UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9762 / April 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74836 / April 29, 2015

Admin. Proc. File No. 3-15211

In the Matter of

FRANCIS V. LORENZO
c/o Robert G. Heim
Meyers & Heim LLP
444 Madison Ave., 30th Floor
New York, NY 10022

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

A formerly registered representative committed securities fraud by sending two potential investors emails that he knew contained false and misleading information about his firm's client. *Held*, it is in the public interest to bar respondent from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock; order him to cease and desist from committing or causing any violations or future violations of the provisions violated; and order him to pay a civil monetary penalty of $15,000.

APPEARANCES:

Robert G. Heim, for Francis V. Lorenzo.

Alex Janghorbani and *Jack Kaufman,* for the Division of Enforcement.

Appeal filed: January 27, 2014
Last brief received: May 7, 2014
Oral argument: March 30, 3015

I.

Francis V. Lorenzo, formerly a registered representative, appeals an administrative law judge's finding that he violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 by sending false and misleading statements to prospective investors.[1] For these violations, the law judge barred Lorenzo from the securities industry, ordered him to cease and desist from violating the antifraud provisions, and ordered him to pay a third-tier civil monetary penalty of $15,000. The Division cross-appeals the imposition of the civil penalty and asks that we increase the penalty to "at least $100,000."

The charges against Lorenzo stem from emails he sent to retail customers that contained false and misleading statements about a debenture offering by his client, Waste2Energy Holdings, Inc. ("W2E"). The emails promised the customers that their investment would have three "layers of protection": (i) that W2E had more than $10 million "in confirmed assets"; (ii) that W2E had "purchase orders and [letters of intent] for over $43 mm in orders"; and (iii) that Lorenzo's employer, Charles Vista, LLC, had "agreed to raise additional monies to repay these Debenture holders (if necessary)." Lorenzo admitted at the hearing that he knew each of these statements was false and/or misleading when he sent them. For the reasons below, his conduct violated the antifraud provisions of the federal securities laws and warrants imposition of an industry-wide bar, a cease-and-desist order, and a $15,000 civil penalty. Our findings are based on an independent review of the record.[2]

II.

Lorenzo was director of investment banking at Charles Vista, LLC, a registered broker-dealer owned by Gregg Lorenzo,[3] from February 2009 through February 2010 (the relevant time

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[1] *Francis V. Lorenzo*, Initial Decision Release No. 544, 2013 WL 6858820 (Dec. 31, 2013).

[2] We note that Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral argument transcript before such participation. Commissioner Aguilar has made the requisite review.

[3] Gregg Lorenzo is not related to the respondent. We will refer to the respondent as "Lorenzo" and to Gregg Lorenzo as "Gregg Lorenzo."

here). As Lorenzo described it, Charles Vista was "a small boiler room." Its registered representatives, Lorenzo explained, engaged in high-pressure sales tactics, were "not being a hundred percent accurate in their presentations" to brokerage clients, and seemed to be "stretching the truth."[4] Lorenzo's only investment banking client during the relevant time was W2E. Lorenzo's responsibilities included preparing offering documents for W2E; making sure the company made all material disclosures; and conducting due diligence, including reviewing the company's financial statements and public filings.

A. Lorenzo knew that W2E was in dire financial condition.

According to W2E's Form 8-K (filed June 3, 2009), the company developed technology for customers "to convert[] biomass or other solid waste streams traditionally destined for landfill or incineration into clean renewable energy." But according to Lorenzo, W2E's technology "didn't really work" and the company's "financial well-being was horrible." As the company explained in its Form 8-K, W2E had been "operating at a substantial operating loss each year since [its] inception," had "a substantial accumulated deficit," and expected "to continue to incur substantial losses for the foreseeable future." The company's unaudited financial statements, which were included in the Form 8-K, disclosed that the company had total assets (as of December 31, 2008) of approximately $14 million and total liabilities of approximately $9.5 million. Of its approximately $14 million in total assets, W2E attributed more than $10 million to "intangibles," which consisted of intellectual property. The company's Form 8-K further disclosed that W2E's business operations depended on generating substantial revenues from one customer, Ascot Environmental Ltd., which subjected W2E to "significant financial and other risks in the operation of [its] business." The company also disclosed that its independent registered auditors had "expressed substantial doubt about [its] ability to continue as a going concern."

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[4] Charles Vista and Gregg Lorenzo settled related charges against them in November 2013. *Gregg C. Lorenzo*, Securities Act Release No. 9480, 2013 WL 6087352 (Nov. 20, 2013) (Settlement Order). Before that settlement, on June 17, 2013, Charles Vista had already withdrawn its registration as a broker-dealer, and FINRA cancelled Charles Vista's membership on July 31, 2013, for failure to pay outstanding fees. We take official notice of this information on BrokerCheck, an electronic database maintained by FINRA and available at http://brokercheck.finra.org. *See* 17 C.F.R. § 201.323 (rule of practice relating to official notice). On June 18, 2013, FINRA also permanently barred Gregg Lorenzo from association with any member for his refusal to comply with multiple requests to appear for an on-the-record interview. *See* http://brokercheck.finra.org (last visited April 28, 2015).

Lorenzo testified that he saw the company's Form 8-K shortly after the company issued it and was concerned at the time that W2E's purported intangible assets were not actually worth $10 million. He instead believed that the intangibles were a "dead asset." There was "no way," Lorenzo testified, that the company could "get even close to $10 million" for the assets, and the company would be "lucky" to receive $1 million for the assets. Lorenzo also thought it was significant that W2E's financial statements were unaudited because "there is way too much risk for investors" without an audit.

B. Lorenzo helped prepare the private placement memorandum for W2E's convertible debentures offering.

By mid-August 2009, W2E was finalizing an audit of its financial statements for the fiscal year ending March 31, 2009, so that those statements could be included in its Form 10-Q. Around the same time, the company also began preparing a private placement of up to $15,000,000 in 12 percent convertible debentures.[5] Charles Vista was the exclusive placement agent for the debenture offering, for which the firm was to be paid nearly 20 percent of the offering proceeds—an amount Lorenzo described as "exorbitant." Lorenzo testified that he was promised seven to nine percent of any money he raised from the offering, but that he ultimately received only one percent of the money he raised.

Lorenzo helped W2E prepare the private placement memorandum ("PPM"). At least twice during that process, Lorenzo asked W2E to disclose the $10 million of intangible assets in its PPM because he thought it was "material." On August 26, 2009, Lorenzo emailed edits and comments regarding the PPM to the company, writing that, "[w]e want to mention that the company has IP and Intangibles valued at $10,038,558" (emphasis in original). Lorenzo testified that he based that number on the unaudited financial statements in W2E's Form 8-K. On September 1, 2009, Lorenzo emailed additional edits to W2E, again asking that they include a reference to the company's intangible assets. But this time Lorenzo left the value of the assets blank because, he testified, he was no longer sure what the assets were worth. Lorenzo also admitted that, as early as April 2009, he began repeatedly telling Gregg Lorenzo not to sell W2E's debentures as being collateralized by the $10 million asset. Lorenzo explained that he did so because he knew that the assets "provided no protection" to investors and that, if the company defaulted on the debentures, investors would not be able to recoup their money through the liquidation of those assets.

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[5] Debentures are "debt secured only by the debtor's earning power, not by a lien on any specific asset." BLACK'S LAW DICTIONARY 330 (9th ed. 2009), *available at* Westlaw Blacks.

