SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 94808 / April 28, 2022

INVESTMENT ADVISERS ACT OF 1940
Release No. 6006 / April 28, 2022

Admin. Proc. File No. 3-19323

In the Matter of

SEAN KELLY

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violations of the antifraud provisions of the federal securities laws. *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:

M. Graham Loomis and *Pat Huddleston II*, for the Division of Enforcement

On August 7, 2019, we instituted an administrative proceeding against Sean Kelly, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and 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 ("OIP") alleged that Kelly had been permanently enjoined from violating the antifraud provisions of the federal securities laws based on conduct that occurred while he was associated with a broker-dealer and was acting as an unregistered investment adviser. Kelly 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 failed to respond to the Division of Enforcement's motion for entry of default and sanctions. We now find Kelly 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 Kelly.

The OIP alleged that, on July 11, 2019, a final judgment was entered against Kelly, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and (2) of the Advisers Act.[2] The Commission's complaint in the injunctive action alleged that, from at least 2014 until October 2018, Kelly raised more than $1,000,000 from at least 12 investors by promising that he would invest their funds in a variety of investment vehicles, including securities.[3] The Complaint further alleged that, rather than investing the money, Kelly stole it and spent it for things like Super Bowl tickets and luxury vacations.[4]

The OIP alleged that, since 2000, Kelly was associated with several broker-dealers registered with the Commission, including most recently with Center Street Securities, Inc., from

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1 *Sean Kelly*, Exchange Act Release No. 86595, 2019 WL 3716361 (Aug. 7, 2019); 15 U.S.C. §§ 78*o*(b), 80b-3(f).

2 *Kelly*, 2019 WL 3716361, at *1; Final Default Judgment, *SEC v. Kelly*, Case No. 1:18-cv-4939 (N.D. Ga. July 11, 2019), ECF No. 34; 15 U.S.C. §§ 77q(a), 78j(b), 80b-6(1) & (2); 17 C.F.R. § 240.10b-5. We take official notice of the final judgment and other federal district court orders and documents referenced herein pursuant to Rule of Practice 323. *See* 17 C.F.R. § 201.323 (providing that official notice may be taken "of any material fact which might be judicially noticed by a district court of the United States"); *Am. Inv. Serv., Inc.*, Exchange Act Release No. 43991, 2001 WL 167861, at *1 n.1 (Feb. 21, 2001) (recognizing Commission's authority to take official notice of federal district court orders).

3 *Kelly*, 2019 WL 3716361, at *1; Compl. ¶ 2, *SEC v. Kelly*, Case No. 1:18-cv-4939 (N.D. Ga. Oct. 25, 2018), ECF No. 1.

4 *Kelly*, 2019 WL 3716361, at *1; Compl. ¶ 3, No. 1:18-cv-4939.

2017 to 2018.[5] The OIP also alleged that Kelly acted as an unregistered investment adviser by providing investment advice to his clients in exchange for compensation in connection with his business.[6]

The OIP instituted proceedings to determine whether the allegations contained therein were true and if any remedial action was appropriate in the public interest. It directed Kelly to file an answer to the allegations contained therein within 20 days of service, as provided by Rule of Practice 220(b).[7] The OIP informed Kelly that, if he failed to answer, he could be deemed in default, the allegations in the OIP may be deemed to be true as provided in the Rules of Practice, and the Commission could determine the proceeding against him upon consideration of the OIP.[8]

B. Kelly failed to answer the OIP, respond to a show cause order why he should not be found in default, or respond to the Division's motion for a default and sanctions.

Kelly was properly served with the OIP on October 15, 2020, pursuant to Rule of Practice 141(a)(2)(i),[9] but did not answer it. On April 12, 2021, more than 20 days after service, the Commission issued an order requiring Kelly to show cause by April 26, 2021, why he should not be deemed to be in default and why this proceeding should not be determined against him due to his failure to file an answer and to otherwise defend this proceeding.[10] The order warned Kelly that when a party defaults, the allegations in the OIP will be deemed to be true and the Commission may determine the proceeding against that party upon consideration of the record without holding a public hearing.[11] Kelly did not respond to the order.

