

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 84106 / September 12, 2018

INVESTMENT ADVISERS ACT OF 1940
Release No. 5005 / September 12, 2018

INVESTMENT COMPANY ACT OF 1940
Release No. 33225 / September 12, 2018

Admin. Proc. File No. 3-16389

In the Matter of

BRETT THOMAS GRAHAM

ORDER DENYING REQUEST TO MODIFY SETTLEMENT ORDER

On February 19, 2015, the Commission accepted Brett Thomas Graham's offer of settlement and entered an order that, among other things, barred him from acting in specified capacities in the securities industry with the right to apply for reentry after three years (the "Order").¹ Graham moves to vacate the portions of the Order imposing certain of those bars and to add to the Order a provision granting him a waiver from the bad actor provisions of Rule 506 under the Securities Act of 1933.² The Division of Enforcement opposes Graham's request. For the reasons set forth below, we deny his motion.

I. Background

Graham was the CEO of broker-dealer VCAP Securities, LLC, and the managing partner, Chief Investment Officer, and a portfolio manager of VCAP's affiliated investment adviser, Vertical Capital, LLC. Graham also indirectly owned over 99% of VCAP and 55.8% of Vertical. In the Order, the Commission found that VCAP and Graham engaged in a scheme to improperly benefit funds that Vertical managed by acquiring certain securities from five liquidation auctions of collateralized debt obligations ("CDOs") that VCAP conducted as liquidation agent during 2012. The Commission also found that Graham provided a non-

¹ VCAP Sec., LLC, Exchange Act Release No. 74305, 2015 WL 692238 (Feb. 19, 2015).

² 17 C.F.R. § 230.506.

affiliated bidder with favorable treatment with respect to a security that the bidder wanted to obtain.

Graham executed, on behalf of VCAP, various engagement agreements with CDO trusts in which he falsely represented that VCAP and its affiliates would not bid in the auctions it conducted and would not misuse confidential or bidding information afforded to VCAP as the liquidation agent. VCAP's compliance manual also prohibited VCAP and its affiliates from bidding in liquidation auctions that VCAP ran. Graham nonetheless wanted Vertical to bid in these auctions and acquire certain securities being liquidated. Graham arranged for a third-party broker-dealer in the United Kingdom to submit bids on Vertical's behalf in the auctions VCAP conducted. Graham falsely advised the third-party broker-dealer that Vertical funds were allowed to bid in the auction and that the broker-dealer was allowed to facilitate that involvement. Because VCAP ran the auctions, Graham knew what bids had been submitted. Graham generally waited until he had received the majority of the bids from the other auction participants and then would tell the third-party broker-dealer which bonds it should bid on for Vertical and at what prices. These prices were often slightly higher than the high bid received from the other auction participants, which ensured that Vertical would win the bonds Graham wanted but not pay too much for them.

The third-party broker-dealer was usually the last, or one of the last, participants to submit its initial bids in the auction. At times, another auction participant would submit or improve a bid after Graham had given his instructions to the third-party broker-dealer. If a later bid was higher than the bid that Graham had instructed to be made, he at times would instruct the third-party broker-dealer to resubmit its bid at a higher amount. In one instance, Graham instructed the third-party broker-dealer to resubmit a bid for a lower amount on behalf of Vertical because Graham had learned that the next high bid for the security being auctioned had decreased. Immediately after each auction, Vertical's funds and separately managed accounts purchased the securities that the third-party broker-dealer had acquired at a slight markup that Graham determined. Overall, Vertical's funds and separately managed accounts acquired 23 securities for nearly \$12 million by placing prohibited bids in this manner. For conducting these auctions, VCAP received nearly \$1.2 million in fees, of which Graham received 10%.

In addition to this misconduct, Graham also provided a non-affiliated bidder with favorable treatment in one auction that VCAP conducted. After the auction started, the bidder's salesperson sent an instant message to Graham stating that it was especially interested in winning a particular security that was very important to it, asking Graham to let the salesperson know where it needed to be to win the auction and indicating that it would increase its bid if necessary. Graham, however, saw that the other bids for the security were just fractions of the non-affiliated bidder's bid and told the salesperson to cut the bid in half. After cutting its bid in half, the non-affiliated bidder won the auction. Graham did not seek the CDO trustee's permission for these instructions or inform it about them.

As a result of the misconduct, the Commission determined that Graham willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.³ The Commission barred Graham from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; prohibited him from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and barred him from participating in any offering of a penny stock. The bars were subject to the right to apply for reentry after three years.

The Order also contained a limited one-year carve-out authorizing Graham to continue to be employed by Vertical solely for the purpose of assisting Vertical in the sale, or transfer to independent managers, of securities and positions held by any funds or accounts managed by Vertical. Graham's activities during this now expired carve-out period were subject to a number of significant restrictions. For example, the Order prohibited Graham from carrying out his employment activities on Vertical's premises; prohibited him from serving on Vertical's board of directors or in any officer, director, or management role; and generally barred him from contact with investors and engaging in activities on behalf of Vertical other than selling securities and positions held by funds or accounts as of the date of the Order. The Order required Graham to provide certain written certifications of compliance and to retain an independent consultant to perform specified compliance tasks. The Commission further ordered Graham to cease and desist from committing or causing any violations and any future violations of Exchange Act Section 10(b) and Rule 10b-5, required Graham to pay \$118,284 in disgorgement plus \$9,449 in prejudgment interest, and imposed a \$200,000 civil money penalty.

