SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 10100 / June 17, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 78098 / June 17, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4431 / June 17, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32152 / June 17, 2016

Admin. Proc. File No. 3-15446

In the Matter of

J.S. OLIVER CAPITAL
MANAGEMENT, L.P., and
IAN O. MAUSNER

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud violations

Compliance and recordkeeping violations

Registered investment adviser and its principal each violated the antifraud provisions by cherry picking profitable transactions for favored accounts and failing to disclose uses of soft dollars to their clients. Investment adviser also engaged in related compliance and recordkeeping violations, which principal aided, abetted, and caused. *Held*, it is in the public interest to bar principal from the securities industry, to revoke investment adviser's registration, to impose cease-and-desist orders, and to order adviser and principal to pay disgorgement and prejudgment interest and civil money penalties.

APPEARANCES

Richard J. Morvillo and *Andrew J. Morris* of Morvillo LLP for J.S. Oliver Capital Management, L.P., and Ian O. Mausner.

David J. Van Havermaat, *John B. Bulgozdy*, and *Ronnie B. Lasky* for the Division of Enforcement.

Appeal filed: August 22, 2014
Last brief received: December 7, 2015
Oral argument held: March 7, 2016

I.

A law judge issued an initial decision finding that, beginning in 2008, J.S. Oliver Capital Management, L.P., a registered investment adviser, and Ian O. Mausner, its principal, violated the antifraud provisions[1] by cherry picking profitable trades for favored accounts and by failing to disclose four distinct uses of soft dollar commissions to their clients.[2] The initial decision ordered them to disgorge $1,376,440, found that they caused $10.9 million in harm to disfavored clients by cherry picking, and imposed, among other sanctions, $3,040,000 and $14,975,000 in civil money penalties on Mausner and J.S. Oliver, respectively. On appeal, J.S. Oliver and Mausner do not challenge the findings of liability in the initial decision (including related compliance and recordkeeping violations),[3] or the industry bar, investment adviser registration revocation, cease-and-desist, and disgorgement orders it imposed.[4] Instead, they request that we order civil money penalties no greater than disgorgement. But because the penalty statute and our precedent do not limit our penalty determinations to a single factor or require us to peg penalties to disgorgement, we reject Respondents' argument. Upon our *de novo* review of the record, we find J.S. Oliver and Mausner liable for the violations found in the initial decision and

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1 Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5; Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(1), (2), and (4); Advisers Act Rule 206(4)-8, 17 C.F.R. § 275.206(4)-8; *see also* Advisers Act Section 207, 15 U.S.C. § 80b-7; Advisers Act Section 204, 15 U.S.C. § 80b-4; Advisers Act Rule 204-1(a)(2), 17 C.F.R. § 275.204-1(a)(2).

2 *See J.S. Oliver Capital Management, L.P.*, Initial Decision Release No. 649, 2014 WL 3834038 (Aug. 5, 2014).

3 *See* Advisers Act Section 204, 15 U.S.C. § 80b-4; Advisers Act Rule 204-2(a)(3) and (7), 17 C.F.R. § 275.204-2(a)(3) and (7); Advisers Act Section 206(4), 15 U.S.C. § 80b-6(4); Advisers Act Rule 206(4)-7, 17 C.F.R. § 275.206(4)-7.

4 Respondents raised an evidentiary issue relating to liability in their petition for review, but abandoned it in their briefing. And in their challenge to the civil penalties that the law judge imposed, they suggest that the amount of disgorgement was overstated but do not ask us to reduce it. We address these issues below.

impose the same sanctions ordered in it, except that we reduce the total civil penalties on Mausner to $1,325,000, and on J.S. Oliver to $6,625,000, by imposing second-tier penalties and eliminating penalties assessed for conduct occurring more than five years before this proceeding began. We also reject Respondents' argument that the proceeding before the law judge was unconstitutional because she was not properly appointed; consistent with our precedent, we find that the law judge was not an inferior officer required to be appointed directly by the Commission. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Although J.S. Oliver and Mausner do not challenge the law judge's findings of liability, our long-standing practice provides that the initial decision "ceased to have any force or effect" when we granted Respondents' petition for review.[5] For this reason, we set forth below the facts supporting our findings of liability and explain the legal basis for those conclusions.

A. J.S. Oliver and Mausner violated the antifraud provisions of the securities laws by cherry picking profitable trades for favored accounts.

We agree with the initial decision's conclusion that J.S. Oliver and Mausner violated the antifraud provisions of the securities laws by cherry picking profitable trades for favored accounts. "Cherry picking is a practice in which securities professionals allocate profitable trades to a preferred account (like their own) and less profitable or unprofitable trades to a non-preferred account (like a customer's)."[6] In this way, an investment adviser can increase the performance of favored accounts, or at least make it more likely that they will outperform other accounts.

One form of cherry picking involves an adviser's allocation of block trades. When an adviser executes a block trade at multiple prices, it may allocate the highest-price sales to favored accounts and the lowest-price sales to disfavored accounts. An adviser can also cherry pick by allocating profitable trades entirely to favored accounts.

1. Between June 2008 and November 2009, J.S. Oliver and Mausner systematically allocated profitable trades to favored accounts on a disproportionate basis.

J.S. Oliver is a registered investment adviser that Mausner co-founded in 2004. Mausner was J.S. Oliver's chief executive officer, portfolio manager, and ultimate decision-maker.

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[5] *See Fundamental Portfolio Advisors, Inc.*, Exchange Act Release No. 48177, 56 SEC 651, 2003 WL 21658248, at *13 n.44 (July 15, 2003) (citing 17 C.F.R. §§ 201.360(d) and (e)).

[6] *The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *1 (Mar. 17, 2016); *see also SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1303 (S.D. Fla. 2007) (finding that "[i]n nearly every conceivable way the cherry-picking scheme operated as a 'device, scheme, or artifice to defraud' and operated 'as a fraud or deceit upon' investors" under Securities and Exchange Act antifraud provisions); *id.* at 1308-09 (finding that cherry picking also violated Advisers Act antifraud provisions).

Mausner managed client accounts, as well as hedge funds, for J.S. Oliver. J.S. Oliver offered those funds to its clients, and Mausner also invested in them.

In June 2008, Mausner launched a new hedge fund, J.S. Oliver Concentrated Growth Fund ("CGF"), using Mausner's seed money. Although J.S. Oliver's other funds had not performed well in 2007 and 2008, CGF did not share that track record, which made it easier for Mausner to market CGF to investors. CGF's fee structure also was more favorable to J.S. Oliver than those of its other funds, and J.S. Oliver's funds generally paid it higher fees than its separate client accounts. Following CGF's launch, Mausner aggressively promoted its performance in mass email distributions to J.S. Oliver's clients and others.

Mausner's emails promoting CGF's performance raised red flags for at least one J.S. Oliver client. Although that client's account followed a similar strategy to CGF, the performance of the client's account lagged the market. Because of the similarity in investment strategy, the client's principal did not understand how CGF could perform much better than the client's account. When pressed, Mausner provided the client with false explanations of the disparity in account performance.

The client's suspicions were well-founded. Mausner traded many of the same securities in J.S. Oliver's funds and individual accounts, and these accounts frequently participated in the same block trades. J.S. Oliver's written policies required that allocations of these trades be fair and equitable, and they specifically required that trades placed together but made at various prices on the same day be allocated among participating accounts on the basis of average cost. But Mausner, who made or directed all allocations of these trades among J.S. Oliver accounts, did not follow these policies.

Beginning in June 2008, Mausner systematically allocated the most profitable trades to six favored accounts, including those of J.S. Oliver's four hedge funds, at the expense of three disfavored client accounts, including the accounts of an elderly widow's trust and a non-profit organization. Mausner did so using the order management system ("OMS") that J.S. Oliver's prime broker offered. Although OMS allowed J.S. Oliver to allocate trades using predefined schema (such as average cost), in many cases, Mausner made manual allocations, which are much less common. Because OMS allowed Mausner to make allocations after the end of the trading day, he could allocate trades after first-day returns (the difference between the transaction and closing prices) were known. And where J.S. Oliver executed a block trade at multiple prices, Mausner could use OMS to allocate the best priced trades to favored accounts and the least favorably priced trades to disfavored accounts.

During the relevant period, J.S. Oliver's prime broker created numerous cherry-picking review reports addressing J.S. Oliver's trade allocation. The prime broker generated these reports to alert its clients, such as investment managers, to variances in how particular accounts were treated with respect to allocations of trades in a specific security on a given day. In its reports, J.S. Oliver's prime broker identified more than 4,000 instances of potential cherry picking during the relevant period. Even after the prime broker recommended to Respondents that they allocate trades using average prices to avoid the disparities highlighted by the reports, J.S. Oliver and Mausner continued to allocate trades in a way that generated the reports.

The Division of Enforcement proved that J.S. Oliver and Mausner had cherry picked profitable trades for favored accounts through a statistical analysis prepared by Paul Glasserman, a professor at Columbia Business School. Glasserman examined more than 23,000 equity transactions in J.S. Oliver's trade blotter between June 2008 and November 2009 and found "extremely strong statistical evidence" that Mausner and J.S. Oliver had systematically allocated a disproportionately large share of equity trades with positive first-day returns to the six favored accounts and systematically allocated a disproportionately large share of equity trades with negative first-day returns to the three disfavored accounts.

Glasserman found that the probability that the observed allocation of profitable and unprofitable trades between the favored and disfavored accounts arose by chance was approximately one in one quadrillion (i.e., 1×10^{15}). Glasserman also found that favored accounts realized an average first-day return of positive 0.12% (on a dollar-weighted basis) during the relevant period, while the average first-day return for disfavored accounts was negative 1.31%, a difference of 1.43%. On an annualized basis, these numbers were positive 35% for the favored accounts and negative 96% for the disfavored accounts, a 131% disparity. Glasserman found that the probability that the observed difference of 1.43% in first-day returns arose due to chance was effectively zero. He also examined various alternative explanations offered for the bias in trade allocations and difference in first-day returns and concluded that, even after controlling for these considerations, bias and differences in first-day returns remained at similarly high levels of statistical significance. Glasserman also determined that the favored and disfavored accounts that were the subject of Respondents' cherry picking made up approximately 98% of J.S. Oliver's total trading volume over the relevant period. Using first-day returns, Glasserman calculated that Respondents' biased allocation of trades caused the three disfavored accounts to incur total losses of $10.9 million.

By cherry picking profitable trades in favor of CGF, Mausner was able to increase its performance and attract clients based on inflated performance results. During the relevant period, J.S. Oliver earned performance fees of $224,600 from CGF.

2. J.S. Oliver and Mausner repeatedly violated the antifraud provisions by fraudulently allocating trades.

The Division met its burden of establishing that J.S. Oliver and Mausner violated the antifraud provisions by cherry picking. Securities Act Section 17(a)(1) and (3)[7] and Exchange Act Section 10(b) and Rule 10b-5(a) and (c)[8] each prohibit, among other things, fraudulent

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[7] 15 U.S.C. § 77q(a)(1) and (3) (prohibiting "employ[ing] any device, scheme, or artifice to defraud" and "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser").

[8] 15 U.S.C. § 78j(b) (making it unlawful for any person to "use or employ. . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe"); 17 C.F.R. § 240.10b-5(a) and (c) (barring "employ[ing] any device, scheme, or artifice to defraud" and "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person").

conduct. Advisers Act Sections 206(1), (2), and (4)[9] and Rule 206(4)-8[10] prohibit such conduct by investment advisers, and advisers to pooled investment vehicles, respectively. Securities Act Section 17(a)(1), Exchange Act Rule 10b-5, and Advisers Act Section 206(1) require a showing of scienter before liability can be imposed.[11] But, as relevant here, negligence is sufficient for liability under Section 17(a)(3), Sections 206(2) and (4), and Rule 206(4)-8.[12]

We find that J.S. Oliver and Mausner systematically allocated trades to favored accounts on a disproportionate basis with scienter. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud,"[13] and "includes recklessness, defined as conduct that is 'an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it.'"[14] Scienter may be proven by "inference from circumstantial evidence,"

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[9] 15 U.S.C. § 80b-6(1), (2), and (4) (making it "unlawful for any investment adviser" by jurisdictional means "directly or indirectly—(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; . . . or (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative").

[10] 17 C.F.R. § 275.206(4)-8(a) (prohibiting investment advisers to pooled investment vehicles from "engag[ing] in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle").

[11] *See Aaron v. SEC*, 446 U.S. 680, 697 (1980) (concluding that "the language of § 17(a) requires scienter under § 17(a)(1)"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (finding Rule 10b-5 and Section 10(b) require a showing of scienter for liability to attach); *Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979) (holding that scienter is required under Section 206(1)), *aff'd on other grounds*, 450 U.S. 91 (1981).

[12] *See Aaron*, 446 U.S. at 697 (observing that the language of Section 17(a)(2) and (3) does not require scienter); *SEC v. Steadman*, 967 F.2d 636, 643 n.5, 647 (D.C. Cir. 1992) (observing that "a violation of [Section] 206(2) of the Investment Advisers Act may rest on a finding of simple negligence" and holding that "scienter is not required under [S]ection 206(4)"); *see also David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *9 (Dec. 21, 2007) ("Scienter is not required for violation of a rule promulgated under Section 206(4)."), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009).

[13] *Ernst & Ernst*, 425 U.S. at 193 n.12.

