

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6278 / April 11, 2023

Admin. Proc. File No. 3-19510

In the Matter of

ALBERT K. HU

ORDER REQUESTING ADDITIONAL BRIEFING AND MATERIALS

On September 24, 2019, the Securities and Exchange Commission issued an order instituting administrative proceedings (“OIP”) against Albert K. Hu pursuant to Section 203(f) of the Investment Advisers Act of 1940.¹ Hu subsequently filed an answer, attaching various pieces of evidence. The Division of Enforcement then filed a motion for summary disposition requesting that the Commission bar Hu from the securities industry. Hu responded in opposition to that motion and, in that same filing, also moved for summary disposition.

To support its motion, the Division relied on materials including the indictment for the criminal case; the verdict for the criminal case; excerpts from the jury trial transcript in the criminal case; the district court’s criminal judgment, order of restitution, and amendment to the order of restitution for the criminal case; the memorandum decision of the Court of Appeals in the criminal case; the civil complaint filed by the Commission; and the order granting the Commission’s motion for final judgment against all defendants in the civil case.² Hu attached to his motion an excerpt of the jury trial transcript in the criminal case. We believe that additional briefing and materials are needed to resolve the parties’ cross-motions for summary disposition.

Advisers Act Section 203(f) authorizes the Commission to suspend or bar a person from the securities industry if it finds, as relevant here, that (1) the person was (a) enjoined from

¹ *Albert K. Hu*, Advisers Act Rel. No. 5365, 2019 WL 4645968 (Sept. 24, 2019).

² The Division filed a motion for the Commission to take official notice of these documents. We deny this motion as unnecessary, and we instead consider the submitted documents as documentary evidence supporting the Division’s motion for summary disposition. *See* Rule of Practice 250(b), 17 C.F.R. § 201.250(b) (permitting parties to rely upon affidavits, declarations, and documentary evidence as support for their motions for summary disposition).

engaging in or continuing any conduct or practice in connection with acting as an investment adviser or in connection with the purchase or sale of any security, or (b) within ten years of the commencement of the proceeding, was convicted of wire fraud in violation of 18 U.S.C. § 1343; (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.³ As to the second element, the record before us does not indicate precisely when Hu acted as an investment adviser⁴ or when Hu's alleged misconduct occurred.⁵

As to the third element, when determining whether remedial action (such as an industry bar) is in the public interest, the Commission must consider the underlying facts and circumstances of the case.⁶ The factors that the Commission considers include 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 or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.⁷ Such analysis must do more than "recite[], in general terms, the reasons why [a respondent's] conduct is illegal," but rather "devote individual attention to the unique facts and circumstances of th[e] case."⁸ Here,

³ 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e)(2) and (4), 15 U.S.C. § 80b-3(e)(2) and (4)); *see also id.* § 80b-3(e)(2)(D) (discussing convictions under 18 U.S.C. § 1343); *id.* § 80b-3(e)(4) (discussing injunctions).

⁴ *Cf.* Advisers Act Section 203(f), 15 U.S.C. § 80b-3(f) (applying to persons associated with an investment adviser "at the time of the alleged misconduct"); *Sean Kelly*, Exchange Act Release No. 94808, 2022 WL 1288179, at *4 n.22 (Apr. 28, 2022) (not granting relief under the Advisers Act where the OIP, which could be deemed true because the respondent defaulted, failed to allege when the respondent was associated with an investment adviser); *id.* at *4 (granting relief under the Exchange Act where the OIP, which was deemed true, established that respondent was associated with a broker-dealer at the time of the alleged misconduct).

⁵ The Division points to the indictment and civil complaint when discussing when Hu's misconduct occurred, but those documents contain allegations rather than necessarily proven facts. Notably, the jury returned a general verdict finding Hu guilty of all charges, meaning that the jury did not necessarily find all allegations in the indictment to be true, and the court's final judgment in the civil case did not expressly find any the civil complaint's allegations to be true.

⁶ *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

⁷ *See id.*; *see also Lawrence Allen Deshetler*, Advisers Act Release No. 5411, 2019 WL 6221492, at *2-3 (Nov. 21, 2019) (applying *Steadman* factors in follow-on proceeding).

⁸ *See McCarthy v. SEC*, 406 F.3d 179, 189-90 (2d Cir. 2005) (vacating and remanding suspension for failing to meet this standard).

the current record contains limited evidence regarding the nature or duration of Hu's misconduct.⁹

Under these circumstances, the Commission would benefit from further briefing and any additional supporting material regarding when Hu was associated with an investment adviser and the factual predicates for Hu's convictions and injunctions.¹⁰ The Commission would also benefit from further materials and briefing relevant to its determination of whether remedial action is in the public interest, such as the nature and duration of Hu's misconduct. Additional material could include, for example, the evidence that the Division attached to its Motion for Final Judgment in the civil case against Hu.

Accordingly, it is ORDERED that the Division shall submit, as it deems necessary, any additional evidentiary materials relevant to its motion for summary disposition as discussed above by May 11, 2023, as well as a brief not to exceed 5,000 words, explaining the relevance of those materials, with specific citations to the evidence relied upon.¹¹

It is further ORDERED that Hu may file any additional evidentiary materials relevant to his defense by June 12, 2023, as well as a brief not to exceed 5,000 words, explaining the relevance of those materials to his defense and responding to the Division's filing, with specific

⁹ For example, the Division points to the criminal jury instructions as support for the proposition that Hu made seven false statements to obtain money from investors. But the instructions required the jury to unanimously find that Hu made just one of the seven alleged fraudulent statements.

¹⁰ See, e.g., *Shawn K. Dicken*, Exchange Act Release No. 89526, 2020 WL 4678066, at *2 (Aug. 12, 2020) (requesting additional information from the Division "regarding the factual predicate for Dicken's convictions" and "why these facts establish" the need for remedial sanctions); see also *Shawn K. Dicken*, Exchange Act Release No. 90215, 2020 WL 6117716, at *1 (Oct. 16, 2020) (clarifying the additional information needed from the Division).

¹¹ See Rule of Practice 154(a), 17 C.F.R. § 201.154(a) (providing that motions "shall state with particularity the grounds therefor" and "shall be accompanied by a written brief of the points and authorities relied upon").

citations to the evidence relied upon.¹² If Hu files a response to this order, the Division may file a reply within 14 days after its service, not to exceed 2,500 words.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

¹² *See id.*