The Order also directed that a Fair Fund be created for the disbursement of these amounts and more than \$1.1 million in disgorgement and prejudgment interest that VCAP was ordered to pay. VCAP was not ordered to pay a penalty. Graham paid the disgorgement, prejudgment interest, and civil money penalty. On January 19, 2017, the Commission directed the disbursement of the Fair Fund to "three harmed CDO trusts and to the senior noteholder of each of the two other trusts" that had paid VCAP to conduct liquidation auctions.⁴ Graham requests that we modify the Order by "(a) removing the provisions . . . [that] bar him from (i) being associated with an investment adviser, (ii) being associated with a securities broker or dealer in a non-supervisory capacity, and (iii) serving or acting as an officer, director or employee of a company which issues securities, including, but not limited to 'penny stocks,' . . . ; and (b) adding a provision to the Order pursuant to Rule 506(d)(2)(ii), . . . stat[ing] that, notwithstanding any other provision of the Order, the Order shall not operate to preclude any issuer with which Mr. Graham is associated as an officer, director, employee or investment adviser, from relying upon the exemption under Rule 506."

³ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

⁴ See *VCAP Sec., LLC*, Exchange Act Release No. 79850 (Jan. 19, 2017) (Order Directing Disbursement of Fair Fund), available at <https://www.sec.gov/litigation/admin/2017/34-79850.pdf>.

II. Analysis

In reviewing requests to lift or modify bar orders, we consider whether, “under all the facts and circumstances presented, it is consistent with the public interest and investor protection to permit the petitioner to function in the industry without the safeguards provided by the bar.”⁵ The factors that guide the Commission’s “public interest/investor protection inquiry” are:

[1] the nature of the misconduct at issue in the underlying matter; [2] the time that has passed since issuance of the administrative bar; [3] the compliance record of the petitioner since issuance of the administrative bar; [4] the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; [5] whether the petitioner has identified verifiable, unanticipated consequences of the bar; [6] the position and persuasiveness of the Division of Enforcement’s response to the petition for relief; and [7] whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.⁶

Relief is appropriate only in “compelling circumstances,” and in the usual case the bar will remain in place.⁷ Maintaining a bar serves the public interest and investor protection by ensuring that the Commission “retains its continuing control over [a] barred individual[’s] activities.”⁸ Nonetheless, the Commission will act in response to those situations in which the equitable need for relief warrants vacating or modifying the bar order.⁹ As explained below, Graham fails to establish the compelling circumstances necessary to vacate or modify his bar order.

A. **Modifying the bar order under the facts and circumstances presented here would not be consistent with the public interest and investor protection.**

Nature of the misconduct at issue in the underlying matter: We look to the findings of the Order to evaluate Graham’s misconduct. We found that Graham willfully violated Exchange Act Section 10(b) and Rule 10b-5 thereunder during the course of five liquidation auctions in 2012 and acted knowingly or recklessly. VCAP received nearly \$1.2 million in fees, of which Graham received 10%, for conducting liquidation auctions in which it improperly participated,

⁵ *Ciro Cozzolino*, Exchange Act Release No. 49001, 2003 WL 23094746, at *3 (Dec. 29, 2003); *accord Edward I. Frankel*, Exchange Act Release No. 49002, 2003 WL 23094747, at *3 (Dec. 29, 2003); *Stephen S. Wien*, Exchange Act Release No. 49000, 2003 WL 23094748, at *4 (Dec. 29, 2003).

⁶ *Kenneth W. Haver, CPA*, Exchange Act Release No. 54824, 2006 WL 3421789, at *2 (Nov. 28, 2006).

⁷ *Cozzolino*, 2003 WL 23094746, at *3.

⁸ *Id.*

⁹ *Id.*

acquiring 23 securities for nearly \$12 million. We found that “VCAP and Graham’s actions in the auctions improperly benefitted funds” that Vertical managed, and we ordered Graham to pay nearly \$120,000 in disgorgement. In addition, Graham’s misconduct in giving preferential treatment to one bidder caused the seller of a security to “receive[] half as much in proceeds . . . as it would have” otherwise. Graham now admits that he and VCAP “breached the integrity of the auction process that [they] were hired to maintain.” We conclude that Graham engaged in “serious and extensive” misconduct that “militate[s] against relief.”¹⁰

Despite his admission, Graham also asserts in support of his motion that his misconduct was isolated, unintentional, and immaterial; hurt no one; and did not benefit him. Although Graham presents affidavits that he contends provide “irrefutable facts” supporting his version of events, the Order’s findings that Graham committed securities fraud that benefitted Vertical funds and directly injured at least one investor through an ongoing scheme contradict his contentions. Because he settled, Graham forfeited his opportunity to adduce his evidence, and waived the right to “complain that the record is inaccurate or incomplete.”¹¹ Graham “elected to forgo further proceedings”; “[h]is choice was a risk, but calculated and deliberate and such as follows a free choice”; and he “cannot be relieved of such a choice now.”¹² We will not consider Graham’s collateral attack on the Commission’s findings.¹³

¹⁰ *Cozzolino*, 2003 WL 23094746, at *3.

