don Morgan," who supposedly was located in Switzerland and a grandson of J.P. Morgan, the famed financier. Fields purportedly was placed in touch with Don Morgan through "a very close associate" who was "compliance director for a trading platform," whose name Fields could not recall. Fields admitted that had never met, spoken with, or corresponded directly with "Don Morgan." Instead he had corresponded with Morgan's representative—"Lars Gunnerson, or something to that effect"—whose whereabouts Fields again could not recall. According to Fields, he received a "letter of intent" from "Don Morgan," but he offered no such letter into evidence at the hearing. Fields did not remember the name of any of the other purported sellers of bank guarantees and mid-term notes. These investigative efforts—especially given Fields's suspect memory—were manifestly insufficient to support Fields's representations about the offered instruments.[67]

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[65] The Series 7 examination is the general securities representative examination and the Series 63 examination covers the principles of state securities regulation. *See* Financial Industry Regulatory Authority, Inc., *FINRA Registration and Examination Requirements*, *available at* http://www.finra.org/industry/compliance/registration/qualificationsexams/qualifications/p011051 (last visited Feb. 19, 2015); *see also Exch. Servs., Inc. v. SEC*, 797 F.2d 188, 189 & n.2 (4th Cir. 1986).

[66] *Kaiden*, 1999 WL 507860, at *5.

[67] *E.g.*, *id.* at *6 (finding scienter given the respondent's inability to identify the unnamed individuals that he supposedly spoke to); *Gallard*, 1997 WL 767570, at *3-4 (finding scienter given the defendant's "total inability to provide any evidentiary support for the existence of the purported instrument or his contacts at various banks").

We acknowledge Fields's assertion that he really did believe that the offered instruments were real. But that does not alter our finding that Fields, at the very least, consciously disregarded the very great risk—which would have been clear to any reasonable person and which must have been clear to Fields—that the securities he offered were fictitious. Promised returns far too good to be true (such as acquiring a ten-year note paying 7.5% issued by a well-known bank for 30% of its face value) are a classic indication of fraud. Yet Fields failed to perform a meaningful inquiry into the existence of those securities despite these obvious warning signs and red flags.[68] As "[m]any courts have held, . . . because Prime Bank schemes claim to offer a combination of high returns with no risk, the deal is inconceivable on its face and imposes a heightened duty on the promoter to investigate."[69] And "an egregious refusal to see the obvious, or to investigate the doubtful, may . . . give rise to an inference of . . . recklessness."[70] Here, Fields's asserted belief in the securities' existence did not "warrant his making exaggerated and unfounded representations and predictions to others."[71] In short, considering (but finding insufficient) Fields's "protestations that [he] genuinely believed"[72] that the securities existed in light of the overwhelming circumstantial evidence bearing on his actual state of mind, we find that he acted with at least extreme recklessness, and thus with the requisite scienter.[73]

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68 *See, e.g.*, *Gebhart*, 2008 WL 4936788, at *9 (finding scienter given paucity of investigation in the face of "obvious warning signs that some investigation was necessary"); *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at *9 n.61 (Jan. 6, 2006) (scienter may be found when a "securities representative failed to exercise skepticism in face of red flags").

69 *SEC v. Reynolds*, Case No. 1:06-CV-1801-RWS, 2010 WL 3943729, at *4 (N.D. Ga. Oct. 5, 2010) (quotation marks omitted; collecting citations) ("Even if [the defendant] could argue that he genuinely believed the claims he made to the investing public, scienter can be inferred because [he] did not conduct adequate diligence."); *see also SEC v. Infinity Grp. Co.*, 212 F.3d 180, 193-94 (3d Cir. 2000); *Wilde*, 2012 WL 6621747, at *5; *Asset Recovery & Mgmt. Trust, S.A.*, 2008 WL 4831738, at *8; *SEC. v. Deyon*, 977 F. Supp. 510, 517 (D. Me. 1997).

70 *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 196 (quoting *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (3d Cir. 1996)); *see also Dolphin and Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) (observing that securities professional have an "an independent duty to use diligence where there are any unusual factors") (quotation marks omitted).

71 *James E. Cavallo*, Exchange Act Release No. 26639, 1989 WL 991979, at *3 (Mar. 17, 1989), *pet. denied*, 993 F.2d 913 (D.C. Cir. 1993) (table).

72 *See, e.g.*, *Gebhart*, 595 F.3d at 1043 (holding that the Commission "correctly applied the appropriate scienter standard" by "consider[ing] the [respondents'] arguments that they acted in good faith" and then determining, "[b]ased on the evidence as a whole," that these "assertions of good faith were 'not plausible' and lacked 'credibility'").

73 *Asset Recovery & Mgmt. Trust, S.A.*, 2008 WL 4831738, at *8; *see also SEC. v. Lyttle*, 538 F.3d 601, 603-04 (7th Cir. 2008) (affirming summary judgment against defendants in prime

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We reject as unpersuasive Fields's arguments to the contrary. Fields first argues that there is "no recklessness or intent to defraud if the respondent purchased the securities for his own benefit." To support this proposition, he cites Exhibit D to his petition for review, which purports to be a "letter of request," dated February 12, 2012, supposedly sent by Fields on behalf of "Royal International Airlines Ghana Limited" to acquire at least €10 billion (and up to €100 billion) in "Fresh Cut" bank guarantees issued by "A++ RATED" banks for 38% of the face value of the instruments. Although Fields had the opportunity to do so, this document was not adduced at the hearing and therefore is not properly before us.[74]

In any event, even if we were to consider the document, we would find that Fields's reliance upon it is unavailing. To be sure, investment of one's own money in a phony enterprise may in the appropriate circumstances be one factor potentially weighing against a finding of scienter,[75] but in this case, there is no evidence that Fields *actually* put any of his own money at stake in this purported Ghanaian airline venture. Furthermore, even assuming that Fields did personally invest in bank guarantees, the evidence detailed above leaves us confident that Fields must have known when he made his misrepresentations that his actions presented an unacceptable danger of misleading potential investors.[76] That Fields stood to gain financially

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(. . . continued)

bank fraud and holding that no "reasonable jury could doubt that they had acted with scienter"); *Graulich*, 2013 WL 3146862, at *6 (agreeing that the "fraudulent character of the [prime bank] scheme . . . is so patent" that any person involved in perpetrating them "is either deliberately making a fraudulent statement or is acting recklessly"); *Wilde*, 2012 WL 6621747, at *5 ("Because 'prime bank' instruments do not exist, courts have repeatedly held that the promoters of such schemes acted, at a minimum, recklessly.").

74 *See* Rule of Practice 460(c), 17 C.F.R. § 201.460(c). Fields has not sought leave to adduce the Letter of Request as additional evidence pursuant to our Rule of Practice 452. *See id.* § 201.452 (allowing submission of additional evidence if the party seeking to introduce such evidence "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously"). Fields attached three other exhibits to his petition for review. Exhibit A is an empty tab. Exhibit B is the purported Bloomberg screenshot already discussed. Exhibit C, which appears to be a fragment of a news release by the International Chamber of Commerce and a fragment of a term sheet outlining Credit Suisse's "standard conditions" for the issuance of legitimate bank guarantees, was not offered at the hearing. These documents do not appear material, and Fields has not explained his failure to introduce them earlier. We decline, therefore, to include them in the record or to discuss them further.

