SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 99263 / January 2, 2024

INVESTMENT ADVISERS ACT OF 1940
Release No. 6519 / January 2, 2024

Admin. Proc. File No. 3-20678

In the Matter of

DAVID MICHAEL

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violations 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:

Casey R. Fronk and *Michael Welsh* for the Division of Enforcement.

On December 14, 2021, the Securities and Exchange Commission instituted an administrative proceeding against David Michael 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 Michael 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

A. The Commission instituted this proceeding against Michael.

The order instituting proceedings ("OIP") alleged that, on November 23, 2021, in a civil action the Commission brought against Michael, a federal district court entered a final judgment of default permanently enjoining him from future violations of Sections 5 and 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Exchange Act Section 15(a)(1), and Sections 206(1), 206(2), and 206(4) of the Advisers Act. The OIP alleged that, between at least June 2018 and December 2019, despite Michael not being registered as a broker with the Commission or associated with a broker registered with the Commission, Michael "engaged in the business of effecting transactions in, or inducing or attempting to induce the purchase and sale of, securities and received transaction-based compensation"[2] According to the OIP, the Commission's complaint in the civil action alleged that Michael solicited investors to purchase securities in connection with two unregistered securities offerings in exchange for transaction-based compensation that was paid to Michael and entities he controlled.

The OIP also alleged that, beginning in early 2019, Michael, "acting as an investment advisor, employed devices, schemes, and artifice to defraud investor clients and prospective clients, made untrue statements of material fact and material omissions to investors, and misappropriated investor funds."[3] According to the OIP, the Commission's complaint in the civil action alleged that Michael created a private investment fund in early 2019—Austin Partners I, LLC ("Austin Partners")—for which he was a managing member, co-CEO, and advisor. The complaint alleged that Michael, both directly and indirectly (through hired securities solicitors), solicited investors to invest in Austin Partners, and in doing so he "falsely represented that the fund would 'create an investment grade portfolio of high-quality [i]nvestments.'" The complaint alleged that the fund actually held only a single investment, and the money invested in it was misappropriated by Michael to pay personal or business expenses or to repay other investors.

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 Michael to file an answer to the allegations within 20 days after service, as provided by Rule of Practice

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1 *David Michael*, Exchange Act Release No. 93781, 2021 WL 5921577 (Dec. 14, 2021).

2 *Id.* at *1.

3 *Id.*

220(b).[4] The OIP also informed Michael 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 proceeding could be determined against him upon consideration of the OIP.[5]

B. Michael 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.

Michael was properly served with the OIP on February 10, 2022, pursuant to Rule of Practice 141(a)(2)(i),[6] but did not respond. On April 4, 2022, more than 20 days after service, the Commission ordered Michael to show cause by April 18, 2022, why it should not find him in default due to his failure to file an answer or otherwise defend this proceeding.[7] The show cause order cautioned Michael 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 Division of Enforcement was directed to file a motion for entry of an order of default and the imposition of remedial sanctions by August 16, 2022, in the event that Michael failed to respond to the show cause order.[8]

After Michael failed to answer the OIP or respond to the show cause order, the Division filed a motion requesting that the Commission find Michael 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 documents from the underlying civil action, including the complaint, docket, order granting the motion for default judgment, and the amended final judgment of default.[9] The Division also submitted a declaration of Division counsel attaching evidence obtained during the Division's investigation giving rise to the civil action. Michael did not respond to the Division's motion.

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4 17 C.F.R. § 201.220(b).

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

6 *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").

7 *David Michael*, Exchange Act Release No. 94603, 2022 WL 1014879 (Apr. 4, 2022).

8 *Id.* at *1; *see also David Michael*, Exchange Act Release No. 95316, 2022 WL 2818962 (July 19, 2022).

9 Because the judgment in the civil action was by default, the facts alleged in the complaint have no preclusive effect in this proceeding. *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *2 (Apr. 23, 2015) (finding that because "'none of the issues is actually litigated"' in the case of a judgment entered by default, issue preclusion "'does not apply with respect to any issue in a subsequent action"' (quoting *Arizona v. California*, 530 U.S. 392, 414 (2000))).

II. Analysis

A. We deem Michael to be 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 Michael 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. During the investigation that led to the underlying civil action, Michael invoked his Fifth Amendment privilege against self-incrimination in his testimony as a basis to refuse to answer many of the Division's questions. Given that this proceeding is civil in nature, we deem it appropriate to draw inferences from Michael's investigative testimony in connection with our findings here.[11]

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 that (1) the person was enjoined from engaging in or continuing any conduct or practice in connection with broker or investment adviser activities, or in connection with the purchase or sale of any security; (2) the person was associated with a broker at the time of the alleged misconduct; and (3) such a sanction is in the public interest.[12] Similarly, Advisers Act Section 203(f) authorizes the Commission to suspend or bar a person from associating in the securities industry if it finds that (1) the person was enjoined from engaging in or continuing any conduct or practice in connection with broker or investment adviser activities, or in connection with 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 [rule] within the time provided, such respondent may be deemed in default pursuant to" Rule of Practice 155(a)).

[11] *See David Howard Welch*, Exchange Act Release No. 92267, 2021 WL 2941483, at *3 (Jun. 25, 2021) (stating that "[b]ecause our proceedings are civil in nature, we may draw adverse inferences from a respondent's invocation of his Fifth Amendment privilege and take this into account in weighing all of the evidence").

[12] 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) (specifying injunctions against various actions, conduct, and practices).

purchase or sale of any 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.[13]

The record establishes the first two of these elements under each statute. First, the injunctions imposed on Michael—from violating Securities Act Sections 5 and 17(a), Exchange Act Sections 10(b) and 15(a)(1) and Exchange Act Rule 10b-5, and Advisers Act Sections 206(1), (2), and (4) and Advisers Act Rule 206(4)-8—all concern conduct in connection with the purchase and sale of any security.[14] Also, Exchange Act Section 15(a)(1) and the above Advisers Act provisions concern conduct in connection with broker and investment adviser activities, respectively.

Second, the OIP specifically alleged that Michael "act[ed] as an investment advisor" during the period of his misconduct.[15] The OIP also alleged that, during the period of the misconduct, Michael "was engaged in the business of effecting transactions in, or inducing or attempting to induce the purchase and sale of, securities and received transaction-based compensation."[16] This allegation, deemed true as a result of Michael's default, establishes that Michael acted as a broker during the period of his misconduct.[17] And additional evidence submitted by the Division—such as investor testimony and declarations, Respondent's testimony, and agreements for commissions with issuers—show that Michael received transaction-based compensation for soliciting investors for unregistered securities offerings.

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13 *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) (specifying injunctions against various actions, conduct, and practices).

14 15 U.S.C. §§ 77e, 77q(a), 78j(b), 78*o*(a), 80b-6(1), (2), (4); 17 C.F.R. §§ 240.10b-5, 275.206(4)-8. Although not alleged in the OIP, the amended final judgment shows that the district court also enjoined Michael (i) from violating Advisers Act Rule 206(4)-8; and (ii) from "soliciting any person or entity to purchase or sell any security" pursuant to Exchange Act Section 21(d)(5). *See* 15 U.S.C. § 78u(d)(5) (providing that a court may grant "any equitable relief that may be appropriate or necessary for the benefit of investors").

15 *Michael*, 2021 WL 5921577, at *1.

16 *Id.*

17 *See* 15 U.S.C. § 78c(a)(4)(A) (defining broker as "any person engaged in the business of effecting transactions in securities for the account of others"); *Anthony Fields, CPA*, Exchange Act Release No. 74344, 2015 WL 728005, at *18 (Feb. 20, 2015) ("Activities that are indicative of being a broker include holding oneself out as a broker-dealer, recruiting or soliciting potential investors, handling client funds and securities, negotiating with issuers, and receiving transaction-based compensation."); *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *7 (Feb. 15, 2017) ("[T]ransaction-based compensation, or commissions are one of the hallmarks of being a broker-dealer.").

Because Michael was acting as a broker and an investment adviser, he was necessarily a person associated with a broker and investment adviser.[18]

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.[19] Our public interest inquiry is flexible, and no one factor is dispositive.[20] The remedy is intended to protect the trading public from further harm, not to punish the respondent.[21]

We have weighed these factors and find associational and penny stock bars are warranted to protect the investing public. The Division has introduced evidence—such as investor testimony and declarations, Respondent's testimony, agreements for commissions with issuers, offering documents, and marketing materials—showing that, from at least June 2018 to December 2019, Michael acted as an unregistered broker for two unregistered securities offerings: convertible note securities offered by Web Blockchain Media, Inc. ("Web"), and private placement securities offered by Heartland Income Properties, LLC ("Heartland"). Michael entered into agreements with Web and Heartland providing that he would receive a 34% and 30% commission, respectively, for raising capital through the offerings. In addition, while acting as an investment adviser, Michael solicited investments in Austin Partners by misrepresenting that it would "create an investment grade portfolio of high-quality [i]nvestments." But Austin Partners held only a single investment, and Michael misappropriated investor funds to pay personal or business expenses or to repay other investors. The district court ordered that Michael disgorge more than $325,000 in net profits gained as a result of his misconduct. Thus, Michael's misconduct was egregious and recurrent.

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[18] *See Allen M. Perres*, Exchange Act Release No. 79858, 2017 WL 280080, at *3 (Jan. 23, 2017) (explaining that an individual who acts as an unregistered broker meets the definition of a "person associated with a broker" in Exchange Act Section 3(a)(18)); *Patrick L. O'Connor*, Advisers Act Release No. 6055, 2022 WL 2239152, at *3 & n.10 (June 22, 2022) (explaining that the respondent "acted as an unregistered investment adviser" and was therefore also "a person associated with an investment adviser" for purposes of Advisers Act Section 203(f)).

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

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

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

Michael also acted with a high degree of scienter.[22] Indeed, Michael must have known that the statements he made to clients about the investment of their funds in Austin Partners were untrue considering that he misappropriated funds to pay his personal expenses.[23] Moreover, multiple investor clients submitted declarations or testified about how they had requested information about their investments in Austin Partners and sought returns of their money. But Michael did not provide that information to his clients or return their money. And according to a sworn declaration from an investor in Austin Partners, after the investor requested a refund and indicated that she may report Michael's conduct, Michael warned her that she "would not be able to get [her] money back" if she were to contact the Commission. These facts provide further support for our finding that Michael must have known that his statements to clients about the investment of their funds were untrue.

Because Michael failed to answer the OIP or respond to the show cause order or the Division's motion, he has made no assurances in this proceeding that he will not commit future violations or that he recognizes the wrongful nature of his conduct. And it appears that Michael's occupation presents opportunities for future violations because he acted as a broker and investment adviser during the period of his misconduct, and he offers no assurances about his future plans.[24]

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 Michael is unfit to participate in the securities industry and that his participation in it in any capacity would pose a risk to investors.[25] Michael's misconduct also involved soliciting investors to purchase securities in unregistered offerings and misappropriating investor funds for his own purposes. And given that Michael has defaulted in this proceeding, he has not opposed the imposition of any particular associational bar or a bar from participating in an

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[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); *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (scienter is "an intent to deceive, manipulate, or defraud").

[23] *See, e.g.*, *SEC v. Wayland*, No. SACV 17-01156 AG (DFMx), 2019 WL 2620669, at *7 (C.D. Cal. Apr. 8, 2019) ("Wayland's misappropriation of investor money for personal use is sufficient proof of scienter."); *C.E. Carlson, Inc.*, Exchange Act Release No. 23610, 1986 WL 72650, at *3 (Sept. 11, 1986) (finding "it clear that respondents acted with scienter" where they misappropriated investor funds for their financial benefit rather than complying with the terms of a securities offering by returning those funds).

[24] *See George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *3 (Jan. 30, 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).

[25] *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 that his participation in it in any capacity would pose a risk to investors).

offering of penny stock. We conclude that it is in the public interest to bar Michael from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock.[26]

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

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[26] *Id.* (imposing associational and penny stock bars where necessary to protect the public).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 99263 / January 2, 2024

INVESTMENT ADVISERS ACT OF 1940
Release No. 6519 / January 2, 2024

Admin. Proc. File No. 3-20678

In the Matter of

DAVID MICHAEL

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that David Michael 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 David Michael 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