¹¹ *Haver*, 2006 WL 3421789, at *3; *see also* Rule of Practice 240(c)(4), 17 C.F.R. § 201.240(c)(4) (“By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer: (i) all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted; (ii) the filing of proposed findings of fact and conclusions of law; (iii) proceedings before, and an initial decision by, a hearing officer; (iv) all post-hearing procedures; and (v) judicial review by any court.”); *see also* Rule 240(b), 17 C.F.R. § 201.240(b) (requiring that “[a]n offer of settlement . . . shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(4) and (5) of this rule”).

¹² *Richard D. Feldmann*, Exchange Act Release No. 77803, 2016 WL 2643450, at *3 n.24 (May 10, 2016) (quoting *Ackermann v. United States*, 340 U.S. 193, 198 (1950)).

¹³ *See Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993) (“If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed.”); *see also Michael H. Johnson*, Exchange Act No. 75894, 2015 WL 5305993, at *4-5 (Sept. 10, 2015) (finding that it would weigh against our “strong interest” in the finality of our settlement orders to modify bar where, by settling, respondent had waived the “opportunity to adduce evidence” he sought to admit in support of his modification request and “forfeited any claim that the Commission was working with incorrect facts when he consented” to the settlement he challenged) (quoting *Haver*, 2006 WL 3421789, at *3); *Haver*, 2006 WL 3421789, at *3 (finding that a respondent may not follow one course of action by settling and then subsequently try to take another course of action); *cf.* Rule of Practice 193, 17 C.F.R. § 201.193 (stating that the

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Time that has passed since issuance of the administrative bar: Graham waited less than two years after the Order was entered to request that we modify it. This is a relatively short period of time.¹⁴ This factor weighs against Graham’s motion.

The compliance record of, and any regulatory interest in, the petitioner since issuance of the administrative bar: Graham asserts that this factor favors him because he complied with the Order “under hardship conditions during the allowed ‘carve-out’ period” in the Order.¹⁵ In light of his serious and extensive misconduct, we barred Graham, but allowed him extremely limited, supervised participation in the sale of Vertical’s assets under carefully tailored restrictions. Because “we expect financial industry professionals to comply with our orders,” Graham’s claimed compliance does not weigh in favor of overturning the Order.¹⁶ Graham’s conduct during the one-year carve-out period also does not support his request to associate without restriction given that, among other things, he was not permitted to work from Vertical’s facilities, contact unaffiliated investors, or have any role in Vertical’s management, strategy, or purchase of securities. This factor does not weigh in his favor.

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“Commission will not consider any application [by a barred individual for consent to associate] that attempts to reargue or collaterally attack the findings that resulted in the Commission’s bar order”); *Sampson v. Radio Corp. of Am.*, 434 F.2d 315, 317 (2d Cir. 1970) (explaining that a “motion under Rule [of Civil Procedure] 60(b) cannot be used to avoid the consequences of a party’s decision to settle . . . litigation or to forgo an appeal from an adverse ruling”).

¹⁴ See *Johnson*, 2015 WL 5305993, at *4, *5 (declining “to modify the settled bar order to allow Johnson to apply for reentry to the securities industry after one year instead of five years,” where “[o]nly sixteen months have passed since entry of the bar,” which “is hardly enough time to conclude that its continuation is no longer required in the public interest”); *Haver*, 2006 WL 3421789, at *4 (declining to modify bar order “because even the five-year period after which Haver may apply for reinstatement has not yet elapsed”); see also *John Gardner Black*, Exchange Act Release No. 70318, 2013 WL 4737370, at *5 (Sept. 4, 2013) (“The bar and revocation were imposed fifteen years ago, but we have previously held, in considering requests to modify sanctions, that substantially longer periods are not unduly long.”).

¹⁵ Although Graham characterizes the carve-out provisions as onerous, they were actually quite permissive as they were an accommodation to allow him to assist Vertical in the sale, or transfer to independent managers, of securities and positions held by any funds or accounts managed by Vertical, tasks that could have been performed by others at the firm. See *Cozzolino*, 2003 WL 23094746, at *3 n.20 (recognizing that “by settling with the Commission, violators receive significant benefits”) (paraphrasing *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983)).

¹⁶ *John Gardner Black*, Advisers Act Release No. 3015, 2010 WL 1474294, at *4 (Apr. 13, 2010).

The age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar: Graham argues that this factor militates in favor of relief because he has had a long and successful career in the securities industry and that the events underlying the bar order are the sole blot on his disciplinary record. But the length of Graham’s service in the industry and his disciplinary history were known to the Commission when it barred Graham. As a result, in evaluating this factor we have focused on the barred individual’s involvement in the securities industry since the entry of the bar order.¹⁷

“We generally first grant incremental relief in our cases vacating bars.”¹⁸ Rule of Practice 193 provides a process for barred individuals to apply for consent to associate notwithstanding the bar, and the Order (to which Graham agreed) specifically contemplated that he would be permitted to apply for reentry after three years.¹⁹ As part of this process, an individual seeking reentry to the securities industry must provide detailed information regarding expected supervision.²⁰ FINRA also provides a process for a member firm to seek consent to associate with a barred individual notwithstanding the bar.²¹ A firm and the barred individual it seeks to employ will fail to meet “their burden ‘to show that . . . continued employment in the securities industry would be in the public interest’” if they fail “to establish heightened

¹⁷ See, e.g., *Black*, 2010 WL 1474294, at *4 (noting the petitioner’s “focus on Black’s . . . thirty years of experience in the industry (before the bar),” but evaluating his conduct during the “time following imposition of the bar”); *Cozzolino*, 2003 WL 23094746, at *4 (noting petitioner’s age but in the context of considering his involvement in the industry since he was barred); *Frankel*, 2003 WL 23094747, at *5 (same); *Wien*, 2003 WL 23094748, at *5 (same).

