SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 96445 / December 5, 2022

INVESTMENT ADVISERS ACT OF 1940
Release No. 6198 / December 5, 2022

Admin. Proc. File No. 3-20111

In the Matter of

BENJAMIN DURANT, III

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 broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participation in any penny stock offering.

APPEARANCES:

Jennifer C. Barry, Esq., *Christopher R. Kelly, Esq.*, and *Michael S. Macko, Esq.* for the Division of Enforcement.

On September 30, 2020, we instituted an administrative proceeding against Benjamin Durant, III, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940.[1] We now find Durant to be in default, deem the allegations against him to be true, and bar him from associating in the securities industry in any capacity and from participating in an offering of penny stock.

I. Background

The order instituting proceedings ("OIP") alleged that, between January 26, 2009 and November 10, 2009, Durant was employed as a registered representative at Euro Pacific Capital, a dually registered broker-dealer and investment adviser. The OIP also alleged that, in 2014, the Commission brought a civil action against Durant alleging that he committed insider trading by trading on material, nonpublic information that he received in breach of a duty regarding the July 28, 2009 acquisition of SPSS, Inc., by International Business Machines Corporation. The OIP alleged further that, in the civil action, a federal district court permanently enjoined Durant on May 16, 2016, from violating Exchange Act Section 10(b) and Exchange Act Rule 10b-5.

The OIP initiated proceedings to determine whether the allegations contained therein were true and if any remedial action was appropriate in the public interest. It directed Durant to file an answer to the allegations within 20 days after service, as provided by Rule of Practice 220(b).[2] The OIP also informed Durant that if he failed to answer, he could be deemed in default, the allegations in the OIP could be deemed to be true as provided in the Rules of Practice, and the proceeding could be determined against him upon consideration of the OIP.[3]

Durant was properly served with the OIP on July 31, 2021, pursuant to Rule of Practice 141(a)(2)(i),[4] but did not respond. On September 3, 2021, more than 20 days after service, the Commission ordered Durant to show cause by September 17, 2021, why it should not find him in default due to his failure to file an answer or otherwise defend this proceeding.[5] The show cause order cautioned Durant that, if the Commission found him 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. The order directed the Division of Enforcement to file a

---

1 *Benjamin Durant, III*, Exchange Act Release No. 90056, 2020 WL 5820433 (Sept. 30, 2020).

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).

4 *See* 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").

5 *Benjamin Durant, III*, Exchange Act Release No. 92877, 2021 WL 4031199 (Sept. 3, 2021).

motion for entry of an order of default and the imposition of remedial sanctions by October 15, 2021, in the event that Durant failed to respond to the show cause order.

After Durant failed to answer the OIP or respond to the show cause order, the Division filed a motion requesting that the Commission find Durant in default and bar him from associating in the securities industry and from participating in an offering of penny stock. The Division supported the motion with the amended complaint in the civil action and Durant's answer, and cited the district court's post-trial judgment and order denying Durant's motion for judgment as a matter of law or a new trial.[6] Durant did not respond to the Division's motion.

II. Analysis

A. We hold Durant 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 Durant has failed to answer or respond to the show cause order 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 and the evidentiary materials that the Division submitted with its motion for default and sanctions.

B. We find associational and penny stock bars to be in the public interest.

Exchange Act Section 15(b)(6)(A) authorizes the Commission to suspend or bar a person from associating in the securities industry and from participating in the offering of penny stock if it finds, on the record after notice and opportunity for hearing, that (1) the person was enjoined from any conduct or practice in connection with the purchase or sale of a security; (2) the person was associated with a broker or dealer at the time of the alleged misconduct; and (3) such a

---

[6] *SEC v. Payton*, No. 1:14-cv-04644, 2016 WL 3023151 (S.D.N.Y. May 16, 2016), *aff'd*, 726 F. App'x 832 (2d Cir. 2018); *SEC v. Payton*, 219 F. Supp. 3d 485, 487 (S.D.N.Y. 2016), *aff'd*, 726 F. App'x 832 (2d Cir. 2018). We take official notice of these decisions of the district court pursuant to Rule of Practice 323, 17 C.F.R. § 201.323.

[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" Rule of Practice 155(a)).

sanction is in the public interest.[8] Similarly, Advisers Act Section 203(f) authorizes the Commission to suspend or bar a person from associating in the securities industry if it finds, on the record after notice and opportunity for hearing, that (1) the person was enjoined from any conduct or practice in connection with the purchase or sale of a security; (2) the person was associated with an investment adviser at the time of the alleged misconduct; and (3) such a sanction is in the public interest.[9] The record establishes the first two of these elements. Durant was enjoined from conduct in connection with the purchase or sale of securities.[10] He was also a person associated with a broker-dealer and investment adviser at the time of his misconduct in 2009. The allegations of the OIP deemed true establish that, at that time, Durant was associated with Euro Pacific Capital, a dually registered broker-dealer and investment adviser.