On December 27, 2021, the Division of Enforcement filed a motion for default and imposition of remedial sanctions. In support of its motion, the Division submitted a copy of the final judgment enjoining Kelly and several codefendants in the injunctive action from violations of the federal securities laws and requiring them to pay disgorgement of more than $1.4 million

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5 *Kelly*, 2019 WL 3716361, at *1. We also take official notice of Kelly's BrokerCheck report, which shows that he was associated with FINRA member firms between 2000 and 2018. https://files.brokercheck.finra.org/individual/individual_2294170.pdf; *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records pursuant to Rule of Practice 323, 17 C.F.R. § 201.323).

6 *Kelly*, 2019 WL 3716361, at *1.

7 17 C.F.R. § 201.220(b).

8 *See Kelly*, 2019 WL 3716361, at *2; Rules of Practice 155(a), 220(f), 17 C.F.R. §§ 201.155(a), .220(f).

9 17 C.F.R. § 201.141(a)(2)(i) (providing that service of an OIP on an individual may be made by "handing a copy of the order to the individual . . . or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein").

10 *Sean Kelly*, Exchange Act Release No. 91538, 2021 WL 1351212, at *1 (Apr. 12, 2021).

11 *Id.* at *1 (citing Rules of Practice 155, 180, 17 C.F.R. §§ 201.155, .180).

and prejudgment interest.[12] The Division recognized that the judgment was entered following Kelly's default and acknowledged that "an industry bar sanction cannot be predicated solely on the allegations in the complaint in a Commission[] civil action if the Respondent defaulted in that proceeding."[13] Accordingly, in support of its motion, the Division submitted the Declaration of Melissa Mitchell, the lead investigator in the Commission's investigation into Kelly and Lion's Share Financial of East Cobb, Inc., a codefendant in the injunctive action.

In her declaration, Mitchell stated that she had reviewed bank records for a checking account in the name of Lionsshare Tax Services, LLC, also a codefendant in the injunctive action, from January 1, 2017, through August 2018. Mitchell determined that these records showed deposits of numerous checks from brokerage customers of Kelly and few, if any, deposits from other sources. The records also showed numerous cash withdrawals and expenditures for travel, Super Bowl tickets, and payments for Kelly's mortgage. Mitchell concluded that none of the money deposited into the account appeared to have been transferred to any custodial brokerage account or to any company offering investment products.

In her declaration, Mitchell also stated that she learned that one investor had given Kelly a check for $5000 made out to "Lion's Share," which Kelly represented he would either invest or deposit in a brokerage account. Instead, Kelly deposited the check in a bank account that he controlled. Mitchell also confirmed that the check was not deposited into the investor's brokerage account. Mitchell also spoke with two other investors whose checks she found in the bank records. They confirmed that their checks were intended for investment purposes and that they had not authorized Kelly to use their money for personal expenses. Mitchell also determined that Kelly provided two account statements to investors that reflected investments that had not been made. Mitchell received email confirmation from the sponsoring organizations for the purported investments that stated that they had no records of them.

Mitchell stated further that, on December 13, 2018, Kelly was charged by criminal information with one count of mail fraud and one count of securities fraud arising from the same misconduct alleged in the injunctive action.[14] On January 4, 2019, Kelly pleaded guilty to both counts, admitting that he did so "because he is in fact guilty of the crimes charged" in both counts.[15] Kelly agreed to pay full restitution for distribution to all victims of the two offenses to

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12 *See supra* note 2.

13 *See Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 WL 421305, at *4 (Feb. 4, 2010) (finding that because injunction was entered by default, it did not have preclusive effect as to facts alleged in the Commission's complaint); *see also Jaswant Gill*, Advisers Act Release No. 5858, 2021 WL 4131427, at *2 n.7 (Sept. 10, 2021) ("Because Gill's injunction in the civil action was entered by default, we do not rely on any findings made in that action in determining whether Gill's conduct warrants remedial sanctions.").