¹⁸ *Jesse M. Townsley, Jr.*, Exchange Act Release No. 52161, 2005 WL 1963783, at *2 (July 29, 2005); *accord Salim B. Lewis*, Exchange Act Release No. 51817, 2005 WL 1384087, at *4 n.40 (June 10, 2005) (citing numerous cases in which the Commission vacated a bar order after having previously permitted the applicant to associate in the securities industry in certain capacities notwithstanding the bar while leaving the bar order in place).

¹⁹ 17 C.F.R. § 201.193. On April 9, 2018, Graham filed an Application for Consent to Associate under Rule 193. We take no position on that application, which is pending.

²⁰ *Eric David Wanger*, Exchange Act Release No. 4728, 2017 WL 2953369, at *3 (July 10, 2017) (explaining that Rule of Practice 193 provides that applicant for consent to associate “shall” address the “manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant” and stating that “in determining whether a proposed association would be consistent with the public interest, an examination of . . . the proposed supervisory structure to which the applicant will be subject is appropriate”).

²¹ See *Interactive Brokers LLC*, Exchange Act Release No. 80164, 2017 WL 1035745, at *2 & nn.5 & 6 (Mar. 6, 2017). The Order contemplated that Graham would apply for reentry “to the appropriate self-regulatory organization, or if there is none, to the Commission.”

supervisory plans” for barred individuals.²² These processes allow a barred individual to “establish a satisfactory compliance record” while under heightened supervision “before moving to vacate the bar.”²³ Graham has not yet obtained consent to associate notwithstanding his bar, and now seeks to avoid this process entirely. To allow this “would permit [Graham] to engage in activities restricted by [his] bars without a prior period of demonstrated compliance.”²⁴ As a result, this factor weighs heavily against Graham.²⁵

Graham argues that the right to seek consent to associate is illusory because it is “highly unlikely that a firm will offer him a position” over other candidates not subject to a bar. But “difficulty finding suitable employment is ‘among . . . the natural and foreseeable consequences that flow from a ban on employment in the securities industry.’”²⁶ As we have said, it is “not a ‘compelling circumstance’ that would justify wholly vacating a remedial sanction designed to prevent recurrence of misconduct and protect investors and the integrity of the markets.”²⁷

Whether the petitioner has identified verifiable, unanticipated consequences of the bar: Graham asserts that he has experienced “[p]ersonal and financial distress that can only be alleviated by modifying the bar.” But these issues arise from the bar itself and are no more than the “natural and foreseeable consequences” of the Order.²⁸ The Order identified with specificity

²² *Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *10 (Dec. 20, 2012) (alteration in original) (quoting *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 WL 2138439, at *6 n.23 (July 17, 2009)).

²³ *Lewis*, 2005 WL 1384087, at *4.

²⁴ *Stephanie Hibler*, Exchange Act Release No. 70140, 2013 WL 4027263, at *2 (Aug. 8, 2013) (denying request to lift broker and dealer bars where respondent “ha[d] not obtained permission to associate with a broker or dealer in any capacity since the order was entered”).

²⁵ *See Johnson*, 2015 WL 5305993, at *4 (“Johnson has not sought prior incremental relief from the bar. As a result, we do not have a sufficient basis for concluding that modification of the bar would be consistent with the public interest.”).

²⁶ *Wanger*, 2017 WL 2953369, at *4 (quoting *Johnson*, 2015 WL 530993, at *4 & n.20).

²⁷ *Id.*; *see also Mark S. Parnass*, Exchange Act Release No. 65261, 2011 WL 4101087, at *3 & n.17 (Sept. 2, 2011) (“[W]e have previously considered and rejected claims, like the one Parnass makes here, that the re-entry procedure and NASD’s fee and audit processes constitute unanticipated harms that would justify setting aside a bar order.”).

²⁸ *Johnson*, 2015 WL 5305993, at *4 n.20; *accord William H. Pike*, Investment Company Act Release No. 20417, 1994 WL 389872, at *2 (July 20, 1994) (“Pike’s difficulties in obtaining employment do not render our Order inequitable. They are simply a natural consequence of the action taken against him.”) (denying motion to vacate order), *petition denied*, 52 F.3d 1122 (D.C. Cir. 1995) (per curiam); *cf. Townsley*, 2005 WL 1963783, at *2 (finding that petitioner’s claimed “inability to become registered as a commodities trading advisor was a consequence of the bar that he should have anticipated”); *Haver*, 2006 WL 3421789, at *4 (finding that revocation of CPA certificate following bar was foreseeable and not a basis for relief).

the particular associations that it prohibited and the terms of the carve-out provision. Graham unquestionably knew of the bar's provisions and its effects cannot be deemed unanticipated.

Rather than identify unanticipated consequences of the bar, Graham argues that “[i]nformation that was unknown or could not have been known at the time the Order was issued” supports modifying the bar. According to Graham, subsequent events show that “this is demonstrably a ‘no harm’ situation as no investor or counterparty has claimed harm” from his misconduct. This argument fails for several independent reasons.

