SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Release No. 6461 / October 13, 2023

Admin. Proc. File No. 3-20086

In the Matter of

GARY EDWARD HAYNES

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Conviction

Respondent was convicted of multiple counts of exploiting a vulnerable adult and one count of racketeering. *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:

John E. Birkenheier, *Brian D. Fagel*, and *Godfried B. Mensah* for the Division of Enforcement.

On September 28, 2020, the Securities and Exchange Commission instituted an administrative proceeding against Gary Edward Haynes, pursuant to Section 203(f) of the Investment Advisers Act of 1940.[1] We amended the order instituting proceedings on October 21, 2022.[2] We now find Haynes to be in default, deem the allegations of the amended order instituting proceedings to be true, and bar him from the securities industry.

I. Background

A. The Commission issued the amended order instituting proceedings against Haynes.

The amended order instituting proceedings (the "OIP") alleged that, from November 2010 through October 2016, Haynes was an investment adviser representative associated with two Commission-registered investment advisers. The OIP also alleged that, in December 2018, a jury in a Michigan state court found Haynes guilty of several counts of exploiting a vulnerable adult in violation of Michigan Compiled Laws § 750.174a and one count of conducting a criminal enterprise in violation of Michigan Compiled Laws § 750.159i(1). According to the OIP, Haynes was sentenced to between 7.5 and 20 years of imprisonment.

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 Haynes to file an answer to the allegations within 20 days after service, as provided by Rule of Practice 220(b).[3] The OIP informed Haynes 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.[4]

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

Haynes was properly served with the OIP on October 31, 2022, pursuant to Rule of Practice 141(a)(2)(i),[5] but did not respond.[6] On December 9, 2022, more than 20 days after

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1 *Gary Edward Haynes*, Advisers Act Release No. 5597, 2020 WL 5766754 (Sept. 28, 2020).

2 *Gary Edward Haynes*, Advisers Act Release No. 6172, 2022 WL 13566113, at *3-5 (Oct. 21, 2022). The amendment corrected an error in the description of some of Haynes's convictions. *Id.* at *1.

3 17 C.F.R. § 201.220(b).

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

5 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").

6 Haynes also failed to respond to the original OIP that was issued in September 2020.

service, the Commission ordered Haynes to show cause by January 23, 2023, why it should not find him in default due to his failure to file an answer or otherwise to defend this proceeding.[7] The show cause order warned Haynes 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 motion for entry of an order of default and the imposition of remedial sanctions by February 21, 2023, in the event that Haynes failed to respond to the show cause order.

Haynes did not respond to the show cause order. On February 21, 2023, the Division filed a motion requesting that the Commission find Haynes in default and bar him from the securities industry. Haynes did not respond to the Division's motion.

The Division supported the motion with transcripts from the criminal trial. The jury instructions and verdict show that Haynes was convicted of one count of exploiting a vulnerable adult for $100,000 or more, eight counts of exploiting a vulnerable adult for $1,000 or more but less than $20,000, and one count of racketeering.[8] These documents also show that, to convict Haynes of racketeering, the jury must have found that Haynes committed at least two instances of embezzlement by an agent.[9] And the sentencing transcript shows that the court sentenced Haynes to a total of 90 months to 20 years of imprisonment.

The jury trial transcript shows that Haynes misappropriated around $300,000 from an approximately 90-year-old victim. Haynes met the victim in 2007 when she was about 85 years old at a money management symposium for elderly people sponsored by Haynes's employer at the time. Eventually, the victim asked Haynes to help her pay her bills online, and she gave him access to one bank account. When she was admitted to a nursing home for a temporary stay, Haynes told her that she should keep her money safe from the nursing home, which she thought meant he would invest it in an annuity. But on approximately 13 separate occasions from 2011 to 2015, when the victim was around 90 years old, Haynes transferred a total of about $300,000 from various bank accounts and annuities owned by the victim to businesses that Haynes owned. Although the victim signed some of the checks that were made out to Haynes's businesses, she

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[7] *Gary Edward Haynes*, Advisers Act Release No. 6202, 2022 WL 17550592 (Dec. 9, 2022).

[8] The OIP describes the racketeering offense as conducting a criminal enterprise in violation of Michigan Compiled Laws § 750.159i, which in turn provides at subsection (1) that "[a] person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity."

[9] Haynes was also convicted of four counts related to his state tax returns. In addition, the jury instructions and verdict show that the jury found that Haynes committed his misconduct on or about March 2011 to September 2015.

testified that she did not recall doing so and never intended to give or loan money to Haynes or his businesses.