Lorenzo did not recall that anyone from W2E ever responded to his requests to disclose the intangible assets, and ultimately W2E did not disclose a dollar value for its intangible assets in its final PPM, which was dated September 9, 2009. Instead, W2E disclosed only that it had "a significant IP portfolio." The company also reiterated many of the disclosures from its earlier Form 8-K, including that the company "had significant operating losses," did "not expect to be profitable for at least the foreseeable future," and could not "predict when we might become profitable, if ever." The company further stated in the PPM that it was "wholly reliant on the net proceeds from this Offering to fund [its] proposed business" and that, "[i]f less than the Maximum Offering [$15 million] is sold, [it] will have an immediate need for substantial additional capital and may only have enough capital for less than one month of proposed operations." The company added: "If we are unable to raise substantial capital, investors will lose their entire investment." Lorenzo testified that he received and reviewed the final PPM.

C. W2E announced a complete write down of its intangible assets.

On October 1, 2009, approximately one month after finalizing the PPM, W2E filed an amended Form 8-K and Form 10-Q. Those filings contained audited financial statements for the fiscal year ended March 31, 2009, and reported a complete write-off of W2E's $10 million intellectual property asset and $496,594 in good will. The company stated that, as of March 31, 2009, its total assets were only $370,552 and that its sole contract (with Ascot Environmental) was causing it to incur a net loss.

Lorenzo testified that, although it was his responsibility to review W2E's filings, he only "skimmed the filings and [he] missed the write off." Lorenzo nevertheless acknowledged that, on October 5, four days after the company filed its financial statements disclosing the write down, W2E's CFO sent Lorenzo an email, stating: "The accumulated deficit we have reported is due to three primary issues [including] . . . . [w]rite off of all of our intangible assets . . . of about $11 million." (emphasis in original). Lorenzo admitted that he reviewed the email and therefore understood, by at least October 5, 2005, that the company had written off the $10 million in intangible assets.

D. Lorenzo emailed two prospective investors about W2E's debenture offering, falsely assuring them of three "layers of protection."

On October 14, 2009, Lorenzo sent a one-page email to two retail customers—Vishal Goolcharan and William Rothe—entitled "W2E Debenture Deal Points." The emails stated that, "[a]t the request of Adam Spero and Gregg Lorenzo, the Investment Banking division of Charles

Vista has summarized several key points of the Waste2Energy Holdings, Inc. Debenture Offering."[6] The emails then told the investors, in bold type, "Please read the Offering Memorandum, including all the 'Risk Factors,'" but Lorenzo acknowledged that he did not know whether either customer ever actually saw the PPM because he never sent them one.

Lorenzo's emails next summarized the offering's basics, including the debenture's term and the interest rate, and promised that investors would be paid first in the event of liquidation. The emails then assured investors:

> There are 3 layers of protection:
>
> (I) The Company has over $10 mm in confirmed assets
> (II) The Company has purchase orders and LOI's [sic] for over $43 mm in orders
> (III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary).

After noting the debenture holders' right to convert their debt into common stock and to receive a warrant to purchase shares, the emails concluded, "Please call with any questions—Truly, Francis V. Lorenzo."

Lorenzo admitted that, at the time he sent the emails, he knew that the statements about all three layers of supposed protection were false, misleading, or both. Lorenzo acknowledged, for example, that the statement about the company having $10 million in confirmed assets "was never true." Lorenzo testified that he took the $10 million number from the company's unaudited financial statements in its June 2009 Form 8-K, which stated that the company had $10 million in intangible assets. Yet Lorenzo admitted that this number had never been confirmed by auditors or the company; that he knew by the time he sent the emails that the company had written off those assets; and that he himself did not believe the company's intangible assets had been worth anywhere close to $10 million. Lorenzo also admitted that, before sending the emails, he knew that the $43 million in purported purchase orders and LOIs were based only on a single, non-binding, letter of intent, which did not obligate the potential purchaser (or W2E) to do anything. He further acknowledged that, by sometime in September, he had "lost confidence that this 43 million was ever going to happen." Lorenzo similarly admitted that he knew, at the

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[6] This quote is from the email to Goolcharan. The email to Rothe did not mention Adam Spero, stating only that Gregg Lorenzo had asked the investment banking division to summarize the debenture offering.

time he sent the emails, that Charles Vista had not agreed to raise any additional money to repay debenture investors.

Lorenzo explained his sending the emails as a "mistake." Lorenzo testified that he sent the emails without thinking about the contents: "I don't want to minimize the severity of it but, you know, I just didn't give it much thought at the time. My boss asked me to send these e-mails out and I sent them out." On December 18, 2009, one of the email recipients, Vishal Goolcharan, invested $15,000 in W2E's debenture offering (jointly with Roslyn Parmasad). Lorenzo earned one percent (or $150) from that investment.

E. Lorenzo provided misleading investigative testimony about Gregg Lorenzo, Charles Vista, and W2E's debenture offering.

The Division subsequently launched an investigation into Lorenzo and his employer, Charles Vista and Gregg Lorenzo, during which Lorenzo testified under oath in November 2009. Lorenzo told Commission staff that Gregg Lorenzo was an "honest guy"; that he was proud of what Gregg Lorenzo planned at Charles Vista; and that he and Gregg Lorenzo were working toward their "vision" of building Charles Vista into a "high quality investment banking [d]ivision." Lorenzo further testified that he "believed in" selling W2E's debentures and described the sale as one of several "high quality projects."

Lorenzo's subsequent hearing testimony was far different. As noted above, for instance, Lorenzo described Charles Vista as a boiler room and expressed concern that the firm's registered representatives were not entirely truthful when selling securities. Lorenzo also testified that, by November 2009, "there [was] no way on God's green earth [he] thought Gregg Lorenzo was an honest guy"; that, by October 2009, it was "a stretch" to say that he was proud of the work he and Gregg Lorenzo were doing at Charles Vista; and that he did not think that Charles Vista was a high-quality investment bank. Nor did Lorenzo describe W2E's debenture offering as a high-quality project, instead labeling it a "toxic convertible debt spiral."

Lorenzo testified that he began looking for a new job sometime in October or November 2009 because he had become "unhappy" at Charles Vista. He eventually left Charles Vista in February 2010 and became a managing director at Hunter Wise Securities, LLC, a broker-dealer where Lorenzo focused primarily on arranging funding for both public and private companies. Lorenzo represents that he resigned from this position on April 15, 2014. He is not currently registered.[7]

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[7] *See* http://brokercheck.finra.org (last visited April 28, 2015).

III.

The Division alleges that Lorenzo violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Securities Act Section 17(a) by sending two materially misleading emails to customers. Section 10(b) makes it "unlawful for any person directly or indirectly . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of" Commission rules.[8] Rule 10b-5 implements the Commission's authority under Section 10(b).[9] It does so through three subsections that are "mutually supporting rather than mutually exclusive."[10] The first, Rule 10b-5(a), prohibits "directly or indirectly . . . employ[ing] any device, scheme, or artifice to defraud."[11] The second, Rule 10b-5(b), prohibits "directly or indirectly . . . mak[ing] any untrue statement of a material fact or [omitting] to state a material fact necessary in order to make the statements made . . . not misleading."[12] The third, Rule 10b-5(c), prohibits "directly or indirectly . . . engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[13]

Section 17(a), in turn, makes it unlawful to engage in certain conduct in "the offer or sale of securities."[14] Like Rule 10b-5, Section 17(a) expresses its prohibitions in three "mutually supporting" subsections.[15] Relevant here is Section 17(a)(1), which, like Rule 10b-5(a), prohibits "directly or indirectly . . . employ[ing] any device, scheme, or artifice to defraud."[16] Liability under Section 17(a) and Rule 10b-5 requires a showing of scienter, which is "a mental state

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8 15 U.S.C. § 78j(b).