First, Graham's argument that he caused no investor harm is an improper collateral attack on the findings of the Order.²⁹ The Order recites that firms paid nearly \$1.2 million to VCAP to run auctions in which Graham secretly bid against auction participants using confidential information, Graham instructed a winning bidder to cut in half its bid for a security (causing the seller to lose money), and Graham decreased a bid for a security after learning that the next highest bidder had reduced its bid. The Order creates a Fair Fund from the penalties and disgorgement Graham and VCAP paid from which investors sought (and obtained) compensation for injury. In addition, the Order finds that Graham's misuse of confidential information caused bidders who would have won auctions for certain securities to lose them to Vertical funds that acquired those securities at slightly higher prices. Graham's claims that he caused no harm improperly contradict the findings of the Order.

Second, even if Graham could pursue a collateral attack on the findings of the Order (which we find would be improper), the Commission was not required to establish that Graham caused investor harm to find that he violated the securities laws³⁰ or that it was appropriate to bar him for that conduct.³¹ Regardless of the degree of harm to investors, the Order also found that

²⁹ See *supra* notes 11-13 and accompanying text; cf. *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *5 (Apr. 20, 2012) (“[W]hen an injunction has been entered by consent, it is appropriate to prohibit Respondents from contesting the factual allegations of the Complaint.”); *Schild Mgm't Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *6 (Jan. 31, 2006) (“We have held that where, as here, respondents consent to an injunction, ‘they may not dispute the factual allegations of the injunctive complaint in [a subsequent] administrative proceeding.’” (quoting *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003)); 17 C.F.R. § 202.5(e) (Commission policy is “not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.”).

³⁰ See, e.g., *Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000) (“[U]nlike a plaintiff in a private damages action, the SEC need not prove actual harm.”); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 (Feb. 13, 2009) (recognizing lack of harm but stating that “our focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future” (citing *Christopher A. Lowry*, Advisers Act Release No. 2052, 2002 WL 1997959, at *6 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003))).

³¹ See *ZPR Inv. Mgm't*, Advisers Act Release No. 4249, 2015 WL 6575683, at *28 & n.136 (Oct. 30, 2015) (stating that “we have imposed bars where misconduct did not cause financial

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Graham “improperly benefitted” funds that Vertical managed through his scheme to defraud and that he falsely represented that he would not “misuse” confidential or bidding information pertaining to the auctions his firm ran. Moreover, Graham admits in his moving papers that he “breached the integrity of the auction process,” which would support a finding of harm to the market.³² Graham “violate[d] the antifraud provisions of the federal securities laws,” which we have recognized is “conduct that . . . is especially serious and subject to the severest of sanctions under the securities laws.”³³

Graham also argues that his consent to the Order was not “knowing” or “informed” because he has since learned that one of his partners at Vertical gave investigative testimony that downplayed her involvement in VCAP’s misconduct. But a settling respondent necessarily operates with imperfect information because settling cuts short the development of the record. Graham does not allege that the settlement was the product of fraud or mutual mistake,³⁴ and his

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harm or lead to monetary gain for the respondent”), *petition denied in relevant part*, 861 F.3d 1239 (11th Cir. 2017); *Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *6 (May 27, 2016) (stating that the “absence from the record of evidence demonstrating any direct customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally”) (quoting *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *17 (July 2, 2010) (citation omitted)); *see also James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *3 (July 23, 2010) (barring respondent in part because his “dishonesty in defrauding his clients breached the trust that is the underpinning of the fiduciary relationship, regardless of whether there was any net loss of money to his clients”).

³² *Cf. Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 (July 26, 2013) (“Although the record does not contain evidence of direct investor harm, ‘our focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future.’”) (quoting *Kornman*, 2009 WL 367635, at *9 n.41).

³³ *Melton*, 2003 WL 21729839, at *9.

³⁴ *See Sargent v. Dep’t of Health & Human Servs.*, 229 F.3d 1088, 1091 (Fed. Cir. 2000) (“It is well-established that in order to set aside a settlement, an appellant must show that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake.”). Graham contends that he was “improperly pressured into entering into the settlement.” “A bare allegation of coercion is not sufficient to set aside the parties’ settlement agreement. Rather, [Graham] must make a ‘showing of wrongful conduct necessary to shift the burden of proof on the allegation’ of . . . coercion from himself to the agency.” *Tiburzi v. Dep’t of Justice*, 269 F.3d 1346, 1355 (Fed. Cir. 2001) (citation omitted). Graham makes no showing of wrongful conduct. *See generally Asberry v. U.S. Postal Serv.*, 692 F.2d 1378, 1381 (Fed. Cir. 1982) (“In order to successfully defend on the ground of force or duress, it must be shown that the party benefited thereby constrained or forced the action of the injured party Nor would duress be implied if the present settlement had been the result of a hard bargain.”) (citations omitted).

lack of contemporaneous access to his partner's testimony does not provide a basis to lift the bar.³⁵

Graham claims that the attorney who represented him (and others) at the time he agreed to the Order incorrectly told him that he could not review his partner's testimony and failed to adequately represent him in settlement negotiations. According to Graham, if he had reviewed his partner's testimony he would have responded to it by emphasizing her role in the relevant events and might have been able to negotiate a settlement with the Division that imposed lesser sanctions on him.³⁶ This argument fails because ineffective assistance of counsel is not a defense in civil proceedings, and it does not provide a basis for a collateral attack on the Order.³⁷

Even if he could engage in such an attack now, Graham's claimed ignorance of his partner's testimony and her alleged failure to acknowledge her actions does not diminish the significance of his own misconduct or show that he does not present a risk to investors.³⁸ Indeed, Graham acknowledges that "neither [his attorney's] conduct nor [his partner's] testimony alter certain basic facts of the matter and my involvement in them." The Commission's order made certain findings about Graham's own conduct and imposed the bar based upon those findings. His argument about his partner's conduct does not alter those findings or the propriety

³⁵ *Edward I. Frankel*, Exchange Act Release No. 38378, 1997 WL 103785, at *2 n.5 (Mar. 10, 1997) (rejecting petition to vacate bar where petitioner contended that bar order "relied upon erroneous information" because respondent "elected to settle the matter and did not develop the record further" and thus could not "now complain that the record is inaccurate or incomplete").

³⁶ Graham does not dispute that the Division specifically advised him that his counsel's representation of multiple clients might present a conflict. *See generally* Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, <https://www.sec.gov/files/sec1662.pdf>, at 1 ("You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours."); *see also* Enforcement Manual § 4.1.1.1, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (stating that "[w]hen an attorney represents multiple parties, staff in testimony typically informs the party of the [foregoing] statement in Form 1662").

³⁷ *See Nelson v. Boeing Co.*, 446 F.3d 1118, 1119 (10th Cir. 2006) ("The general rule in civil cases is that the ineffective assistance of counsel is not a basis for appeal or retrial."); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 802 (7th Cir. 2000) ("[I]neffective assistance of counsel . . . is not a basis for collateral attack on a civil [judgment].").

³⁸ *Cf. Shreyans Desai*, Exchange Act Release No. 80129, 2017 WL 782152, at *5 (Mar. 1, 2017) (rejecting in follow-on proceeding respondent's claim that "the Commission should have named his business partner as a defendant in the civil case against him").

of the bar. Graham's additional claim that his partner committed misconduct during the one-year carve-out period also does not demonstrate any unanticipated consequences of the bar or demonstrate Graham's fitness for the securities industry. Graham has identified no verifiable, unanticipated consequences of the bar, and accordingly this factor does not weigh in his favor.

The position and persuasiveness of the Division of Enforcement: The Division opposes Graham's request. It argues that to "undo the terms of a settlement to which [Graham] consented" and "to remove portions of the bar so that he may immediately associate with certain entities with no restrictions or review" would present an unacceptable danger to investors. We find this argument persuasive and conclude that this factor does not favor Graham.

Whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors: This factor weighs against Graham because there are considerations that would cause the requested relief to be inconsistent with the public interest. "Public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to [follow] one course of action and, upon an unfavorable [result], to try another course of action."³⁹ Graham's request to strip the Order of critical investor protection provisions would undermine our "'strong interest' in the finality of our settlement orders."⁴⁰

Based on the foregoing, we find that Graham has failed to show compelling circumstances that establish it is consistent with the public interest and investor protection to permit him to function in the industry without the safeguards provided by the bars he seeks to vacate, which require that he apply for consent to associate notwithstanding the bar.⁴¹

B. *Kokesh v. SEC* does not entitle Graham to any relief.

Graham also contends that the Supreme Court's recent decision in *Kokesh v. SEC*⁴² supports his argument that the bar should be modified because it is "both punitive and excessive." But *Kokesh* said nothing about the standards for imposing a bar in a settled proceeding, the standards for imposing a bar in a litigated proceeding, or the standards for vacating a bar; *Kokesh* involved a challenge to the imposition of disgorgement in a litigated proceeding based on a statute of limitations. In any case, Graham may not rely on *Kokesh* to argue that his bar should be vacated or modified because his case became final when he settled.

³⁹ See *Johnson*, 2015 WL 5305993, at *4 (quoting *Haver*, 2006 WL 3421789, at *3).

⁴⁰ See *supra* note 13 and accompanying text.

⁴¹ As discussed above, we take no position in this order on Graham's pending application to associate pursuant to Rule of Practice 193. See *supra* note 19 and accompanying text.

⁴² 137 S. Ct. 1635 (2017).

1. *Kokesh*'s holding has no bearing on Graham's request for relief.

Kokesh does not provide grounds for vacating or modifying the bar. In that case, the Supreme Court held that “[d]isgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under [the statute of limitations provided by 28 U.S.C.] § 2462.”⁴³ Graham challenges not disgorgement but a bar order. And he does not do so by invoking 28 U.S.C. § 2462 or any other statute of limitations—indeed, the Commission entered the bar order within the five-year limitations period that Section 2462 provides. *Kokesh* provides no basis for holding that it was impermissibly punitive for the Commission to bar Graham in the Order pursuant to his settlement. Nor does *Kokesh* say anything about when a sanction would be considered excessive (but rather held disgorgement to be punitive for purposes of Section 2462).

2. *Kokesh* has no bearing on cases that have become final.

Graham asserts *Kokesh* is relevant because in *Saad v. SEC* the D.C. Circuit remanded for the Commission “to address, in the first instance, the relevance—if any—of” *Kokesh* to Saad’s contention that a lifetime bar FINRA imposed as a disciplinary sanction in a litigated matter was “impermissibly punitive.”⁴⁴ According to Graham, he also challenges “the bar issued against him as impermissibly punitive” “in light of the conduct involved, where no investors were harmed.” As a result, he contends that *Kokesh* and *Saad* have “direct relevance” to his motion.

Graham may not rely on *Kokesh* to now argue that his bar is punitive (or excessive). Saad could rely on *Kokesh* to argue that his bar was punitive because Saad’s case was not final at the time the Supreme Court issued *Kokesh*. *Kokesh*’s relevance—or lack thereof—to FINRA’s imposition of the bar on Saad was therefore before the D.C. Circuit.⁴⁵

Here, *Kokesh* would not help Graham even if its holding were relevant to the propriety of imposing a bar in an administrative proceeding. The Commission “need not reopen closed cases in order to apply its holding.”⁴⁶ The Supreme Court’s “controlling interpretation of federal law”

⁴³ *Id.* at 1645; *see also* 28 U.S.C. § 2462 (providing statute of limitations applicable to “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture”).

⁴⁴ 873 F.3d 297, 304 (D.C. Cir. 2017).

⁴⁵ *See, e.g., Arce v. Walker*, 139 F.3d 329, 334-35 (2d Cir. 1998) (addressing the scope of a recent Supreme Court opinion because that opinion “applie[d] retroactively to govern [the court’s] review of [plaintiff’s] claims” where the case was “still open on direct review”). *See generally United States v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1405-06 (9th Cir. 1995) (stating that “a new rule of law applies retroactively to civil cases on direct review or those not yet final if it is applied to the parties in the case in which it is announced”).

⁴⁶ *Shah v. Holder*, 736 F.3d 1125, 1127 (7th Cir. 2013) (holding that a Supreme Court case disagreeing with a legal conclusion of the Board of Immigration Appeals applied only “to all immigration cases that were pending on the day of [the Supreme Court opinion’s] release” because the agency is not required “to reopen closed proceedings whenever, years later, the Supreme Court or a court of appeals disagrees with the Board’s legal conclusions”).

announced in a new decision applies to “all cases still open on direct review.”⁴⁷ It does not apply to “litigants . . . barred by procedural requirements or res judicata.”⁴⁸ “[O]nce suit is barred by res judicata or statutes of limitations or repose, a new rule cannot reopen the door already closed.”⁴⁹ One who had the “opportunity to bring to the courts the same argument presented successfully” in a subsequent case but failed to do so before his case became final may not rely on the new decision to have his case reopened.⁵⁰ In other words, the requirement that the case be “still open on direct review” means that a litigant may not use the new decision as a “collateral attack on a final judgment.”⁵¹ Because the Commission’s order accepting Graham’s settlement offer “constituted a final judgment on the merits” that would be accorded res judicata effect,⁵² Graham may not rely on *Kokesh* to argue that we should reconsider our imposition of the bar.⁵³

Nor does *Kokesh* establish a change in the law that would warrant relieving Graham from the operation of the bar. Modification of an order imposing ongoing obligations may be warranted where “the statutory or decisional law has changed” to either make “one or more of

⁴⁷ *Halper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993). Whether a litigant properly preserves an argument based on new precedent is a separate question. *See, e.g.*, Exchange Act Section 25(c)(1), 15 U.S.C. § 78y(c)(1) (“No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.”).

⁴⁸ *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) (opinion of Souter, J.).

⁴⁹ *Id.* at 541; *see also United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) (“The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision’s announcement is . . . the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. . . . [I]n the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become res judicata.”).

⁵⁰ *Mitchael v. Colvin*, 809 F.3d 1050, 1055 (8th Cir. 2016) (citing *Halper* and *James B. Beam*).

⁵¹ *Déjà vu v. Metro. Gov’t of Nashville*, 421 F.3d 417, 421 (6th Cir. 2005).

⁵² *Sec’y of Labor v. Copomon Enters. LLC*, 601 F. App’x 823, 826 (11th Cir. 2015); *see also SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) (stating that a consent decree entered by a district court is a final judgment that “has the force of res judicata”).

⁵³ *See generally Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 26 (1st Cir. 2009) (“Once litigation has run its course and all available avenues of appeal have been exhausted, the parties must be able to depend upon the certainty and stability of the resultant judgment. . . . [T]he principle of finality should hold sway even when newly emergent decisions materially alter the legal landscape.”) (citing *James B. Beam Distilling Co.*, 501 U.S. at 541) (explicating the principle that changes in decisional law “cannot reopen the door already closed”).

the obligations placed upon the parties . . . impermissible under federal law” or make “legal what the decree was designed to prevent.”⁵⁴ *Kokesh* does neither. It does not make it impermissible for the Commission to bar individuals from the securities industry, and it does not legalize any conduct that the Order prohibits. As a result, *Kokesh* does not entitle Graham to any relief.⁵⁵ “To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in . . . litigation.”⁵⁶

C. Graham’s remaining arguments do not establish that the bar should be modified.

Graham raises three other issues. First, Graham contends that the Commission has “modified bar orders in the absence of ‘compelling circumstances’” and that the Commission’s stated standard is thus “far more exacting than it is in practice.” But the cases Graham cites involved Commission orders vacating “collateral” bars—*i.e.*, bars prohibiting association in a capacity other than the capacity in which the barred individual was associated.⁵⁷ And the Commission vacated such bars in light of the D.C. Circuit’s decision in *Teicher v. SEC* that the

⁵⁴ *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 388 (1992). The Commission adopted the multi-factor test discussed above to determine whether to vacate a bar rather than the standards articulated in either *Rufo* or *Swift v. United States*, 286 U.S. 106 (1932). See *Cozzolino*, 2003 WL 23094746, at *2-3. Nevertheless, to the extent Graham seeks to rely on the language in *Rufo* that contemplates modifying an injunction where there has been a change in the law, for the reasons discussed above *Rufo* does not entitle Graham to relief.

⁵⁵ See, e.g., *Flores v. Lynch*, 828 F.3d 898, 909-10 (9th Cir. 2016) (stating that when “the basis for modification is a change in law, the moving party must establish that the provision it seeks to modify has become ‘impermissible’” and holding that movant had not met that burden); *United States v. Wayne Cty., Michigan*, 369 F.3d 508, 515 (6th Cir. 2004) (holding that “legal developments [did] not permit modification of a consent decree” because they did not make the obligations that the decree imposed on the party seeking modification “impermissible”); cf. *Inmates of Suffolk Cty. Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997) (modifying a consent decree that had become “impermissible under federal law”) (quoting *Rufo*, 502 U.S. at 388). Graham does not establish that *Kokesh* rendered the bar in the Order impermissible.

⁵⁶ *United States v. Krilich*, 303 F.3d 784, 792 (7th Cir. 2002) (quoting *Rufo*, 502 U.S. at 389) (alteration in *Krilich*) (finding that a recent Supreme Court decision did not “establish that the EPA’s entry into and continued enforcement of the Consent Decree are *ultra vires* acts”). *Rufo* also states that modification may be appropriate where there has been a change in the law and the parties “based their agreement on a misunderstanding of the governing law.” Graham does not allege that he agreed to the Order based on any misunderstanding of the law.

⁵⁷ *Parnass*, 2011 WL 4101087, at *4 & n.21; *Lewis*, 2005 WL 1384087, at *4 & n.43; *Charles E. Gaecke*, Advisers Act Release No. 2681, 2007 WL 4246109, at *3 & n.18 (Dec. 4, 2007); *Townsley*, 2005 WL 1963783, at *2 & n.14.

Commission did not have the “statutory authority” at that time to impose such bars.⁵⁸ In 2010, the Dodd-Frank Act authorized the Commission to impose collateral bars,⁵⁹ and Graham committed his misconduct in 2012. The cases that Graham cites are thus inapposite.

Second, Graham argues that “the continued enforcement of the Order in its current form is not justifiable in light of the 10th Circuit Court of Appeals’ recent ruling that the SEC’s process for appointing administrative law judges is unconstitutional.”⁶⁰ But Graham’s proceeding was not assigned to an administrative law judge because he settled at the outset of the proceeding. In any case, by settling Graham waived any challenge to the administrative forum.⁶¹

Finally, Graham requests that we add to the Order a provision waiving the bad actor disqualification provisions of Securities Act Rule 506.⁶² Graham acknowledges, however, that the Commission has established a procedure for the submission of Rule 506 waiver applications to the Division of Corporation Finance.⁶³ We decline to address Graham’s waiver request here and deny that request without prejudice.⁶⁴

⁵⁸ 177 F.3d 1016, 1017 (D.C. Cir. 1999); *see also Hibler*, 2013 WL 4027263, at *2 (recognizing that the Commission has “vacate[d] the collateral portion” of bars “following the D.C. Circuit’s decision in *Teicher v. SEC*”).

⁵⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111–203, 124 Stat. 1376, 1850-51 (July 21, 2010).

⁶⁰ *See Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *petition for rehearing en banc denied*, 855 F.3d 1128 (10th Cir. May 3, 2017), *cert. denied*, 2018 WL 3148308 (June 28, 2018). After Graham filed his application, the Supreme Court also held that Commission administrative law judges are subject to the Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044 (2018). As discussed above, that holding has no bearing on Graham’s application.

⁶¹ *Wanger*, 2017 WL 2953369, at *4 n.18 (explaining that “a respondent may not collaterally attack a Commission final order simply by asserting a constitutional challenge that could have been raised when the order was entered” (citing *Gordon Brent Pierce*, Exchange Act Release No. 77643, 2016 WL 1566396 (Apr. 18, 2016), *petition for review dismissed*, No. 16-1185 (D.C. Cir. Nov. 7, 2016) (per curiam))).

⁶² *See generally* Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings, Securities Act Release No. 9414, 2013 WL 3817311 (July 10, 2013).

⁶³ *Statement on Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D*, <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml> (Mar. 13, 2015).

⁶⁴ *Cf. George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *2 n.4 (Jan. 30, 2017) (declining to address Rule 506 waiver request in adjudication proceeding and noting that “[w]aiver applications may be submitted to the Division of Corporation Finance”). We state no opinion as to the waiver request.

Accordingly, IT IS ORDERED that the request of Brett Thomas Graham to modify the settled order dated February 19, 2015, is DENIED for the reasons set forth above.

By the Commission.

Brent J. Fields
Secretary