[14] *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *7 (Dec. 5, 2014) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

which "can be more than sufficient" to establish the requisite state of mind.[15] "A company's scienter is imputed from that of the individuals controlling it."[16]

The evidence here establishes that Mausner, and thus J.S. Oliver, acted with scienter by deliberately defrauding customers through biased trade allocations. Mausner was the only person at J.S. Oliver who could approve trade allocations, and he either personally made or directed each of the allocations over the relevant 18-month period. Mausner's actions marked a sharp departure from J.S. Oliver's written policy of fair trade allocation. After J.S. Oliver's prime broker generated potential cherry picking reports listing inconsistencies in trade allocations, Mausner disregarded its advice to allocate trades based on average price. Instead of selecting a pre-defined schema to allocate trades fairly, Mausner made and approved allocations that systematically favored certain accounts, including those of the four affiliated J.S. Oliver funds. These funds paid J.S. Oliver more in fees than individual accounts generally did. The start of Mausner's cherry picking also coincided with his launch of a new fund (CGF), which Mausner initially funded. Mausner promoted CGF heavily to prospective investors based on the inflated performance he obtained by cherry picking, and over the relevant period, J.S. Oliver received $224,600 in performance fees from CGF. When one client asked Mausner why the client's account had not performed as well as CGF, although the two accounts followed similar strategies, Mausner lied about the reason for the disparity in performance. We conclude that J.S. Oliver and Mausner acted with scienter.[17]

J.S. Oliver and Mausner's conduct also satisfies the additional statutory requirements for liability under the antifraud provisions at issue. They acted through means of interstate commerce as required by all provisions,[18] and their misconduct, which related to the allocation of both purchases and sales, was necessarily "in the offer or sale" and "in connection with the purchase or sale," of securities, as required under Securities Act Section 17(a),[19] and Exchange

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[15] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983).

[16] *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *9 n.33 (Jan. 16, 2008); *accord SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096 n.16 (2d Cir. 1992).

[17] *See SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d at 1305 (concluding that defendant who "knowingly put his interests above those of his clients by allowing" the allocation of profitable trades to an account in which he had a personal interest acted with scienter).

[18] *See* Securities Act Section 17(a), 15 U.S.C. § 77q(a) (prohibiting specified conduct "by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails"); Exchange Act Section 10, 15 U.S.C. § 78j (same with respect to conduct "by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange"); Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (same); Advisers Act Section 206, 15 U.S.C. § 80b-6 (barring delineated acts undertaken "by use of the mails or any means or instrumentality of interstate commerce").

[19] 15 U.S.C. § 77q(a).

Act Section 10(b) and Rule 10b-5, respectively.[20] J.S. Oliver and Mausner are both investment advisers as required for liability under Section 206 because they provided investment advice to others for profit,[21] and their misconduct was with respect to "any client or prospective client."[22] And because they made investment decisions on behalf of their hedge funds (all pooled investment vehicles), they were investment advisers to a pooled investment vehicle, as required for liability under Rule 206(4)-8(a).[23]

Although they do not now contest liability, J.S. Oliver and Mausner asserted in their petition for review that the law judge erred because she did not admit a document providing account returns that purportedly would have helped show they did not cherry pick. But the exclusion of that exhibit is irrelevant because Respondents abandoned their argument in their briefing on the merits—thus depriving the Division of the opportunity to respond—and they now challenge only the civil money penalties that the law judge imposed. In any event, the document that Respondents referenced in their petition does not show any flaw in Glasserman's analysis because it does not address the first-day results that he analyzed. It shows the performance of only certain accounts over longer time periods, including after the close of the relevant period.

For these reasons, we conclude that J.S. Oliver and Mausner repeatedly violated the antifraud provisions by cherry picking profitable transactions for favored accounts. Each time that they did so, they violated the securities laws. In particular, they repeatedly employed a deceptive device, scheme, or artifice to defraud and engaged in deceptive acts and practices prohibited by the antifraud provisions.[24]

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[20] 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *see also SEC v. Zandford*, 535 U.S. 813, 819, 825 (2002) (holding that the "in connection with" requirement is satisfied if the "fraudulent scheme" and securities transaction coincide).

[21] Advisers Act Section 202(a)(11), 15 U.S.C. § 80b–2(a)(11) (providing statutory definition of investment adviser, which includes "any person who, for compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities").

[22] Advisers Act Section 206, 15 U.S.C. § 80b-6 (prohibiting specified conduct by "any investment adviser"); Advisers Act Section 206(1) and (2), 15 U.S.C. § 80b-6(1) and (2) (providing that prohibited conduct must be with respect to "any client or prospective client").

[23] 17 C.F.R. § 275.206(4)-8(a).

[24] *See supra* notes 7-10 (excerpting language of relevant antifraud provisions). The law judge also found that Respondents violated the antifraud provisions by failing to disclose their cherry picking, and Respondents do not challenge this finding. Because we sanction Respondents for their acts of cherry picking, rather than their failure to disclose it, we do not discuss this finding herein.

B. J.S. Oliver and Mausner violated the antifraud provisions of the securities laws by failing to disclose their uses of soft dollars to their clients.

We also agree with the law judge that J.S. Oliver and Mausner violated the antifraud provisions of the securities laws by failing to disclose four separate uses of over $1.1 million in soft dollars to their clients.

1. Between January 2009 and November 2011, J.S. Oliver and Mausner caused soft dollars (client assets) to be used to pay expenses that benefited them without disclosing these uses to their clients.

Between January 2009 and November 2011, J.S. Oliver and Mausner caused over $1.1 million in soft dollars to be used to pay expenses that benefited them without disclosing these uses to their clients. Soft dollars are client assets. "Soft dollar practices are arrangements under which products or services other than execution of securities transactions . . . are obtained by an adviser from or through a broker in exchange for the direction by the adviser of client brokerage transactions to the broker."[25] A limited safe harbor created by Exchange Act Section 28(e) applies to certain payments of research and brokerage expenses.[26]

In early 2009, J.S. Oliver established relationships with broker-dealers that permitted the use of soft dollars for purposes beyond the Section 28(e) safe harbor. J.S. Oliver and these brokers agreed on commission rates for the execution of trades, and these agreed commission rates included a soft dollar component that benefited J.S. Oliver. The brokers accrued soft dollars for J.S. Oliver's account that were generated from trades placed by J.S. Oliver for its funds and client accounts. J.S. Oliver would then submit invoices to the brokers, which Mausner approved, requesting that certain payments be made from its soft dollar accounts. Because these payments came from client assets, amassed through higher brokerage commissions charged to J.S. Oliver's funds and separately managed clients than otherwise would be payable, J.S. Oliver did not have to make the payments itself out of its own resources. As a result, the soft dollar payments gave J.S. Oliver a motive to make more trades than necessary in order to accrue additional soft dollars in its account.

J.S. Oliver purported to describe its uses of soft dollars in Part 2 of its Form ADV, which was distributed to all clients, and in offering memoranda distributed to investors in the four funds that it managed. These disclosures stated that J.S. Oliver might use soft dollars for research and brokerage services within the scope of Section 28(e), as well as for other purposes outside the safe harbor that they purported to describe in varying terms. But these documents did not

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[25] Disclosure by Investment Advisers Regarding Soft Dollar Practices, Exchange Act Release No. 35375 (Feb. 14, 1995), 60 Fed. Reg. 9750, 9750 (Feb. 21, 1995).

[26] 15 U.S.C. § 78bb(e); *see also* Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165 (July 18, 2006), 71 Fed. Reg. 41978, 41985 (July 24, 2006) (recognizing "Congress's intention to provide a limited safe harbor [through Section 28(e)] for conduct that otherwise may be a breach of fiduciary duty").

disclose four ways in which J.S. Oliver was using soft dollars, including three that benefited Mausner personally, and none of those four uses fell within Section 28(e).

First, J.S. Oliver and Mausner used soft dollars to pay $482,381 to Powerhouse Capital, an ostensible research firm owned by a former J.S. Oliver employee, for what amounted to that employee's salary and a bonus for operating the soft dollar program. But J.S. Oliver did not disclose in its Form ADV or the offering memoranda for three of its four funds that it would pay salaries using soft dollars. And although the CGF offering memorandum identified salaries as a potential use of soft dollars, it did not identify bonus payments or explain that J.S. Oliver would use soft dollars to pay a former employee for management of its soft dollar program. In any event, J.S. Oliver did not provide the CGF offering memorandum, which applied to the investors in CGF, to all of its clients.

Second, J.S. Oliver and Mausner used soft dollars to pay $329,365 to Mausner's former spouse in connection with a marital settlement agreement with Mausner. Neither J.S. Oliver's Form ADV nor any of its offering memoranda disclosed that J.S. Oliver would use soft dollars to satisfy Mausner's personal obligation to his ex-wife. And to secure the payment, Mausner directed a subordinate to fabricate an excerpt from a non-existent contract between J.S. Oliver and Mausner's former spouse and to provide the false document to J.S. Oliver's broker.

Third, J.S. Oliver and Mausner caused $300,000 in soft dollars to be used to pay rent to J.O. Samantha, a company that Mausner owned. J.O. Samantha owned the house that J.S. Oliver used for its offices and that Mausner sometimes used as his personal residence. After Mausner arranged for rent to be paid using soft dollars, he twice raised the rent for the property (including retroactively) to above-market rates, and he directed that the difference between the monthly rent payment and J.O. Samantha's monthly mortgage obligation be deposited in his personal account. Respondents did not disclose these uses of soft dollars in J.S. Oliver's Form ADV or offering memoranda. The Form ADV and offering memoranda for three funds mentioned that soft dollars might be used for overhead (although they did not identify rent among the examples of possible overhead expenses), and the CGF offering memorandum more specifically identified rent as an expense that might be paid with soft dollars. But J.S. Oliver nowhere disclosed that it would use soft dollars to pay rent to an entity that Mausner owned and controlled, that he could set the rent unilaterally, or that he would transfer large sums to his personal account from those payments.

Fourth, J.S. Oliver and Mausner used soft dollars to pay $40,000 to the St. Regis Residence Club in New York City for a timeshare Mausner maintained there. Mausner used the timeshare, among other things, to visit his family and entertain guests. J.S. Oliver and Mausner never disclosed that they would use soft dollars to pay Mausner's timeshare bills. Some disclosures mentioned that J.S. Oliver would use soft dollars to reimburse travel expenses related to conferences, and the CGF offering memorandum disclosed that soft dollars might be used for travel and other expenses related to potential investment opportunities. But Mausner used the timeshare for personal uses, and the record does not show that Mausner otherwise used the timeshare consistent with J.S. Oliver's disclosures.

2. Respondents violated the antifraud provisions by failing to disclose their soft dollar uses to their clients.

We find that J.S. Oliver and Mausner violated the antifraud provisions by failing to disclose their uses of soft dollars to their clients. Securities Act Sections 17(a)(1) and (3), as well as Exchange Act Rules 10b-5(a) and (c), prohibit certain material misrepresentations and omissions.[27] In addition, Securities Act Section 17(a)(2),[28] Exchange Act Rule 10b-5(b),[29] and Advisers Act Rule 206(4)-8(a)(1)[30] each prohibit specified misrepresentations and omissions. Advisers Act Sections 206(1), (2), and (4) also prohibit fraudulent misstatements and omissions by investment advisers.[31]

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[27] More than half a century ago, we explained that the three main subdivisions of Section 17 and Rule 10b–5 are "mutually supporting rather than mutually exclusive." *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 40 SEC 907, 1961 WL 60638, at *4 (Nov. 8, 1961). "Thus, a breach of duty of disclosure may be viewed as a device or scheme, an implied misrepresentation, and an act or practice, violative of all three subdivisions." *Id.*; *see also Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *11 (May 27, 2015) (finding that "Fillet's failure to disclose was a deceptive 'device, scheme, or artifice to defraud' under Rule 10b-5(a) and a deceptive act that operated as a fraud on the customer under Rule 10b-5(c)"); *Dolphin & Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 WL 1976000, at *7 (July 13, 2006) (stating that "[v]iolations of Section 17(a)(1). . . may be established by a showing that persons acting with scienter omitted material facts in connection with securities transactions, such that the omission rendered disclosures that were made materially false or misleading"), *petition denied*, 512 F.3d 634 (D.C. Cir. 2008); *cf. Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014) (stating that Rule 10b-5 "forbids the use of any 'device, scheme, or artifice to defraud' (*including* the making of 'any untrue statement of a material fact' or any similar 'omi[ssion]') 'in connection with the purchase or sale of any security'" (alterations in original; emphasis added)).

[28] 15 U.S.C. § 77q(a)(2) (prohibiting "obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading").

[29] 17 C.F.R. § 240.10b-5(b) (barring any person from "mak[ing] any untrue statement of a material fact" or "omit[ting] to state a material fact necessary . . . to make the statements made, in the light of the circumstances under which they were made, not misleading").

[30] 17 C.F.R. § 275.206(4)-8(a)(1) (barring investment advisers to pooled investment vehicles from making same misrepresentations and omissions identified in Rule 10b-5(b) "to any investor or prospective investor in the pooled investment vehicle").