Haynes took the stand in his own defense at the criminal trial. He admitted that he took the victim's money, but he claimed that she had extended the money to him as investments in real estate, as loans, and to pay him back for cash he brought her. Haynes also claimed to have repaid some of the money and planned to repay the rest. He testified that he thought he still owed around $184,000 at the time of the trial, although he claimed that the money was not due for a few months.

II. Analysis

A. We hold Haynes 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."[10] Because Haynes has failed to answer or to respond to the show cause order or 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 evidentiary materials that the Division submitted with its motion for default and sanctions.

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 (1) within ten years of the commencement of the proceeding, the person was convicted of an offense that involves embezzlement or misappropriation of funds; (2) the person was associated with an investment adviser at the time of the misconduct; and (3) such a sanction is in the public interest.[11]

The record establishes the first two of these elements. Haynes was convicted of one count of racketeering and nine counts of exploiting a vulnerable adult within ten years of the

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[10] 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)).

[11] 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e)(2), 15 U.S.C. § 80b-3(e)(2)); *see also id.* § 80b-3(e)(2)(C) (discussing convictions involving embezzlement and misappropriation of funds).

commencement of this proceeding.[12] The offense of racketeering was predicated on the jury finding that Haynes committed two or more instances of embezzlement by an agent, and therefore that offense involved embezzlement.[13] The nine offenses of exploiting a vulnerable adult required the jury to find that Haynes obtained or used for his own benefit a vulnerable adult's money or property "through fraud, deceit, misrepresentation, coercion, or unjust enrichment."[14] To reach this verdict, the jury necessarily rejected Haynes's testimony that the victim had voluntarily given or loaned him or his businesses money and instead credited the victim's testimony that she had not done so. Thus, we find that Haynes's convictions for exploiting a vulnerable adult involved a misappropriation of funds.[15] The allegations of the OIP deemed true establish that Haynes was associated with a Commission-registered investment adviser at the time of his misconduct.

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 the conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[16] Our

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12 *See* Advisers Act Section 202(a)(6), 15 U.S.C. § 80b-2(a)(6) (defining "[c]onvicted" to include a "verdict" if it "has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed"). Here, the Michigan Court of Appeals affirmed Haynes's convictions and sentence. *See People v. Haynes*, 980 N.W.2d 66 (Mich. Ct. App. 2021) (per curiam).

13 *See* Mich. Comp. Laws § 750.159i(1) (prohibiting "a pattern of racketeering activity"); *id.* § 750.159f(c) (defining "pattern of racketeering activity" as "not less than 2 incidents of racketeering"); *id.* § 750.159g(t) (defining racketeering to include any felony violation of Michigan Compiled Laws § 750.174); *id.* § 750.174(1) (defining the crime of "embezzlement").

14 Mich. Comp. Laws § 750.174a(1).

15 *See Misappropriation*, Black's Law Dictionary (11th ed. 2019) (defining "misappropriation" as "[t]he application of another's property or money dishonestly to one's own use"); *cf. Ismail Elmas*, Exchange Act Release No. 96409, 2022 WL 17346048, at *3 (Nov. 30, 2022) (noting that respondent misappropriated funds for his personal use while misrepresenting that they were being used for business purposes); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *3 (Feb. 4, 2008) (noting that respondent misappropriated funds from investors while misrepresenting how they would and had been used).

16 *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.[17] The remedy is intended to protect the trading public from further harm, not to punish the respondent.[18]

We have weighed all these factors and find an industry bar is warranted to protect the investing public. In making this determination, applying Michigan law, we consider the jury's findings to be persuasive (but not conclusive) evidence of the nature of Haynes's violations.[19]

The jury found that, on at least nine separate occasions, Haynes wrongfully took a total of at least $109,000 from a vulnerable adult, and the transcript supports that finding, showing that in fact Haynes misappropriated more than $300,000 from an approximately 90-year-old individual whom he had met through a firm-sponsored money management symposium for elderly adults. The jury rejected Haynes's claim that the victim had given him the money voluntarily, such as for real estate investments or loans, and the transcript supports this finding. For example, in her testimony, the victim denied giving or loaning any money to Haynes or his business, testifying that she did not intend to surrender her annuity, enter into a business relationship with Haynes, or invest in the house-flipping or renovating business. And it is not plausible that the victim, a woman in her nineties, cashed in on her annuity and spent much of her other money to invest in a new real estate venture, as Haynes asserted in his testimony. Haynes testified that he repaid some of the money and planned to repay the rest but, even