14 *United States v. Kelly*, Case No. 1:18-cr-00475 (N.D. Ga. Dec. 13, 2018), ECF No. 1.

15 Guilty Plea and Plea Agreement, *United States v. Kelly*, Case No. 1:18-cr-00475 (N.D. Ga. Jan. 4, 2019), ECF No. 4-1.

which he pleaded guilty, which he agreed totaled at least $550,000.[16] On June 17, 2019, Kelly was sentenced to a total term of imprisonment of 60 months and, upon release from imprisonment, to a total term of supervised release of three years.[17] Kelly was also ordered to pay more than $1.4 million in restitution to at least 14 identified victims of his offenses.[18] On January 14, 2022, Kelly was released from federal custody.[19]

Kelly did not respond to the Division's motion for a default and sanctions.

II. Analysis

A. We hold Kelly 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."[20] Because Kelly has failed to answer or respond to the show cause order or the Division's motion for entry of default and sanctions, we find it appropriate to deem him in default and deem the allegations of the OIP to be true. We base the findings that follow on the record, including the OIP, the materials the Division submitted with its motion, and the additional materials of which we take official notice.[21]

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

Exchange Act Section 15(b)(6)(A) authorizes the Commission to suspend or bar a person from the securities industry if we find, on the record after notice and opportunity for hearing, that

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16 *Id.*

17 *United States v. Kelly*, Case No. 1:18-cr-00475 (N.D. Ga. June 17, 2019), ECF No. 31.

18 *Id.*

19 *See* Federal Bureau of Prisons Inmate Locator, https://www.bop.gov/inmateloc/ (search for Sean Kelly). We take official notice of the information provided by this website pursuant to Rule of Practice 323. 17 C.F.R. § 201.323; *cf. United States v. Muskett*, 970 F.3d 1233, 1237 n.4 (10th Cir. 2020) (taking judicial notice of defendant's release date).

20 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 17 C.F.R. § 201.155(a)").

21 Although the OIP did not predicate this action on Kelly's criminal conviction, we may consider it in determining whether it is appropriate to impose sanctions on him. *See generally Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 WL 121451, at *5 (Jan. 14, 2011) (considering respondent's criminal conviction in sanctions analysis although it was not referenced in the OIP (citing *Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 WL 21468604, at *5 n.20 (June 26, 2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions"))).

(i) the person has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; (ii) the person was associated with a broker or dealer at the time of the alleged misconduct; and (iii) such a sanction is in the public interest.[22]

The record establishes the first two elements. Because the district court enjoined Kelly from violating Exchange Act Section 10(b) and Rule 10b-5 thereunder "in connection with the purchase or sale of any security,"[23] Kelly has been enjoined "from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security."[24] The allegations of the OIP deemed true establish that Kelly was associated with a broker-dealer at the time of the misconduct alleged in the Commission's complaint.[25]

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.[26] Our

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[22] 15 U.S.C. § 78*o*(b)(6)(A) (cross-referencing Exchange Act Section 15(b)(4)(C), 15 U.S.C. § 78*o*(b)(4)(C), which specifies injunctions against various actions, conduct, and practices). Advisers Act Section 203(f) makes the same relief available on similar terms against a person so enjoined who was associated with an investment adviser at the time of the alleged misconduct. 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e)(4), 15 U.S.C. § 80b-3(e)(4), which specifies injunctions against various actions, conduct, and practices). Although the Division also seeks relief on the basis of the Advisers Act, and the OIP alleges that Kelly also acted as an unregistered investment adviser, the OIP does not specify when Kelly acted as an investment adviser. We need not resolve this issue because Exchange Act Section 15(b)(6) provides a sufficient basis for us to impose the remedial sanctions on Kelly that we order in this opinion. Exchange Act Section 15(b)(6) also authorizes a bar from participating in an offering of penny stock, but the Division did not request such a bar, and we do not impose one here.