[31] *Anthony Fields*, Securities Act Release No. 9727, 2015 WL 728005, at *14-15 (Feb. 20, 2015) (finding that investment adviser violated Section 206 by making material misrepresentations and omissions); *Disraeli*, 2007 WL 4481515, at *8 (same); *see also SEC v. Washington Inv. Network*, 475 F.3d 392, 404 (D.C. Cir. 2007) (rejecting argument that Section 206 was intended to cover "only actual misrepresentations of fact and other affirmative frauds"

(*continued . . .*)

J.S. Oliver and Mausner were under a duty to disclose their uses of soft dollars for two reasons. First, as investment advisers, they were 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.[32] Respondents were under a "duty to disclose any potential conflicts of interest accurately and completely."[33] "It is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission."[34] Soft dollars payments present such a conflict because they are obtained from client funds but used to benefit an investment adviser.

Second, because J.S. Oliver and Mausner purported to describe their uses of soft dollars in Part 2 of their Form ADV, they were required to disclose facts necessary to ensure that these statements were not misleading.[35] And they were under a duty to update their statements to ensure that they were accurate.[36] For example, Advisers Act Section 204 and Rule 204-1(a)(2) require an investment adviser to amend its Form ADV if required by the form's instructions.[37] Those instructions require prompt updates if information provided in Part 2 of Form ADV, where J.S. Oliver described its soft dollar uses, "becomes materially inaccurate."[38]

(. . . *continued*)
and holding that Section 206 "prohibits failures to disclose material information, not just affirmative frauds").

32 *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 191, 194 (1963); *see, e.g.*, *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 & n.44 (Sept. 26, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

33 *Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003); *see also Montford & Co., Inc.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *19 (May 2, 2014) (explaining that failure to disclose a conflict of interest is "a reckless disregard for the well-established fiduciary duty [an investment adviser] owe[s] his clients"), *petition denied*, 793 F.3d 76 (D.C. Cir. 2015).

34 *Vernazza*, 327 F.3d at 859.

35 *See, e.g.*, Exchange Act Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b) (prohibiting omissions "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading").

36 *See generally In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998) ("A duty to update may exist when a statement, reasonable at the time it is made, becomes misleading because of a subsequent event.").

37 15 U.S.C. § 80b-4; 17 C.F.R. § 275.204-1(a)(2).

38 *See Montford*, 2014 WL 1744130, at *16 ("The General Instructions for Part 2 of Form ADV require investment advisers to promptly amend Form ADV whenever information in Part 2 becomes materially inaccurate.").

J.S. Oliver and Mausner acted with scienter by omitting to disclose four distinct ways they used over $1.1 million of soft dollars (client assets) for their own benefit.[39] Three of these uses provided Mausner with direct personal benefits. Mausner approved the requests for soft dollar payments, and he directed the creation of a false document to ensure that a settlement payment was made to his ex-wife. The record amply establishes that Mausner, and thus J.S. Oliver, acted with scienter in failing to disclose the four soft dollar uses at issue.

Because each of J.S. Oliver's and Mausner's failures to disclose their uses of soft dollars constitutes a separate omission of a material fact, we find that they violated the antifraud provisions on at least four occasions. Their misconduct occurred in interstate commerce, was in the offer or sale, and purchase and sale, of securities, and they obtained money by means of their failure to disclose their soft dollar uses.

J.S. Oliver and Mausner also each violated Advisers Act Section 207 through their misrepresentations and omissions in J.S. Oliver's Form ADV. Section 207 makes it unlawful for "any person willfully to make any untrue statement of a material fact" in Form ADV or "willfully to omit to state . . . any material fact which is required to be stated therein."[40] Scienter is not required for violations of Section 207.[41] To find willfulness, it is sufficient that the respondent "intentionally commit[ed] the act which constitutes the violation."[42] There is no requirement that the respondent "also be aware" that he "violat[ed] one of the Rules or Acts."[43] J.S. Oliver's and Mausner's conduct meets this standard.

In addition, J.S. Oliver violated Advisers Act Section 204 and Rule 204-1(a)(2) by failing to update its Form ADV to disclose its soft dollar uses.[44] Mausner aided and abetted, and thus

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[39] A showing of scienter is necessary to establish violations of Exchange Act Section 10(b), Exchange Act Rule 10b-5, Securities Act Section 17(a)(1), and Advisers Act Section 206(1), while negligence is sufficient under Sections 17(a)(2) and (3) and Sections 206(2) and (4). *See supra* notes 11 and 12.

[40] *See* 15 U.S.C. § 80b-7 (more broadly prohibiting such misrepresentations or omissions "in any registration application or report filed with the Commission under section 203 or 204"); 17 C.F.R. § 279.1 (providing that Form ADV is such "an application for registration").

[41] *Vernazza v. SEC*, 327 F.3d at 860 (explaining that, although scienter is required under Advisers Act Section 206(1), it "is not required for the other violations of the Advisers Act" at issue in the case, including under Section 207); *see also SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d at 1309 (observing that Section 207 is satisfied by showing of willfulness and that a "finding of willfulness does not require intent to violate (or scienter), but merely intent to do the act which constitutes a violation").

[42] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal citation omitted).

[43] *Id.* (internal citation omitted).

[44] *See* supra notes 37 and 38 and associated text.

also caused,[45] this violation because he substantially assisted J.S. Oliver's misconduct and acted with scienter.[46]

C. J.S. Oliver also violated compliance and recordkeeping requirements, and Mausner aided, abetted, and caused these violations.

We also agree with the law judge that J.S. Oliver violated compliance and recordkeeping requirements. Mausner aided, abetted, and caused these violations.

First, J.S. Oliver willfully violated compliance requirements imposed by Advisers Act Section 206(4) and Rule 206(4)-7.[47] Rule 206(4)-7 provides that it shall be unlawful under Section 206(4) for a registered investment adviser, or an adviser required to be registered under Section 203, to provide investment advice to clients unless it adopts and implements written policies and procedures reasonably designed to prevent violation of the Advisers Act and rules by the adviser and its supervised persons. But by cherry picking J.S. Oliver ignored and failed to implement its written trade allocation policy. Mausner aided, abetted, and caused J.S. Oliver's violation because he intentionally allocated trades in violation of J.S. Oliver's written policies.[48]

Second, J.S. Oliver willfully violated recordkeeping requirements. Advisers Act Section 204(a) generally provides that investment advisers "shall make and keep for prescribed periods such records . . . , furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the

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[45] *Warwick Capital*, 2008 WL 149127, at *7 n.21 (explaining that a finding that a respondent willfully aided and abetted primary violations "necessarily makes him a 'cause' of those violations" (citing *Sharon M. Graham*, Exchange Act Release No. 40727, 53 SEC 1072, 1998 WL 823072, at *7 n.35 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000))); *Richard D. Chema*, Exchange Act Release No. 40719, 53 SEC 1049, 1998 WL 820658, at *6 n.20 (Nov. 30, 1998) (same).

[46] *See Brendan E. Murray*, Advisers Act Release No. 28519, 2008 WL 4964110, at *5 (Nov. 21, 2008) (setting out elements of aiding and abetting liability in administrative proceedings as (1) an underlying violation by a primary violator, (2) substantial assistance by the respondent, and (3) the respondent's scienter, which may be satisfied by showing that he knew or recklessly disregarded the wrongdoing and his role in furthering it), *appeal dismissed*, No. 09-79 (2d Cir. July 27, 2009); *accord vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *13 (July 2, 2010) (citing *Graham v. SEC*, 222 F.3d at 1000).

[47] 15 U.S.C. § 80b-6(4); 17 C.F.R. § 275.206(4)-7; *see also* Compliance Programs of Investment Companies and Investment Advisers, Advisers Act Release No. 2204 (Dec. 17, 2003), 68 Fed. Reg. 74714, 74728, 74715 n.11 (Dec. 24, 2003) (adopting Rule 206(4)-7 pursuant to Advisers Act Sections 206(4) and 211(a) and explaining that a violation of Rule 206(4)-7 violates Section 206(4)).

[48] *See supra* note 46.

protection of investors."[49] In turn, Advisers Act Rule 204-2(a) requires every registered investment adviser or adviser required to be registered under Advisers Act Section 203 to "make and keep true, accurate and current" specified books and records relating to its investment advisory business, including, among other things, a "memorandum of each order given by the investment adviser for the purchase or sale of any security" and copies of all written communications the investment adviser sends relating to "any recommendation made or proposed to be made and any advice given or proposed to be given."[50]

J.S. Oliver willfully violated these provisions because it failed to maintain trade blotters memorializing each order it gave for the purchase or sale of securities over at least a six-month period and failed to maintain copies showing recipients' addresses of emails promoting CGF's performance and recommending that current and prospective investors invest in it. Mausner aided, abetted, and caused these violations. He recklessly failed to comply with J.S. Oliver's document retention obligations.

III.

The law judge barred Mausner from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (an "industry bar"); revoked J.S Oliver's registration as an investment adviser; entered cease-and-desist orders against each of them; ordered them jointly and severally to disgorge $1,376,440, plus prejudgment interest; and imposed civil money penalties of $3,040,000 on Mausner and $14,975,000 on J.S Oliver. Respondents challenge only the civil money penalties. We generally impose the same sanctions as those imposed in the initial decision except that we reduce the civil penalties on J.S. Oliver and Mausner to $1,325,000 and $6,625,000, respectively; unlike the initial decision, we impose second-tier penalties in our discretion based on the facts and circumstances present here and do not impose penalties for conduct that occurred more than five years before the order instituting proceedings was issued.

A. We bar Mausner from the securities industry.

We bar Mausner from the securities industry for his misconduct between 2008 and 2011. Advisers Act Section 203(f) authorizes us to impose an industry bar on any person who, at the time of the misconduct, was associated with an investment adviser if we find that the person willfully violated or "aided, abetted, counseled, commanded, induced, or procured" a violation of

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[49] 15 U.S.C. § 80b-4(a) (making requirement applicable to "[e]very investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser" other than advisers "specifically exempted from registration" pursuant to Advisers Act Section 203(b)).

[50] 17 C.F.R. § 275.204-2(a)(3) and (7).

the securities laws and the bar is in the public interest.[51] At the time of his misconduct, Mausner was associated with J.S. Oliver, an investment adviser, and he acted willfully.[52]

We find that it would serve the public interest to bar Mausner from the securities industry. In making that determination, we consider, among other things, "the egregiousness of a respondent's actions, the degree of scienter involved, the isolated or recurrent nature of the infraction, the recognition of the wrongful nature of the conduct, the sincerity of any assurances against future violations, and the likelihood that the respondent's occupation will present opportunities for future violations."[53] Our inquiry into the public interest "is flexible, and no single factor is dispositive."[54]

Mausner's conduct was egregious and he acted with a high degree of scienter. Although he was an investment adviser charged with fiduciary duties to his clients,[55] Mausner persistently and systematically failed to act in the best interests of those clients (including at least one elderly client and a non-profit) by disproportionately allocating profitable trades to favored accounts and using soft dollars to pay for undisclosed personal benefits, effectively stealing from clients. Indeed, Mausner caused at least some of the soft dollar commissions to be transferred to his personal account. Mausner also directed that a subordinate prepare and submit a fraudulent document to a soft dollar broker so that the broker would make a settlement payment to his former spouse. And when one client became suspicious, Mausner lied to its principal about the reasons for the disparity in performance between its account and CGF. Mausner's conduct was also recurrent: Mausner continued his cherry-picking scheme, in which he made or directed each of the many fraudulent allocations, for 18 months, and he directed the submission of the soft dollar invoices at issue from 2009 to 2011. Although Mausner does not now contest liability, he argued in the proceedings before the law judge that the Division had not established his liability. On appeal, he argues only that the penalties imposed on him are excessive; he does not address the wrongful nature of the conduct. And he has not provided any assurances against future violations. The securities industry presents many opportunities for future violations and Mausner's continued employment in it in any capacity would pose an unacceptable risk to investors.[56] We find that an industry bar will protect investors from future violations by Mausner

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[51] 15 U.S.C. § 80b-3(f) (referencing, among other provisions, Advisers Act Section 203(e)(5), (6), 15 U.S.C. § 80b-3(e)(5), (6)).

[52] S*ee supra* notes 42 and 43 and accompanying text (discussing willfulness standard).

[53] *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *8 (Aug. 5, 2011) (citing *Steadman v. SEC*, 603 F.2d at 1140).

[54] *Id.* (citing *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004)).

[55] *See supra* notes 32 and 33 and accompanying text.

[56] *Seghers*, 2007 WL 2790633, at *7 (observing that securities industry "presents continual opportunities for [similar] dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence"); *see also Charles Phillip Elliot*, Exchange Act Release No. 31202, 50 SEC 1273, 1992 WL 258850, at *3 (Sept. 17, 1992) (noting that the industry "presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994).

and that his ongoing failure to disclose the use of soft dollars after the effective date of the Dodd-Frank Act independently supports all components of an industry bar.

B. We revoke J.S. Oliver's investment adviser registration.

We also revoke J.S. Oliver's investment adviser registration. Advisers Act Section 203(e) authorizes us to revoke an adviser's registration if it is in the public interest and the adviser, or any person associated with it, has willfully violated the securities laws.[57] J.S. Oliver has done so by cherry picking, failing to disclose its soft dollar uses, and engaging in other violations. Revocation is in the public interest for the same reasons that we impose an industry bar on Mausner because Mausner controlled J.S. Oliver and acted through it.