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.[11] Our public interest inquiry is flexible, and no one factor is dispositive.[12] The remedy is intended to "protect[] the trading public from further harm," not to punish the respondent.[13]

We have weighed all of these factors, and find associational and penny stock bars are warranted to protect the investing public. A jury found Durant liable for insider trading in violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5. In its post-trial orders, the district court found that Durant was a "sophisticated investment professional[]," who

---

8 15 U.S.C. § 78*o*(b)(6) (cross-referencing Exchange Act Section 15(b)(4), 15 U.S.C. § 78*o*(b)(4)); *see also* Exchange Act Section 15(b)(4), *id.* § 78*o*(b)(4)(C) (discussing injunctions from any conduct or practice in connection with the purchase or sale of a security).

9 *Id.* § 80b-3(f) (cross-referencing Advisers Act Section 203(e), 15 U.S.C. § 80b-3(e)); *see also* Advisers Act Section 203(e)(4), *id.* § 80b-3(e)(4) (discussing injunctions from any conduct or practice in connection with the purchase or sale of a security).

10 *Payton*, 2016 WL 3023151, at *5 (enjoining Durant from committing violations of Exchange Act Section 10(b) and Exchange Act Rule 10b-5); Exchange Act Section 10(b), 15 U.S.C. § 78j(b) (applying to conduct "in connection with the purchase or sale of any security"); Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (same).

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

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

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

"understood that information about unannounced corporate transactions was confidential and valuable" and was "well aware of the prohibition on insider trading."[14] Durant nevertheless misappropriated confidential information that he learned from a friend about IBM's imminent acquisition of SPSS, Inc., to repeatedly purchase call option contracts before the deal was publicly announced, ultimately making over $600,000 from those trades. The district court found that Durant then attempted to cover up his insider trading scheme, such as by lying to his employer when asked about his trades and resolving with others involved in the scheme to "not talk to authorities if they received inquiries about their trades."[15] In addition to imposing the injunction, the district court ordered that Durant disgorge more than $600,000, plus prejudgment interest, and pay a civil penalty equivalent to disgorgement. We conclude that Durant's misconduct was egregious, recurrent, and involved a high degree of scienter.[16]

Because Durant failed to answer the OIP or respond to the show cause order or the Division's motion, he has made no assurances that he will not commit future violations or that he recognizes the wrongful nature of his conduct. Durant also worked for at least seven years in the securities industry. His occupation therefore presents opportunities for future violations. The district court also concluded that the trial evidence suggested that Durant had "not remotely absorbed the magnitude of [his] misconduct" and that it was "far from assured" that Durant "will not again find [himself] in a position to trade on material non-public information."[17]

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 Durant is unfit to participate in the securities industry and that his participation in it in any capacity would pose a risk to investors.[18] Given that Durant has defaulted in this proceeding, he has not opposed the imposition of any particular associational bar or a bar from

---

[14] *Payton*, 219 F. Supp. 3d at 492. The doctrine of collateral estoppel precludes Durant from relitgating in this proceeding the factual findings that the district court made. *Timothy Mobley*, Exchange Act Release No. 36689, 1996 WL 20833, at *3 (Jan. 5, 1996).

[15] *Payton*, 219 F. Supp. 3d at 492.

[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); *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (scienter is "an intent to deceive, manipulate, or defraud"); *Phillip J. Milligan*, Exchange Act Release No. 61790, 2010 WL 1143088, at *5 (Mar. 26, 2010) ("attempts to conceal misconduct indicate scienter").

[17] *Payton*, 2016 WL 3023151, at *5.

[18] *George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *5 (Jan. 30, 2017) (finding that the misconduct underlying the respondent's injunction demonstrated that respondent was unfit to participate in the securities industry and posed a risk to investors).

participating in an offering of penny stock. We conclude that it is in the public interest to bar him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participation in an offering of penny stock.[19]

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners CRENSHAW, UYEDA, and LIZÁRRAGA; Commissioner PEIRCE concurring in part and dissenting with respect to the imposition of a bar from participating in an offering of penny stock).

Vanessa A. Countryman
Secretary

---

[19] *Id.* (imposing associational bars where they were necessary to protect the public); *see also Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *5 (Apr. 20, 2012) (finding that "barring Respondents from participating in the securities industry and from participating in an offering of penny stock provides an important additional layer of protection to the public beyond the sanctions imposed by the district court").

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96445 / December 5, 2022

INVESTMENT ADVISERS ACT OF 1940
Release No. 6198 / December 5, 2022

Admin. Proc. File No. 3-20111

In the Matter of

BENJAMIN DURANT, III

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Benjamin Durant, III is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that Benjamin Durant, III is barred from participating in any offering of a penny stock, including acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Vanessa A. Countryman
Secretary