9 *See John P. Flannery*, Securities Exchange Act Release No. 73840, 2014 WL 7145625, at *10 (Dec. 15, 2014) (citing *United States v. Zandford*, 535 U.S. 813, 816 n.1 (2002)), *appeal docketed*, No. 15-1080 (1st Cir. Jan. 16, 2015).

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

11 17 C.F.R. § 240.10b-5(a).

12 *Id.* § 240.10b-5(b).

13 *Id.* § 240.10b-5(c).

14 15 U.S.C. § 77q(a). We find, and there is no dispute, that all of the statements and omissions at issue here were made in connection with the offer or sale of securities.

15 *Cady, Roberts & Co.*, 1961 WL 60638, at *4.

16 15 U.S.C. § 77q(a)(1).

embracing intent to deceive, manipulate, or defraud."[17] As explained below, we agree with the Division that Lorenzo violated these provisions by knowingly sending materially misleading emails to prospective investors.

A. The emails that Lorenzo sent were misleading.

We first examine whether the emails Lorenzo sent were misleading. There is no dispute that the statement regarding the first layer of protection—that the company had "over $10 mm in confirmed assets"—was misleading. In fact, Lorenzo admitted that this statement had never been true. Lorenzo derived that number from the $10 million in intangible assets listed in the company's unaudited financial statements. But by the time Lorenzo wrote the emails, W2E had written off those assets and disclosed that it had only $400,000 in assets remaining. And Lorenzo himself testified that he did not believe at the time he sent the emails that the company's intangible assets were worth anywhere close to $10 million. Lorenzo's emails to customers stating otherwise were therefore plainly false and would mislead any reader about the state of the company's assets.

The statement regarding the second layer of supposed protection—that the company had "purchase orders and LOI's for over $43 mm in orders"—was also misleading. As Lorenzo testified, this assurance was based on a single, non-binding, letter of intent, which did not obligate the potential purchaser (or W2E) to do anything. Lorenzo argues on appeal that W2E's CEO "believed in the validity of this LOI [and] that it would turn into customer orders." But that assertion is based on Lorenzo's own, self-serving testimony about what W2E's CEO may have believed. And even if that *is* what the CEO believed, it is still only vague speculation that the LOI *could* "turn into customer orders." Lorenzo's written statements promising the prospective investors that the company *had* over $43 million in orders was therefore false and would mislead any reader about the company's future revenue.

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[17] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter may be established through "a heightened showing of recklessness." *Flannery*, 2014 WL 7145625, at *10 n.24. This has been "defined as . . . an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *5 (Dec. 21, 2007); *accord SEC v. Ficken*, 546 F.3d 45, 47–48 (1st Cir. 2008) (finding that Section 17(a)(1), Section 10(b), and Rule 10b–5 require only "a high degree of recklessness" (quotations omitted)); *Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1093 (D.C. Cir. 2005) (finding that Rule 10b-5 requires a showing of extreme recklessness).

The third statement—that Charles Vista had agreed to raise additional money—was also misleading. As Lorenzo admitted, Charles Vista had no such agreement with W2E. Lorenzo nevertheless argues on appeal that the emails' assurance to the contrary was "not an unreasonable statement because Gregg Lorenzo had on a number of prior occasions raised money to pay back debenture holders" and because Gregg Lorenzo had been meeting with other broker-dealers about raising additional funds for W2E. But even if these claims were true, they establish only the theoretical possibility that Charles Vista could have raised additional money to repay investors, not that it had agreed to do so (as Lorenzo's emails claimed). Lorenzo also admitted that, even if Charles Vista *had* agreed to raise additional money, it would have had a difficult time doing so: Charles Vista, Lorenzo explained, did not have "the buying power or resources to properly fund Waste2Energy in order to repay the debentures." Lorenzo's assurance that Charles Vista had agreed to raise additional money was therefore false and would mislead any investor about the prospects of Charles Vista actually raising additional money in the event of W2E's default.

B. The misrepresentations in the emails were material.

We next examine whether the misrepresentations were material. For a misstatement to be material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[18] It does not matter whether "disclosure of the omitted fact would have caused the reasonable investor to change" his behavior.[19]

That standard is met here. Lorenzo's emails concerned an unsecured debt offering by a company in dire financial straits. Yet instead of mentioning any of the substantial risks involved, Lorenzo falsely assured retail customers that their investment would be protected in three different ways.[20] A reasonable investor would have found the accuracy of any one of these

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[18] *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[19] *TSC Indus.*, 426 U.S. at 449.

[20] We note that, while the emails directed the customers to read the PPM (which disclosed some of the risks involved with the offering but not the company's $10 million write-down), Lorenzo never sent them the disclosure document and did not know whether they ever saw it. *Cf. New Jersey Carpenters Health Fund v. Royal Bank of Scotland*, 709 F.3d 109, 127 (2d Cir. 2013) (explaining that "'[t]here are serious limitations on a corporation's ability to charge its stockholders with knowledge of information omitted from a document such as a . . . prospectus on the basis that the information is public knowledge and otherwise available to them'"); *SEC v.*

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promises of protection to significantly alter "the 'total mix' of information made available" given the company's precarious financial state and the offering's unsecured nature.[21] That all three statements were inaccurate—meaning that any investment had essentially no protection—made the misrepresentations all the more material to prospective investors.

C. Lorenzo acted with scienter when sending the materially misleading emails to customers.

We next turn to the question of scienter—namely, whether Lorenzo knew or must have known that his emails were materially misleading.[22] That standard is met here. Regarding the first layer of supposed protection (that the company had "over $10 mm in confirmed assets"), Lorenzo admitted knowing that W2E had written off its $10 million in intangible assets when he sent the emails. Lorenzo also acknowledged that, even before the write-off, he had considered the supposed $10 million in intangibles to be "dead assets" because there was "no way" that W2E could "get even close to $10 million" for them. Lorenzo further admitted that, for more than half a year before sending the emails, he repeatedly told Gregg Lorenzo not to sell the debentures as being collateralized by the intangible assets because he understood that those assets would not protect the customers' investment.

Lorenzo's testimony similarly establishes that he knew or must have known that the statement regarding the second layer of supposed protection (the alleged $43 million in purchase orders and LOIs) was both false and misleading. Lorenzo admitted that, before sending the emails, he knew that the $43 million in purported purchase orders and LOIs were based on only a single, non-binding letter of intent, which did not obligate the potential purchaser (or W2E) to do anything and that, by sometime in September, Lorenzo had "lost confidence that this 43 million

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Morgan Keegan & Co., Inc., 678 F.3d 1233, 1252 (11th Cir. 2012) (rejecting defendant's motion for summary judgment on the "materiality" issue by noting that the "misstatements must be considered in the factual context of a weak, or non-existent, distribution of the written disclosures"). And while W2E previously disclosed the $10 million write-down and lack of other assets in its Forms 8-K and 10-Q, that information was more than six months old when Lorenzo sent the emails. A reasonable investor could therefore believe, as Lorenzo's emails implied, that the company's fortunes had changed in that time—a misimpression furthered by Lorenzo's other false claims about the company's supposedly strong revenue stream of $43 million in purchase orders and letters of intent and Charles Vista's supposed willingness to raise additional funds.

[21] *TSC Indus.*, 426 U.S. at 449.

[22] *See supra* note 17 (defining scienter).

was ever going to happen." He even acknowledged that, while he could not say with "a hundred percent" certainty that the statement was misleading, "I could see it being misleading."

And regarding Lorenzo's third misstatement (Charles Vista's supposed agreement to raise additional money), Lorenzo admitted that, at the time of the emails, he knew that Charles Vista had not agreed to raise any additional money to repay debenture investors. He further acknowledged that, even if such an agreement had existed, he knew, "long before October," that W2E would have had a difficult time raising additional money because Charles Vista had already invested 70 percent of all of its brokerage clients' money in W2E, an amount Lorenzo acknowledged was "way too much." Because of this, Lorenzo admitted, "Charles Vista would not have the buying power or resources to properly fund Waste2Energy in order to repay the debentures." In fact, when asked at the hearing whether his assurance that Charles Vista would raise additional money was misleading, he admitted that "you couldn't hang your hat on it."

Despite this evidence of scienter, Lorenzo asserts on appeal that he had a good faith belief in the truthfulness of his emails and that there is no basis for concluding that he "acted with intent to deceive investors." He claims it was "entirely reasonable" to state that the company had $10 million in confirmed assets because that figure was taken from the company's unaudited financial statements, which had been filed with the Commission. Lorenzo further reasons that it was not reckless for him to have missed the company's subsequent write off because W2E allegedly "buried" that fact in its filings and failed to fulfil a contractual agreement that Lorenzo claimed the company had with Charles Vista to immediately disclose any material changes in W2E's financial condition. The write down "needed to be emphasized," Lorenzo testified, "not minimized and not hidden in a regulatory document. There [are] no disclosures anywhere, anywhere that this asset may have been written off to 95 percent. None. Zero."

These contentions are both implausible and contradicted by Lorenzo's testimony. W2E was Lorenzo's only investment banking client, and it was his job to review the company's financial statements. Lorenzo knew at the time he received the filings that W2E was in dire financial condition. He had also believed for months that the company's assets were not worth "even close to $10 million." That Lorenzo could have looked at the company's filings, which was his job, and missed what was one of the most pertinent facts in them—the valuation of the company's assets—is either untrue or extreme recklessness.[23] But even if Lorenzo did initially

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[23] Lorenzo points to Charles Vista's chief compliance officer's sending an email to Charles Vista's brokers (which contained a research report showing that W2E's assets exceeded $10 million) as evidence that the compliance officer also missed the asset write down in W2E's

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miss W2E's write-down, Lorenzo admitted that he learned about it a few days later, when the company's CFO emailed him about it. In fact, when asked during his investigative testimony about whether he knew at the time he sent the emails that the statements about the three layers of protection were inaccurate and misleading, he answered, "I can't sit here and say that I didn't know."

Lorenzo also admitted during the hearing that he did not believe that W2E was a worthwhile investment; that he had "lost confidence in the management of Waste2Energy to grow the business"; and that he thought it was "highly unlikely . . . that [W2E] was going to have enough corporate growth in order to pay back the money that it had borrowed." These worries about the company's offering, combined with his long-standing concern about the legitimacy of the company's $10 million in claimed assets, establish that it was at least extremely reckless for Lorenzo to email customers that their investment would be protected by $10 million in confirmed assets without first checking that statement against the company's most recent financial statements.[24]

We also disagree with Lorenzo's claim that his forwarding the company's public filings (which contained the $10 million write down) to Charles Vista's brokers shortly after receiving them shows that he lacked the intent to misrepresent or hide W2E's financial condition. Forwarding the company's filings internally to Charles Vista employees does not explain or excuse Lorenzo's subsequent decision to send materially misleading emails externally to firm customers. And the record contains evidence of at least one possible motive for misleading potential investors: Lorenzo knew when he sent the emails that his employer, Charles Vista, would earn what he described as an "exorbitant" fee from any successful sales and that he would

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financial statements and thus represented "some evidence that Mr. Lorenzo was not acting recklessly or negligently when he missed it." But there was no testimony or other evidence introduced about the circumstances surrounding the distribution of that document, and the mere fact that, for whatever unknown reason, a compliance officer sent an inaccurate research report internally to the firm's brokers is neither analogous to, nor an excuse for, Lorenzo's knowingly sending materially misleading emails to prospective investors.

[24] *Cf. Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *9 n.36 (June 30, 2005) (finding violations of Section 10(b) and Rule 10b-5 because "it was at least reckless [for respondent to] not actually review the [Form 10-K] about which she was making representations"), *pet. for review denied*, 465 F.3d 780 (7th Cir. 2006).

receive a portion of those fees.[25] Lorenzo's testimony clearly establishes that he either knew or must have known that his emails would materially mislead investors.[26]

Nor are we persuaded by Lorenzo's assertion that his sending the emails was simply a "mistake." Lorenzo was well aware that the emails falsely represented crucial facts about W2E and its debenture offering. Sending emails to customers was also not a normal occurrence for Lorenzo. In fact, he contends that these emails were the only time he ever communicated with customers. His claim that he nevertheless "didn't give [sending the emails] much thought" is therefore implausible. And if Lorenzo did send the emails without "think[ing] about it one way or the other," as he claims, such a dismissive attitude toward investors' interests would be equally troubling and still constitute acting with extreme recklessness.

D. Lorenzo "made" the material misstatements in the emails.

Lorenzo argues that even if he knowingly sent the materially misleading emails to customers, he cannot be a primary violator of the antifraud provisions because he did not "make" the misstatements at issue. In support, Lorenzo cites the Supreme Court's decision in *Janus Capital Group v. First Derivative Traders*, which interpreted Rule 10b-5(b)'s prohibition against "mak[ing] any untrue statement of a material fact" as extending only to those with "ultimate authority" over an alleged false statement.[27] This argument is doubly flawed.

As a preliminary matter, because the language that a primary violator must "make" a misstatement appears in only Rule 10b-5(b), the Division need not establish that a defendant

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[25] *Cf. Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *14 (May 16, 2014) ("[P]roof of motive is not required where there is direct evidence of manipulative intent; it is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical.").

[26] Lorenzo argues that the Division failed to introduce any expert testimony that would establish the proper standard of care for investment bankers conducting placements of debentures or that would establish that Lorenzo acted recklessly in not catching W2E's write down of its assets. But we need not rely on expert testimony when determining such legal questions. *Cf. Dearlove v. SEC*, 573 F.3d 801, 804 (D.C. Cir. 2009) (stating that "the SEC need not have received expert testimony to establish the standard of care or to determine whether Dearlove's conduct was unreasonable"); *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *17 (May 27, 2011) (stating that the Commission is not hindered by the lack of expert testimony when determining whether a securities violation has occurred).

[27] 131 S. Ct. 2296, 2302–05 (2011).

"made" a misstatement to establish liability under the other antifraud provisions.[28] And as to Rule 10b-5(b), we conclude that Lorenzo "made" each misstatement by exercising "ultimate authority over the statement, including its content and whether and how to communicate it."[29] Although Lorenzo's emails stated that he was summarizing several key points of the debenture offering at Gregg Lorenzo's "request," Lorenzo testified during his investigatory testimony that he did not recall ever discussing either of the emails or their subject matter with Gregg Lorenzo. Lorenzo later testified at the hearing that he "got the e-mail addresses from [Gregg Lorenzo]," but that, "[i]f memory serves me—I think I authored [the email] and then it was approved by Gregg and Mike [Molinario, Charles' Vista's compliance officer]." Lorenzo also put his own name and direct phone number at the end of the emails, and he sent the emails from his own account.[30] Lorenzo further testified that he understood that Gregg Lorenzo wanted the emails to come from the investment banking division (which Lorenzo oversaw) and that, by sending the emails, Lorenzo was putting his own reputation on the line.[31]

On appeal, Lorenzo disputes that he was a "maker" of the emails by asserting that he "merely helped to distribute the statements by sending the email that Gregg Lorenzo drafted." Yet there is no persuasive evidence of that. At best, Lorenzo provided conflicting and ambiguous testimony about his and Gregg Lorenzo's respective roles in the emails. For example, when asked during the hearing whether he knew it was misleading to tell customers that W2E had $10 million in confirmed assets, Lorenzo testified that he "just made a mistake and sent it. I cut and pasted and sent it. I made a mistake." Lorenzo later testified that, "as soon as [Gregg Lorenzo] gave me the e-mail address, I typed it into the 'to' column and cut and pasted this – the content

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[28] *See Flannery*, 2014 WL 7145625, at *10–19.

[29] *Janus*, 131 S. Ct. at 2302.

[30] *Cf. City of Roseville Employees Ret. Sys. v. Energysolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011) (stating that there was "no dispute" that each of the defendants who had signed the misstatements had "made" the statements under *Janus*); *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *6 (Dec. 5, 2014) (finding that respondents had "made" the misstatements where they "drafted, dated, printed on Firm letterhead, and signed" the documents containing the misstatements).

[31] *Cf. Janus*, 131 S. Ct. at 2302 (stating that "attribution within a statement or implicit from surrounding circumstances is strong evidence" that the statement "was made by" the party to whom it was attributed); *SEC v. Greystone Holdings, Inc.*, No. 10-Civ-1302, 2012 WL 1038570, at *9 (S.D.N.Y. Mar. 28, 2012) (finding that chief operating officer was the "maker" of misstatements in certain press releases under *Janus* despite defendant's claim that the chief executive officer had ultimate authority over issuance of press releases).

and sent it out." Lorenzo also claimed, "My boss asked me to send these e-mails out and I sent them out." But all that this self-serving testimony establishes is that Gregg Lorenzo may have asked Lorenzo to email certain customers about the debenture offering and that he provided Lorenzo with the email addresses to do so. It does not establish that anyone other than Lorenzo was ultimately responsible for the emails' content. Nor do the emails themselves establish this. They state only that Gregg Lorenzo had requested that Lorenzo's investment banking division summarize the debenture offering, not that Gregg Lorenzo wrote or had anything else to do with the substance of that summary. To the contrary, Lorenzo testified at the hearing that he remembered authoring the emails himself. And during his earlier investigative testimony, Lorenzo testified that he did not recall ever discussing the emails or their subject matter with Gregg Lorenzo. We therefore find that Lorenzo was ultimately responsible for the emails' content and dissemination and was thus the maker of the misstatements within the meaning of Rule 10b-5(b).[32]

E. Lorenzo's role in the misrepresentation constituted a deceptive "device," an "artifice to defraud," and a deceptive "act" in violation of Section 10(b), Rule 10b-5(a) and (c), and Section 17(a)(1).

We also find that Lorenzo employed a "device, scheme, or artifice to defraud," in violation of Section 17(a)(1) and Rule 10b-5(a); that he engaged in an "act" that would operate as a fraud in violation of Rule 10b-5(c); and that his conduct was deceptive, as required by Section 10(b). Independently of whether Lorenzo's involvement in the emails amounted to "making" the misstatements for purposes of Rule 10b-5(b), he knowingly sent materially misleading language from his own email account to prospective investors. Lorenzo's role in producing and sending the emails constituted employing a deceptive "device," "act," or "artifice to defraud" for purposes of liability under Section 10(b), Rule 10b-5(a) and (c), and Section 17(a)(1).[33]

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[32] Although the law judge found that "Gregg Lorenzo had drafted [the emails] relating to the debenture offering to two Charles Vista clients," she did so after weighing the evidence, rather than after making a credibility determination. And even if she had made a credibility finding, we do not accept such findings "blindly." *Ofirfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL 3199181, at *8 n.46 (Nov. 3, 2006) (noting that "'there are circumstances where, in the exercise of our review function, we must disregard explicit determinations of credibility'" (quoting *Kenneth R. Ward*, Securities Act Release No. 8210, (Mar. 19, 2003) *aff'd*, 75 F. App'x 320 (5th Cir. 2003))), *pet. denied*, 269 F. App'x 217 (3d Cir. 2008); *see also supra* note 35 and accompanying text (describing our *de novo* review).

[33] *See Flannery*, 2014 WL 7145625, at *12–13 (concluding that Rule 10b-5(a) and (c) and

(continued…)

F. The Commissions' *de novo* review cures any alleged errors in the initial decision.

In his appeal, Lorenzo challenges the sufficiency of the law judge's findings, arguing that the law judge "simply plugged in the facts from Lorenzo's case into [an] earlier [initial decision, *Gualario & Co., LLC*],[34] when they just don't fit." Among other things, Lorenzo contends that the law judge failed to specify which of the three statements at issue in the present case were false, why they were false, or the basis for finding that Lorenzo acted with scienter. Lorenzo similarly claims that the law judge reached her sanctions determinations by "essentially cut[ting] and pasting the facts of Lorenzo's case into the earlier decision," when, according to Lorenzo, "the acts committed [in *Gualario*] were much more severe and completely dissimilar to the facts in this case." Lorenzo contends that, because the law judge did not make adequate findings, "there is no way the Commission can perform an adequate review of its findings." We disagree. Any alleged deficiencies in the law judge's analysis are of no consequence because our review is *de novo*; the violations we find and the sanctions we impose are based on our own independent review of the record.[35] In particular, we find that notwithstanding differences between the facts in this case and those in *Gualario*, the record evidence of Lorenzo's own, unique misconduct and the risks he poses to investors establishes both the violations we find and the propriety of the sanctions we impose for all the reasons described herein.

IV.

The law judge imposed the following sanctions against Lorenzo: (i) a bar from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization companies and from participating in an offering of penny stock; (ii) an order to cease and desist from committing or causing any violations or future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5; and (iii) and a third-tier civil penalty

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(…continued)

Section 17(a)(1) encompass drafting or devising, in addition to "making," a fraudulent misstatement); *accord SEC v. Clark*, 915 F.2d 439, 448 (9th Cir. 1990) (noting that Rule 10b-5(a) and (c) "provide a broad linguistic frame within which a large number of practices may fit").

[34] Initial Decision Release No. 452, 2012 WL 627198 (Feb. 14, 2012).

[35] *See* Rule of Practice 411(a), 17 C.F.R. § 201.411(a) ("The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.").

of $15,000. We find that these sanctions are appropriate and necessary to protect the investing public.

A. Barring Lorenzo from the industry is appropriate.

Exchange Act Section 15(b)(6) authorizes the Commission to bar a respondent from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization, and from participating in an offering of penny stock "if that person has willfully violated any provision of the Exchange Act . . . and the bar is in the public interest."[36] We find that these elements are met and that an industry-wide bar is appropriate.

1. Lorenzo willfully violated the securities laws.

We first find that Lorenzo's conduct was willful. It is well established that "[a] willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'"[37] It is sufficient that the actor "intentionally" or "voluntarily" committed the act that constitutes the violation; he need not also be aware that he is violating one of the securities laws or rules promulgated thereunder.[38] Lorenzo claims that he did not give "much thought" to sending the emails, but there is no dispute that Lorenzo intentionally sent them.

2. An industry-wide bar is in the public interest.

We assess whether a bar is in the public interest by considering the egregiousness of Lorenzo's conduct, the isolated or recurrent nature of the infraction, the degree of scienter involved, Lorenzo's recognition of the wrongful nature of his conduct, the sincerity of any assurances against future violations, and the likelihood that Lorenzo's occupation will present

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[36] 15 U.S.C. § 78o(b).

[37] *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *11 n.75 (July 12, 2013) (quoting *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)).

[38] *Wonsover*, 205 F.3d at 414; *accord Mathis v. SEC*, 671 F.3d 210, 217 (2d Cir. 2012) (stating that willfulness "means intentionally committing the act which constitutes the violation [and that there] is no requirement that the actor also be aware that he is violating one of the Rules or Acts"); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *4 (Dec. 22, 2008) (stating that a willful violations of the securities laws requires that we "need to find only that [the respondent] voluntarily committed the acts that constituted the violation, not that [the respondent] was aware of the rule he violated or that he acted with a culpable state of mind").

opportunities for future violations.[39] Our inquiry into these factors "is a flexible one, and no one factor is dispositive."[40] Here, these considerations weigh in favor of barring Lorenzo from the industry.

Lorenzo's conduct was egregious. A fundamental purpose of the securities laws is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry."[41] Because of this, "[t]he proper functioning of the securities industry and markets depends on the integrity of industry participants and their commitment to transparent disclosure."[42] Lorenzo demonstrated a complete disregard for these principles by grossly misleading, if not outright lying to, retail customers about the significant risks involved in purchasing W2E's debentures. We have repeatedly warned that such violations of the antifraud provisions are "'especially serious and subject to the severest of sanctions under the securities laws.'"[43]

Lorenzo has also displayed troubling dishonesty. He sent his two misleading emails separately, to different customers, thus presenting separate opportunities to mislead prospective investors. And while Lorenzo seeks credit for voluntarily testifying to Commission staff during its investigation, his testimony painted a notably misleading picture of his employer and W2E's offering. For example, while Lorenzo initially described Gregg Lorenzo to Commission staff as an "honest guy," he later admitted at the hearing that "there [wa]s no way on God's green earth I thought Gregg Lorenzo was an honest guy." Lorenzo similarly described W2E's debt offering as a high quality project during the investigation but later admitted that he thought the offering was "a toxic convertible debt spiral."

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[39] *Ronald S. Bloomfield*, Exchange Act Release No. 71632, 2014 WL 768828, at *18 (Feb. 27, 2014); *accord Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[40] *Disraeli*, 2007 WL 4481515, at *15 (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. for review denied*, 548 F.3d 129 (D.C. Cir. 2008)), *pet. for review denied*, 334 F. App'x 334 (D.C. Cir. 2009).

[41] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963).

[42] *Clifton*, 2013 WL 3487076, at *14 (quoting *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *11 (Dec. 13, 2012)).

[43] *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013) (quoting *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *4 (Apr. 20, 2012)), *pet. for review denied*, 773 F.3d 89 (D.C. Cir. 2014).

Lorenzo also acted with a high degree of scienter. Lorenzo knew, when he sent his emails to customers, that he was misstating critical facts about W2E and the safety of its debenture offering.[44] That Lorenzo so blatantly ignored the importance of communicating truthfully with potential investors creates a significant risk that he will engage in similar misconduct in the future and demonstrates his unfitness to participate in the securities industry.[45]

Lorenzo's unwillingness to accept responsibility for this misconduct further weighs in favor of a bar. Although he claims to have "apologized many times for his limited involvement with the W2E debentures" and to "regret[] the emails being sent out," he continues to blame W2E and Gregg Lorenzo for his actions. Lorenzo claims, for instance, that W2E failed to inform him properly of the $10 million write-down and that he sent the emails at Gregg Lorenzo's direction. But none of these supposed failures by others explains, or excuses, Lorenzo's decision to send retail customers emails that he knew contained materially misleading statements. Such a refusal to accept responsibility "has long been deemed an appropriate measure of fitness for association in the industry."[46]

We are particularly troubled by Lorenzo's continued attempts to shift blame onto W2E for not disclosing the company's write down more fully. Lorenzo criticized W2E's supposed lack of disclosure by testifying that the company's $10 million write-down "deserved a Sermon on the Mount meeting" and "needed to be emphasized, emphasized, not minimized and not hidden in a regulatory document." Yet when discussing his own failure to disclose the same write-down to

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[44] *Cf. Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *3 (Feb. 4, 2008) (stating that respondent's conduct "evince[d] a high degree of scienter" because "he knew [the private placement memorandum]'s representations with respect to the use of proceeds were misleading"), *pet. for review denied*, 561 F.3d 548 (6th Cir. 2009).

[45] *Cf. Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *7 (July 26, 2013) (finding that "the deliberate manner in which Korem flouted [a core] responsibility suggests that he is likely to engage in future misconduct"); *Lawton*, 2012 WL 6208750, at *9 (considering past conduct as evidence in a "broader inquiry into whether a person presents a future risk to the public interest because, as the Supreme Court has recognized, the 'degree of intentional wrongdoing evident in a defendant's past conduct' is an important indication of the defendant's propensity to subject the trading public to future harm" (quoting *Aaron v. SEC*, 446 U.S. 680, 701 (1980))).

[46] *Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *11 (Mar. 7, 2014) (finding that respondent's unwillingness to accept responsibility weighed in favor of a bar); *accord Seghers*, 548 F.3d at 137 (holding that imposition of a more severe sanction for refusal to accept responsibility "did not unconstitutionally burden [respondent] in the district court . . . nor did it deny him due process before the SEC").

investors, Lorenzo dismissed his conduct as an "unintentional miscue" and his involvement as "limited." Although a respondent has the right to present a vigorous defense, we find that Lorenzo's continued attempts here to shift blame and minimize his role in deceiving investors demonstrate that he "does not fully understand the seriousness of his misconduct and how it violated the duties of a securities professional" and "presents a significant risk that, given th[e] opportunity, he would commit further misconduct in the future."[47]

Nor does the lack of any demonstrated causal link between Lorenzo's emails and the customers' ultimate investment decisions weigh against a bar. The Division is not required to establish either reliance or loss by any investor.[48] Instead, "our focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future."[49] And that is particularly true here, as Lorenzo's emails created a substantial risk to investors by misleading them about the likelihood of losing much, if not all, of any investment.

We are also unpersuaded by Lorenzo's claim that his occupation will not present opportunities for future violations. Lorenzo contends that his communicating with retail customers "was a unique occurrence that was outside the scope of his investment banking responsibilities—both at Charles Vista and at his [subsequent] firm," but his admission that sending emails to customers was not within his normal duties heightens our concern that Lorenzo will engage in future misconduct if allowed to remain in the industry, no matter the scope of that employment. As we have repeatedly observed, "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[50] And the antifraud provisions that Lorenzo violated apply to all securities industry participants. While we recognize the severity of a collateral bar and its obvious impact on Lorenzo's ability to continue working in the securities industry, we find, for all the reasons discussed herein, that imposing such a bar on Lorenzo from associating with any

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47 *Clifton*, 2013 WL 3487076, at *14 (citations omitted).

48 *See, e.g.*, *Morgan Keegan & Co.*, 678 F.3d at 1244; *Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000).

49 *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 (Feb. 13, 2009) (citing *Christopher A. Lowry*, Advisers Act Release No. 2052, 55 SEC 1133, 2002 WL 1997959, at *6 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003)); *cf. Korem*, 2013 WL 3864511, at *5 (rejecting respondent's argument that his conduct was not egregious because there was no harm or loss).

50 *Seghers*, 2007 WL 2790633, at *7; *see also Koch*, 2014 WL 1998524, at *21 n.224 (citing cases).

investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stocks is necessary to prevent Lorenzo from putting investors at further risk and will deter other market professionals from engaging in similar misconduct.[51]

Lorenzo argues that imposing such a bar is so "grossly disproportionate to the offense at issue, particularly given Mr. Lorenzo's long unblemished career in the securities industry," that it violates the Eighth Amendment's prohibition against excessive punishment. We disagree. Although some mitigating factors exist, including that Lorenzo has a relatively clean disciplinary record, that he claims to have made some effort at assisting defrauded investors, and that he earned relatively little profit from his misconduct, his claims of mitigation are far outweighed by the gravity of his violations and the risk of his committing future violations.[52] Our intent in ordering that Lorenzo be barred from the industry is to protect the investing public from further harm, not to punish Lorenzo.[53] And the Exchange Act specifically authorizes us to impose such

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[51] *Cf. Lawton*, 2012 WL 6208750, at *12–13 (finding that a collateral bar was justified when respondent "reveal[ed] an attitude toward regulatory oversight that is fundamentally incompatible with the principles of investor protection"; violated professional responsibilities that are "not limited to a particular aspect of the securities industry"; and demonstrated "his ongoing unfitness and risk that he would engage in further misconduct if given future opportunities in the industry," where "opportunities for similar misconduct arise in each of the associational capacities covered by the collateral bar").

[52] *Cf. Philip J. Milligan*, Exchange Act Release No. 61790, 2010 WL 1143088, at *5 (Mar. 26, 2010) (imposing an associational bar despite a previously clean record); *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 WL 1113518, at *8 (Apr. 26, 2006) (sustaining self-regulatory organization's imposition of a bar because, while the petitioner earned "a relatively small amount of profits," the potential harm to the markets "could be considerably greater than this dollar amount"); *Marshall E. Melton*, Exchange Act Release No. 48228, 56 SEC 695, 2003 WL 21729839, at *7 (July 25, 2003) (finding that respondent's previously clean record did not outweigh his misconduct and imposing a bar). We also note that Lorenzo's disciplinary history is not quite unblemished, as Lorenzo claims. In June 2011, FINRA suspended Lorenzo for twelve days in all capacities for failing to timely pay outstanding FINRA hearing session fees. *See* http://brokercheck.finra.org (last visited April 28, 2015).

[53] *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005); *cf. Seghers*, 2007 WL 2790633, at *9 (stating that imposition of a bar was "not intended to punish, but 'to protect the public interest from future harm at his hands'" (quoting *Leo Glassman*, Exchange Act Release No. 11929, 46 SEC 209, 1975 WL 160418, at *2 (Dec. 16, 1975))), *pet. for review denied*, 548 F.3d 129 (D.C. Cir. 2008).

an industry-wide bar.[54] Barring him from the industry is therefore not a punishment within the meaning of the Eighth Amendment.[55]

At oral argument, Lorenzo's counsel asserted that imposing an industry-wide bar would be inconsistent with the one-year suspension that we imposed against respondents in *John P. Flannery*.[56] But the Commission has consistently held that the "appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings."[57] And here, although Lorenzo and the respondents in *Flannery* all had relatively clean disciplinary histories, we find that the egregiousness of Lorenzo's misstatements, the high degree of his scienter, and his continued attempts to shift blame onto others, along with the other considerations discussed above, are distinguishable from *Flannery* and warrant a bar in this case. This conclusion is consistent with our repeated holding "that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws."[58]

B. Ordering Lorenzo to cease and desist from violating the antifraud provisions is in the public interest.

Securities Act Section 8A(a) and Exchange Act Section 21C(a) authorize us to issue a cease-and-desist order against any person who "has violated" those statutes or rules thereunder.[59] When determining whether such an order is appropriate, we consider public interest factors that are substantially the same as those we consider when assessing whether to impose a bar.[60] "In

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[54] *Cf. Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *18 (Feb. 27, 2012) (observing that substantial deference is granted to the legislature when determining whether a penalty is excessive under the Eighth Amendment).

[55] *Cf. Charles Phillip Elliot*, Exchange Act Release No. 31202, 50 SEC 1273, 1992 WL 258850, at *4 (Sept. 17, 1992) (finding that a bar from the industry is not a punishment within the meaning of the Eighth Amendment (citing *Flemming v. Nestor*, 363 U.S. 603, 613–14 (1960))).

[56] 2014 WL 7145625, at *10.

[57] *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 WL 5328765, at *17 n.68 (Dec. 19, 2008) (quoting *Christopher J. Benz*, Exchange Act Release No. 38440, 52 SEC 1280, 1997 WL 137027, at *4 (March 26, 1997), *petition denied*, 168 F.3d 478 (3d Cir. 1988) (Table)).

[58] *Siris*, 2013 SEC LEXIS 3924, at *23 (imposing a full collateral bar); *see also Clifton*, 2013 WL 3487076, at *14 (same).

[59] 15 U.S.C. § 77h-1(a) (Securities Act); *id.* § 78u-3(a) (Exchange Act).

[60] *See Joseph J. Barbato*, Exchange Act Release No. 41034, 53 SEC 1259, 1999 WL 58922, at

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addition, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought."[61] This inquiry is flexible, and no single factor is dispositive.[62] "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[63]

As discussed above, Lorenzo's conduct was egregious, demonstrated a pattern of dishonesty, evidenced a high degree of scienter, and presents a substantial risk of future violations.[64] Lorenzo's clear failure to appreciate his responsibilities as a securities professional outweighs the various factors Lorenzo asserts as mitigating: that his misconduct occurred approximately five years ago; that he claims to "regret[] the emails being sent out"; that, after leaving Charles Vista, he claims to have spent "a substantial amount of time and effort assisting investors who purchased W2E debentures in organizing and filing claims"; and that he claims to have given "statements to the Commission, without retaining a lawyer, for the purpose of aiding the Commission, and particularly those who purchased W2E debentures."[65]

(…continued)

*14 n.31 (Feb. 10, 1999). For instance, we consider the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind in committing the violation, the sincerity of assurances against future violations, the respondent's recognition of the wrongful nature of the conduct, and the respondent's opportunity to commit future violations. *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *26 (Jan. 19, 2001), *pet. for review denied*, 289 F.3d 109 (D.C. Cir. 2002).

61 *KPMG Peat Marwick*, 2001 WL 47245, at *26.

62 *Id.*

63 *Id.* at *24 (finding that a cease-and-desist order may be imposed only where there is some risk of future violations, but that the risk "need not be very great"); *see also Schoemann v. SEC*, 398 F. App'x 603, 604 (D.C. Cir. 2010) (per curiam) (affirming the imposition of a cease-and-desist order because petitioner's conduct "constituted a violation of the [Securities] Act"), *aff'g* Securities Act Release No. 9076, 2009 WL 3413043, at *12–13 (Oct. 23, 2009) (noting that "absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations").

64 *See supra* notes 42–51 and accompanying text; *cf. Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *21 (Dec. 15, 2009) (imposing cease-and-desist order for violations that "involved a high degree of scienter").

65 Lorenzo testified that, after he left Charles Vista, "a lot of clients, they didn't want to speak to Gregg [Lorenzo] anymore, so he would toss them to me." At which point, Lorenzo explained, "I got to know a few of these debentures holders, about 15." He said that he told them: "'My

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Moreover, although we are ordering that Lorenzo be barred from serving in the securities industry, he could still rejoin the industry in a non-registered capacity or otherwise become active in the financial markets. Our concern that Lorenzo will commit future violations, regardless of any constraints placed on his involvement in the industry, is heightened by Lorenzo's acknowledgement that he sent the emails outside the scope of his investment banking responsibilities. Ordering Lorenzo to cease and desist from violating the antifraud provisions will serve the remedial purpose of encouraging Lorenzo to take his responsibilities more seriously should he be allowed to re-enter the securities industry or should he resume acting in a capacity that does not require registration.[66]

C. Imposing a civil penalty of $15,000 is in the public interest.

Securities Act Section 8A(g) and Exchange Act Section 21B(a) authorize us to impose civil monetary penalties for violations of those securities statutes if it is in the public interest and if, in the case of Exchange Act § 21B(a), the respondent willfully violated the Exchange Act.[67] As discussed above, Lorenzo acted willfully when committing his violations. The question is therefore whether a civil penalty is in the public interest, which we assess based on (i) whether the act or omission involved fraud or deliberate or reckless disregard of a regulatory requirement; (ii) whether the act or omission resulted in harm to others; (iii) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; (iv) whether the individual has committed previous violations; (v) the need to deter such person and others from committing violations; and (vi) such other matters as justice may require.[68]

We find that these factors weigh in favor of imposing a monetary sanction. We acknowledge Lorenzo's relative lack of disciplinary history, that the amount of his gain was relatively small ($150), and that there was no evidence that his conduct directly led to significant

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suggestion is this, you form a group and you try and get some relief as a group from either Waste2Energy or Charles Vista.' I did this—I didn't charge him money to help. I just made the introduction."

66 *Cf. Trautman*, 2009 WL 6761741, at *21 (finding a cease-and-desist order to be appropriate where the Commission also imposed a bar).

67 15 U.S.C. §§ 77h-1 (providing that the Commission may impose civil penalties if it finds a violation of the Securities Act in a cease-and-desist proceeding), 78u-2 (providing that the Commission may impose civil penalties for any violation of the federal securities laws).

68 *Id.* § 78u-2(c).

customer losses. But none of this outweighs that Lorenzo displayed a knowing and reckless disregard for his obligations as a securities professional by sending materially misleading emails to retail customers. The need to deter Lorenzo from committing such deliberately fraudulent conduct in the future warrants imposition of a monetary sanction.

As for the amount of that sanction, the securities laws authorize us to impose first-tier penalties of up to $6,500 for each "act or omission"; second-tier penalties of up to $65,000 for each act or omission that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; and third-tier penalties of up to $130,000 for each act or omission that "resulted in substantial losses," created "a significant risk of substantial losses to other persons," or resulted in "substantial pecuniary gain to the person who committed the act or omission."[69]

Here, we find that Lorenzo committed two "acts or omissions" in violation of the securities laws by sending two different customers a materially misleading email.[70] While the emails he sent were largely the same and sent close in time, they were not identical and provided Lorenzo two separate opportunities to mislead customers. As for the appropriate sanction for each act or omission, we find that a third-tier penalty is appropriate because Lorenzo's violations involved "fraud, deceit, [and] deliberate or reckless disregard of a regulatory requirement," while also creating "a significant risk of substantial losses" to the customers.[71] Specifically, Lorenzo hid the fact that W2E was in dire financial straits and that the customers were unlikely to recoup much, if any, of their investment in the event of default. This deceit created a significant risk that recipients of the emails would lose all of whatever they decided to invest. That the customers were ultimately unable, or unwilling, to invest more than $15,000 does not negate the possibility that Lorenzo's misleading emails could have resulted in far larger investments (and subsequent losses). After all, Lorenzo was seeking to raise $15,000,000 for W2E. Such a risk of substantial loss warrants imposition of the highest tier penalty, regardless of whether either customer actually read or relied on Lorenzo's emails when making their investment decision.[72]

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69 *Id.* §§ 77h-1(g)(2), 78u-2(b); *see also* 17 C.F.R. § 201.1003 (setting forth the maximum penalty amounts for violations occurring from February 15, 2005 to March 3, 2009).

70 *Cf. SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 288 n.7 (2d Cir. 2013) (finding no error in a district court counting each late trade as a separate violation).

71 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b).

72 *Cf. Clifton*, 2013 WL 3487076, at *16 (imposing a maximum third tier penalty where the

(continued…)

We nevertheless recognize Lorenzo's relative lack of profit, the lack of evidence that the emails harmed others, and Lorenzo's relatively clean disciplinary record. While we do not believe these mitigating factors outweigh the need to protect investors from future harm by barring him from the industry, we nevertheless decline to grant the Division's request to impose a $100,000 civil penalty. We instead find that a third-tier penalty of $7,500 for each of Lorenzo's emails (for an aggregate of $15,000) is in the public interest to deter Lorenzo and others in similar positions from committing future violations.

An appropriate order will issue.[73]

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

Brent J. Fields
Secretary

(…continued)

respondent had sought to raise more than $1 million, but where the record contained no evidence regarding actual losses nor substantial pecuniary gains).

[73] 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. 9762 / April 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74836 / April 29, 2015

Admin. Proc. File No. 3-15211

In the Matter of

FRANCIS V. LORENZO

c/o Robert G. Heim
Meyers & Heim LLP
444 Madison Ave., 30th Floor
New York, NY 10022

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that Francis V. Lorenzo be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stocks; and it is further

ORDERED that Francis V. Lorenzo cease and desist from committing or causing any violations or future violations of Section 17(a)(1) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and it is further

ORDERED that Francis V. Lorenzo pay a civil money penalty in the amount of $15,000.

Payment of the civil money penalty shall be: (i) made by U.S. postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, 100 F. Street NE, Mail Stop 6042, Washington, DC 20549; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to Alex

Janghorbani and Jack Kaufman, Division of Enforcement, U.S. Securities and Exchange Commission, New York Regional Office, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY, 10281.

Brent J. Fields
Secretary