C. We impose cease-and-desist orders on J.S. Oliver and Mausner.

We also find it appropriate to impose cease-and-desist orders on J.S. Oliver and Mausner. Advisers Act Section 203(k)(1) authorizes us to impose a cease-and-desist order on any person we find has violated or a caused a violation of the Advisers Act or rules thereunder,[58] and, in this case, Securities Act Section 8A[59] and Exchange Act Section 21C[60] provide for the same relief for violations of those statutes. In determining whether a cease-and-desist order is appropriate, we consider, among other things, the same factors used in determining whether a bar is in the public interest. We also take into account "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings,"[61] as well as the risk of future violations.[62] Although "'some' risk is necessary, it need not be very great to warrant issuing a cease-and-desist order."[63] "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[64]

We order J.S. Oliver and Mausner to cease and desist from committing or causing violations or future violations of the securities law provisions they violated or caused to be violated: Securities Act Section 17(a); Exchange Act Section 10(b) and Rule 10b-5; and Advisers Act Sections 204, 206(1), (2), and (4), and 207 and Rules 204-1(a)(2), 204-2(a)(3) and

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57 15 U.S.C § 80b-3(e)(5).

58 15 U.S.C. § 80b-3(k)(1).

59 15 U.S.C. § 77h-1.

60 15 U.S.C. § 78u-3.

61 *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *see also Herbert Moskowitz*, Exchange Act Release No. 45609, 55 SEC 658, 2002 WL 434524, at *8 (Mar. 21, 2002).

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

63 *Id.* at *24.

64 *Id.*

(7), 206(4)-7, and 206(4)-8. The same factors that strongly support the industry bar and revocation orders that we impose also support cease-and-desist orders. J.S. Oliver and Mausner violated the antifraud provisions as recently as 2011, and they caused more than $10 million in harm to investors. The cease-and-desist orders are a crucial complement to the industry bar because the securities laws "apply to securities transactions by any person."[65] And although we revoke J.S. Oliver's registration as an investment adviser, Section 206 prohibits fraud by all advisers, not just those registered with the Commission.[66] Cease-and-desist orders are "therefore necessary to protect the public against future violations that [respondents] could commit without being . . . associated person[s] of a broker-dealer,"[67] or other entity covered by an industry bar. Finally, we find that J.S. Oliver and Mausner's recurrent misconduct establishes the risk of future violations necessary to impose cease-and-desist orders.[68]

D. We order J.S. Oliver and Mausner to jointly and severally disgorge their ill-gotten gains and to pay pre-judgment interest.

We also find it appropriate to order J.S. Oliver and Mausner, jointly and severally, to disgorge $1,376,440, plus prejudgment interest. In this proceeding, Securities Act Section 8A(e), Exchange Act Section 21C(e), Advisers Act Sections 203(j) and (k)(5), and Investment Company Act Section 9(e) all authorize us to impose disgorgement and reasonable interest.[69] Disgorgement "is intended primarily to prevent unjust enrichment."[70] Although "the amount of disgorgement should include all gains flowing from the illegal activities," calculating that amount "requires only a reasonable approximation of profits causally connected to the violation."[71] "Once the Division shows that its disgorgement figure" reasonably approximates

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65 *See Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 WL 3100582, at *21 (Sept. 29, 2009) (imposing cease-and-desist order and broker-dealer bar) (internal citation omitted), *petition denied sub nom.*, *Robles v. SEC*, No. 09-1293 (D.C. Cir. Dec. 30, 2010); *see also* Securities Act Section 17(a), 15 U.S.C. § 77q(a) (providing that "i[t] shall be unlawful for any person" to engage in specified misconduct); Exchange Act Section 10, 15 U.S.C. § 78j (same); Exchange Act Rule 10b-5 (same); Advisers Act Section 207, 15 U.S.C. § 80b-7 (same).

66 Advisers Act Section 206, 15 U.S.C. § 80b-6 (making it "unlawful for any investment adviser" to engage in specified acts).

67 *See Bridge*, 2009 WL 3100582, at *21.

68 *See supra* notes 62-64 and accompanying text.

69 15 U.S.C. §§ 77h-1(e), 78u-3(e), 80b-3(j) and (k)(5), and 80a-9(e).

70 *Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)); *see also Michael David Sweeney*, Exchange Act Release No. 29884, 50 SEC 761, 1991 WL 716756, at *5 (Oct. 30, 1991) ("[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched.").

71 *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006) (quotation omitted); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (noting that, when calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task").

the ill-gotten gains, "the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation."[72] Thus, "[e]xactitude is not a requirement; '[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'"[73]

The Division's calculation of $1,376,440 in disgorgement represents a reasonable approximation of J.S. Oliver and Mausner's ill-gotten gains. This is the sum of all the soft dollar payments at issue that Respondents did not disclose to their clients ($1,151,840), plus performance fees earned from CGF ($224,600) during the relevant period. Respondents benefited from the undisclosed payments and obtained performance fees based on returns that they inflated by cherry picking and used to attract investors. These gains flowed from their misconduct.

Although J.S. Oliver and Mausner do not directly challenge the law judge's imposition of disgorgement, they suggest in their argument regarding civil money penalties that the disgorgement that the law judge ordered overstates their ill-gotten gains from soft dollars. They do not dispute that Mausner benefited directly from the payment to his former spouse, excess rent that he deposited in his bank account, and timeshare payments. Instead, Respondents assert that $482,381 in soft dollars went to compensate one of Mausner's subordinates and "some of the payments at issue, such as a portion of the rent, were earned." We are not convinced. J.S. Oliver and Mausner benefited from the payments to Mausner's subordinate and any allegedly legitimate portion of the rent and timeshare payments because J.S. Oliver and Mausner arranged for these payments to be made from client funds using soft dollars, instead of their own resources. We order Respondents to pay $1,376,440 in disgorgement jointly and severally,[74] plus prejudgment interest.[75]

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[72] *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *15 (Feb. 27, 2012) (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006)), *petition denied sub nom.*, *Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

[73] *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) (quoting *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998)); *see also Zacharias*, 569 F.3d at 473 (noting that, where disgorgement cannot be exact, the "well-established principle is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty").

[74] *See SEC v. Calvo*, 378 F.3d at 1215 ("It is a well settled principle that joint and several liability is appropriate in securities laws cases where two or more individuals or entities have close relationships in engaging in illegal conduct.").

[75] *See Terence Michael Coxon*, Exchange Act Release No. 48385, 56 SEC 934, 2003 WL 21991359, at *14 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005).

E. We impose modified civil money penalties on Respondents for their acts and omissions violating the antifraud provisions.

We also impose $1,325,000 in civil money penalties on Mausner and $6,625,000 on J.S. Oliver for their recurrent cherry picking and multiple failures to disclose their soft dollar uses.

1. The relevant statute and law afford us discretion in determining whether to assess civil money penalties, and if so, in setting their amount.

It is a "long-standing principle"[76] that "the breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions . . . to arrive at maximum effectuation of Congressional objectives."[77] We have consistently held that "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases,"[78] and the D.C. Circuit has recognized that we are "not obligated to make [our] sanctions uniform."[79] "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."[80]

Consistent with these principles, Congress granted us considerable discretion under Advisers Act Section 203(i) to decide in eligible cases whether to assess civil money penalties, and if so, to determine the appropriate amount of those penalties.[81] If statutory prerequisites are met, Section 203(i) provides that we "*may* impose a civil penalty"[82] of up to an applicable

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[76] *AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006).

[77] *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735 (D.C. Cir. 2015) (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967) (footnote omitted)).

[78] *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *21 n.75 (Jan. 30, 2009), *petition denied*, 416 F. App'x 142 (3d Cir. 2010).

[79] *Geiger v. SEC*, 363 F.3d at 488 (declining to "compare [ordered] sanction to those imposed in previous cases"); *accord Kornman v. SEC*, 592 F.3d 173, 188 (D.C. Cir. 2010); *cf. Seghers v. SEC*, 548 F.3d 129, 135 (D.C. Cir. 2008) ("We accord great deference to the SEC's decisions as to choice of sanction, inquiring only whether a sanction was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (internal citation omitted)).

[80] *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973).

[81] 15 U.S.C. § 80b-3(i); *cf.* Securities Act Section 8A(g), 15 U.S.C. § 77h-1(g) (similar penalty provision applicable in certain proceedings instituted under the Securities Act); Exchange Act Section 21B, 15 U.S.C. § 78u-2 (same with respect to Exchange Act); Investment Company Act 9(d), 15 U.S.C. § 80a-9(d) (same with respect to Investment Company Act).

[82] 15 U.S.C. § 80b-3(i)(1)(A) (emphasis added).

statutory maximum for "each" eligible "act or omission"[83] if we find that the "penalty is in the public interest."[84] This inquiry necessarily invokes our discretion.[85]

To guide our discretion, Congress provided a broad, non-exclusive list of factors that we "may consider" in determining the public interest.[86] These factors include: (A) "whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; (B) "the harm to other persons resulting either directly or indirectly from such act or omission"; (C) "the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior"; (D) specified prior findings of misconduct; and (E) "the need to deter such person and other persons from committing such acts or omissions."[87] Congress also specified that we may consider "such other matters as justice may require."[88]

In this context, the overall penalties that we impose depend on three determinations: the number of penalties we impose, the amount of each penalty, and the adjustments, if any, we make for a respondent's financial circumstances. Each of these factors is within our discretion, although that discretion must be exercised within statutory parameters.[89]

First, we may impose a separate civil money penalty for each of a respondent's "act[s] or omission[s]" willfully violating the securities laws.[90] Although Congress specified additional

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[83] 15 U.S.C. § 80b-3(i)(2).

[84] 15 U.S.C. § 80b-3(i)(1)(A).

[85] *See Marketlines, Inc. v. SEC*, 384 F.2d 264, 267 (2d Cir. 1967) (recognizing that "[i]n charging the Commission with the enforcement of the [Advisers] Act 'in the public interest,' Congress necessarily gave it a broad discretion" and affirming Commission order finding that revocation of investment adviser's registration was in the public interest) (citing *Berko v. SEC*, 316 F.2d 137 (2d Cir. 1963); 2 Loss, Securities Regulation 1323 (2d ed. 1961)).

[86] 15 U.S.C. § 80b-3(i)(3); *see also Collins v. SEC*, 736 F.3d 521, 524-25 (D.C. Cir. 2013) (recognizing that "Congress guides the Commission's discretion by pointing to six factors" in penalty statute).

[87] Advisers Act Section 203(i)(3), 15 U.S.C. § 80b-3(i)(3).

[88] Advisers Act Section 203(i)(3)(F), 15 U.S.C. § 80b-3(i)(3)(F).

[89] *S.W. Hatfield, CPA*, 2014 WL 6850921, at *12 ("Within th[e] statutory framework, we have discretion in setting the amount of penalty.").

[90] Advisers Act Section 203(i)(2), 15 U.S.C. § 80b-3(i)(2) (setting maximum penalties for "each act or omission" described in Advisers Act Section 203(i)(1)); Advisers Act Section 203(i)(1)(A)(i), 15 U.S.C. § 80b-3(i)(1)(A)(i) (stating that Commission may impose a penalty in the public interest against a person who "has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, [the Investment Company Act of 1934], or [the Investment Advisers Act of 1940], or the rules or regulations thereunder").

types of acts or omissions we may penalize,[91] it did not define the term "act or omission" itself.[92] Respondents urge us to clarify the method of counting the acts or omissions that we sanction. They assert that we (or our law judges in non-precedential initial decisions)[93] have issued penalties that correspond to (a) units of time,[94] (b) defrauded customers,[95] (c) one or more courses of conduct,[96] and (d) individual transactions violating the securities laws.[97]

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[91] Advisers Act Section 203(i)(1)(A)(ii)-(iv), 15 U.S.C. § 80b-3(i)(2)(ii)-(iv) (identifying certain secondary violations, misstatements to the Commission, and supervisory failures); *see also* Advisers Act Section 203(i)(1)(B), 15 U.S.C. § 80b-3(i)(1)(B) (specifying additional acts or omissions that can be penalized in cease-and-desist proceedings).

[92] *Fields*, 2015 WL 728005, at *24 n.162 (noting that, although penalty statute authorizes penalties for certain acts or omissions, it "leaves the precise unit of violation undefined").

[93] *See Rapoport v. SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012) (recognizing that "ALJ order[s]" are "not . . . binding" on the Commission); *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *8 n.48 (Apr. 4, 2014) (stating that the Commission is not bound by law judge decisions).

[94] *See* Order Making Findings and Imposing Sanctions by Default as to Centreinvest, Inc., Dan Rapoport, and Svyatoslav Yenin, *Centreinvest, Inc.*, Exchange Act Release No. 60413, 2009 WL 2356790 (A.L.J. July 31, 2009), *modified by* Order Denying Motion to Set Aside Default and Correcting Sanction, Exchange Act Release No. 61751, 2010 WL 1039862 (A.L.J. Mar. 22, 2010) (assessing civil money penalties for each year that violations continued), *vacated by Rapoport v. SEC*, 682 F.3d at 107, 108 (vacating Commission order applying default rule but also expressing skepticism as to law judge's approach to penalty assessment).

[95] *See Brown*, 2012 WL 625874, at *17; *Collins v. SEC*, 736 F.3d at 524 (recognizing that in *Brown* we "treated each of the five relevant sales [to different customers] as 'distinct and separate' acts or omissions, resulting in five penalties" and denying petition for review).