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

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

[19] We apply Michigan law to determine the preclusive effect of Haynes's Michigan conviction. *See Bruce C. Worthington*, Exchange Act Release No. 94557, 2022 WL 969939, at *2 & n.9 (Mar. 30, 2022) (order requesting additional briefing and materials) (applying state law to determine the preclusive effect of a state order); *cf. Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . . ."). Under Michigan law, collateral estoppel does not apply here because the Commission was not a party or in privity with a party in the Michigan criminal proceeding. *See Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 845-52 (Mich. 2004) (providing that, with some exceptions not at issue here, collateral estoppel requires mutuality of estoppel). However, again applying Michigan law, we treat the conviction as "highly probative evidence" of the facts underlying the conviction. *Waknin v. Chamberlain*, 653 N.W.2d 176, 180 (Mich. 2002); *Calusinski v. Kruger*, 24 F.3d 931, 934 (7th Cir. 1994) (applying state law in determining to admit prior criminal state court conviction as evidence of the facts upon which the conviction was based); *see also* Rule of Practice 320, 17 C.F.R. § 201.320 (allowing admission of any relevant evidence, including hearsay that "is relevant, material, and bears satisfactory indicia of reliability"); *cf. Foelber-Patterson, Inc.*, Exchange Act Release No. 3324, 1942 WL 33823, at *4 (Oct. 29, 1942) (stating that the Commission "might give some weight to the failure of [a] grand jury to indict" in some circumstances, even though it would be "in no sense, *res judicata*").

assuming he did so, repaying embezzled money does not excuse the embezzlement,[20] nor does any mitigating effect from it outweigh the factors demonstrating the need to bar Haynes as we discuss herein. Besides, even by his own admission, Haynes still owed the victim about $184,000 at the time of his criminal trial.

The jury also found that Haynes knew or had reason to know that his victim was a vulnerable adult, meaning that "because of age, developmental disability, mental illness, or physical disability," she "require[d] supervision or personal care or lack[ed] the personal and social skills required to live independently,"[21] and again the trial transcript supports that finding. For example, the victim testified that several people in addition to Haynes helped her around the house, and her niece testified that the victim could not throw out and restock items from her fridge. For his conduct, Haynes was sentenced to between 90 months and 20 years of imprisonment. Haynes's misconduct was thus egregious and recurrent.

Haynes also acted with a high degree of scienter.[22] According to the jury instructions, to find Haynes guilty of racketeering, the jury had to find that he committed two or more underlying offenses of embezzlement by an agent, which in turn required the jury to find that he acted with intent to defraud or cheat.[23] And the transcript of the underlying criminal proceeding supports the jury's scienter determination. For example, the victim testified that Haynes repeatedly took her money without her approval, while telling her that he was helping her pay her bills or protecting her money from a nursing home. Haynes admitted that he instead used the money for his own businesses and other personal purposes, and we have already rejected his contention that she gave him permission to do so.

Because Haynes failed to answer the OIP or to respond to the show cause order or the Division's motion, he has made no assurances that he will not commit future violations or demonstrated that he appreciates the wrongful nature of his conduct. It also appears that Haynes's occupation presents opportunities for future violations because he was associated with an investment adviser for almost six years, including during the period of his misconduct, and offers no assurances about his future plans.[24] Although Haynes is currently incarcerated, absent

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[20] *Cf. Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 WL 31769236, at *5 (Oct. 23, 2002) (finding that applicant's "repayment of the funds" does not "justif[y] his misuse of [another individual's] credit card numbers").

[21] Mich. Comp. Laws §§ 750.174a(15)(c), .145m(u)(*i*).

[22] *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).

[23] *See* Mich. Comp. Laws § 750.174(1) (defining embezzlement to include an agent "fraudulently dispos[ing] of or convert[ing]" money entrusted to them).

[24] *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).

a bar, he would have the opportunity to re-enter the securities industry and commit further violations upon his release.[25]

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 Haynes is unfit to participate in the securities industry and that his participation in it in any capacity would pose a risk to investors.[26] Because Haynes 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.[27]

An appropriate order will issue.

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

Vanessa A. Countryman
Secretary

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[25] *See, e.g.*, *Martin A. Armstrong*, Advisers Act Release No. 2926, 2009 WL 2972498, at *4 (Sept. 17, 2009) (finding that "there is a likelihood that Armstrong would, after his release from prison, be able and inclined to re-enter the securities industry where he would confront opportunities to violate the law again").

[26] *See James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *6 (Feb. 15, 2017) (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); *see also Bruce Paul*, Exchange Act Release No. 21789, 1985 WL 548579, at *2 (Feb. 26, 1985) (finding it appropriate to bar respondent for misconduct that did not involve securities because the misconduct provided "a clear demonstration of his propensity for dishonesty").

[27] *See Tagliaferri*, 2017 WL 632134, at *6 (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. 6461 / October 13, 2023

Admin. Proc. File No. 3-20086

In the Matter of

GARY EDWARD HAYNES

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Gary Edward Haynes 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