SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Release No. 5728 / April 30, 2021

Admin. Proc. File No. 3-18943

In the Matter of

MARK J. MOSKOWITZ

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Conviction

Respondent was convicted of wire fraud. *Held*, it is in the public interest to bar respondent from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

APPEARANCES:

Mark J. Moskowitz, pro se.

Stephan J. Schlegelmilch for the Division of Enforcement.

On December 20, 2018, we instituted administrative proceedings against Mark J. Moskowitz, pursuant to Section 203(f) of the Investment Advisers Act of 1940, to determine whether the statutory predicate for an administrative remedy was satisfied and whether remedial action would serve the public interest.[1] The order instituting proceedings (the "OIP") alleged that Moskowitz had been convicted of one count of wire fraud for conduct that occurred while he was acting as an investment adviser. Moskowitz failed to file an answer to the OIP, failed to respond to an order to show cause why he should not be found in default and a subsequent order to the same effect, and failed to respond to the Division of Enforcement's motion for entry of default and sanctions. We now find Moskowitz to be in default, deem the allegations of the OIP to be true, and bar him from the securities industry.

I. Background

A. The Commission issued an OIP against Moskowitz.

The OIP alleged that, on March 28, 2017, Moskowitz pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343. The OIP alleged further that Moskowitz's conviction was based on facts sufficient to establish that he "knowingly, and with the intent to defraud investors, acted as an investment adviser by providing investment advice and selling securities to at least eight clients, obtained money by means of materially false and misleading statements, engaged in the offer and sale of unregistered securities, provided false investment advice, and diverted investor funds to his personal bank account." The OIP also alleged that Moskowitz "raised at least $675,000 from the offer and sale of unregistered securities to investors who believed they were contributing to one or more investment pools or individual managed trading accounts," but that he "instead diverted a significant portion of the investor funds for his personal use and to pay off other investors in the fraudulent scheme."

At his plea hearing, Moskowitz engaged in the following colloquy with the court:

> THE COURT: From in or about March 2012 through in or about October 2015, did you operate a purported hedge fund in New Jersey known as Edge Trading Partners, LP?
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> THE DEFENDANT: Yes.
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> THE COURT: Was the general partner of Edge Trading Partners, L.P. a company known as Edge Trading LLC?
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> THE DEFENDANT: Yes.
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> THE COURT: And did you own and operate Edge Trading LLC?
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> THE DEFENDANT: Yes.

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[1] *Mark J. Moskowitz*, Advisers Act Release No. 5081, 2018 WL 6696603 (Dec. 20, 2018), https://www.sec.gov/litigation/admin/2018/ia-5081.pdf; 15 U.S.C. § 80b-3(f).

THE COURT: Was Edge Trading LLC formed to purportedly make investments in U.S. and foreign equities, futures, contracts and options contracts?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you induce prospective investors to invest in Edge Trading LLC by telling them you were a successful and profitable investor?

THE DEFENDANT: Yes.

THE COURT: Did you induce prospective investors to invest in Edge Trading LLC by telling them that, in any given calendar year, you would only be paid 30 percent of any profit generated by Edge Trading LLC?

THE DEFENDANT: Yes.

THE COURT: And did you induce prospective investors to invest in Edge Trading LLC by telling them that, from March 2012 through in or around October 2015, Edge Trading LLC was profitable in each quarter of its operation?

THE DEFENDANT: Yes, your Honor.

THE COURT: Was each of these representations to prospective investors false?

THE DEFENDANT: Yes.

THE COURT: Specifically, did you fail to inform victim investors that the entirety of the investors' principal contributions would not be invested but instead would be diverted to pay your personal expenses?

THE DEFENDANT: Yes.

THE COURT: Did you also email account statements that falsely represented that investors' principal contributions had been fully invested and had appreciated substantially in value?

THE DEFENDANT: Yes.

THE COURT: Based on your misrepresentations, did investors provide you money, by wire transfer and by check, to be deposited in a bank account in the name of Edge Trading LLC?

THE DEFENDANT: Yes, your Honor.

THE COURT: Specifically, on or about September 20, 2013, did you cause Victim 1, an investor living in or around Byron, Georgia, to send a wire

transmission of $100,000 from Victim 1's bank account to a bank account controlled by you?

THE DEFENDANT: Yes.

THE COURT: Did you divert money from that Edge Trading LLC bank account to personal use instead of investing in U.S. and foreign equities, futures contracts, and options contracts?

THE DEFENDANT: Yes.

THE COURT: Did you take all of these actions knowingly and with the intent to defraud victim investors?

THE DEFENDANT: Yes.

THE COURT: And as a result of this scheme, did you cause victim investors to suffer a loss of approximately $694,576.71?

THE DEFENDANT: Yes.

THE COURT: Are you pleading guilty to the charged offense because you are, in fact, guilty?

THE DEFENDANT: Yes, your Honor.