[96] *See Raymond J. Lucia Cos., Inc.*, Initial Decision Release No. 540, 2013 WL 6384274 (A.L.J. Dec. 6, 2013), *superseded by Raymond J. Lucia Cos., Inc.*, Exchange Act Release No. 75837, 2015 WL 5172953, at *27 (Sept. 3, 2015) (Commission opinion imposing single penalty), *petition for review filed*, No. 15-1345 (D.C. Cir. Oct. 5, 2015); *Daniel Bogar*, Initial Decision Release No. 502, 2013 WL 3963608, at *28 (Aug. 2, 2013) (imposing civil money penalties for two courses of action), *superseded as to one respondent by Bernerd E. Young*, Exchange Act Release No. 774421, 2016 WL 1168564, at *23 (Mar. 24, 2016) (Commission opinion imposing penalties for two subjects of misrepresentations and omissions), *petition for review filed*, No. 16-1149 (D.C. Cir. May 24, 2016).

[97] *See optionsXpress, Inc.*, Initial Decision Release No. 490, 2013 WL 2471113, at *87 (June 7, 2013) (ordering respondent "to pay a civil monetary penalty in the amount of $2 million, which is $1,667 for each of the 1,200 Reg. SHO violations" in light of determination that ordering maximum penalties for each act or omission would have led to an "absurd result"), *pending review by the Commission*, Exchange Act Release No. 70810, 2013 WL 5915774 (Nov. 5, 2013).

This variation in calculating the number of acts or omissions sanctioned in particular cases is a feature of the discretion granted to us in the penalty regime that Congress created. The securities laws prohibit a broad range of conduct that is not susceptible to a single definition. For example, "Section 10(b) was designed as a catch-all clause to prevent fraudulent practices,"[98] including not only "garden type variet[ies] of fraud" but also "unique form[s] of deception" involving "[n]ovel or atypical methods."[99] And because conduct by an investment adviser that violates Rule 10b-5 also violates Section 206, the reach of that section is similarly broad.[100] Thus, our exact methodology for imposition of civil money penalties may vary from case to case, as widely as the misconduct those penalties address. But that variation is rationalized by our consistent consideration and application of the statutory parameters.[101]

In authorizing civil money penalties in our administrative proceedings, Congress intended to provide us with flexibility to assess appropriate penalties on the disparate conduct prohibited by the securities laws.[102] Section 203(i) of the Advisers Act of 1940 authorizes us to impose civil money penalties for "each" of a respondent's "act[s] or omission[s]" willfully violating the securities laws, including each such provision at issue here.[103] Acting consistently with this language, we have, at times, imposed separate penalties for each of a respondent's violative transactions.[104] Federal courts also have construed the language of the penalty statute

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98 *Chiarella v. United States*, 445 U.S. 222, 226 (1980).

99 *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11 n.7 (1971) (internal quotation marks omitted); *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) (recognizing that Section 10(b) and Rule 10b-5 "are broad and, by repeated use of the word 'any,' are obviously meant to be inclusive").

100 *Disraeli*, 2007 WL 4481515, at *8 ("Facts showing a violation of . . . [Exchange Act Section] 10(b) by an investment advisor will also support a showing of a Section 206 violation." (alteration in original) (quoting *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007))).

101 *See generally Montford & Co. v. SEC*, 793 F.3d 76, 84 (D.C. Cir. 2015) (affirming the Commission's imposition of civil money penalties where it "considered and discussed the appropriate statutory factors in reaching its decision").

102 H.R. Rep. No. 101-616, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1379 (1990) ("The principal purpose of H.R. 975, the Securities Law Enforcement Remedies Act of 1990, is to provide the Securities and Exchange Commission (Commission) with new remedial authority that will enable the agency to operate its enforcement program in a more flexible manner."); *id.* at 14 ("Given the disparate nature of the cases, the Commission must have a range of remedies that enables it to act in a flexible manner."); *see also* S. Rep. No. 101-337, at 11 (1990) ("In addition to increasing deterrence, civil money penalties will provide both the courts and the SEC with greater flexibility to tailor a remedy to the seriousness of the violation.").

103 *See supra* note 90.

104 *See, e.g.*, *Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *22 (Dec. 11, 2009) (imposing separate civil money penalties for each violative transaction), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010); *Mark David Anderson*, Exchange Act Release No. 48352, 56 SEC 840, 2003 WL 21953883, at *10 (Aug. 15, 2003) (ordering respondent to pay a

(*continued . . .*)

applicable in civil actions, which permits district courts to impose penalties "[f]or each violation" of the Exchange Act,[105] to authorize transactional penalties.[106] Similarly, we have imposed multiple penalties where, although respondents' "misconduct followed a general pattern, their acts and omissions [violating the securities laws] . . . were nevertheless distinct and separate."[107] But we also have exercised our discretion to impose only a single penalty for repeated misconduct,[108] and the penalty statute also provides flexibility to assess penalties for fewer than each act or omission that violates the law or to assess no penalty at all.[109] Our determination does not turn on a single factor but rather looks to the factors relevant to the public interest.

(. . . *continued*)
separate civil money penalty for each of 96 trades at issue); *New Allied Dev. Corp.*, Exchange Act Release No. 37990, 52 SEC 1119, 1996 WL 683705, at *8 (Nov. 26, 1996) (imposing civil money penalties for each misrepresentation, as well as separate penalties for each of respondent's unregistered sales of securities).

[105] Exchange Act Section 21(d)(3)(B) (establishing maximum penalties for "each violation" of the Exchange Act), 15 U.S.C. § 78u(d)(3)(B).

[106] *SEC v. Pentagon Capital Management PLC*, 725 F.3d 279, 288 n.7 (2d Cir. 2013) (finding "no error in the district court's methodology for calculating the maximum penalty by counting each late trade as a separate violation"), *vacating on other grounds civil penalty determination made in*, No. 08 Civ. 3324(RWS), 2012 WL 1036087, at *3 (S.D.N.Y. Mar. 28, 2012) (collecting authority for the proposition that numerous courts have interpreted district court penalty statute to permit imposing penalties "based upon the number of acts taken that violate the securities laws"); *see also SEC v. Lazare Indus., Inc.*, 294 F. App'x 711, 715 (3d Cir. 2008) (affirming imposition of $500,000 civil penalty because the statutes "provide for a maximum penalty of $100,000 for individuals for *each* violation (i.e., each of Harley's at least 54 sales of stock)" (emphasis in original)).

[107] *Brown*, 2012 WL 625874, at *17; *see also supra* note 95 (discussing *Brown*).

[108] *See, e.g.*, *Fields*, 2015 WL 728005, at *24 n.162 (noting that "a penalty may be imposed for 'each act or omission,'" but accepting the parties' implied premise that all of the respondent's misconduct "may be considered as one course of action" and thus "constitute[d] a single act for purposes of assessing a civil penalty").

[109] *See supra* notes 82-85 and accompanying text; *see also Bloomfield v. SEC*, ___ F. App'x ____, 2016 WL 2343244, at *3 (9th Cir. May 4, 2016) (recognizing that "within th[e] structure [created by Congress], the Commission is given a good deal of flexibility," with respect to the assessment of penalties, and sustaining penalties ordered where, although "the Commission could have assessed a separate penalty for each of the many sales involved," it "limited itself to one penalty per named security"); *cf. Michael v. FDIC*, 687 F.3d 337, 355-56 (7th Cir. 2012) (finding no abuse of discretion where Board affirmed ALJ's assessment of relatively modest civil money penalties although petitioners were eligible for penalties that "far exceeded the amounts actually imposed").

That being said, assessing penalties on the basis of a unit of time, without an explanation of how the units of time relate to acts or omissions, may not comply with the penalty statute.[110] In *Rapoport*, the D.C. Circuit expressed skepticism regarding a law judge's civil penalty determination where, although he acknowledged the need to determine "whether to treat the entire course of conduct [at issue] as a single act or as a series of acts, as to which multiple penalties would be appropriate," he "imposed the maximum penalty on each respondent five times—once for each year" during which misconduct occurred—without explaining why.[111] Citing *Rapoport*, the law judge in this case recognized the need to "determine how many violations occurred and how many are attributable to each person" on whom penalties are imposed.[112] And she identified some authority supporting her conclusion that "it would be reasonable to assess a penalty for each month [a] cherry-picking scheme occurred."[113] But the law judge did not identify an evidentiary basis to conclude that one or more "act[s] or omission[s]" violating the securities laws occurred during each month for which she imposed a civil penalty.[114]

Second, for each act or omission that we determine to sanction we may impose up to a statutory maximum civil money penalty provided that it is consistent with the public interest.[115] There are no minimum or fixed penalties. Advisers Act Section 203(i)(2) specifies three periodically adjusted[116] tiers of maximum penalties, which are applicable to increasingly serious misconduct.[117] First-tier penalties require no additional statutory showing. But before we

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[110] *Cf. Phlo Corp.*, Exchange Act Release No. 55562, 2007 WL 966943, at *14 (Mar. 30, 2007) (imposing civil penalties "for each month in which [respondent] aided and abetted Phlo's violation of the turnaround rule," which "generally requires that registered transfer agents turnaround (or complete), within three business days of receipt, at least ninety percent of all routine items received for transfer *during a month*" (emphasis added)).

[111] 682 F.3d at 108.

[112] 2014 WL 3834038, at *54 n.65 (citing *Rapoport*, 682 F.3d at 108).

[113] *Id.* at *55 (citing *K.W. Brown & Co.*, 555 F. Supp. 2d at 1314-15).

[114] Advisers Act Section 203(i)(2), 15 U.S.C. § 80b-3(i)(2); *cf. Brown*, 2012 WL 625874, at *17 (explaining that we issued separate penalties not to address "a single act that defrauded multiple customers" but rather to sanction "separate interactions, where each customer presented a unique opportunity to violate the securities laws").

[115] *New Allied Dev. Corp.*, 1996 WL 683705, at *8 (observing that we may impose less than maximum penalties for applicable tier).

[116] *See* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, ch. 10, sec. 31001 (providing for, among other things, periodic adjustment of penalty amounts without amendment of text of penalty statute); *see also* 17 C.F.R. §§ 201.1003, 1004, and 1005 (effecting adjustment of civil money penalties for violations after, respectively, February 14, 2005, March 3, 2009, and March 5, 2013), Tables III, IV, and V to Subpart E of Part 201 (specifying such adjusted penalty amounts).

[117] Advisers Act Section 203(i)(2)(A)-(C), 15 U.S.C. § 80b-3(i)(2)(A)-(C) (specifying three tiers of maximum penalties).

impose a second-tier penalty, we must find that the misconduct we sanction "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement."[118] And we may impose third-tier penalties only for such misconduct that also "directly or indirectly resulted in substantial losses or 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."[119] Within each tier, maximum penalties for natural persons are lower than for other persons.[120] In determining what level of penalty to impose under the appropriate tier, we may consider the factors relevant to the public interest, as well as the number of acts or omissions we chose to penalize.

Third, we also "may, in [our] discretion" consider properly submitted evidence of a respondent's ability to pay penalties.[121] But "[e]ven when a respondent demonstrates an inability to pay, we have discretion not to waive the penalty, . . . particularly when the misconduct is sufficiently egregious."[122] And a respondent waives a claim of inability to pay by failing to raise it with the law judge.[123]

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[118] Advisers Act Section 203(i)(2)(B), 15 U.S.C. § 80b-3(i)(2)(B).

[119] Advisers Act Section 203(i)(2)(C), 15 U.S.C. § 80b-3(i)(2)(C).

[120] Advisers Act Section 203(i)(2), 15 U.S.C. § 80b-3(i)(2).

[121] Advisers Act Section 203(i)(4), 15 U.S.C. § 80b-3(i)(4) (emphasis added); Rule of Practice 410(c), 17 C.F.R. § 201.410(c) ("Any person who files a petition for review of an initial decision that asserts that person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in Rule 630(b)."); Rule of Practice 630(b), 17 C.F.R. § 201.630(b) ("The financial statement shall show the respondent's assets, liabilities, income or other funds received and expenses or other payments, from the date of the first violation alleged against that respondent in the order instituting proceedings, or such later date as specified by the Commission or a hearing officer, to the date of the order requiring the disclosure statement to be filed."); *see also* Rule of Practice 630(e), 17 C.F.R. § 201.630(e) (addressing waiver of claims of inability to pay based on failure to file financial disclosure statement).

[122] *Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *24 (Dec. 15, 2009) (quoting *Philip A. Lehman*, Exchange Act Release No. 54660, 2006 WL 3054584, at *4 (Oct. 27, 2006) and declining to reduce penalty in light of egregiousness of respondent's actions).

[123] *Disraeli*, 2007 WL 4481515, at *19.

2. The public interest requires stringent penalties against J.S. Oliver and Mausner for their misconduct.

We find that it is in the public interest to impose stringent penalties against J.S. Oliver and Mausner for their misconduct.[124] We impose $1,325,000 in penalties on Mausner and $6,625,000 on J.S. Oliver for their willful violations of the securities laws.