[23] *See supra* note 2; *see also* 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5 (each applying to conduct "in connection with the purchase or sale of any security").

[24] Exchange Act Section 15(b)(4)(C), 15 U.S.C. § 78*o*(b)(4)(C).

[25] *See Kelly*, 2019 WL 3716361, at *1 (alleging that Kelly was associated with a broker-dealer between 2000 and 2018 and that the complaint in the Commission's injunctive action alleged misconduct from at least 2014 until October 2018); Compl., No. 1:18-cv-4939 (setting forth alleged misconduct).

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

public interest inquiry is flexible, and no one factor is dispositive.[27] The remedy is intended to protect the trading public from further harm, not to punish the respondent.[28]

We have weighed all these factors and find an industry bar warranted to protect the investing public. Kelly's misconduct was egregious and recurrent. Kelly misappropriated funds from multiple investors for personal use, and was ordered to pay over $1.4 million in restitution to at least 14 identified victims. Kelly also misled investors by providing them with false account statements that represented that they held investments that had not been made.[29]

Kelly also acted with scienter.[30] Each of the two criminal counts to which Kelly pleaded guilty—mail fraud and securities fraud—requires a specific intent to defraud.[31] Kelly's use of false account statements to mislead investors also indicates a high degree of scienter.[32]

Because Kelly failed to answer the OIP, respond to the show cause order, or respond to the Division's motion, he has made no assurances that he will not commit future violations. And although his guilty plea indicates that Kelly might have some appreciation for the wrongfulness of his conduct, any such appreciation does not outweigh the evidence that Kelly poses a risk to the investing public.[33] It also appears that Kelly's occupation presents opportunities for future

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

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

29 *Cf. Shreyans Desai*, Exchange Act Release No. 80129, 2017 WL 782152, at *3 (Mar. 1, 2017) (finding that respondent acted egregiously, and imposing an industry bar on him, where respondent made material misrepresentations to investors, falsified account documents, and otherwise lied to investors about the status of their accounts, thereby causing them to lose over $100,000).

30 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976) (describing scienter as "a mental state embracing intent to deceive, manipulate, or defraud"); *see also 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).

31 *United States v. Rhone*, 864 F.2d 832, 837 (D.C. Cir. 1989) (stating that "[s]pecific intent is an essential element of mail fraud"); *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (explaining that criminal securities fraud, like mail fraud, requires proof of specific intent to defraud).

32 *Cf. Desai*, 2017 WL 782152, at *4 (finding that respondent acted with a high degree of scienter where in addition to misappropriating investors' funds he attempted to conceal the actual value of their accounts).

33 *See, e.g.*, *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").

violations because he worked as a registered representative for approximately 18 years including during the period of his misconduct, and he offers no assurances about his future plans.[34]

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 Kelly is unfit to be in the securities industry and that his participation in it in any capacity would pose a risk to investors.[35] Accordingly, because Kelly poses a continuing threat to investors, we conclude that it is in the public interest to bar Kelly from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

An appropriate order will issue.

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

Vanessa A. Countryman
Secretary

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[34] *See George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *3 (Jan. 20, 2017) (expressing concern that respondent's occupation would present opportunities for future violations where he did not indicate that he planned to leave the securities industry).

[35] *See id.* at *5 (barring respondent on the ground that the respondent's misconduct demonstrated that he was unfit to participate in the securities industry and posed a risk to investors).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 94808 / April 28, 2022

INVESTMENT ADVISERS ACT OF 1940
Release No. 6006 / April 28, 2022

Admin. Proc. File No. 3-19323

In the Matter of

SEAN KELLY

ORDER IMPOSING REMEDIAL SANCTIONS

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

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

By the Commission.

Vanessa A. Countryman
Secretary