After accepting Moskowitz's guilty plea, the court sentenced him to a 33-month prison term, followed by three years of supervised release, and ordered him to make restitution and forfeiture in the amount of $694,576.71 and pay a $100 special assessment. The OIP also alleged that Moskowitz was an investment adviser at the time of the misconduct. The OIP instituted proceedings to determine whether the allegations contained therein were true and if any remedial action was appropriate in the public interest.

The OIP directed Moskowitz to file an answer to the allegations contained therein within twenty days after service, as provided by Commission Rule of Practice 220(b).[2] The OIP informed Moskowitz that if he failed to answer, he may be deemed in default, the allegations in the OIP may be deemed to be true as provided in the Rules of Practice, and the proceedings may be determined against him upon consideration of the OIP.[3]

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[2] 17 C.F.R. § 201.220(b).

[3] *See* Rules of Practice 155(a), 220(f), 17 C.F.R. §§ 201.155(a), .220(f).

B. Moskowitz failed to answer the OIP, respond to the Division's motion, or respond to a show cause order or a subsequent order to the same effect.

Moskowitz was properly served with the OIP pursuant to Rule of Practice 141(a)(2)(i),[4] but did not answer it. On April 30, 2019, more than twenty days after service, the Division filed a motion requesting that the Commission find Moskowitz in default and bar him from the securities industry. The Division supported the motion with the Declaration of Fuad Rana, which attached proof of service and copies of the docket, plea agreement, transcript of plea hearing, and judgment in the criminal proceeding. Moskowitz did not respond.

On June 4, 2019, Moskowitz was ordered to show cause by July 19, 2019, why the Commission should not find him in default due to his failure to file an answer, respond to the Division's motion, or otherwise defend this proceeding.[5] Moskowitz was directed to address the reasons for his failure to timely file an answer or respond to the Division's motion, as well as the substance of the Division's request for sanctions. Moskowitz was also warned that, if he were found in default, the allegations in the OIP would be deemed to be true and the Commission could determine the proceeding against him upon consideration of the record.

Moskowitz did not subsequently answer the OIP or respond to the Division's motion or the show cause order. Instead, on November 7, 2019, Moskowitz sent an email to the apfilings@sec.gov mailbox with an attached PDF file suggesting that he intended to defend the proceeding, which the Office of the Secretary subsequently forwarded to counsel at the Division. The email did not address the substance of the OIP or the Division's request for sanctions.

On January 14, 2020, the Commission issued an additional order recognizing that, although Moskowitz had not responded to the show cause order, he had suggested that he would like to defend this proceeding.[6] The Commission again ordered Moskowitz to file an answer to the allegations made in the OIP and to make the filing directed by the show cause order. The Commission also reminded Moskowitz that a failure to make that filing or submit an answer might result in him being held in default. The Commission directed Moskowitz to the show cause order for information about the consequences of default.

On February 18, 2021, the Division filed a status report stating that Moskowitz had not responded to the Commission's orders, filed an answer to the OIP, or filed a response to the Division's motion for entry of default and imposition of sanctions. Moskowitz did not respond

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[4] 17 C.F.R. § 201.141(a)(2)(i) (providing that service of an OIP on an individual may be made by "sending a copy . . . addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt").

[5] *Mark J. Moskowitz*, Exchange Act Release No. 86029, 2019 WL 2354646, at *1 (June 4, 2019), https://www.sec.gov/litigation/opinions/2019/34-86029.pdf.

[6] *Mark J. Moskowitz*, Advisers Act Release No. 5433, 2020 WL 223622, at *2 (Jan. 14, 2020), https://www.sec.gov/litigation/opinions/2020/ia-5433.pdf.

to the report and did not subsequently make any of the filings required by the Commission's orders.

II. Analysis

A. We hold Moskowitz in default and deem the OIP's allegations to be true.

Rule of Practice 155(a) provides that if a party fails to "answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding," we may deem the party in default and "determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true."[7] Because Moskowitz has failed to answer or respond to the Commission's orders or to the Division's motion, we find it appropriate to deem him in default and to deem the allegations of the OIP to be true. We base the findings that follow on the record, including the OIP, the Rana declaration and attached documents, and Moskowitz's BrokerCheck report.[8]

B. We find an industry bar to be in the public interest.

Advisers Act Section 203(f) authorizes the Commission to suspend or bar a person from the securities industry if it finds, on the record after notice and opportunity for hearing, that (i) the person was convicted of violating 18 U.S.C. § 1343 within ten years of the commencement of the proceeding; (ii) the person was associated with an investment adviser at the time of the alleged misconduct; and (iii) such a sanction is in the public interest.[9] Moskowitz was convicted of violating 18 U.S.C. § 1343 within ten years of the commencement of this proceeding.[10] The allegations of the OIP deemed true establish that Moskowitz acted as an

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[7] 17 C.F.R. § 201.155(a); *see also* Rule of Practice 220(f), 17 C.F.R. § 201.220(f) (providing that "[i]f a respondent fails to file an answer required by this section within the time provided, such respondent may be deemed in default pursuant to § 201.155(a)").