We start with our analysis of the public interest, an inquiry that Respondents do not address. J.S. Oliver and Mausner engaged in fraud and deceit by cherry picking and failing to disclose their uses of soft dollars. By cherry picking, they caused clients over $10.9 million in first-day losses, and they also misused over $1.1 million of soft dollars (client assets). Respondents were unjustly enriched because they used those soft dollars for purposes they did not disclose to clients and received nearly $225,000 in fees for CGF, one of the funds that they favored over three client accounts and promoted on the basis of inflated performance. Although they settled an arbitration with one disfavored client, they do not attempt to show that they made any restitution of the amounts we order disgorged.[125] Moreover, although J.S. Oliver and Mausner have no disciplinary history, their misconduct (which continued over an extended period, i.e., June 2008 to November 2011) was serious, calculated, and grossly breached their fiduciary duties to clients through what essentially amounted to theft. Respondents' misconduct also permeated nearly every aspect of their business because it involved the trading in their most active accounts and the use of soft dollars obtained from broker commissions. And the factors we discussed in support of our decision to impose an industry bar on Mausner also weigh heavily in favor of a substantial penalty.[126]

We also find that there is a significant need for heavy penalties to deter J.S. Oliver, Mausner, and others from engaging in cherry-picking and soft dollar violations. Congress recognized that penalties "should be higher if the violation is of a type that is difficult to detect."[127] Cherry picking is, by its nature, difficult to detect because an investment adviser's

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[124] *See* Advisers Act Section 203(i)(1)(A), 15 U.S.C. § 80b-3(i)(1)(A) (authorizing us to impose civil money penalties "[i]n any proceeding instituted pursuant to subsection (e) or (f) against any person," such as this one, on an appropriate showing of the public interest and predicate acts or omissions).

[125] *See generally Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *44 n.225, *46 n.243 (May 29, 2015) (declining to adjust disgorgement and penalties where respondent failed to show he had made restitution through settlement).

[126] *See supra* Section III.A.

[127] H.R. Rep. No. 101-616, at 21; S. Rep. No. 101-337, at 15 ("The Committee believes it is appropriate to enable the SEC to impose a higher penalty if the violation is of a type that is difficult to detect."); *see also* Advisers Act Section 203(i)(3)(F), 15 U.S.C. § 80b-3(i)(3)(F) (providing that, in determining the public interest, the Commission may consider "such other matters as justice may require"); *cf. SEC v. Henke*, 275 F. Supp. 2d 1075, 1085 (N.D. Cal. 2003) (noting with respect to application of district court penalty statute that "civil penalties beyond the amount required to compensate injured investors may be appropriate in order to achieve an

(*continued . . .*)

clients cannot see how the adviser allocates block trades. It appears that Respondents assumed that their conduct would not be discovered. They cherry picked for 18 months, and during this period, they repeatedly put off the principal of one disfavored client when he pressed for an explanation of the performance of the client's disfavored account. Even after the client left J.S. Oliver, Mausner continued cherry picking. Respondents also failed to disclose their uses of soft dollars. By its nature, this nondisclosure was necessarily difficult to detect. It is important to deter Respondents (notwithstanding the industry bar and revocation orders),[128] and others, from engaging in this conduct in the future.

The Division requests that, like the initial decision, we impose 18 separate maximum third-tier penalties on each of J.S. Oliver and Mausner for their 18-month long cherry picking, and four maximum third-tier penalties on each of them for their failures to disclose to clients four separate uses of soft dollars. Respondents do not contend that these penalties are inconsistent with the statute. Rather, they assert that the law judge did not comply with principles of reasoned decision-making because she penalized Respondents' cherry picking on a monthly basis but imposed a separate penalty for each subject of their soft dollar omissions. Respondents contend that the law judge should have explained in more detail her basis for imposing monthly cherry picking penalties, why she counted the cherry picking and soft dollar violations differently for penalty purposes, and why she did not use one of the other methods of counting violations that the Commission or law judges have used in the past.[129] We address Respondents' arguments to the extent that they raise issues relevant to our own penalty calculations.[130]

Respondents' misconduct involved repeated calculated violations of the securities laws, and its gravity does not merit that we assess only a single penalty for an ongoing course of conduct. Instead, we impose 15 maximum second-tier penalties on each of J.S. Oliver and Mausner for their cherry picking, representing one penalty for each of 15 acts of cherry picking within the five years before the OIP was issued—a number that, as discussed below, is supported

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(. . . *continued*)
optimal level of deterrence for a crime that is difficult to detect"), *aff'd*, 130 F. App'x 173 (9th Cir. 2005).

128 *See supra* notes 65 and 66 and accompanying text (recognizing that a person may violate the securities laws even if he is not affiliated with an industry participant).

129 *See Rapoport v. SEC*, 682 F.3d at 104 (stating in the context of discussion of the Commission's application of its default rule that "agencies must apply their rules consistently" and "may not depart from their precedent without explaining why"); *cf. id.* at 108 (addressing civil money penalties and explaining that the Commission "must provide some meaningful explanation for imposing sanctions"). *But see* supra notes 76-80 and accompanying text (discussing deference owed to, and fact specific nature of, administrative sanctions determinations).

130 *See supra* note 5 and accompanying text (recognizing that the initial decision is of no force or effect in this appeal).

by the evidentiary record[131]—and four maximum second-tier penalties for their omissions to disclose the separate soft dollar uses at issue. Second-tier penalties are appropriate because Respondents engaged in fraud.[132]

The record supports a finding that Respondents engaged in at least 15 separate willful acts of cherry picking in violation of the antifraud provisions, as required to impose 15 separate penalties under Advisers Act Section 203(i)(2)(B).[133] We find that Glasserman's expert analysis establishes that J.S. Oliver and Mausner engaged in at least one act of cherry picking during each month between and including June 2008 and November 2009, a total of 18 months. The Division observes that Glasserman "offered a detailed analysis that calculated the disparity in performance between the favored and disfavored accounts during each" of these months, which is reflected in an exhibit to his report.[134] This analysis shows significant disparities between average monthly first-day returns in each month at issue: in 14 of the 18 months, average first-day returns for favored accounts are positive and average first-day returns for the disfavored accounts are negative, and in the remaining months the negative returns for the disfavored accounts significantly exceed those of the favored accounts. Glasserman's findings are particularly persuasive when considered with his analysis of Mausner's trade allocations over the period as a whole. Indeed, Respondents do not dispute that the evidence establishes that they

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131 *Cf. Calabro*, 2015 WL 3439152, at *46-47 (imposing a single civil money penalty on each respondent for churning of client accounts—misconduct litigated as a course of conduct over a discrete period, rather than individual acts or omissions).

132 15 U.S.C. § 80b-3(i)(2)(B).

133 15 U.S.C. § 80b-3(i)(2)(B) (authorizing second-tier penalties for "each . . . act or omission" falling within scope of the provision).

134 *See* Exhibit 5 to Glasserman expert report. Glasserman's expert report reflects that, in performing this monthly analysis, he reviewed and relied on J.S. Oliver's trade blotter in conjunction with other evidence of securities prices. In an addendum to his report, Glasserman also identifies certain "specific allocation audit trail report[s]" for various trade dates in the years 2008 through 2010 that he consulted. Glasserman relied on this data to provide "a narrower set of 'same day, same security' transactions," which he concluded in his report provided "further statistical evidence of cherry-picking" beyond his analysis of the trade blotter. At oral argument, counsel for the Division acknowledged that Glasserman did not list any audit trail reports for July 2009 as documents consulted in his report. This does not undermine our conclusion that Respondents engaged in at least one cherry-picking transaction in each month over the relevant period, including July 2009. First, Glasserman did not rely on the audit trail reports in Exhibit 5 or in his principal analysis of cherry picking over the relevant period, which concluded that the evidence "overwhelmingly" showed that Respondents engaged in cherry picking. Thus, any "gap" in the audit trail reports is irrelevant to our determination that Respondents engaged in at least one act of cherry-picking during the 15-month period. Second, the record separately contains trade allocation data for July 2009, so there is not a gap in the trade data for that month. Third, Respondents did not challenge the Division's assertion that Exhibit 5 provides a basis to conclude that they engaged in at least one cherry-picking trade a month during the relevant period.

engaged in at least one act of cherry picking during each month of the 18-month relevant period. By fraudulently allocating trades at least once a month, Respondents "employ[ed]" a "device, scheme, or artifice to defraud"[135] or "engage[d]" in an "act," "transaction, practice, or course of business which operates or would operate as a fraud or deceit"[136] at least 18 times over the relevant period. But only 15 of these 18 acts occurred within the five years before the order instituting proceedings was issued, and, although Respondents did not raise a statute of limitations defense,[137] we exercise our discretion to limit the penalties we impose for cherry picking to those 15 acts.[138]

The Division requests that we impose third-tier penalties for Respondents' cherry picking because it "involved fraud" and caused substantial losses of $10.9 million to the three disfavored accounts.[139] And at oral argument, counsel for Respondents twice stated that they were not challenging the tier of the penalties that the law judge imposed. Based on our consideration of the relevant public interest factors and the facts of this case, however, we exercise our discretion to impose maximum second-tier penalties.[140] We impose total cherry-picking penalties of $1,055,000 on Mausner and $5,275,000 on J.S. Oliver for seven acts between September 2008 and March 2009 at applicable maximum penalties of $65,000 and $325,000 per act and eight acts between April 2009 and November 2009 at applicable maximum penalties of $75,000 and $375,000.[141] The penalty we impose on J.S. Oliver is slightly less than half the $10.9 million in harm it caused its clients through cherry picking, and the penalty on Mausner is lower.

Although the parties do not attempt to calculate a precise number of cherry-picking violations, it appears from the record that the actual number of acts or omissions constituting

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135 Exchange Act Rule 10b-5(a), 17 C.F.R. § 240.10b-5(a); Securities Act Section 17(a)(1), 15 U.S.C. § 77q(a)(1); Advisers Act Section 206(1), 15 U.S.C. § 80b-6(1).

136 Exchange Act Rule 10b-5(c), 17 C.F.R. § 240.10b-5(c); Securities Act Section 17(a)(3), 15 U.S.C. § 77q(a)(3); Advisers Act Section 206(2), 15 U.S.C. § 80b-6(2); *see also* Advisers Act Section 206(4), 15 U.S.C. § 80b-6(4).

137 *See* 28 U.S.C. § 2462 (generally providing that "an action, suit or proceeding for the enforcement of any civil fine, *penalty*, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued") (emphasis added); *Brown*, 2012 WL 625874, at *17-18 (finding, where argument was raised, that calculation of civil penalties "should not include sales to customers outside the applicable limitations period").

138 *Cf. Canady v. SEC*, 230 F.3d 362, 365 (D.C. Cir. 2000) (concluding that "it was not arbitrary for the Commission to deem forfeited Canady's statute of limitations defense which was neither briefed to the ALJ nor raised in Canady's exceptions to his decision-nor urged by Canady at any time before the Commission's opinion on review").

139 Advisers Act Section 203(i)(2)(C), 15 U.S.C. § 80b-3(i)(2)(C).

140 *See supra* notes 124-28 and accompanying text (analyzing statutory public interest factors).

141 *See supra* note 116 (referencing adjusted maximum per tier penalties).

cherry picking could be much greater. J.S. Oliver engaged in more than 23,000 transactions over the relevant period, and during that time, its prime broker identified in excess of 4,000 transactions on 167 trading days as potential instances of self-dealing. The favored and disfavored accounts that were the subject of Respondents' cherry picking made up approximately 98% of J.S. Oliver's total trading volume over the relevant period, and Glasserman opined that Mausner's misconduct "affected virtually all of J.S. Oliver's equity trading on behalf of its clients." Thus, it would appear that with further analysis of trade and allocation data, we could be justified in finding a much larger number of acts or omissions, although this alone would not establish that a greater penalty was appropriate in the public interest. But given the record before us and our consideration of the public interest based on all the relevant statutory factors, we believe that the 15 instances we have identified are substantially justified for assessing maximum second-tier penalties for cherry picking.

Given the amount of the penalties we impose for cherry-picking, we also determine in our discretion to impose maximum second-tier penalties for each of Respondents' four failures to disclose a separate use of soft dollars.[142] Because Advisers Act Section 203(i) specifically authorizes us to sanction each "act or *omission*" violating the securities laws,[143] our decision to penalize each of Respondents' separate failures to disclose their use of soft dollars also complies with the statute.[144] These sanctions reflect that the primary nature of Respondents' soft dollar misconduct was in failing to disclose separate soft dollar uses. We apply the applicable second-tier maximum penalties for the three omissions beginning before March 3, 2009 ($65,000 and $325,000) and the higher applicable maximum penalties ($75,000 and $375,000) for the fourth omission that began in June 2009 (the payment to Mausner's former spouse). For their soft dollar violations, we thus assess additional penalties of $270,000 (three $65,000 penalties plus an additional $75,000 penalty) on Mausner and $1,350,000 (three $325,000 penalties plus an additional $375,000 penalty) on J.S. Oliver.

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[142] We are exercising our discretion with respect to penalties for soft dollar violations based on the entirety of the facts and circumstances of this case. We can and have assessed third-tier penalties for failure to disclose material conflicts of interest. *See, e.g.*, *Montford & Co.*, 2014 WL 1744130, at *25 (failure to disclose compensation); *Zion Capital Mgmt.*, Release No. 48904A, 2003 WL 25596513, at *9 (Dec. 11, 2003) (failure to disclose conflict of interest).

[143] *See* Advisers Act Section 203(i)(2)(B), 15 U.S.C. § 80b-3(i)(2)(B) (setting "maximum amount of [second-tier] penalty for each such act or *omission*") (emphasis added).