75 *See Hoffman v. Estabrook & Co.*, 587 F.2d 509, 517 (1st Cir. 1978).

76 *Gebhart*, 2008 WL 4936788, at *10 (rejecting respondents' argument that they lacked scienter because it was "implausible to suggest that the [the respondents] knew or suspected that [the company] would be unable to repay these loans while, at the same time, loaning it money" given the abundance of other circumstantial evidence of scienter).

from his fraudulent conduct—in the form of hundreds of millions, if not billions, of dollars in commissions—further reinforces our finding that he acted with a high degree of scienter.[77] It would be entirely rational for someone to invest a relatively small amount of his or her own assets in a fraudulent investment with the hope of lulling into complacency potential investors from whom he or she expected to earn much more money. As Fields put it, he expected to make "big bucks" out of his "cut" of the commissions that the buyers' and sellers' representatives and consultants were supposed to share among themselves once a deal was consummated. Finally, the "letter of request" contains significant indicia of untrustworthiness and, if anything, confirms Fields's recklessness. The letter is strewn with typos, ungrammatical and haphazardly capitalized, and describes a transaction that is economically nonsensical and incredible.

Fields's second argument fares no better. He insists at some length that his conduct cannot be considered reckless because he intended to serve only "high net worth and institutional investors" and to target his postings to "accredited investors," not retail investors.[78] According to Fields, accredited investors have access to "privileged information," and therefore have the ability to do their own "due diligence to determine the viaboloty [sic] of the posts made." We are skeptical that Fields meant to target his postings so narrowly; for example, one of the LinkedIn discussion groups in question had over 1,000 members, and there is no indication that membership in that group was limited to accredited investors. At any rate, we find no merit to Fields's contention that individuals are free to offer fictitious securities to accredited investors because such investors are more likely to be able to ferret out the fraud on their own. As we have explained, "a sophisticated person is entitled to the protection of the antifraud provisions of the securities laws" as well.[79]

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[77] *Riordan*, 2009 WL 4731397, at *9 n.49 (finding that a "pecuniary motive for engaging in the . . . scheme" is "further circumstantial evidence of . . . scienter"); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007) (stating that "motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference").

[78] The term "accredited investor" has a number of different definitions, and Fields does not identify which he has in mind. For illustrative purposes, Rule 501 of Regulation D, generally speaking, defines that term to include institutional investors as well as natural persons whose individual net worth exceeds $1 million or whose individual income exceeds $200,000. *See* 17 C.F.R. § 230.501(a). Offers of securities made solely to accredited investors may, under certain circumstances, be exempt from registration, but that does not constitute an exemption from other provisions of the securities laws, including the antifraud provisions. *See generally* 17 C.F.R. § 230.500; *Kevin D. Kunz*, Exchange Act Release No. 45290, 2002 WL 54819, at *4 n.14, *7-8 (Jan. 16, 2002); *see also infra* note 114.

[79] *Schmidt*, 2002 WL 89028, at *6 & n.40, 9 (collecting cases); *Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 611726, at *4 (Sept. 15, 1998) ("accredited investors . . . are also vulnerable to fraud").

For all of the foregoing reasons, we conclude that the preponderance of the evidence establishes that Fields acted with scienter and, furthermore, willfully violated Sections 17(a)(1) and (a)(3) of the Securities Act.[80]

2. Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-1(a)(5)

We find that Fields also violated the antifraud provisions of the Advisers Act. In particular, Section 206(1) of that Act makes it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud any client or prospective client; Section 206(2) makes it unlawful for an investment adviser to engage in any transaction, practice, or course of business that operates as a fraud or deceit on any client or prospective client; and Section 206(4) makes it unlawful for an investment adviser to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.[81] Rule 206(4)-1(a)(5) provides that it is fraudulent within the meaning of Section 206(4) for any investment adviser to distribute any advertisement "which contains any untrue statement of a material fact, or which is otherwise false or misleading."[82] Together, these sections prohibit investment advisers from misstating material facts or omitting facts necessary to make a prior statement non-misleading in promotional literature and other communications to clients or prospective clients.[83] Scienter is required for violations of Section 206(1), but not for violations of Sections 206(2) or 206(4).[84]

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[80] Willfulness for purposes of the securities laws means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quotation marks omitted); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976). In this case, Fields's willfulness is established by, *inter alia*, his admissions that he purposely made, and had sole responsibility for, his social media postings and the statements contained therein.

[81] 15 U.S.C § 80b-6(1); *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *8 (Jan. 16, 2008).

[82] 17 C.F.R. § 275.206(4)-1(a)(5).

[83] *E.g.*, *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *8-9; *Valicenti Advisory Servs., Inc.*, Advisers Act Release No. 1774, 1998 WL 798699, at *1, *5 (Nov. 18, 1998); *Standard Inv. Mgmt., Inc.*, Advisers Act Release No. 228, 43 SEC 864, 1968 WL 86065, at *1 n.1 (Aug. 30, 1968). Notably, because investment advisers and their associated persons are fiduciaries, they are charged with the affirmative duty of "utmost good faith, and full and fair disclosure of all material facts" and the obligation "to employ reasonable care to avoid misleading" their clients through half-truths or incompletely volunteered information. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 194 (1963); *e.g.*, *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 & n.44 (Sept. 26, 2007).

[84] *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *8 & n.30.

a. *Fields is an investment adviser.*

The Advisers Act defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities," subject to several exceptions inapplicable here.[85] This aptly describes AFA, which, according to the Form ADV filed by Fields, was organized to provide "[f]inancial planning" and "[p]ortfolio management" services in exchange for compensation based on a percentage of assets under management. Fields's activities as AFA's president, chief compliance officer, and control person bring him within the "broad" definition of "investment adviser" under the Advisers Act.[86] As discussed above, Fields admitted that he controlled AFA and was solely responsible for everything that AFA did and said. Thus, he is an "investment adviser" within the meaning of the Advisers Act, and it is appropriate to hold him personally and primarily liable for violations of that Act.[87]

b. *Fields made numerous material misrepresentations to potential investment adviser clients.*

Via AFA's Form ADV and AFA's and Platinum's websites, Fields disseminated false and material information to prospective clients.[88] We catalogue here some of the more flagrant misrepresentations:

- Fields represented that AFA was registered as an investment adviser with the Commission. In reality, AFA was ineligible to register as an investment adviser because it lacked sufficient assets under management.[89]

- Fields represented that AFA had assets under management of $400 million. In reality, as Fields admitted during the hearing, AFA did not actually have any assets under management; Fields merely "anticipated" later getting them. Fields

[85] 15 U.S.C. § 80b-2(a)(11).

[86] *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *9 & n.37.

[87] *Id.*; *John J. Kenny*, Exchange Act Release No. 47847, 2003 WL 21078085, at *17 & n.54 (May 14, 2003); *SEC v. Berger*, 244 F. Supp. 2d 180, 193 (S.D.N.Y. 2001) ("Because [the defendant] effectively controlled [the investment advisory firm] and its decisionmaking, [the defendant] is also properly labeled an investment adviser within the meaning of the Advisers Act.").