[8] We take official notice of Moskowitz's BrokerCheck report, which shows that he was associated with FINRA member firms between 1992 and 2007. https://brokercheck.finra.org/individual/summary/2187277; *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records and citing Rule of Practice 323, 17 C.F.R. § 201.323).

[9] 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e), 15 U.S.C. § 80b-3(e)); *see also id*. § 80b-3(e)(2)(D) (discussing convictions for violating 18 U.S.C. § 1343).

[10] *See* Advisers Act Section 202(a)(6), 15 U.S.C. § 80b-2(a)(6) (defining "convicted" to include a "plea of guilty").

investment adviser, and because Moskowitz was an investment adviser at the time of his misconduct, he necessarily also was a person associated with an investment adviser.[11]

Thus, we need determine only if any remedial action is in the public interest. In doing so, we consider the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[12] Our public interest inquiry is flexible, and no one factor is dispositive.[13] The remedy is intended to "protect[] the trading public from further harm," not to punish the respondent.[14]

We have weighed all these factors, and find an industry bar is warranted to protect the investing public. Moskowitz's misconduct was egregious and recurrent. Operating a purported hedge fund, Moskowitz induced investors to provide him money based on misrepresentations regarding his success as an investor, the fund's profitability, and the extent of his compensation from fund proceeds. Moskowitz also diverted funds to his personal use instead of purchasing the securities in which the fund was formed to invest. Moskowitz concealed his misconduct by emailing account statements to investors that falsely represented that their principal contributions had been fully invested and had appreciated substantially in value. As a result of his scheme, which lasted more than three years, Moskowitz caused investors nearly $700,000 in losses.

The record establishes that Moskowitz repeatedly abused the position of trust he occupied as an investment adviser.[15] Moskowitz also acted with a high degree of scienter.[16] Wire fraud

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[11] *Shreyans Desai*, Advisers Act Release No. 4656, 2017 WL 782152, at *3 (Mar. 1, 2017) ("[T]he finding that Desai acted as an unregistered investment adviser establishes that he was associated with an investment adviser for purposes of Advisers Act Section 203(f).") (citing *Anthony J. Benincasa*, Advisers Act Release No. 1923, 2001 WL 99813, at *2 (Feb. 7, 2001) (explaining that a person who acts "as an investment adviser in an individual capacity" is "in a position of control with respect to the investment adviser" and thus "meets the definition of a 'person associated with an investment adviser'")).

[12] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[13] *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *4 (July 26, 2013).

[14] *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

[15] *See James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *4 (July 23, 2010) ("[W]e have consistently viewed misconduct involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary . . . as egregious.").

[16] *See Aaron v. SEC*, 446 U.S. 680, 701 (1980) (the "degree of intentional wrongdoing evident in a defendant's past conduct" is an "important factor" indicating a risk of future harm).

requires a specific intent to defraud, and Moskowitz acknowledged at his plea hearing that he acted "knowingly and with the intent to defraud victim investors."[17]

Because Moskowitz failed to answer the OIP or respond to the Division's motion or our orders, he has made no assurances to us that he will not commit future violations or that he recognizes the wrongful nature of his conduct. Moskowitz has worked for more than 15 years in the securities industry as an investment adviser or person associated with a broker-dealer, and his occupation therefore presents opportunities for future violations. Although his guilty plea indicates that Moskowitz might have some appreciation for the wrongfulness of his conduct, it does not outweigh the evidence that Moskowitz poses a risk to the investing public.[18]

The Commission may impose bars to protect the investing public from a respondent's future actions by restricting access to areas of the securities industry where a demonstrated propensity to engage in violative conduct may cause further investor harm. Here, the record establishes that Moskowitz is "unfit to participate in the securities industry" and that his "participation in it in any capacity would pose a risk to investors."[19] Because Moskowitz poses a continuing threat to investors, we conclude that it is in the public interest to bar him from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.[20]

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

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17 *United States v. Spalding*, 894 F.3d 173, 181 (5th Cir. 2018) (recognizing that elements of wire fraud include "a specific intent to defraud"); *see also SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992) (scienter is "an intent to deceive, manipulate, or defraud") (citation omitted).

18 *See Lawrence Allen DeShetler*, Advisers Act Release No. 5411, 2019 WL 6221492, at *3 (Nov. 21, 2019) (finding that "[a]lthough his guilty plea indicates that DeShetler might have some appreciation for the wrongfulness of his conduct, it does not outweigh the evidence that DeShetler poses a risk to the investing public"); *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *6 (Feb. 15, 2017) (finding the "egregious and recurrent nature of the fraud in which [respondent] violated his fiduciary duties and harmed his clients outweigh any acceptance of responsibility").

19 *Tagliaferri*, 2017 WL 632134, at *6 (finding that the misconduct underlying the respondent's conviction demonstrated that respondent was unfit to participate in the securities industry and posed a risk to investors).

20 *Id.* (imposing associational bars where they were necessary to protect the public).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5728 / April 30, 2021

Admin. Proc. File No. 3-18943

In the Matter of

MARK J. MOSKOWITZ

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Mark J. Moskowitz is barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission.

Vanessa A. Countryman
Secretary