[144] *See Montford & Co*, 2014 WL 1744130, at *25 (imposing two civil money penalties on each of firm and its principal where "[o]n two separate occasions, Respondents failed to immediately alert clients, by full and fair disclosure, of information bearing directly on their advisory independence and critical to the clients' investment decisions"); *see also Maria T. Giesige*, Exchange Act Release No. 60000, 2009 WL 1507584, at *8 (May 29, 2009) (stating that "Giesige made numerous and repeated misstatements and omissions to each of her approximately fifty customers who purchased Carolina Development securities, and the Commission has the authority to assess a penalty for each of these individual violations").

We reject Respondents' argument that imposing monthly penalties for cherry picking is internally inconsistent with imposing a separate penalty for each use of soft dollars that Respondents failed to disclose. Our decision to do so reflects the differing nature of Respondents' two types of misconduct (one centered on repeated affirmative acts and the other on omissions), and is consistent with the flexibility authorized by Congress through the penalty statute.[145] These methods of calculation also strike a balance between ends of a spectrum. Penalizing Respondents' violations as two unitary course of conduct, each warranting a single penalty, is too lenient given the gravity of their misconduct. On the other hand, in our discretion and on the facts of this case, we decline to use a method of counting that would yield a larger number of total penalties. As explained above, we decline to impose a separate penalty for each cherry-picking transaction.[146] And although a different method of counting soft dollar violations might result in a greater number of penalties (e.g., counting the undisclosed payments or some other method identified by Respondents), assuming it were consistent with the statute, we find it unnecessary given the total amount of penalties we impose.[147] In all, we assess total civil money penalties of $1,325,000 on Mausner and $6,625,000 on J.S. Oliver for their cherry-picking acts and soft dollar omissions. In our discretion, we do not order them to pay penalties for their other violations of the securities laws.

J.S. Oliver and Mausner argue that imposing stringent civil money penalties is excessive because "the record establishes that neither firm nor principal have substantial assets." We disagree. Respondents failed to offer the financial records required by our rules to support such an argument.[148] Congress believed that it was "appropriate that respondents have the obligation to present evidence of their ability to pay, since they have better access to their financial records" than we do.[149] Moreover, the evidence that Respondents marshal in favor of their argument is not persuasive. The initial decision did not conclude that they could have been forced into bankruptcy by an earlier settlement, as they contend. Instead, it found—consistent with the record—that Respondents threatened bankruptcy to avoid payment of the full settlement. And Respondents' decision to proceed pro se before the law judge and to run J.S. Oliver's operations out of Mausner's one-time residence also do not establish an inability to pay. In any event, we have the discretion to impose penalties notwithstanding a respondent's financial circumstances,

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[145] *See, e.g.*, *supra* notes 76-86, 88, and 102 and accompanying text (discussing flexibility in determination of, case specific nature of, and deference due to administrative sanctions determinations).

[146] *See supra* paragraph following note 141.

[147] *See supra* notes 94-97 and accompanying text (identifying various other forms of counting).

[148] *See supra* note 121 and accompanying text; *see also Calabro*, 2015 WL 3439152, at *45 n.231 (rejecting respondent's argument that he was "financially unable to pay any level of disgorgement or penalty" because he failed to offer the required supporting record evidence).

[149] S. Rep. 101-337, at 16; *accord* H.R. Rep. No. 101-616, at 39.

and we find that J.S. Oliver and Mausner's misconduct is egregious enough for us to have done so here had they established their financial circumstances.[150]

Respondents raise one final attack on the amount of civil money penalties, which we also reject. Citing the D.C. Circuit's decision in *Collins v. SEC*, they assert that the initial decision erred because the penalties it imposed were "out of line" with our precedent.[151] They argue that we generally impose penalties that "bear a proportional relationship to other dollar figures in a case" and ask us to cap the amount of the penalties imposed at the amount of disgorgement we order. Respondents' argument fails for three reasons.

First, we reject Respondents' request to set civil penalties at no more than disgorgement because our "broad discretion in fashioning sanctions in the public interest cannot be strictly cabined according to some mechanical formula."[152] Further, in *Collins*, the D.C. Circuit recognized that the penalty statute "seems to demand that [we] look beyond harm to victims or gains enjoyed by perpetrators" and "lists harm to other persons as only one of five specific factors (plus the catch-all reference to 'such other matters as justice may require')."[153] And unlike the civil money penalty statutes that apply to federal court securities enforcement actions, the penalty statute here does not authorize us to impose civil penalties equal to a respondent's pecuniary gain as an alternative to penalties based on acts or omissions.[154] In any event, it is reasonable for disgorgement and civil money penalties to differ because they serve different purposes: unlike penalties, "[d]isgorgement serves to remedy securities law violations by

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[150] *See supra* note 122 and accompanying text. Citing *Steadman v. SEC*, 603 F.2d at 1137, Respondents also contend that "when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors." But courts have rejected this burden. *See, e.g.*, *Paz Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) (citing *Rizek v. SEC*, 215 F.3d 157, 161 (1st Cir. 2000) (explaining *Steadman* says "no more than . . . that agencies must sufficiently articulate the grounds of their decisions")).

[151] *See Collins*, 736 F.3d at 526 (stating that "[r]eview for whether an agency's sanction is 'arbitrary or capricious' requires consideration of whether the sanction is out of line with the agency's decisions in other cases"). *But see supra* notes 79 and 80 and accompanying text (explaining that agency is not required to make its sanctions uniform).

[152] *See Blinder, Robinson & Co. v. SEC,* 837 F.2d 1099, 1113 (D.C. Cir. 1988); *accord Paz Sec., Inc. v. SEC*, 566 F.3d at 1175.

[153] *See Collins*, 736 F.3d at 526 (addressing parallel Exchange Act administrative penalty provision).

[154] *See* Advisers Act Section 209(e)(2), 15 U.S.C. § 80b-9(e)(2) (permitting district court to set penalty at "the gross amount of pecuniary gain to [sanctioned] defendant as a result of the violation"); Securities Act Section 20(d)(2), 15 U.S.C. § 77t(d)(2) (same); Exchange Act Section 21(d)(3)(B), 15 U.S.C. § 78u(d)(3)(B) (same); Investment Company Act Section 42(e)(2), 15 U.S.C. § 80a-41(e)(2) (same); *SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d at 1315 (imposing civil money penalty for cherry picking equal to amount of pecuniary gain).

depriving violators of the fruits of their illegal conduct" and "does not serve a punitive function."[155]

Second, even if Respondents were correct that it is necessary for penalties to be proportional to other numbers in the case because "the penalty statute's use of a test that is multi-factorial" makes other comparisons too difficult,[156] the penalties we impose here meet that test. The total penalties that we assess on J.S. Oliver ($6,625,000) are somewhat more than one-half the sum of the $10.9 million in harm that Respondents caused the disfavored accounts plus the $1,376,440 in disgorgement we order. The total penalties on Mausner ($1,325,000) are much lower and are slightly less than disgorgement. These penalties are thus proportional to other figures in the case, as Respondents urge. There is no "huge excess of the penalty over other relevant dollar figures," and thus this case is not a "stark outlier," as Respondents claim with respect to the initial decision.

Our penalties are also well within the range of multiples of disgorgement that the D.C. Circuit has identified in our proceedings. In *Collins*, the court observed civil penalties in administrative proceedings "ranging from roughly one-half of the disgorgement amount . . . to about 25 times" disgorgement, but ultimately sustained a penalty imposed on an individual that was over 100 times disgorgement.[157] And as Respondents highlight, we have imposed civil penalties where we have ordered no disgorgement at all.[158] In this case, the range identified in *Collins* is $688,220 to $34,411,000, and 100 times disgorgement would be $137,644,000. The total penalties we impose on both Respondents ($7,950,000) do not approach the midpoint of the range of one-half to 25 times disgorgement ($17,549,610).

Finally, Respondents' assertion that we must justify every penalty imposed as consistent with prior decisions fails because it would overrule long-standing precedent providing that administrative sanctions are not invalid because they are "more severe than sanctions imposed in other cases."[159] Indeed, J.S. Oliver and Mausner concede that "the Commission is not obligated to make its sanctions uniform."[160] Although Respondents deny it, their assertion that we should limit penalties to the amount of disgorgement would impose precisely such a requirement here.

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[155] *See SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014).

[156] *But see Collins*, 736 F.3d at 525 (rejecting claim that penalties were inconsistent with precedent when considered as a multiple of disgorgement where, as here, petitioner "ma[de] no effort to hold constant the many other factors relevant to determining civil penalties" in their comparisons to other cases).

[157] *See Collins*, 736 F.3d at 525.

[158] *See, e.g., Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *16 (July 12, 2013).

[159] *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. at 187.

[160] *See Geiger v. SEC*, 363 F.3d at 488; *see also generally supra* notes 76-80 and accompanying text (discussing flexibility in administrative sanctions determinations).

IV.

Respondents argue that Chief ALJ Brenda P. Murray—who presided over this matter and issued the Initial Decision—was not appointed in a manner consistent with the Appointments Clause of the Constitution. We find that the appointment of Commission ALJs is not subject to the requirements of the Appointments Clause.

Under the Appointments Clause, certain high-level government officials must be appointed in particular ways: "Principal officers" must be appointed by the President (and confirmed by the Senate), while "inferior officers" must be appointed either by the President, the heads of departments, or the courts of law.[161] The great majority of government personnel are neither principal nor inferior officers, but rather "mere employees" whose appointments are not restricted by the Appointments Clause.[162] The Division does not dispute that Chief ALJ Murray was not appointed by the President, the head of a department, or a court of law.[163] Respondents therefore contend that her appointment violates the Appointments Clause because, in their view, Chief ALJ Murray should be deemed an inferior officer. The Division counters that she is an employee and thus there was no violation of the Appointments Clause.

As we have previously explained,[164] the D.C. Circuit's decision in *Landry v. FDIC* guides our resolution of this question.[165] *Landry* held that, for purposes of the Appointments Clause, ALJs at the Federal Deposit Insurance Corporation ("FDIC"), who oversee administrative proceedings to remove bank executives, are employees rather than inferior officers. *Landry* explained that the touchstone for determining whether adjudicators are inferior officers is the extent to which they have the power to issue "final decisions."[166] Although ALJs

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[161] The Clause provides that the President "by and with the advice and consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

[162] *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991)); *see also Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

[163] The Commission constitutes the "head of a department" when its commissioners act collectively. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010).

[164] *David F. Bandimere*, Exchange Act Release No. 76308, 2015 WL 6575665, at *19 (Oct. 29, 2015), *petition for review filed*, No. 15-9586 (10th Cir. Dec. 22, 2015); *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *24 (Sept. 17, 2015), *petition for review filed*, No. 15-1416 (D.C. Cir. Nov. 13, 2015); *Raymond J. Lucia Co.*, 2015 WL 5172953, at *21.

[165] 204 F.3d 1125 (D.C. Cir. 2000).

[166] *Id*. at 1133-34. Respondents assert that the Commission has changed its views on this point, having previously taken the position in *Free Enterprise Fund* that members of the PCAOB were inferior officers even though they lacked authority to issue final decisions. *See* Brief for the United States, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (No. 08-861), 2009 WL 3290435 (Oct. 13, 2009). Respondents misapprehend what was

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at the FDIC take testimony, conduct trial-like hearings, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders, they "can never render the decision of the FDIC."[167] Instead, they issue only "recommended decisions," which the FDIC Board of Directors reviews *de novo*, and "[f]inal decisions are issued only by the FDIC Board."[168] The FDIC ALJs thus function as aides who assist the Board in its duties, not officers who exercise significant authority independent of the Board's supervision. Because ALJs at the FDIC "have no such powers" of "final decision," the D.C. Circuit "conclude[d] that they are not inferior officers."[169]

The mix of duties and powers of the Commission's ALJs are very similar to those of the ALJs at the FDIC. Like the FDIC's ALJs, the Commission's ALJs conduct hearings, take testimony, rule on admissibility of evidence, and issue subpoenas. And like the FDIC's ALJs, the Commission's ALJs do not issue the final decisions that result from such proceedings. Just as the FDIC's ALJs issue only "recommended decisions" that are not final, the Commission's ALJs issue "initial decisions" that are likewise not final.[170] Respondents may petition the Commission for review of an ALJ's initial decision,[171] and it is our "longstanding practice [to] grant[] virtually all [such] petitions for review."[172] Indeed, we are "unaware of any case in which the Commission has declined to grant" a respondent's timely petition for review from an ALJ's initial decision.[173] Absent a petition, we may also choose to review a decision on our own initiative.[174] In either case, our rules expressly provide that "the initial decision [of an ALJ] shall

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at issue in *Free Enterprise Fund*. There, it was "undisputed" that PCAOB Board members were inferior officers, so there was no occasion to address the distinction between mere employees and inferior officers. *See id.* at 29 n.8. Further, that case did not turn on the absence or presence of adjudicative finality, because PCAOB Board members performed "enforcement or policymaking functions." *Free Enterprise Fund*, 561 U.S. at 507 n.10.

[167] *Landry*, 204 F.3d at 1133.

[168] *Id*.

[169] *Id*. at 1134.

[170] *See* Rule of Practice 360(a)(1) & (d), 17 C.F.R. § 201.360(a)(1) & (d).

[171] Rule of Practice 411(b), 17 C.F.R. § 201.411(b).