[88] AFA's website advertised its relationship to Platinum, which it described as an "affiliated company" established to "reduce brokerage fees." AFA's website also promoted its "relationship with the 45th primary dealer" of U.S. Treasury Securities, an intended reference to Platinum.

[89] *See infra* pages 28-29.

nonetheless argues that the Form ADV's statements were true because he had entered into contracts that supposedly gave him a "reasonable expectation" that he would receive such assets to manage. We do not agree. The Form ADV provides clear instructions about how an investment adviser must calculate "assets under management." Consistently with the statute, it defines "assets under management" in the present tense as including only "portfolios for which you [*i.e.*, the adviser] *provide* continuous and regular supervisory or management services *as of the date of filing*."[90] Assets that an adviser expects to manage in the future do not count.[91]

- Fields represented that AFA had acquired a $50 billion contract. In reality, the purported contract was nonsensical on its face.[92] That contract provided for AFA to sell East West Trading $50 billion of U.S. Treasury Strips at a mere 22% of the face value of the instruments plus a one percent commission. Yet Fields did not have any Treasury Strips and lacked the funding to acquire them.[93] Although (as Fields argues) it is literally correct that AFA "did have a $50 Billion contract" with East West Trading, it was fraudulent and misleading for Fields to fail to disclose the additional—and highly material—facts showing that the purported contract could not possibly have been carried out.[94]

- Fields represented that AFA's client base included high net worth individuals and hedge funds. In reality, AFA had no investment advisory clients.

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[90] *See* Form ADV: Instructions for Part 1A, Item 5.F (emphasis added); *see also* 15 U.S.C. § 80b-3a(a)(3).

[91] Additionally, it was patently unreasonable to suppose that any of Fields's contracts, which made no economic sense, would result in the acquisition of assets under management and, like the law judge, we find that Fields's explanation was simply not credible.

[92] *See supra* note 5.

[93] Fields testified that he was planning to obtain $200 million via a purported "Joint Venture Agreement" with Lakeshore Ventures Group, Inc. dated March 27, 2010. But that document—which is also absurd on its face—actually calls for *Fields*, not Lakeshore, to "procure the funds . . . required for the [joint venture] . . . in tranches of not less than $200 million." Fields acknowledged that "that's what that [*i.e.*, the agreement] says, but that is not the way" he supposedly envisioned the venture as being structured. We do not view this purported "joint venture agreement" with Lakeshore as a sufficient basis for Fields to represent that AFA had acquired a $50 billion contract.

[94] *See Capital Gains Research Bureau, Inc.*, 375 U.S. at 200 (explaining that fraud by an investment adviser fiduciary embraces the "[f]ailure to disclose material facts").

- Fields represented that Platinum was a "primary dealer" in government securities and that Platinum had "a portfolio of over 25,000 U.S. Government securities." In reality, Platinum was not a primary dealer and did not have any securities in its inventory.[95]

- Fields represented that AFA and Platinum had an "expert" and "experienced" investment team. In reality, AFA and Platinum did not have any employees who provided investment-related services other than Fields himself.

These false statements were material because they "conveyed a false impression of [AFA's and Platinum's] size and investor asset base and of the professional qualifications" of those affiliated with the firms.[96] They made AFA "appear to be larger" than it actually was, and a reasonable investor would have wanted to know the truth because investors routinely consider an adviser's "attractiveness to other investors" when making investment decisions.[97]

c. Fields acted with scienter.

We find that Fields's misrepresentations about AFA and Platinum were knowing and intentionally calculated to deceive others. As their sole proprietor, Fields inescapably had first-hand, personal knowledge about the size and extent of their operations and the falsity of his representations concerning them. Further, as stated previously, Fields had a "motive for overstating [AFA's] assets," which provides additional circumstantial evidence of his scienter.[98]

B. Sections 203A and 207 of the Advisers Act

We also find that Fields violated Section 203A of the Advisers Act, which, at the time Fields registered AFA, prohibited an adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business from registering with the Commission, unless it had assets under management in excess of $25 million or advises a registered investment company.[99] Fields admits in his briefing that AFA

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95 We reject Fields's explanation that Platinum was affiliated with other companies—*e.g.*, Pershing, Fidelity, and Merrill Lynch—and *those* entities, some of which were primary dealers, had over 25,000 securities in *their* inventories. A reasonable investor would surely find it important to making an investment decision whether Platinum *itself* possessed the inventory or whether it merely had access to *others'* inventory.

96 *The Barr Fin. Grp., Inc.*, Advisers Act Release Number 2179, 2003 WL 22258489, at *5 (Oct. 2, 2003).

97 *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *9.

98 *Id.*

99 15 U.S.C. § 80b-3a(a)(1). The Dodd-Frank Act raised the threshold for Commission registration to $100 million for most investment advisers by creating a new category of "mid-sized advisers." *Id.* § 80b-3a(a)(2). Section 203A "exempts an adviser from this prohibition if,

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lacked the "required qualifications to meet the standards of registration." AFA's principal office and place of business was in Illinois, which had a regulatory regime for investment advisers. Because AFA had no assets under management, it was ineligible to register with the Commission.

Yet Fields contends that the Commission is actually to blame for his violation of Section 203A because AFA's eligibility "was supposed to be determined by the Commission" and AFA should have "been properly screened" before it was allowed to register. Of course, it was *Fields himself* who fraudulently misrepresented AFA's qualifications to register and thus induced the Commission to accept AFA's registration. We are unmoved by this baseless argument.[100]

For much the same reasons, we find that Fields violated Section 207 of the Advisers Act, which makes it unlawful for any person to willfully make any untrue statement of a material fact or to willfully omit any required fact in any registration application or report filed with the Commission.[101] AFA's Form ADV stated that AFA had assets under management of $400 million and four clients. In reality, AFA had no assets under management and no clients—misstatements that were material in that they bore on whether AFA satisfied the requirements for Commission registration. These misstatements were also willful: Fields had sole responsibility for AFA's registration form and knew that its contents were false when he submitted it.

C. Rule 206(4)-7 of the Advisers Act

Rule 206(4)-7(a) of the Advisers Act requires, among other things, that an investment adviser adopt and implement written policies and procedures reasonably designed to prevent violations by the investment adviser or its supervised persons of the Advisers Act and the rules

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at the time of registration, the adviser . . . has a reasonable expectation that it would be eligible for Commission registration within 120 days after the date its registration becomes effective." *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *11 (Dec. 21, 2007). However, this exemption must be explicitly invoked on Schedule D of Form ADV and, moreover, the adviser must withdraw the registration if it remains ineligible to register after 120 days. 17 C.F.R. § 275.203A-2(c)(2). Fields did not invoke this exemption, did not withdraw AFA's registration in light of AFA's continuing ineligibility to register, and AFA would not, in any event, have qualified for the exemption because, as we observe *supra* notes 91-94 and accompanying text, Fields could not have had a reasonable expectation that AFA would acquire any assets under management as a result of these facially absurd contracts.

[100] *See, e.g.*, *Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 WL 1376365, at *5 n.22 (May 9, 2007) (explaining that the Commission has repeatedly held that industry participants cannot shift responsibility for compliance to regulators).

[101] 15 U.S.C. § 80b-7. Scienter is not required to support a Section 207 violation. *E.g.*, *Disraeli*, 2007 WL 4481515, at *13.

adopted thereunder.[102] Fields admitted that AFA did not have any written procedures when he first registered AFA with the Commission in March 2010. It was only in October 2010 that Fields purchased a template for a compliance manual from a vendor called National Regulatory Services. Based on the undisputed fact that Fields did not have any compliance manual prior to that date, we find that Fields violated Rule 206(4)-7(a).

Moreover, we are doubtful that Fields's eventual adoption of the off-the-shelf compliance manual from National Regulatory Services cured the violation. In adopting Rule 206(4)-7, we stressed that "[e]ach adviser should adopt policies and procedures that take into consideration the nature of *that firm's operations*" and that advisers should "identify conflicts and other compliance factors creating risk exposure . . . in light of the firm's *particular operations*, and then design policies and procedures that address *those* risks."[103] It is evident that Fields did not tailor the manual to the particular risks of AFA's operations. Fields testified that he spent about an hour answering yes-or-no questions and filling in the template. He admitted that he did not edit the resultant document in any fashion and that he never read the manual in its entirety. Indeed, during the investigative interview, Fields was surprised by the presence of a provision—which required advertisements to be reviewed by someone "other than the individual who prepared [the] material"—that he conceded he did not even mean to include in the manual.

We find that Fields's violation of Rule 206(4)-7(a) was willful. Although Fields claimed that he "didn't know [he] needed a compliance code," there is no doubt that he intended to operate AFA as an investment advisor and that Fields did so without a compliance code. Thus, Fields "intentionally commit[ted] the act which constitutes the violation," which is sufficient to establish willfulness.[104]

D. Section 15(a) of the Exchange Act

Section 15(a)(1) of the Exchange Act prohibits a broker or dealer from making use of any means or instrumentality of interstate commerce to effect, induce, or attempt to induce any transactions in any security (other than an exempted security)[105] unless the person is registered

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[102] 17 C.F.R. § 275.206(4)-7(a).

[103] *Compliance Programs of Investment Companies and Investment Advisers*, Advisers Act Release No. 2204, 68 Fed. Reg. 74714, 74716 (Dec. 24, 2003) (emphasis added); *see also Battery Wealth Mgmt., Inc.*, Advisers Act Release No. 2800, 2008 WL 4587550, at *4 (Oct. 15, 2008) (instituting and settling administrative proceeding where adviser had adopted "generic compliance manual[]" that was not tailored to the "particular risks" of that adviser's business).

[104] *Wonsover*, 205 F.3d at 414; *see also supra* note 80.

[105] Section 3 of the Exchange Act defines "exempted security" to include government securities. 15 U.S.C. § 78c(12)(A)(i). A broker-dealer whose business consists "*primarily* of transactions in exempted securities" still must register with the Commission if it conducts *any* business in "non-exempt securities." *See Burley & Co.*, 28 SEC 126, Exchange Act Release No. 4109, 1948 WL 69443, at *2 (June 22, 1948) (emphasis added). We base our finding that Fields

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with the Commission or is associated with a registered firm.[106] This provision "ensure[s] that customers . . . receive either the regulatory protections that result from a salesman being registered himself or the protections that stem from the salesman being supervised by a registered firm."[107] Scienter is not required to prove a violation of Section 15(a)(1).[108]

Platinum was not registered with the Commission after September 2010. Fields withdrew Platinum's registration effective in September 2010 when he was informed by FINRA that Platinum did not meet the net capital requirements to be a broker-dealer. Fields claimed that he resubmitted Platinum's registration later that month, but because there is no record of such a submission in the Commission's records and Fields presented no other corroborating evidence, we do not credit Fields's account. It is undisputed, in any event, that Fields was never licensed as a registered representative of Platinum.

We also find that Fields engaged in activities after September 2010 that required him to register as a broker. Section 3(a)(4) of the Exchange Act defines a "broker" as any person "engaged in the business of effecting transactions in securities for the account of others."[109] The phrase "engaged in the business" means a "level of participation in purchasing and selling securities involv[ing] more than a few isolated transactions"; there is "no requirement . . . that such activity be a person's principal business or the principal source of income."[110] Activities that are indicative of being a broker include holding oneself out as a broker-dealer, recruiting or soliciting potential investors, handling client funds and securities, negotiating with issuers, and receiving transaction-based compensation.[111]

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violated Section 15(a)(1)'s broker-dealer registration requirement exclusively upon Fields's holding himself out as a broker and his attempts to induce transactions in non-exempted securities (and not on his attempts to induce transactions in government securities). We note that a distinct registration regime applies to government securities brokers, which is not at issue in this proceeding.. *See* 15 U.S.C. § 78o-5.

[106] 15 U.S.C. § 78o(a)(1).

[107] *Charles A. Roth*, Exchange Act Release No. 31085, 1992 WL 216693, at *4 (Aug. 25, 1992).

[108] *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

[109] 15 U.S.C. § 78c(a)(4).

[110] *Gordon Wesley Sodorff*, Exchange Act Release No. 31134, 1992 WL 224082, at *4 (Sept. 2, 1992); *see also SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998).

[111] *See, e.g.*, *SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Art Intellect, Inc.*, Case No. 2:11-CV-357, 2013 WL 840048, at *20 (D. Utah Mar. 6, 2013); *Kenton Capital, Ltd.*, 69 F. Supp. 2d at 12-13; *Strengthening the Commission's Requirements Regarding Auditor Independence*, Exchange Act Release No. 47265, 68 Fed. Reg. 6006, 6014 & n.82 (Feb. 5, 2003).

Fields, AFA, and Platinum explicitly held themselves out as brokers and providing brokerage services, and that is by itself sufficient to trigger Section 15(a)(1)'s registration requirement.[112] AFA's website (which was active through at least May 2011) told readers that Fields had "established a securities brokerage firm 'Platinum Securities Brokers.'" Platinum's website (which also remained publicly accessible until at least that date) described Platinum as a "top institutional brokerage firm" that provided "prime brokering" services, including "securities lending, . . . leveraged trade executions, and cash management." According to Platinum's website, Platinum's customers could buy, among other things, "bonds" and "mutual funds" by, among other things, "calling one of [Platinum's] representatives." The website stated that Platinum was "registered with the Securities and Exchange Commission."

Although the foregoing itself required Fields and Platinum to register as a broker, Fields also repeatedly attempted to induce transactions in securities for other individuals by soliciting potential investors and arranging transactions on their behalf.[113] For example, Fields's October 13, 2010 TradeKey posting stated that Fields had a "client interested in buying $50 billion [in] bank guarantees." In one series of emails, Fields described himself as the "Mandate/Representative" of "Westminster International Corp." seeking to purchase €500 billion in medium-term notes, a transaction for which Fields was to receive a one percent commission. In another series of emails, Fields reported to "Steve Dills," an individual who had expressed interest in purchasing mid-term notes, that he had "spoke to the sellers rep" and that he looked forward to a "very sound business relationship." At the hearing, Fields readily agreed that he was "basically" trying to "broker a purchase and sale" of the securities in question and that he expected to receive a commission if the sale went through.[114]

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[112] *E.g.*, *Kenton Capital, Ltd.*, 69 F. Supp. 2d at 13 ("In its representations to investors, [the broker] held itself out as being engaged in the business . . . ."); *Strengthening the Commission's Requirements Regarding Auditor Independence*, 68 Fed. Reg. at 6014 n.82 ("A person may be 'engaged in the business,' among other ways, . . . by holding itself out as a broker-dealer.").

[113] *E.g.*, *George*, 426 F.3d at 797 (individual who "regularly involved in communications with and recruitment of investors for the purchase of securities" found to be a broker); *Kenton Capital, Ltd.*, 69 F. Supp. 2d at 13 (individual who "actively solicit[ed] participation" in transactions was found to be a broker); *SEC v. Deyon*, 977 F. Supp. 510, 518 (D. Me. 1997) (individual who "solicited investors" and "distributed sales circulars in the hope that potential investors" would invest in prime bank scheme found to be a broker); *SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980) (individual who "solicited clients actively" found to be a broker).

[114] Fields nevertheless argues that the contemplated transactions involved "private placements," not public offerings. Generally speaking, a private placement refers to the sale of a security that is exempt from the Securities Act's registration requirements. *See Kunz*, 2002 WL 54819, at *7; *e.g.*, *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 899-900 (5th Cir. 1977). We find Fields's argument flawed in two independent respects. In the first place, exemptions from these requirements "are construed

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We therefore find that the evidence is overwhelming that Fields acted as an unregistered broker in violation of Section 15(a)(1) of the Exchange Act.

IV.

In scattershot fashion, Fields argues for the first time in his reply brief that the conduct of the proceedings by the law judge denied him due process. These contentions are waived;[115] they also are devoid of merit.

Denial of a continuance to obtain counsel: Fields argues that the law judge's denial of his request for a continuance to obtain counsel deprived him of due process. We have carefully reviewed the record and find no basis for relief. We issued the Order Instituting Proceedings in this matter on January 4, 2012. On January 6, the law judge issued a scheduling order, attached to which was a document informing Fields that he was "entitled to be represented by counsel of [his] choice" and "encourage[d] . . . to retain legal counsel." The document also reminded Fields that "[a]ll parties, including pro se litigants, are expected to be familiar with and abide by the applicable procedural Rules." The hearing was ultimately set for May 21, 2012. That morning, immediately before the hearing was to commence, Fields for the first time sought a continuance so that he could "to try to hire an attorney." By Fields's own account, he did not take any steps to obtain counsel until 30 days before the hearing. The law judge denied Fields's request for a continuance on the ground that it came too late.

"We have stated that our inquiry on review of a denial of a postponement or continuance is whether the denial constituted an unreasoning and arbitrary insistence upon expeditiousness in

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narrowly," and Fields has failed to carry his "burden of demonstrating [his] entitlement to an exemption." *Kunz*, 2002 WL 54819, at *7. For example, Fields has not demonstrated that his offers were limited to only accredited investors or that they satisfied the conditions for exemption under Regulation D or Section 4(2) of the Securities Act. *See supra* note 78; 17 C.F.R. § 230.501 (defining accredited investor); *id.* §§ 230.502 (general conditions for all exemptions under Regulation D), 230.504-.506 (specific exemptions); *SEC v. Murphy*, 626 F.2d 633, 645 (9th Cir. 1980) (four-factor test for exemption under Section 4(2)). Moreover, even if an exemption were applicable, that at most would mean that the *sales of the securities* themselves need not be registered—not that a person (such as Fields) attempting to engage in those securities transactions was exempt from registration as a broker. *See, e.g.*, 17 C.F.R. § 230.500 ("Regulation D relates to transactions exempted from the registration requirements of [S]ection 5 of the Securities Act . . . Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws.").

[115] Under our Rules of Practice, "[a]ny exception to an initial decision not stated in the petition for review . . . . may, at the discretion of the Commission, be deemed to have been waived." Rule of Practice 410(b), 17 C.F.R. § 201.410(b). Moreover, arguments for reversal not made in the opening brief are waived because "[r]eply briefs shall be confined to matters in opposition briefs of other parties." Rule of Practice 450(b), *id.* § 201.450(b).

the face of a justifiable request for delay."[116] Fields's eleventh-hour bid for a continuance to obtain counsel plainly did not constitute a "justifiable request for delay," especially in view of his conceded inaction on that front in the period leading up to the hearing. Fields had almost four months to find a lawyer from when he received the OIP on January 31, 2012.[117] "[W]hile a respondent has the right to be represented by counsel, the law does not require endless postponements of judicial proceedings while respondents attempt to secure legal representation."[118] Under the circumstances, we find no error in the law judge's decision to deny Fields's motion for a continuance.[119]

Delay in issuance of initial decision: Fields asserts without elaboration that the "7 month delay in the Administrative Law Judge's decision" from the completion of the hearing was unlawful. We disagree. The initial decision was issued on December 5, 2012, within 300 days of February 21, 2012, the date that Fields effectively waived service of the OIP by filing an answer.[120] We have rejected similar arguments for dismissal even in the face of far longer delays.[121] Fields has "not even hinted at the existence" of any sort of "lackadaisical conduct on

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116 *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 WL 281105, at *35 (Jan. 31, 2008) (quotation marks omitted).

117 In fact, Fields has been aware of the issues raised in this proceeding since May 25, 2011, when the Division first requested documents from him. Moreover, at a June 17, 2011 investigative interview, Fields was specifically advised that he had the right to be represented by counsel.

118 *Dearlove*, 2008 WL 281105, at *35 n.155 (quotation marks omitted).

119 *See also David Post*, Exchange Act Release No. 37613, 1996 WL 498554, at *3 (Aug. 28, 1996) (finding that the hearing board acted "within its discretion in refusing to continue the hearing indefinitely to give [the pro se respondent] the opportunity to retain counsel" when he had "four weeks between notice of the hearing and the hearing date"); *Underhill Sec. Corp.*, Exchange Act Release No. 7668, 42 SEC 689, 1965 WL 87065, at *8 (1965) (affirming denial of requested continuance when need was occasioned by the respondents' "own dilatory conduct").

120 The OIP specified that the initial decision was to be filed within 300 days from the date of service of the OIP. *Cf.* Rule of Practice 360(a)(2), 17 C.F.R. § 201.360(a)(2) (noting that such "deadlines confer no substantive rights "). The service copy of the OIP was mailed to Fields via U.S. Express Mail on January 4, 2012 to the address that Fields provided in his registration forms filed with the Commission. The U.S. Postal Service unsuccessfully attempted delivery, and the mailing was unclaimed. The Division then hired a process server to attempt to serve Fields at his registered address and at a nearby address to which Fields's neighbors directed the process server; these attempts, too, were unsuccessful. It appears that Fields eventually obtained the OIP from the Commission's website upon his return from an out-of-country trip at the end of January 2012 and filed an answer that did not challenge the sufficiency of service.

121 *Feeley & Wilcox Asset Mgmt. Corp.*, Exchange Act Release No. 48607, 2003 WL 22316308, at *2 (Oct. 9, 2003) (two-year delay).

the part of the Commission or of any improper reason for the delay" that might conceivably present grounds for abating the proceedings.[122] Nor has Fields "suggested, let alone demonstrated, as [he] would be required to do, any prejudice to [him] or to [his] ability to defend [himself] caused by the allegedly undue delay."[123]

Hearsay and denial of the right to cross-examination: Fields also argues that the Division introduced inadmissible evidence in the form of hearsay by a "witness that [he] was not able to cross examine." Fields's brief does not identify the challenged statements (or the individual who supposedly made them) and it does not appear that Fields made a contemporaneous objection to any testimony on hearsay grounds at the hearing.[124] Our review of the record also shows that the law judge gave Fields great latitude in cross-examination of the Division's expert, the only witness (other than Fields himself) who testified at the hearing. In any event, "hearsay is admissible in administrative proceedings, and we evaluate such evidence based on its probative value, its reliability, and the fairness of its use."[125] Fields does not argue that the (unidentified) testimony lacks reliability or probative force. Finally, and in any event, our de novo review cures any evidentiary error that the law judge may have made.[126]

Malicious prosecution: Fields asserts without elaboration that he was the victim of "malicious prosecution." To establish a claim for selective prosecution, the respondent must demonstrate not only that he was "unfairly singled out," but also that his "prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally-protected right."[127] Fields has not alleged any facts, nor can we find any in the record before us, that suggest he was singled out or that his prosecution was motivated by such considerations.

In short, we find no merit to Fields's contentions that he was deprived of due process.

V.

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[122] *Id.* (quotation marks omitted).

[123] *Id.*

[124] *Cf.* Rule of Practice 321(a), 17 C.F.R. § 201.321(a) ("Objections to the admission . . . of evidence must be made on the record . . . ."). The law judge *sua sponte* identified one of the Division's proffered exhibits as containing hearsay, and the Division agreed that it would not move that exhibit into evidence.

[125] *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *11 (Sept. 13, 2010).

[126] *Dearlove*, 2008 WL 281105, at *10.

[127] *John B. Busacca III*, Exchange Act Release No. 63312, 2010 WL 5092726, at *13 (Nov. 12, 2010) (quotation marks omitted).

We now turn to the issue of sanctions. "[I]n determining an appropriate sanction in the public interest, we consider the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations."[128] Fields principally argues that sanctions are unwarranted because there "was no securities fraud," the prime bank instruments he offered were real, and the proceedings against him were "all a lie orchestrated by the Division." For the reasons set forth above, we have found that Fields willfully committed violations of the securities laws, and we conclude that these violations warrant the imposition of stringent sanctions.

A. Cease-and-Desist Order

Section 8A(a) of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act authorize us to impose a cease-and-desist order upon a person who "is violating, has violated, or is about to violate" any provision of these statutes or any rule or regulation thereunder.[129] "In determining whether a cease-and-desist order is an appropriate sanction, we look to whether there is some risk of future violations," and even a "single egregious violation can be sufficient to indicate some risk of future violation."[130] Indeed, "[i]n the ordinary case, and absent evidence to the contrary, a finding of past violation raises a risk of future violation sufficient to support our ordering a respondent to cease and desist."[131] Fields made numerous material misrepresentations and omissions to prospective investors, such as his repeated pretensions to have access to nonexistent prime bank instruments. Moreover, as his sole argument that a cease-and-desist order is unwarranted, he continues to insist that he has "proven beyond a reasonable doubt that the financial instruments do actually exist." Given Fields's "lack of recognition of the wrongful nature of [his] conduct," we find that there is a sufficient risk that he will commit future violations, and that the public interest warrants imposing a cease-and-desist order.[132]

B. Bar Order

Section 925 of the Dodd-Frank Act enlarged the scope of bars available in administrative proceedings by authorizing us to impose collateral bars—that is, bars prohibiting individuals

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[128] *E.g.*, *John A. Carley*, Exchange Act Release No. 57246, 2008 WL 268598, at *21 (Jan. 31, 2008).

[129] 15 U.S.C. §§ 77h-1(a), 78u-3, 80b-3(k).

[130] *Dolphin & Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 WL 1976000, at *15 (July 13, 2006), *pet. denied*, *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634 (D.C. Cir. 2008).

[131] *Fundamental Portfolio Advisors, Inc.*, Exchange Act Release No. 48177, 2003 WL 21658248, at *18 (July 15, 2003).

[132] *Johnny Clifton*, 2013 WL 3487076, at *15.

from associating in capacities other than those in which the respondent was associated at the time of the misconduct.[133] Thus, as amended, Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act authorize us to bar a person who has willfully violated any provision of the Securities Act, Exchange Act, Investment Advisers Act, or Investment Company Act from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if we find such a sanction to be in the public interest.[134] Section 9(b) of the Investment Company Act authorizes us to prohibit any person from serving or acting in certain capacities with respect to an investment company when similar conditions are satisfied.[135]

Although the Division sought the full breadth of collateral bars available under Dodd-Frank, the law judge did not grant its request—Fields was barred only from association with any broker, dealer, investment adviser, municipal securities dealer, transfer agent, or investment company, and not from association with a municipal advisor or nationally recognized statistical rating organization. The initial decision does not explain the basis for this decision. The Division did not appeal the initial decision and neither party has addressed the scope of the bar on appeal. Nonetheless, as our order granting Fields's petition for review makes clear, we have determined on our own initiative to review the sanctions imposed pursuant to Rule of Practice 411(d), including the scope of the bar.[136]

Having done so, we find that imposition of a collateral bar in all capacities is in the public interest. As we have held, "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws."[137] Fields's fraudulent conduct was egregious and recurrent. He repeatedly tried to broker transactions with potential investors involving nonexistent prime bank securities, and this by itself has warranted the imposition of a bar in prior cases.[138] He deceived potential clients about

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133 *Id.* at *13.

134 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(6), 80b-3(e)(5), 80b-3(f); *see, e.g.*, *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *5 (Dec. 13, 2012); *John A. Carley*, 2008 WL 268598, at *21-22.

135 15 U.S.C. § 80a-9(b)(2); *see, e.g.*, *Brendan E. Murray*, Advisers Act Release No. 2809, 2008 WL 4964110, at *10 (Nov. 21, 2008).

136 *See* Order Granting Petition For Review and Scheduling Briefs, at 1 (Jan. 18, 2012); 17 C.F.R. § 201.411(d). We took a similar course in *Alfred Clay Ludlum, III*, 2013 WL 3479060, at *4 n.34, *5 n.56.

137 *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003).

138 *E.g.*, *Schmidt*, 2002 WL 89028, at *9 (imposing a bar in light of the respondent's "repeated misrepresentations" about "fraudulent scheme that purported to lease non-existent T-Bills"); *Kaiden*, 1999 WL 507860, at *8 (imposing a bar in light of the respondent's "refus[al] to

(continued on next page)

AFA's background, assets under management, operational experience, and size. There is no question, moreover, that his conduct was willful. Fields admitted that he intended to make, and was solely responsible for, all of the representations in his social media postings and on his websites. He has no regrets—"[n]one at all," Fields proclaims—for his conduct. Further, as set forth in our discussion of scienter, the wrongfulness of Fields's conduct was obvious and manifested a high degree of scienter.[139] Fields "ignored numerous red flags," and his "failure to conduct a searching inquiry . . . evinces a disregard for regulatory requirements that calls into serious question [his] ability to function as [a] securities professional[]."[140]

Moreover, it is apparent from Fields's testimony at the hearing and his briefing to us that he remains unwavering in the belief that the bank guarantees and mid-term notes he offered actually exist. He testified that the "secondary market [for such prime bank instruments] is everywhere" and that, going forward, he would continue to "buy them for [him]self." He has made clear that it is his "aspiration[]" and intent to remain in the securities industry as an investment adviser and broker if given the chance. He insists that he still has a contract to broker the sale of $50 billion in U.S. Treasury Strips and that he has the "potential to do [that] deal."[141] That even now, Fields does not appear to "grasp the wrongful nature of [his] conduct,"[142] convinces us that permitting him to remain in the securities industry in any of the capacities covered by Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) "will present opportunities for future violations."[143] For essentially the same reasons, permitting Fields to associate with or provide services to investment companies also would present an unacceptably high risk of future violations.[144]

(. . . continued)

acknowledge that . . . prime bank instruments were fictitious" and "complete lack of appreciation of his obligations under the securities law").

139 *Murray*, 2008 WL 4964110, at *10.

140 *Carley*, 2008 WL 268598, at *22.

141 Fields was adamant on this point at the hearing, insisting "I do have a 50 billion dollar contract."

142 *Murray*, 2008 WL 4964110, at *10; *Schmidt*, 2002 WL 89028, at *9 ("He has not taken responsibility for his actions and appears to lack contrition."); *see also Lawton*, 2012 WL 6208750, at *12 & n.64 ("[F]ailure[] to recognize the wrongfulness of his conduct presents a significant risk that, given th[e] opportunity, he would commit further misconduct in the future.").

143 *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 (Feb. 13, 2009).

144 *E.g.*, *Murray*, 2008 WL 4964110, at *10 (imposing bar under both Section 9(b) of the Investment Company Act and Section 203(f) of the Advisers Act for the same underlying misconduct).

We do not find mitigation in Fields's sundry contentions that a bar will "destroy his ability to invest in his family's future" and the "future of his grandchildren," that a bar will impair Fields's purported investments in a Ghanaian airline, and that a bar is too severe a penalty given that he has "several friends who are investment advisers." How a respondent might in other respects suffer as a result of his or her misconduct or the sanctions that follow—*e.g.*, loss of money, unemployment, or harm to reputation—is not a mitigating factor.[145] The fact that Fields apparently never profited directly from his misrepresentations also does not justify a reduced sanction in light of his serious misconduct.[146] In short, the "hardship [Fields] asserts he has and will continue to suffer is outweighed by the necessity of ensuring that public investors are protected from him."[147]

Finally, we note that some of Fields's misconduct predated the July 21, 2010 enactment of the Dodd-Frank Act. That is immaterial to our determination of sanctions, however, because we have held that collateral bars premised upon pre-Dodd-Frank conduct are not impermissibly retroactive.[148] In any event, we would find that Fields's post-Dodd-Frank acts of misconduct—for example, making postings on LinkedIn that solicited potential buyers of bank guarantees and mid-term notes, which continued until at least "[s]ometime in 2011," and maintaining the AFA and Platinum websites, which were active until at least May 20, 2011—are by themselves sufficient to warrant a collateral bar under the circumstances of this case.

More than a decade ago, we observed that "a person who refuses to acknowledge the fictitious nature of prime bank instruments has no place in the securities industry."[149] That is all the more true today given the opportunities to reach a large audience that have been created by new avenues of communication. As the Division's expert put it, social media makes perpetrating prime bank schemes especially easy and inexpensive since the technology can automatically make connections to potential victims. Given Fields's egregious and deliberate pattern of violative conduct and his unwillingness to acknowledge the wrongfulness of this conduct or to offer credible assurances against future violations, "we find ample evidence of his ongoing unfitness and risk that he would engage in further misconduct if given future opportunities in the

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145 *Clifton*, 2013 WL 3487076, at *16 n.116; *Ashton Noshir Gowadia*, Exchange Act Release No. 40410, 53 SEC 786, 1998 WL 564575, at *4 (Sept. 8, 1998).

146 *Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 WL 358737, at *26 & n.66 (Feb. 1, 2010), *pet. denied*, 647 F.3d 1156 (D.C. Cir. 2011).

147 *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *13 (June 14, 2013) (rejecting as mitigating the respondent's claims "that he has been out of work, he cannot find employment, and his family is suffering"); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *7 (Dec. 22, 2008) ("We also do not consider mitigating the economic disadvantages [the respondent] alleges he suffered because they are a result of his misconduct.").

148 *Clifton*, 2013 WL 3487076, at *13; *Lawton*, 2012 WL 6208750, at *10.

149 *Kaiden*, 1999 WL 507860, at *7.

industry."[150] Thus, we have determined to bar Fields from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and to prohibit him from serving or acting in any of the statutorily enumerated capacities with respect to an investment company.[151] Imposing such a bar serves the public interest and will protect investors from the threat that Fields poses and, just as importantly, deter others from engaging in the same serious misconduct.[152]

C. Revocation of Registration

Section 203(e) of the Advisers Act authorizes us to revoke an investment adviser's registration if it, or any person associated with it, has willfully violated the securities laws and if revocation is in the public interest.[153] We may also revoke an investment adviser's registration if it "has willfully made or caused to be made in any application for registration or report required to be filed with the Commission . . . any statement" that was materially false or misleading and revocation is in the public interest.[154] We find that revocation of AFA's registration as an investment adviser is appropriate and in the public interest. Fields (who is AFA's sole proprietor) committed multiple violations of the securities laws; AFA's Form ADV contains numerous material misrepresentations; and AFA, which does not have any assets under management, is statutorily prohibited from registering with the Commission by Section 203A(a) of the Advisers Act.[155] Moreover, there can be no question that these violations were willful, given that Fields undisputedly intended to submit the registration forms with full knowledge of the misstatements contained therein. Fields himself concedes that AFA's registration should be

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150 *Lawton*, 2012 WL 6208750, at *13 (imposing full collateral bar); *see also Clifton*, 2013 WL 3487076, at *15 (imposing full collateral bar "[g]iven the scope and severity of [the respondent's] misconduct," which "evidences an unfitness to participate in the securities industry that goes beyond the professional capacity in which he was acting when he engaged in the misconduct underlying these proceedings"); *Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 WL 3479060, at *5-6 (July 11, 2013) ("imposing a broad industry-wide bar" given the respondent's "extended, egregious violations of the law," which "demonstrate[] that allowing him to enter the securities industry in *any capacity* would create too great a risk that future efforts to detect securities violations would be impaired, causing harm to the public") (quotation marks omitted; emphasis in original).

151 15 U.S.C. § 80a-9(b)(2).

152 *See Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) ("[G]eneral deterrence . . . may be considered as part of the overall remedial inquiry[.]") (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)).

153 15 U.S.C § 80b-3(e)(5).

154 *Id.* § 80b-3(e)(1).

155 *Id.* § 80b-3A(a).

revoked because AFA does not have the "required qualifications to meet the standards of registration."

D. Civil penalties

Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, and Section 203(i) of the Advisers Act authorize us to impose civil money penalties when a respondent has violated a provision of each respective statute, and assessing such penalties is in the public interest.[156] In determining whether a penalty is in the public interest, we consider (1) whether the violation involved fraud, deceit, or 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.[157] If we determine that the imposition of a civil penalty is in the public interest, a three-tier system establishes the maximum such penalty that may be imposed for each violation found. For each act or omission involving fraud or deceit that additionally resulted in (or created a significant risk) of substantial losses to other persons or that resulted in substantial gains to the wrongdoer, a third-tier penalty may be warranted.[158] For the time period at issue here, the maximum third-tier penalty for a natural person was $150,000 for each violation.[159]

The law judge prescribed a single, third-tier civil penalty of $150,000. The Division's position is that a "$150,000 penalty is appropriate." Fields himself agrees that the Commission should "keep the civil money sanction as it is at $150,000," although elsewhere he asserts in passing that the penalty should "not be as excessive as that which is handed down from a judge to a convicted murderer." We understand this to be an argument that the penalty is disproportionate to the gravity of Fields's misconduct, and, so construed, reject it. It is clear that "disproportionate penalties are irrelevant to the appropriateness of a sanction if the sanction is

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[156] 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i). Section 929P(a) of the Dodd-Frank Act conferred upon the Commission the authority to impose civil penalties in cease-and-desist proceedings. In such proceedings, no additional findings of willfulness are required; we need find only that the respondent "is violating or has violated" any provision of the applicable statute or "is or was a cause" of such violation to impose a civil penalty. We have no occasion in this case to address any retroactive effect of Section 929P because we find that Fields's misconduct postdating the enactment of the Dodd-Frank Act standing alone warrants the imposition of civil penalties and, moreover, that Fields's misconduct throughout was willful.

[157] 15 U.S.C. §§ 78u-2(c), 80b-3(i)(3); *see, e.g.*, *Fundamental Portfolio Advisors, Inc.*, 2003 WL 21658248, at *17.

[158] 15 U.S.C. §§ 77h-1(g)(2)(C), 78u-2(b)(3), 80b-3(i)(2)(C).

[159] 17 C.F.R. § 201.1004 sets forth the inflation-adjusted maximum civil penalty amounts for violations occurring after March 3, 2009 but before March 5, 2013.

within the SEC's discretion."[160] We note, in any event, that we have imposed a third-tier civil penalty in other cases involving schemes to offer nonexistent securities.[161]

Considering all the circumstances, we find that a penalty is in the public interest and that a third-tier penalty is warranted because Fields's misconduct involved fraud and created a significant risk of losses to prospective investors. Fields's social media postings reached thousands, if not more, of potential victims.[162] A credulous individual taken in by them might have pursued an investment in nonexistent prime bank instruments; investors not infrequently have been deceived by similar prime bank schemes: The Federal Reserve, for example, reports that prime bank frauds "have defrauded investors out of nearly $10 billion."[163] The fortunate happenstance that nobody *actually* lost money in this case does not negate the significant *risk* of substantial losses that Fields's violations created.[164] The severity of Fields's misconduct

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[160] *Seghers v. SEC*, 548 F.3d 129, 135 (D.C. Cir. 2008); *cf. Craig*, 2008 WL 5328784, at *6 ("[B]ecause the appropriate remedial action depends on the facts and circumstances of each particular case, the proper sanction cannot be precisely determined by comparison with action taken in other cases.") (quotation marks omitted).

[161] *Schmidt*, 2002 WL 89028, at *10 & n.52 (finding that a "fraudulent and deceitful" scheme to lease fictional securities was "a classic example of the type of behavior against which [the securities laws were] intended to protect" and that a "severe penalty . . . is necessary").

[162] Although the statutory text provides that a penalty may be imposed for "each act or omission," it leaves the precise unit of violation undefined. Throughout, this case has been litigated on the Division's premise that all of Fields's misconduct "may be considered as one course of action" constituting a single act for purposes of assessing a civil penalty. For present purposes, and because no party has urged a different view, we accept this position. *Cf. Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012). We accordingly have no occasion to determine whether an alternative way of tallying up the number of violative acts or omissions—for example, counting each distinct violative posting or each distinct potential investor to whom Fields made misrepresentations—might also present an appropriate basis for the determination of civil money penalties. *See generally Brown*, 2012 WL 625874, at *17 & n.59 ("[T]his was not a single act that defrauded multiple customers, but rather separate interactions, where each customer presented a unique opportunity to violate the securities laws."); *Guy P. Riordan*, 2009 WL 4731397, at *22 (imposing separate civil money penalty for each violative transaction).

[163] *See* Board of Governors of the Federal Reserve System, *Fictitious Instrument Fraud*, *supra* note 36; *see, e.g.*, *United States v. Monach*, 429 F. App'x 179, 179 (3d Cir. 2011) (victim lost $3 million); *Lyttle*, 538 F.3d at 604 (victims lost $32 million); *United States v. Dazey*, 403 F.3d 1147, 1158 (10th Cir. 2005) (victims lost $14 million); *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 187-88 (victims lost $2.6 million); *Secure Capital Funding Corp.*, 2013 WL 3286234, at *2 (victims lost $4 million); *Graulich*, 2013 WL 3146862, at *1 (victims lost $13 million).

[164] *Clifton*, 2013 WL 3487076, at *16; *Kornman*, 2009 WL 367635, at *9 (declining to give mitigating weight to fact that "no particular investor was directly harmed by [the] conduct").

underscores the need for a very significant penalty to deter Fields and others from recklessly peddling nonexistent securities.[165] We accordingly find that a penalty of $150,000 is appropriate and in the public interest.

An appropriate order will issue.[166]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN, and PIWOWAR).

Brent Fields
Secretary

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[165] We note that Fields asserts without providing any evidentiary support that he has declared bankruptcy and owes about $120,000 in outstanding tax liabilities. Fields does not claim to be financially unable to pay a civil penalty, however, and we would, at any rate, decline to exercise our discretion to waive the penalty given that his "misconduct is . . . egregious." *Trautman*, 2009 WL 6761741, at *24.

[166] 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

SECURITIES ACT OF 1933
Release No. 9727 / February 20, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74344 / February 20, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4028 / February 20, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31461 / February 20, 2015

Admin. Proc. File No. 3-14684

In the Matter of

ANTHONY FIELDS, CPA d/b/a
ANTHONY FIELDS & ASSOCIATES and d/b/a
PLATINUM SECURITIES BROKERS

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Anthony Fields cease and desist from committing or causing any violations or future violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933, Section 15(a) of the Securities Exchange Act of 1934, and Sections 203A, 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940, and Rules 206(4)-1(a)(5) and 206(4)-7 thereunder; and it is further

ORDERED that Anthony Fields be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that Anthony Fields is prohibited, permanently, from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or

principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and it is further

ORDERED that the investment adviser registration of Anthony Fields & Associates be revoked; and it is further

ORDERED that Anthony Fields pay a civil money penalty in the amount of $150,000.

Payment of the civil money penalty shall be made by United States postal money order, certified check, bank cashier's check, wire transfer, or bank money order; payable to the Securities and Exchange Commission. The payment and a cover letter identifying the respondent and file number of this proceeding shall be mailed or hand-delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., 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.

By the Commission.

Brent Fields
Secretary