[172] Exchange Act Release No. 35833, 1995 WL 368865, at *80-81 (June 9, 1995). We reiterated this policy in the context of amendments to our Rules of Practice in 2004 that eliminated the filing of oppositions to petitions for review. We deemed such oppositions pointless, "given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision." Exchange Act Release No. 48832, 2003 WL 22827684, at *13 (Nov. 23, 2003).

[173] Exchange Act Release No. 33163, 1993 WL 468594, at *59 (Nov. 5, 1993).

[174] Rule of Practice 411(c), 17 C.F.R. § 201.411(c); *see also* 15 U.S.C. § 78d-1(b) (providing that "the Commission shall retain a discretionary right to review the action of any . . . administrative law judge . . . upon its own initiative or upon petition"). We have *sua sponte*
(*continued . . .*)

not become final."[175] Even where an aggrieved person fails to file a timely petition for review of an initial decision and we do not order review on our own initiative, our rules provide that "*the Commission* will issue an order that the decision has become final," and it becomes final only "upon issuance of the order" by the Commission.[176]

Moreover, as does the FDIC, we review our ALJs' decisions *de novo*.[177] Upon review, we "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in

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ordered review on a number of occasions. *See, e.g.*, *MGSI Sec., Inc.*, Exchange Act Release No. 42717, 2000 WL 462952, at *1 (Apr. 25, 2000) ("The Commission has determined to review the decision on its own initiative for the limited purpose described below."); *Robert I. Moses*, Exchange Act Release No. 37795, 1996 WL 580130, at *1 (Oct. 8, 1996) ("On our own motion, we ordered a limited review of the [initial] decision . . . ."); *accord Dian Min Ma*, Exchange Act Release No. 74887, 2015 WL 2088438, at *1 (May 6, 2015); *Michael Lee Mendenhall*, Exchange Act Release No. 74532, 2015 WL 1247374, at *1 (Mar. 19, 2015); *George C. Kern, Jr.*, Exchange Act Release No. 29356, 1991 WL 284804, at *1 (June 21, 1991).

175 Rule of Practice 360(d)(1), 17 C.F.R. § 201.360(d)(1).

176 Rule of Practice 360(d)(2), 17 C.F.R. § 201.360(d)(2) (emphasis added). An initial decision does *not* become final simply "on the lapse of time" for seeking review. Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004). And any sanctions become effective only after the date specified in the Commission's notice of finality. Rule of Practice 360(d)(2), 17 C.F.R. § 201.360(d)(2) ("The order of finality shall state the date on which sanctions, if any, take effect.").

177 We do not view the fact that we accord our ALJs deference in the context of demeanor-based credibility determinations to vest them with the type of authority that would qualify them as inferior officers. *First*, as we have repeatedly made clear, we do not accept such findings "blindly," and we will "disregard explicit determinations of credibility" when our *de novo* review of the record as a whole convinces us that a witness's testimony is credible (or not) or that the weight of the evidence warrants a different finding as to the ultimate facts at issue. *Kenneth R. Ward*, Exchange Act Release No. 47535, 2003 WL 1447865, at *10 (Mar. 19, 2003), *aff'd*, 75 F. App'x 320 (5th Cir. 2003); *accord Francis V. Lorenzo*, Exchange Act Release No. 74836, 2015 WL 1927763, at *10 n.32 (Apr. 29, 2015), *petition for review filed*, No. 15-1202 (D.C. Cir. July 1, 2015); *Irfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL 3199181, at *8 n.46 (Nov. 3, 2006), *petition denied*, 269 F. App'x 217 (3d Cir. 2008); *see also Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) ("The law is settled that an agency is not required to adopt the credibility determinations of an administrative law judge."). *Second*, our practice in this regard is no different from the FDIC's and so does not warrant a departure from *Landry*. *Compare [Redacted] (Insured State Nonmember Bank)*, FDIC-82-73a, 1984 WL 273918, at *5 (June 18, 1984) (stating, "as a general rule," that "the assessment of the credibility of witnesses" by the FDIC's ALJs is given "deference" by the FDIC) *with Ramon M. Candelaria*, FDIC-95-62e, 1997 WL 211341, at *3-4 (Mar. 11, 1997) (noting that the FDIC ALJ found respondent to be "entirely credible" but rejecting respondent's testimony "in light of the entire record").

part," any initial decision.[178] And "any procedural errors" made by an ALJ in conducting the hearing "are cured" by our "thorough, *de novo* review of the record."[179] We may expand the record by "hear[ing] additional evidence" ourselves or remanding for further proceedings before the ALJ, and may "make any findings or conclusions that in [our] judgment are proper and on the basis of the record."[180]

Respondents suggest that our ALJs are functionally comparable to, and enjoy as much discretion as, Article III trial judges. But that is not the case. A trial judge's factual findings are afforded significant deference by reviewing courts, while we do not defer to our ALJs' findings. And although ALJs may oversee the taking and hearing of evidence, we have made clear that we have "plenary authority over the course of [our] administrative proceedings and the rulings of [our] law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief."[181] This includes authority over all evidentiary and discovery-related rulings. We are not limited by the record that comes to us. As explained above, we may expand the record. The fact that our ALJs may rule initially on evidentiary matters and discovery issues (subject to our *de novo* review) does not distinguish them from the FDIC's ALJs in *Landry* who have the same authority.

Respondents rely on several decisions in which district courts have found that the Commission's ALJs are inferior officers.[182] Those decisions decline to follow the D.C. Circuit's reasoning in *Landry* and rely instead on *Freytag v. Commissioner*,[183] in which the Supreme Court held that a "special trial judge" of the Tax Court was an inferior officer. But we agree with *Landry's* analysis and the distinctions that the D.C. Circuit identified between ALJs and the special trial judges at issue in *Freytag*.[184] The greater role and powers of the special trial judges

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[178] Rule of Practice 411(a), 17 C.F.R. § 201.411(a); *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . .").

[179] *Heath v. SEC*, 586 F.3d 122, 142 (2d Cir. 2009); *see also, e.g.*, *Fields*, 2015 WL 728005, at *20 ("[O]ur *de novo* review cures any evidentiary error that the law judge may have made.").

[180] Rules of Practice 411(a), 452; 17 C.F.R. §§ 201.411(a), 452.

[181] *Mendenhall*, 2015 WL 1247374, at *1. Further, our "ALJs' rulings are not precedential and are not binding on the Commission or on other ALJs." *Bandimere*, 2015 WL 6575665, at *23 n.138 (collecting cases).

[182] *See Ironridge Global IV, Ltd. v. SEC*, No. 1:15–CV–2512–LMM, ___ F. Supp. 3d ____, 2015 WL 7273262 (N.D. Ga. Nov. 17, 2015) (appeal pending); *Gray Financial Group Inc. v. SEC*, No. 15-cv-00492, ECF No. 56 (N.D. Ga. Aug. 4, 2015) (appeal pending); *Duka v. SEC*, No. 15 Civ. 357(RMB)(SN), 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015) (appeal pending); *Hill v. SEC*, No. 1:15–CV–1801–LMM, 2015 WL 4307088 (N.D. Ga. June 8, 2015) (appeal pending).

[183] 501 U.S. 868 (1991).

[184] *Landry*, 204 F.3d at 1133 (explaining that the special trial judges at issue in *Freytag* exercised "authority . . . not matched by the ALJs").

relative to Commission ALJs, in our view, makes *Freytag* inapposite here. First, unlike the ALJs whose decisions are reviewed *de novo*, the special trial judges made factual findings to which the Tax Court was required to defer, unless clearly erroneous.[185] Second, the special trial judges were authorized by statute to "render the [final] decisions of the Tax Court" in significant, fully-litigated proceedings involving declaratory judgments and amounts in controversy below $10,000.[186] As discussed above, our ALJs issue initial decisions that are not final unless the Commission takes some further action. Third, the Tax Court (and by extension the court's special tax judges) exercised "a portion of the judicial power of the United States," including the "authority to punish contempts by fine or imprisonment."[187] Commission ALJs, by contrast, do not possess such authority.[188] And while Commission ALJs may issue subpoenas to compel compliance, they are powerless to enforce their subpoenas; the Commission must seek and then obtain an order from a federal district court to compel compliance.[189] In this respect, too, our ALJs are akin to the FDIC's ALJs that *Landry* found to be "mere employees."[190]

Respondents also rely on three cases involving military judges, which are inapposite because those judges possessed far greater powers than do our ALJs (or the FDIC's ALJs). They could, for example, decide "court-martial proceedings that result in the most serious sentences" (including death, dishonorable discharge, or imprisonment);[191] make conclusive determinations about the factual sufficiency of the evidence;[192] or render findings to which reviewing courts

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185 *See id.*

186 *Freytag*, 501 U.S. at 882.

187 *Id.* at 891.

188 *See* Rule of Practice 180, 17 C.F.R. § 201.180. The Commission's rules provide ALJs with authority to punish contemptuous conduct in only the following, limited ways: If a person engages in contemptuous conduct before the ALJ during any proceeding, the ALJ may "exclude that person from such hearing or conference, or any portion thereof" or "summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding." *Id.* § 201.180(a). If there are deficiencies in a filing, a Commission ALJ "may reject, in whole or in part," the filing, such filing "shall not be part of the record," and the ALJ "may direct a party to cure any deficiencies." *Id.* § 201.180(b). Finally, if a party fails to make a required filing or to cure a deficiency with a filing, then a Commission ALJ "may enter a default . . . , dismiss the case, decide the particular matter at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that matter." *Id.* § 201.180(c). Any such ruling would, of course, be subject to *de novo* Commission review.

189 *See* 15 U.S.C. § 78u(c).

190 *See* 12 C.F.R. §§ 308.25(h), 308.26(c), 308.34(c) (providing that an aggrieved party must apply to a federal district court for enforcement of a subpoena issued by a FDIC ALJ).

191 *Edmond v. United States*, 520 U.S. 651, 652 (1997).

192 *Weiss v. United States*, 510 U.S. 163, 168 (1994); 10 U.S.C. § 867(c).

were required to defer.[193] In short, not all judges possess the same stature or exercise the same powers, and that the Commission's ALJs may carry out some of the same tasks as other officials who also are denominated "judges" does not mean they have the requisite significant authority to qualify as inferior officers.

Based on the foregoing, we conclude that the mix of duties and powers of our ALJs is similar in all material respects to the duties and role of the FDIC's ALJs in *Landry*.[194] Accordingly, we follow *Landry*, and we conclude that our ALJs are not "inferior officers" under the Appointments Clause.[195]

An appropriate order will issue.[196]

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

Brent J. Fields
Secretary

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[193] *Ryder v. United States*, 515 U.S. 177, 187 (1995).

[194] We do not find any relevance in the fact that the federal securities laws and our regulations at times refer to ALJs as "officers" or "hearing officers." There is no indication that Congress intended "officers" or "hearing officers" to be synonymous with "Officers of the United States," U.S. Const. art. II, § 2, cl. 2, and the word "officer" in our regulations has no such meaning. We also note in this regard that the Administrative Procedure Act "consistently uses the term 'officer' or the term 'officer, employee, or agent'" to "refer to [agency] staff members." Kenneth Culp Davis, *Separation of Functions in Administrative Agencies,* 61 HARV. L. REV. 612, 615 & n.11 (1948). *Cf.* 5 U.S.C. §§ 556, 557 (referring to the individual who presides over a hearing as the "presiding employee").

[195] Beyond *Landry*, we believe that our ALJs are properly deemed employees (rather than inferior officers) because this is how Congress has chosen to classify them, and that decision is entitled to considerable deference. *See Burnap v. United States*, 252 U.S. 512, 516 (1920). For example, as we discussed above, Congress created and placed ALJ positions within the competitive service system, just like most other federal employees. Like such other employees, an ALJ who believes that his employing agency has engaged in a prohibited personnel practice can seek redress either through the Office of Special Counsel or the Merit Systems Protection Board. *See* 5 U.S.C. §§ 1204, 1212, 1214, 1215, 1221. And ALJs—like other employees—are subject to reductions-in-force. *See id.* § 7521(b).

[196] 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. 10100 / June 17, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 78098 / June 17, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4431 / June 17, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32152 / June 17, 2016

Admin. Proc. File No. 3-15446

In the Matter of

J.S. OLIVER CAPITAL
MANAGEMENT, L.P., and
IAN O. MAUSNER

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Ian O. Mausner ("Mausner") be, and hereby is, 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 the investment adviser registration of J.S. Oliver Capital Management, L.P. ("J.S. Oliver"), be, and it hereby is, revoked; and it is further

ORDERED that J.S. Oliver and Mausner cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933; Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 thereunder; and Sections 204, 206(1), (2), and (4), and 207 of the Investment Advisers Act of 1940 and Rules 204-1(a)(2), 204-2(a)(3) and (7), 206(4)-7, and 206(4)-8 thereunder; and it is further

ORDERED that J.S. Oliver and Mausner disgorge $1,376,440 for their cherry-picking and soft dollar violations, as identified in our opinion finding liability in this matter, plus prejudgment interest of $200,794.87, such prejudgment interest calculated beginning from

November 1, 2011, with such interest continuing to accrue on all funds owed until they are paid, in accordance with Commission Rule of Practice 600, 17 C.F.R. § 201.600; and it is further

ORDERED that Mausner pay civil money penalties of $1,325,000; and it is further

ORDERED that J.S. Oliver pay civil money penalties of $6,625,000.

Payment of the amounts to be disgorged and the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary