

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933

Release No. 10227 / September 30, 2016

SECURITIES EXCHANGE ACT OF 1934

Release No. 79009 / September 30, 2016

INVESTMENT ADVISERS ACT OF 1940

Release No. 4543 / September 30, 2016

INVESTMENT COMPANY ACT OF 1940

Release No. 32298 / September 30, 2016

ADMINISTRATIVE PROCEEDING

File No. 3-15617

In the Matter of

LARRY C. GROSSMAN,

Respondent.

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud violations

Compliance violations

Investment adviser violated certain antifraud, broker-dealer, and investment adviser provisions of the federal securities laws by, among other things, making misrepresentations and omissions of material fact to clients when he advised them to invest in funds from which he received undisclosed referral fees, consulting fees, and sales charges. *Held*, the statute of limitations prohibits us from imposing civil penalties, but does not apply to the remaining categories of equitable relief; it is in the public

interest to impose an industry bar, order respondent to cease and desist from further violations, and require him to disgorge his ill-gotten gains.

APPEARANCES:

Zachary D. Messa and Michael T. Cronin, Johnson Pope Bokor Ruppel & Burns, LLP, for Larry C. Grossman.

Patrick R. Costello and Sunny H. Kim, for the Division of Enforcement.

Initial decision filed: December 23, 2014

Petition for review filed: January 13, 2015

Last brief received: April 10, 2015

Respondent Larry C. Grossman appeals from an administrative law judge's initial decision finding that he violated Section 17(a) of the Securities Act of 1933; Section 15(a) of the Securities Exchange Act of 1934; and Sections 206(1), (2), (3), and 207 of the Investment Advisers Act of 1940; and that he aided, abetted, and caused violations of Section 206(4) of the Advisers Act and Advisers Act Rules 204-3 and 206(4)-2. Among other misconduct, Grossman received undisclosed compensation from hedge funds in which he advised his clients to invest. Grossman does not contest that he violated the federal securities laws, and we find that he did.

Grossman argues only that a five-year statute of limitations prohibits the relief ordered by the law judge. The Order Instituting Proceedings in this case was filed on November 20, 2013. Based on the particular facts of this case, we find that a civil penalty is unavailable because Grossman's conduct ended before the five-year limitations period set forth in 28 U.S.C. § 2462. But Section 2462's statute of limitations does not apply to equitable remedies. We find that an industry bar, cease-and-desist order, and disgorgement are equitable remedies not subject to Section 2462. We also find that an industry bar, cease-and-desist order, and disgorgement are in the public interest.

I. FINDINGS OF FACT

Grossman did not appeal the ALJ's findings of liability and has not disputed his liability before us. He has thus waived any challenge to those findings.¹ Because the initial decision "ceased to have any force or effect" when we granted Grossman's petition for review,² we review Grossman's conduct and provide the legal basis for our findings of liability.

¹ See 17 C.F.R. §§ 201.410(b), .411(d), .450(b).

² *Eric J. Brown*, Securities Act Release No. 3393, 2012 WL 1143573, at *2 (Apr. 5, 2012) (order denying reconsideration); see 17 C.F.R. § 201.360(d). More details about Grossman's fraud are in the law judge's initial decision. See *Larry C. Grossman*, Initial Decision Release No. 727, 2014 WL 7330327, at *2-24, 28-38 (Dec. 23, 2014).

Grossman founded, owned, and operated Sovereign International Asset Management, Inc. (“Sovereign”), a registered investment adviser. During the time he owned Sovereign, Grossman recommended to clients that they invest in certain offshore hedge funds. In doing so, Grossman had a significant financial conflict of interest: each time a Sovereign client invested in the funds, the fund manager deducted a sales charge from their investment, and paid it to a foreign bank account that Grossman controlled through a foreign company he owned. Certain of the funds also charged Sovereign clients management and performance fees, and Grossman received half of the fees charged to Sovereign clients.

Grossman did not disclose these conflicts to his clients, either directly or through the Forms ADV that registered investment advisers file with the Commission. After the Commission’s Office of Compliance Inspections and Examinations (“OCIE”) warned him that his disclosures were inadequate, Grossman revised the disclosures, but did not inform his clients about his conflict of interest. In addition to this undisclosed conflict, Grossman misrepresented to clients the extent to which he had undertaken due diligence on the funds, and the extent to which he offered individualized investment advice. And, despite a fiduciary duty to Sovereign clients, he failed to ensure that Sovereign complied with other Advisers Act regulations related to client disclosures and custody of client assets.

Grossman advised his clients to invest in offshore hedge funds.

Grossman was registered with the Commission as Sovereign’s investment adviser representative, and was responsible for Sovereign’s activity from its founding in 1998 until he sold it to his co-respondent, Gregory Adams, on October 1, 2008.³ Grossman also owned several related entities that played a role in his fraud; we discuss them below as relevant.

Sovereign’s clients were primarily investors who sought to use their self-directed IRAs to invest in offshore securities. Grossman advised clients to invest in offshore hedge funds and a managed account run by Nikolai Battoo; we collectively call these the “Battoo Funds” or the “Funds.”⁴ Battoo managed the Funds through two related entities that he owned or controlled; we collectively call these “BC Capital” because their differences are not material.

³ We accepted Adams’ offer of settlement, in which he consented to entry of an order finding that he violated or aided and abetted violations of the same securities laws as Grossman. *See Gregory J. Adams*, Securities Act Release No. 9572, 2014 WL 1350276 (Apr. 7, 2014). Adams agreed to additional proceedings to determine the amount of disgorgement and third-tier civil penalties. In the same initial decision from which Grossman has petitioned for review, the ALJ ordered Adams to disgorge \$1,070,828 plus prejudgment interest, and to pay a civil penalty of \$750,000. Adams did not contest those sanctions, and we issued an order finding that the initial decision was final as to Adams. *See Gregory J. Adams*, Securities Act Release No. 9754 (Apr. 22, 2015).

⁴ Sovereign investors could invest in certain share classes of Anchor Hedge Fund Ltd. (“Anchor”), including “Anchor A” and “Anchor C”; certain share classes of FuturesOne

(continued...)

Grossman received significant payments from the Battoo Funds when he was recommending them to clients. He entered into a series of agreements with the Battoo Funds, which became effective between August 2003 and December 2003, under which he was to be paid out of his clients' assets that were invested in the Funds. Under these agreements, Grossman was paid—through an identically named Anguilla limited liability company he owned, Sovereign International Asset Management LLC (“Sovereign Anguilla”)—a sales charge (or load) of between 1% and 4.5% of the principal amount each time a client invested in certain of the Battoo Funds. Grossman was also paid half of the annual management fees that BC Capital earned when a Sovereign client invested in PIWM. And, in exchange for serving as a “consultant,” Grossman was paid half of the management and performance fees charged to Sovereign clients who invested in Anchor.⁵ According to the Division’s calculation, which is undisputed and we accept, Grossman received \$3,407,765.66 through a Danish bank account from entities related to the Battoo Funds between 2004 and October 2008.

While Grossman was recommending to Sovereign clients that they invest in the Battoo Funds, he concealed from them that he had a significant conflict of interest in doing so. Grossman had initially told Sovereign clients in January 2003 that he had “taken an active role as an investment adviser to” the Battoo Funds. He told them, truthfully at the time, that Sovereign received “no additional compensation” for recommending the Battoo Funds. Grossman never disclosed to investors, however, that he started receiving compensation from the Battoo Funds in August 2003. Nor did the Battoo Funds’ private placement memoranda (“PPMs”) disclose that Grossman received a sales charge. Although certain of the PPMs stated that investors “may” have to pay “a maximum 4.5% cost of entry fee,” neither the PPMs nor Grossman himself ever disclosed that Grossman would receive any sales charge or any portion of annual management and quarterly performance fees.

Grossman did not disclose his arrangement with the Battoo Funds in the firm’s investment advisory agreements (“IAAs”), or the Forms ADV in effect through 2004 and early 2005. In 2004, OCIE conducted an examination of Sovereign’s books and records. The examination led OCIE to send Sovereign a deficiency letter in February 2005 noting eleven areas of concern, including Grossman’s failure to disclose, or untrue statements about, the nature and extent of Sovereign’s business and relationship with the Battoo Funds, what it sold to clients, how it was compensated, and whether it or any related entity had custody over client assets.

Grossman responded to the deficiency letter in March 2005 and represented to OCIE that Sovereign’s IAA and Form ADV had been modified. Sovereign’s revised IAA stated, for

(...continued)

Diversified Fund Ltd. (“FuturesOne”), including “FuturesOne A” and “FuturesOne C”; and a managed account called Private International Wealth Management (“PIWM”), which invested primarily—sometimes exclusively—in other Battoo Funds.

⁵ The record is unclear as to when Grossman stopped receiving fees under the consulting agreement, but the Division’s calculation does not include any such fees after October 2008.

example, that Sovereign “*may* receive performance-based compensation from certain investment companies. Advisor will notify clients in advance of any investments the nature of any and all fees charged to the client and/or paid to the Advisor.” Grossman also made several revisions to the Forms ADV, including by amending the Form to reflect the quoted revisions to the IAA. Those documents still did not accurately reflect Sovereign’s and Grossman’s relationship to the Battoo Funds. Nor did Grossman make any other disclosures to Sovereign clients, outside the IAA or Forms ADV, about Sovereign’s and his relationship to the Battoo Funds.

Grossman’s undisclosed conflict of interest—and the misstatements and omissions of material fact—continued until October 1, 2008, when he sold Sovereign, Sovereign Anguilla, and two other related entities to Adams.⁶ In exchange, Adams paid him \$3.8 million—with \$500,000 due at closing, another \$500,000 due six months later, and the balance due under a promissory note bearing 8% interest per year. Grossman did not sell Sovereign International Pension Services, Inc. (“SIPS”), an individual retirement account administrator.

After buying Sovereign, Adams asked Grossman to stay on as a consultant. Grossman helped Adams with transitioning the business and interacting with Sovereign clients after the financial crash in late 2008 through early 2009. Grossman was serving in this consulting role when, on October 13, 2008, Anchor’s manager informed Sovereign that it was suspending redemptions of Anchor C, supposedly so the fund could switch its portfolio from one bank to another. Grossman waited until November 2008 to inform Sovereign’s clients that Anchor C had suspended redemptions. In late November, Battoo proposed—and Adams strongly recommended to Sovereign clients—a swap of Anchor C shares for PIWM shares.

Grossman was also involved in informing Sovereign clients that “substantially all” of the funds in which Anchor A invested were exposed to the Bernard Madoff Ponzi scheme. Anchor A’s administrator sent Grossman and Adams two letters in December 2008 explaining that because of the Madoff Ponzi scheme it was suspending redemptions and the calculation of net asset value for Anchor A. Grossman and Adams waited two months to tell Sovereign clients about Anchor A’s exposure to the Madoff Ponzi scheme and the resulting consequences.

Sovereign clients suffered significant losses,⁷ and Sovereign filed for Chapter 7 bankruptcy in June 2012.⁸ The State of Florida administratively dissolved Sovereign in

⁶ The other two were Anchor Holdings, LLC (Florida) (“Anchor Florida”); and Anchor Holdings, LLC (Nevis) (“Anchor Nevis”). Despite their similar name, they were not affiliated with the Anchor hedge fund or its manager. Anchor Florida and Anchor Nevis had a role in Grossman’s fraud in connection with the accounts through which Sovereign clients wired money to and held interests in the Anchor hedge funds. *See infra* text accompanying note 43.

⁷ As of the hearing, clients had not yet redeemed their investments in Anchor A, Anchor C, or PIWM. The Sovereign clients who testified at the hearing—a fraction of Sovereign’s clients during Grossman’s ownership—lost at least \$3.23 million from the Battoo Funds. Some testified that they would not have invested with Grossman had they known about his conflict of interest.

September 2012.⁹ Battoo is a defendant in a case that the Division brought against him in the U.S. District Court for the Northern District of Illinois in September 2012. The court issued a default judgment against Battoo imposing a permanent injunction, disgorgement of \$272.6 million plus prejudgment interest, and a \$68 million civil penalty.¹⁰

II. VIOLATIONS

We find that, before Grossman sold Sovereign to Adams, Grossman violated Advisers Act Sections 206(1), (2), (3), and 207, Securities Act Section 17(a), and Exchange Act Section 15(a). We also find that, before Grossman sold Sovereign to Adams, Grossman aided and abetted and was a cause of Sovereign's violations of Advisers Act Section 206(4) and Advisers Act Rule 206(4)-2 and 204-3.¹¹

A. *Grossman violated Advisers Act Section 206 and Securities Act Section 17(a).*

Advisers Act Section 206(1) makes it unlawful for an investment adviser directly or indirectly “to employ any device, scheme, or artifice to defraud any client or prospective client.”¹² Advisers Act Section 206(2) makes it unlawful for an investment adviser directly or indirectly “to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.”¹³ Securities Act Section 17(a)(2) makes it unlawful, in the offer or sale of any securities, for any person to obtain money or property by means of any untrue statement of a material fact or any material omission.¹⁴ Scinter—intent to

(...continued)

⁸ See *In re Sovereign Int’l Asset Mgmt., Inc.*, No. 8:12-bk-9978-CPM (Bankr. M.D. Fla.).

⁹ See *Corporation Search, Detail by Entity Name*, Florida Department of State Division of Corporations, available at <http://search.sunbiz.org/Inquiry/CorporationSearch/ByName> (last visited August 25, 2016) (search for “Sovereign International Asset Management, Inc.”).

¹⁰ See *SEC v. Battoo*, No. 12-cv-7125, ECF No. 105 (filed Sept. 30, 2014).

¹¹ Each of the violations charged requires a nexus to the mails or any means or instrumentalities of interstate commerce. See 15 U.S.C. §§ 77q(a), 78o(a)(1), 80b-6. Grossman does not dispute, and we find, that these jurisdictional elements are satisfied because he used telephone calls, email, wire transfers, and the Internet to communicate with Battoo and with Sovereign clients. See, e.g., *SEC v. Tourre*, 2013 WL 2407172, at *11 (S.D.N.Y. June 4, 2013).

¹² 15 U.S.C. § 80b-6(1).

¹³ *Id.* § 80b-6(2).

¹⁴ *Id.* § 77q(a)(2).

deceive, manipulate, or defraud—is necessary for a violation of Advisers Act Section 206(1), but negligence is sufficient for a violation of Section 206(2) or Securities Act Section 17(a)(2).¹⁵

It is undisputed that, before he sold Sovereign, Grossman met the general statutory definition of an “investment adviser”: one compensated to “advise others . . . as to the value of securities or as to the advisability of investing in, purchasing or selling securities.”¹⁶ Grossman controlled and owned Sovereign, and was compensated for providing investment advice.¹⁷

We find that Grossman violated the Advisers Act by failing to disclose his referral and consulting fees, failing to conduct adequate due diligence into the Battoo Funds, failing to adequately disclose the Funds’ risks, falsely claiming that he offered individualized investment advice, and falsely stating that Sovereign would not have custody over client funds. We find that he violated the Securities Act by obtaining money by means of these misstatements and omissions.

1. *Grossman failed to disclose referral and consulting fees.*

As an investment adviser, Grossman was a fiduciary who had an affirmative obligation not to mislead his clients. This included a duty to disclose all material facts, including conflicts of interest.¹⁸ Grossman failed to disclose, in the IAA and Forms ADV prior to OCIE’s 2004 examination, the referral and consulting agreements between Sovereign Anguilla and the Battoo Funds, or the fact that he received fees from the Battoo Funds under those agreements.¹⁹ This

¹⁵ See *Aaron v. SEC*, 446 U.S. 680, 695-697 (1980); *SEC v. Steadman*, 967 F.2d 636, 641-43 & nn.3, 5 (D.C. Cir. 1992); *Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 WL 3100582, at *13 n.59 (Sept. 29, 2009).

¹⁶ 15 U.S.C. § 80b-2(a)(11).

¹⁷ See *Warwick Capital Mgmt., Inc.*, Advisers Act Rel. No. 2694, 2008 WL 149127, at *9 n.37 (Jan. 16, 2008) (firm president’s “activities cause[d] him to meet the broad definition of investment adviser”); *John J. Kenny*, Securities Act Release No. 8234, 2003 WL 21078085, at *17 n.54 (May 14, 2003) (firm’s chief executive officer and parent company’s co-owner). We address below the Division’s argument that Grossman continued to meet the definition of an investment advisor even after selling Sovereign. See *infra* note 72 and accompanying text.

¹⁸ *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 194, 200-01 (1963); *IMS/CPAs & Assocs.*, Securities Act Release No. 8031, 2001 WL 1359521, at *8 & n.33 (Nov. 5, 2001), *aff’d sub nom. Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003).

¹⁹ Details of these failures to disclose are discussed *infra* in connection with the violations of Advisers Act Section 207. See *infra* text accompanying notes 34-36.

“economic conflict of interest” was material as a matter of law.²⁰ It could have raised questions for a reasonable investor about the objectivity of Grossman’s recommendations.²¹

Although Grossman revised the IAAs and Form ADV after OCIE’s examination, his revisions did not cure the deficiencies. Despite statements in Sovereign’s IAA and Forms ADV stating that it would notify clients of “any and all fees” it was paid, the revised documents did not disclose receipt of performance-based fees, referral fees, and international consulting fees. And by stating that Sovereign “may” receive fees or compensation, Grossman misleadingly suggested that the receipt of fees was uncertain.²² As the Fifth Circuit has held, to “warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.”²³

Grossman acted with scienter in not disclosing his conflict of interest. Grossman knew both that he was receiving compensation from the Battoo Funds and that he did not disclose this fact to his clients. In light of that knowledge, he acted with scienter.

2. *Grossman failed to conduct adequate due diligence.*

An investment adviser has a fiduciary duty to independently investigate securities before recommending them to clients.²⁴ Advisers are charged with knowledge of their fiduciary duties,²⁵ and Grossman testified that he was in fact well-versed in his duties. Nonetheless, Grossman recommended the Battoo Funds without a reasonable independent basis for his advice.

²⁰ *IMS/CPAs*, 2001 WL 1359521 at *8 & n.33.

²¹ *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 240 (1988); *see, e.g., SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 12275, 1305 (S.D. Fla. 2007) (“The existence of a conflict of interest is a material fact which an investment adviser must disclose to its clients because a conflict of interest ‘might incline an investment adviser—consciously or unconsciously—to render advice that was not disinterested.’”) (quoting *Capital Gains Research Bureau*, 375 U.S. at 191-92).

²² *See, e.g., SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (holding that newsletter publisher made a “material misstatement” in disclaiming that he “may” invest in stocks he recommended, where he in fact had invested heavily in those stocks).

²³ *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981), *rev’d on other grounds*, 459 U.S. 375 (1983).

²⁴ *See Alfred C. Rizzo*, Advisers Act Release No. 897, 1984 WL 470013, at *7 (Jan. 11, 1984) (finding adviser violated Section 206 by making recommendations based “almost solely” upon the issuer’s “incredible claims,” and without undertaking independent due diligence); *see also SEC v. GLT Dain Rauscher*, 254 F.3d 852, 858 (9th Cir. 2011).

²⁵ *See Montford and Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *14 (May 2, 2014).

Grossman knew little more about the Battoo Funds than what Battoo had told him about portfolio composition, past returns, and volatility. Grossman determined whether the Battoo Funds were suitable for clients primarily by reviewing promotional materials and performance-tracking documents associated with each fund. These included monthly one-page reports produced by the Funds' supposedly independent administrator—which Grossman knew or must have known was run by Battoo's associates and therefore was not in fact independent²⁶—and which reported the Funds' returns and variance. For a time, Battoo provided Grossman with information about the Funds' portfolio composition, but Battoo later became evasive about portfolio details. Grossman continued recommending the funds even after Battoo stopped providing him with information about fund composition.

Recklessness, an “extreme departure from the standards of ordinary care, . . . which presents a danger of misleading [clients] that is either known to the [respondent] or is so obvious that [he] must have been aware of it,” satisfies the scienter requirement.²⁷ In recommending the investments despite Battoo's evasiveness, the risk that his clients would be misled was either known to Grossman or so obvious that he must have been aware of it. Grossman therefore acted with scienter.²⁸

3. *Grossman failed to disclose the risks of investing in the Battoo Funds.*

Because Grossman failed to conduct adequate due diligence into the funds he was recommending, he had no basis for describing the Battoo Funds as “moderately conservative.” Grossman also received financial records from the Battoo Funds noting their “cross-portfolio liability”: for example, the assets of Anchor A could be used to satisfy the liabilities of Anchor C, and vice versa, which increased the risk of loss for any individual fund. This risk of cross-portfolio liability, and the fact that Grossman had not performed adequate due diligence to provide a basis for any assurance about the Funds' risks, were not disclosed to investors. These failures to disclose were material because a reasonable investor would have wanted to know about such risks before deciding whether to invest.

²⁶ Grossman was also a member of the investment advisory board for Anchor. He received certain documents in this capacity, as well as in his capacity recommending and selling placements in the funds to his clients, that identified who else was involved with advising Anchor. For example, Anchor's PPM said that the fund would be independently administered by a company called Folio Administrators. But Folio Administrators was not in fact independent; Grossman knew or must have known from his role with Anchor that some of Folio Administrators' directors were also associated with Anchor's manager, with BC Capital, and with other entities associated with the Battoo Funds. As with Anchor, FuturesOne's supposedly independent administrator was also associated with Battoo entities.

²⁷ *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

²⁸ *See SEC v. Monterosso*, 756 F.3d 1326, 1335 (11th Cir. 2014).

4. *Grossman falsely claimed that he offered individualized investment advice.*

Grossman falsely claimed that he offered individualized investment advice. Sovereign's promotional materials represented that it offered "highly personalized and individually tailored solutions" that "address[ed] client needs." Contrary to his representations about providing individualized investment advice, Grossman advised clients to invest heavily in the Battoo Funds, and fully 75% of assets under Sovereign's management were invested in the Funds when Grossman sold Sovereign to Adams. And, as described above, Grossman recommended the Battoo Funds without a reasonable independent basis for his advice. He therefore could not have been giving individualized advice in recommending the Battoo Funds to Sovereign clients. Grossman's claims were material because a reasonable investor would have wanted to know whether Grossman recommended the funds because they were appropriate for the investor or because he was paid to do so. Grossman acted with scienter because he knew, or must have been aware, that despite his representations he was advising Sovereign clients to invest the vast majority of their assets in the Battoo Funds without individualizing the advice to the needs of particular clients.²⁹

5. *Grossman falsely stated that Sovereign would not have custody over client funds.*

Grossman stated falsely (in the IAAs, Form ADV, and other disclosures) that Sovereign and related entities would not have custody over client funds. But Sovereign structured clients' investments in the Battoo Funds in such a way that related parties—Sovereign Anguilla before 2005, and Anchor Florida after 2005—had custody over client funds. A reasonable investor would have wanted to know the risk that funds could be accessed by the investment adviser.

* * *

With respect to his failure to disclose his referral and consulting fees, failure to conduct adequate due diligence, and false statements about individualized investment advice, we find that Grossman violated Advisers Act Sections 206(1) and (2) because he acted with scienter. With respect to his failure to disclose the risks of investing in the Battoo Funds and false statements about Sovereign's custody of client funds, we find that Grossman violated Advisers Act Section 206(2). We also find that Grossman violated Section 17(a)(2) by obtaining money by means of his false statements and omissions of material fact. During the time he owned Sovereign, Grossman was the beneficiary of compensation agreements between the Battoo Funds and Sovereign Anguilla, under which Grossman would receive referral and consulting fees paid out of Sovereign clients' invested assets. Grossman's receipt of these fees, by means of the

²⁹ See *id.* at 1335-36.

undisclosed compensation agreements and the untrue statements and omissions of material fact to his clients who invested in the Battoo Funds, violated Securities Act Section 17(a)(2).³⁰

B. *Grossman violated Advisers Act Section 207.*

Advisers Act Section 207 forbids “any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 203, or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.”³¹ Scierter is not required to find a violation of Advisers Act Section 207.³² Form ADV is filed with the Commission under Sections 203 and 204.³³

Before receiving the 2005 OCIE deficiency letter, Grossman made a series of untrue statements in Sovereign’s Form ADV regarding the nature and extent of Sovereign’s business, its relationship with outside companies (such as the Battoo Funds), what it sold or recommended to clients, how it was compensated, and whether it had custody over client assets. In response to the deficiency letter, Grossman represented that Sovereign’s IAA and Form ADV were modified to more accurately reflect the various ways that Sovereign may receive compensation. For example, Grossman revised Form ADV Part II, Item I.C, to reflect that Sovereign offers investment advisory fees for “subscription fees.”³⁴ Grossman also disclosed in Schedule F that “[Sovereign] may receive incentive or subscription fees from certain investment companies,” “[Sovereign] may receive performance-based compensation from certain investment companies,” and “[Sovereign] will notify clients in advance of any investments the nature of any and all fees charged to the client and/or paid to [Sovereign].” As discussed above, however, Grossman’s use of the word “may” was misleading because it suggested uncertainty about whether Sovereign would receive fees and other compensation when it was in fact receiving them at the time.³⁵ Grossman did not address the remaining untrue statements in the Form

³⁰ We find that Grossman made all of these false and misleading statements in the “offer and sale” of securities, as required by Securities Act Section 17(a)(2). We also find that the Battoo Funds subscriptions were unregistered foreign securities under the investment contract test. *See SEC v. Howey*, 328 U.S. 293, 301 (1946) (looking to “whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others”); *SEC v. Banner Fund Int’l*, 211 F.3d 602, 608-10, 614-16 (D.C. Cir. 2000) (applying the Securities Act and Exchange Act to “predominantly foreign securities” meeting the *Howey* test).

³¹ 15 U.S.C. § 80b-7.

³² *Montford and Co.*, 2014 WL 1744130, at *14.

³³ *See* 17 C.F.R. §§ 275.204-1(e), 279.1.

³⁴ Grossman contended at the hearing that this was intended to disclose that the Battoo Funds were paying him. Assuming for the sake of argument that Grossman intended this to truthfully describe the fees Sovereign received, he made an untrue statement insofar as he did not include this disclosure on the Form ADV Part II dated March 26, 2008.

³⁵ *See supra* text accompanying note 22.

ADVs effective after receiving the OCIE letter.³⁶ The undisclosed fee arrangements, relationship with the Battoo Funds, and custody arrangements were material.³⁷ For these reasons, we find that Grossman violated Advisers Act Section 207.³⁸

C. *Grossman aided and abetted, and was a cause of, violations of Advisers Act Section 206(4) and Advisers Act Rule 206(4)-2 and 204-3.*

To conclude that a respondent aided and abetted a securities law violation, we must find that (1) a violation occurred; (2) the respondent substantially aided the violation; and (3) the respondent provided that assistance with the requisite scienter.³⁹ Scienter can be met by establishing that the respondent rendered such assistance knowingly or recklessly.⁴⁰

1. *Grossman aided and abetted and caused violations of Advisers Act Rule 206(4)-2.*

Advisers Act Section 206(4) provides that it is unlawful for an investment adviser “to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative” and that the Commission shall define such conduct by rule.⁴¹ Advisers Act Rule 206(4)-2(a) provides that it is a “fraudulent, deceptive, or manipulative act, practice, or course of business” for a registered investment adviser to have custody over client funds or securities unless the adviser is a qualified custodian and meets certain other obligations.⁴² Sovereign had custody over client assets in that, after 2005, it directed clients to send funds to a bank account

³⁶ We find that Grossman did not properly revise Sovereign’s responses in Form ADV Part I Items 5.E (means of compensation), 6.B(1) (active engagement in business other than investment advice), 6.B(3) (products or services other than investment advice), and 9 (custody of client assets), or in Form ADV Part II Items 8 (material arrangement with investment company), 9 (recommendation of securities or investment products in which Sovereign or related person had interest), and 13 (written or oral arrangements for additional compensation).

³⁷ See *supra* text accompanying notes 20-21.

³⁸ We find that Grossman acted willfully, as Section 207 requires. See *infra* note 160.

³⁹ See *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *13 (July 2, 2010); see also *Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000) (setting forth elements). One who aids and abets primary violations is necessarily “a ‘cause’ of” those violations. See *Sharon M. Graham*, Exchange Act Release No. 40727, 1998 WL 823072, at *28 n.35 (Nov. 30, 1998), *aff’d*, 222 F.3d 994 (D.C. Cir. 2000).

⁴⁰ See *Russell W. Stein*, Exchange Act Release No. 47504, 2003 WL 1125746, at *4 (Mar. 14, 2003).

⁴¹ 15 U.S.C. § 80b-6(4).

⁴² 17 C.F.R. § 275.206(4)-2(a)(1)-(3) (2003).

held by related entity Anchor Florida.⁴³ Sovereign violated Advisers Act Section 206(4) and Rule 206(4)-2 because it had custody and failed to: have a qualified custodian maintain those funds or securities in separate client accounts, or in the adviser's account as agent or trustee; notify clients that it had such custody; and have a qualified custodian send quarterly account statements (or undergo an annual surprise examination if it sent the account statements itself).⁴⁴ Grossman claimed that he was unaware of the custody rules, but advisers are obligated to know the custody rules; Grossman's claimed lack of awareness was at least reckless.⁴⁵ Grossman substantially assisted Sovereign's violation by forming Anchor Florida, instructing Sovereign clients to wire funds to EverBank, and acting as account signatory. We find that Grossman aided and abetted and was a cause of Sovereign's violation of Advisers Act Rule 206(4)-2.

2. *Grossman aided and abetted and caused violations of Advisers Act Rule 204-3.*

Sovereign violated Advisers Act Rule 204-3, which requires advisers to provide clients with brochures "contain[ing] all information required by Part 2 of Form ADV,"⁴⁶ by not providing such brochures. Grossman was responsible for ensuring Sovereign's compliance with the rule. Sovereign's violation was known to Grossman or was so obvious that he must have been aware of it, because at least one client had to request the Form ADV information.⁴⁷ Grossman substantially assisted the violation because he failed to ensure that clients were given the adviser brochures and supplements.⁴⁸ We find that Grossman aided and abetted and was a cause of Sovereign's violation of Advisers Act Rule 204-3.

⁴³ See 17 C.F.R. § 275.206(4)-2(d)(2) (defining custody as "holding, directly or indirectly, client funds" or the "authority to obtain possession of them," which would include by a related person).

⁴⁴ We have amended Advisers Act Rule 206(4)-2, effective March 12, 2010, but the requirements at issue were in effect at the relevant times.

⁴⁵ *Abraham and Sons Capital, Inc.*, Exchange Act Release No. 44624, 2001 WL 865448, at *8 (July 31, 2001); see *id.* at *8 n.28 (recognizing that "[l]ack of intent is no defense to a violation of Rule 206(4)-2"); cf. *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) (noting that securities professional must be familiar with the law).

⁴⁶ See 17 C.F.R. § 275.204-3(a) (2008).

⁴⁷ See *Steadman*, 967 F.2d at 641-42; *Sundstrand Corp.*, 553 F.2d at 1045.

⁴⁸ Inaction constitutes substantial assistance if the alleged aider and abettor owes a fiduciary duty directly to the person injured by the primary violation. See *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 295 (2d Cir. 2006). As an adviser, Grossman had a fiduciary duty to his clients and was obligated to ensure that they received the brochures required by Rule 204-3.

D. *Grossman violated Exchange Act Section 15(a) by selling subscriptions to the Battoo Funds as an unregistered broker.*

Exchange Act Section 15(a) prohibits a broker or dealer from effecting any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless such broker or dealer is registered with the Commission (or falls within another exception not relevant here).⁴⁹ We find, based on multiple factors, that Grossman met the Exchange Act’s definition of a broker: one “engaged in the business of effecting transactions in securities for the account of others.”⁵⁰ Grossman regularly participated at key points in the chain of distribution of Battoo Funds subscriptions. He advised clients about the merits of those investments; he discussed their risks and returns, and described Anchor A, for example, as suitable for “widows and orphans.”⁵¹ He facilitated sales of tens of millions of dollars in subscriptions, and received referral fees as transaction-based compensation.⁵² Finally, he had custody over client funds that clients wired to bank accounts associated with related entities Sovereign Anguilla before 2005, and Anchor Florida after 2005.⁵³ Grossman was not registered as a broker, was not associated with a registered broker or dealer, and was not exempt from registration. Grossman thus violated Exchange Act Section 15(a).⁵⁴

E. *Grossman violated Advisers Act Section 206(3).*

Advisers Act Section 206(3) makes it unlawful for any investment adviser, acting as broker for a person other than the adviser’s own client, to knowingly sell or purchase any security from that person for the client, without making a written disclosure before the completion of the transaction about the capacity in which he is acting, and obtaining the client’s

⁴⁹ 15 U.S.C. § 78o(a). Scienter is not required for a violation of Exchange Act Section 15(a). *See SEC v. Montana*, 464 F. Supp. 2d 772, 785 (S.D. Ind. 2006).

⁵⁰ 15 U.S.C. § 78c(a)(4)(A); *see, e.g., SEC v. Coplan*, 2014 WL 695393, at *6 (S.D. Fla. Feb. 24, 2014) (outlining factors relevant in determining whether one meets definition of broker).

⁵¹ *See Coplan*, 2014 WL 695393, at *6 (“advised investors as to the merits of an investment”).

⁵² *See Persons Deemed Not To Be Brokers*, Exchange Act Release No. 22172, 1985 WL 634795, at *4 (June 27, 1985) (“In determining whether an associated person is a ‘broker’, the receipt of transaction-based compensation often indicates that such a person is engaged in the business of effecting transactions in securities.”).

⁵³ *See SEC v. Margolin*, 1992 WL 279735, at *5 (S.D.N.Y. Sept. 30, 1992).

⁵⁴ The OIP also charged Grossman with aiding and abetting violations of Exchange Act Section 15(a). Because we find that Grossman was a primary violator, we do not reach the question of whether he is also liable as an aider and abettor under that section.

consent.⁵⁵ Grossman acted both as an investment adviser to Sovereign clients, and as a broker to the Battoo Funds. He effectuated the sale to Sovereign clients of private placements in the Battoo Funds. He neither disclosed this dual capacity to clients in advance, nor obtained their consent. We therefore find that Grossman violated Advisers Act Section 206(3).

III. SANCTIONS

Grossman argues that the sanctions the Division seeks are barred by a statute of limitations. Although the Securities Act and Exchange Act include a statute of limitations for each of the seven express private claims Congress authorized,⁵⁶ Congress “deliberate[ly]” refrained from enacting any express statute of limitations for Commission enforcement actions.⁵⁷ Grossman invokes 28 U.S.C. § 2462, a catch-all statute of limitations applicable where Congress has not otherwise provided a statute of limitations. Section 2462 provides, in relevant part, that “an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.”⁵⁸

A claim accrues when the plaintiff has “a complete and present cause of action.”⁵⁹ And “[a] cause of action does not become ‘complete and present’ for limitations purposes until the plaintiff can file suit and obtain relief.”⁶⁰ This occurs when all the conduct necessary for all the

⁵⁵ See 15 U.S.C. § 80b-6(3); see also *Mark Geman*, Advisers Act Release No. 1924, 2001 WL 124847, at *8 (Feb. 14, 2001) (noting that Advisers Act Section 206(3) “can be violated without a showing of fraud”), *aff’d*, 334 F.3d 1183 (10th Cir. 2003).

⁵⁶ *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-60 (1991) (describing the Securities Act and Exchange Act); see also 28 U.S.C. § 1658(b) (setting forth the limitations period for specified “private right[s] of action” under certain “securities laws”).

⁵⁷ See *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993); see also *E.L. DuPont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (actions brought “on behalf of the United States in its governmental capacity” are “subject to no time limitation, in the absence of congressional enactment clearly imposing it”). Congress similarly declined to specify an express statute of limitations for Commission enforcement actions under Section 206 of the Investment Advisers Act of 1940, although it also did not authorize any private right of action under that provision. See 15 U.S.C. § 80b-6; *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979).

⁵⁸ 28 U.S.C. § 2462. The direct predecessors of Section 2462 date back to 1839, and their antecedents date to the 1790s. See *3M Co. v. Browner*, 17 F.3d 1453, 1458 (D.C. Cir. 1994). Section 2462 itself was codified in 1948; any alterations were merely “changes in phraseology,” and “the revised statute means only what it meant before 1948.” *Id.*

⁵⁹ *Green v. Brennan*, 136 S. Ct. 1769, 1776 (U.S. May 23, 2016) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel Wilson*, 545 U.S. 409, 418 (2005)).

⁶⁰ *Id.* (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)); see also *Earle v. District of Columbia*, 707 F.3d 299, 306 (D.C. (continued...))

elements of the claim has occurred. For example, a claim under Advisers Act Section 206(3) accrued each time Grossman, acting as a broker for the Battoo Funds, sold his investment advisory clients a subscription to the funds without disclosing his dual capacity or obtaining their consent to it.

A. *Civil Penalties and the Continuing Violations Doctrine*

Grossman contends that we should not impose civil penalties because his conduct occurred outside the applicable statute of limitations period. The ALJ recognized that a claim for civil penalties is ordinarily subject to the statute of limitations set forth in 28 U.S.C. § 2462. But the ALJ brought Grossman's conduct into Section 2462's five-year limitations period by applying the "continuing violations" doctrine and ordered Grossman to pay civil penalties.⁶¹

The OIP was filed on November 20, 2013, and therefore the limitations period began on November 20, 2008. Any claim that accrued prior to that date is outside the limitations period. We find that none of the Division's claims under Section 17(a) of the Securities Act, Section 15(a) of the Exchange Act, Sections 206(3), 206(4), and 207 of the Advisers Act, and Advisers Act Rules 204-3 and 206(4)-2 accrued after November 20, 2008.

We also find that the Division has not established by a preponderance of the evidence that Grossman committed any of the charged violations⁶² during the five years prior to the filing of the Order Instituting Proceedings, and therefore the continuing violations doctrine is not triggered. The Supreme Court has held that in determining whether a claim is time barred, a "continuing violation ... should be treated differently from one discrete act."⁶³ Although limitations periods cut off liability for "stale claims," "the staleness concern disappears" when the claim challenges an "unlawful practice that continues into the limitations period."⁶⁴ Thus, the doctrine permits a court to impose liability for "a series of separate acts that collectively constitute one" offense, even when "some of the component acts . . . fall outside the statutory time period."⁶⁵ As long as "an act contributing to the claim occurs within the filing period, the

(...continued)

Cir. 2012) ("As a general rule, a claim normally accrues when the factual and legal prerequisites for filing suit are in place.").

⁶¹ Securities Act Section 8A(g), Exchange Act Section 21B(a) and Advisers Act Section 203(i) authorize the imposition of civil penalties in administrative proceedings. 15 U.S.C. §§ 77h-1(g), 78u-2(a)(1)(A), (C), 80b-3(i)(1)(A)(i), (iii).

⁶² See *infra* note 73 and accompanying text.

⁶³ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

⁶⁴ *Id.*

⁶⁵ *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002).

entire time period of [misconduct] may be considered by a court for the purposes of determining liability.”⁶⁶

Under the continuing violations doctrine, Section 2462 would not bar as untimely an action for a civil penalty premised on a violation of the federal securities laws, as long as a portion of the misconduct satisfying the elements of the violation occurred within the limitations period.⁶⁷

Although the continuing violations doctrine is available in the context of violations of the federal securities laws,⁶⁸ we find that it is not triggered with respect to the Division’s claims because they accrued outside the limitations period. None of the Division’s theories to the contrary have merit because the Division did not establish that Grossman’s conduct during the limitations period was connected to the elements of a violation of the securities laws.⁶⁹

⁶⁶ *Id.* at 117.

⁶⁷ *See Baird v. Gotbaum*, 662 F.3d 1246, 1251 (D.C. Cir. 2011) (explaining that timely and untimely conduct “can qualify” as a continuing violation only if all such conduct is “adequately linked into a coherent” violation). As Grossman concedes in his brief, the continuing violations doctrine allows us to treat a claim as “timely so long as the last act evidencing the continuing practice falls within the limitations period.”

⁶⁸ *See SEC v. Kovzan*, 2013 WL 5651401, at *3 (D. Kan. Oct. 15, 2013); *SEC v. Huff*, 758 F. Supp. 2d 1288, 1340-41 (S.D. Fla. 2010); *SEC v. Kelly*, 663 F. Supp. 2d 276, 287-88 (S.D.N.Y. 2009); *SEC v. Ogle*, 2000 WL 45260, at *4-5 (N.D. Ill. Jan. 11, 2000); *Donald A. Roche*, Exchange Act Release No. 38742, 1997 WL 328870, at *5-6 (June 17, 1997); *see also Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 WL 183600, at *12 n.54 (Apr. 5, 1999), *aff’d on other grounds*, 230 F.3d 362 (D.C. Cir. 2000). The continuing violations doctrine is not a tolling rule prohibited under *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). *Gabelli* held that the discovery rule does not toll Section 2462’s limitations period for an action for civil penalties. *Id.* at 1221. As opposed to the discovery rule at issue in *Gabelli*, the continuing violations doctrine does not toll the statute of limitations, but rather recognizes situations in which a claim *accrues* when “an act contributing to” the offense occurs. *Morgan*, 536 U.S. at 117.

⁶⁹ We address the Division’s arguments notwithstanding its August 10, 2016 filing providing “notice that it is no longer relying on the continuing violations doctrine the Law Judge utilized as part of her rationale for imposing a civil penalty on” Grossman. The Division cited our recent statement in *Dennis J. Malouf*, Advisers Act Release No. 4463, 2016 WL 4035575, at *28 n.176 (July 27, 2016), that we were “consider[ing] only the conduct that fell within the five-year statute of limitations for the purposes of determining the civil penalty.” But we have made similar statements repeatedly in past cases. *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *18 (Dec. 11, 2009) (basing civil penalty “exclusively on [respondent’s] conduct occurring during the five-year period preceding the OIP’s issuance” where five out of the 80 transactions occurred within the limitations period), *aff’d*, 627 F.3d 1230 (continued...)

The record does not support a finding that Grossman continued to violate Securities Act Section 17(a)(2) during the limitations period. The Division argued in its briefs that after November 20, 2008, Grossman had continued to receive payments from the Battoo Funds “filtered” through Sovereign. It is undisputed that, after Grossman sold Sovereign to Adams, the Battoo Funds continued to pay Sovereign under fee arrangements entered into years earlier—and that, at least after Grossman returned as a managing director of Sovereign in January 2009, Sovereign paid him a fixed salary. But the Division conceded at oral argument that Grossman did not receive payments from the Battoo Funds during the limitations period.⁷⁰ Consistent with the Division’s concession, the record does not support a finding that Grossman’s misconduct during the limitations period satisfied the elements of a violation of Securities Act Section 17(a)(2) such that he continued to violate that provision during the limitations period.

We also conclude that the record does not support a finding that Grossman violated Advisers Act Section 206(1) or (2) during the limitations period. The Division argued in its briefs that Grossman violated Section 206(1) and (2) by failing to correct misstatements and omissions “each time [he] interacted with Sovereign clients” after November 2008 about “their investments in the Battoo Funds.”⁷¹ Despite having sold his advisory firm, Grossman could still

(...continued)

(D.C. Cir. 2011); *see also, e.g., Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *14 (Feb. 12, 2012) (similar), *aff’d sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013); *John A. Carley*, Securities Act Release No. 8888, 2008 WL 268598, at *21 (Jan. 31, 2008) (similar), *aff’d sub nom. Zacharias v. SEC*, 569 F.3d 458, 470-71 (D.C. Cir. 2009); *Edgar B. Alacan*, Securities Act Release No. 8436, 2004 WL 1496843, at *11 (July 6, 2004) (similar). And we have made these statements because generally Section 2462 precludes the imposition of civil penalties for misconduct occurring outside the limitations period. *See, e.g., SEC v. Mercury Interactive, LLC*, 2008 WL 4544443, at *4 (N.D. Cal. Sept. 30, 2008). Neither *Malouf* nor any of those prior cases addressed whether the “continuing violations doctrine” permits imposition of penalties where conduct occurring outside the limitations period together with conduct occurring within the limitations period are part of “a series of separate acts that collectively constitute one” offense, the claim is based “on the cumulative effect of [the] individual acts,” and the claim accrues within the period because at least a portion of the misconduct necessary to complete the offense occurs within the period. *Morgan*, 536 U.S. at 113-14. It is this issue we address in the text above.

⁷⁰ The Division represented at oral argument that it was “not contending that he received any of these kickbacks or anything to that effect during the limitations period, with the exception of two particular instances where he had specifically recommended the clients swap their subclasses from Class C of the Anchor funds to [another investment], and [where] there was remuneration involved.” But Grossman denied any involvement in making these recommendations, and an employee of SIPS confirmed that he played no role in doing so.

⁷¹ We do not address the Division’s argument that a continuing violation can be found because Grossman failed “to advise SIPS clients of his conflict of interest.” The Division cites to general authority describing the duties that an *investment adviser* owes its clients, but the

(continued...)

be liable for violations of Advisers Act Section 206(1) and (2) if he continued to act as an investment adviser: one who, “for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing or selling securities.”⁷² The evidence, however, does not establish that Grossman continued to meet the definition of an investment adviser during the limitations period. Because the Division has not met its burden of establishing that element by a preponderance of the evidence, we decline to find a continuing violation of Advisers Act Section 206 within the limitations period.

The Division separately argues that, even if we do not apply the continuing violations doctrine, we may find that Grossman violated Advisers Act Section 206(1) and (2) during the limitations period by failing to notify his clients that he sold Sovereign to Adams. Although this could be a basis for finding Grossman liable if the record supported a finding that he continued to act as an investment adviser, it cannot serve as the predicate for a violation here. The OIP did not charge as a violation his failure to notify his clients about the sale,⁷³ the Division did not assert this as a theory for finding Grossman liable until its post-hearing brief, and the Division did not assert in its briefs on appeal that this was a potential independent violation during the limitations period. Grossman lacked notice of this theory, and argues that it was not a proper basis for the ALJ’s finding of a continuing violation. We decline to rely on it here.

Nor does the record support a finding that Grossman continued to meet the statutory definition of a broker during the limitations period, as would be necessary to find that he continued to violate Exchange Act Section 15(a) or Advisers Act Section 206(3). The statute defines a broker as one “engaged in the business of effecting transactions in securities for the account of others.”⁷⁴ The Division has established that Grossman acted as an unregistered broker during his ownership of Sovereign, but not that he did so during the limitations period.

(...continued)

Division has not established Grossman acted as an investment adviser with respect to his SIPS clients.

⁷² 15 U.S.C. § 80b-2(a)(11). There is no merit to Grossman’s contention that he did not offer investment advice at all after selling Sovereign; in an email he sent two weeks after selling the firm, Grossman introduced clients to Adams and stated that he would “be advising [Adams] on both my worldview, as it relates to investments, and in the latest asset protection strategies.” He also advised clients about the potential “reward[s]” from not selling their hedge fund investments during the “trying times in the global markets.” Grossman sent that email, however, on October 14, 2008, which is outside the limitations period.

⁷³ See *Jaffee & Co. v. SEC*, 446 F.2d 387, 393-94 (2d Cir. 1971) (declining to find a violation not charged in the OIP); see also, e.g., *Rita J. McConville*, Advisers Act Release No. 2271, 2005 WL 1560276, at *7 n.27 (June 30, 2005) (declining to “base findings as to [the respondent’s] liability” for violations not charged in the OIP); *Russell Ponce*, Exchange Act Release No. 43235, 2000 WL 1232986, at *11 n.49 (Aug. 31, 2000) (similar).

⁷⁴ 15 U.S.C. § 78c(a)(4)(A).

The Division had argued that Grossman “receiv[ed] transaction-based remuneration from the Battoo Funds,” but its concession at oral argument eliminates this as support for a finding that he acted as an unregistered broker. In addition, the Division had argued that Grossman “continu[ed] to advise Sovereign clients to invest and remain invested in the Battoo Funds,” but we have rejected this argument already. The Division points to no other factors that would support a finding that Grossman acted as a broker after November 20, 2008.

The Division has also argued that Grossman independently violated Advisers Act Section 207 during the limitations period by making misstatements in Sovereign’s Form ADV dated December 2008.⁷⁵ The law judge, in finding that Grossman acted as an investment adviser during the limitations period, noted that Grossman’s signature was on the Form ADV along with Adams’ signature. But the law judge made no explicit finding as to Grossman’s role in preparing the form, and the undisputed testimony at the hearing suggested that Adams prepared the Form ADV while Grossman had no role in doing so. In our view, the record does not support a finding that during the limitations period Grossman—as compared to Adams—“willfully” made any untrue statements of material fact in that filing in violation of Section 207.

In sum, we find that the continuing violations doctrine is inapplicable under the particular facts and circumstances of this case, and that because all of the Division’s claims therefore accrued outside of the limitations period, no civil penalties may be imposed.⁷⁶

B. *Section 2462’s statute of limitations does not apply to equitable remedies.*

In addition to imposing civil penalties, the ALJ barred Grossman from the securities industry, imposed a cease-and-desist order, and ordered him to disgorge as ill-gotten gains \$3,004,180.65 he received in undisclosed fees, plus prejudgment interest.

Grossman argues that Section 2462’s five-year statute of limitations prohibits us from ordering these sanctions. The law judge rejected this argument, and so do we.

Section 2462 does not apply to equitable remedies. Courts have routinely held that “the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies.”⁷⁷ “Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief.”⁷⁸

⁷⁵ The Division has not argued that this violation triggered the continuing violations doctrine.

⁷⁶ The Division does not argue that Grossman aided and abetted or caused Sovereign’s violations of Advisers Act Section 206(4) and Advisers Act Rule 206(4)-2 and 204-3 during the limitations period so as to trigger the continuing violations doctrine.

⁷⁷ *Nat’l Parks & Conserv. Ass’n*, 502 F.3d at 1326; see *SEC v. PacketPort.com*, 2006 WL 2798804, at *3 (D. Conn. Sept. 27, 2006) (observing that the “plain language of the section” does not refer to “equitable relief”); see also, e.g., *SEC v. Brown*, 740 F. Supp. 2d 148, 157

Equitable sanctions are functionally different from punitive sanctions such as civil penalties. And the Supreme Court has held that the terms “fine, penalty, or forfeiture” in Section 2462 “refer to something imposed in a punitive way.”⁷⁹ It is an objective question whether a remedy is punitive; it is therefore not dispositive that in a specific case “the person subjected to a[n equitable] sanction [may] feel[] pain or find[] the sanction disagreeable.”⁸⁰ When we impose equitable remedies to serve the public interest—by protecting the public from future harm—we are not seeking to impose a “suffering,” which is how the Supreme Court described the category of punishments covered by Section 2462’s predecessor statute.⁸¹

Applying this standard, we find that Section 2462’s statute of limitations does not apply to the industry bar, cease-and-desist order, and disgorgement imposed on Grossman.

1. *Industry bar*

The law judge imposed industry bars under the Exchange Act and Advisers Act, and an officer-director bar under the Investment Company Act. In Section 9(b) of the Investment Company Act, Congress authorized us to impose a suspension or bar from investment-adviser or investment-company associations if we make certain findings.⁸² Likewise, in Section 203(f) of the Advisers Act and Section 15(b) of the Exchange Act, Congress authorized us to impose a suspension or bar from other securities industry associations if we make certain findings, and if the individual was associated with an investment adviser or broker-dealer during the relevant period.⁸³

These remedies prevent those professionals who have engaged in misconduct from associating with the securities industry in certain roles. In determining whether to impose a bar,

(...continued)

(D.D.C. 2010); *Kelly*, 663 F. Supp. 2d at 286-87; *SEC v. Williams*, 884 F. Supp. 28, 30 (D. Mass. 1995).

⁷⁸ *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (“suits in equity may lie though a comparable action at law would be barred”).

⁷⁹ *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915) (interpreting phrase “penalty or forfeiture” under Section 2462’s predecessor statute); *see also Gabelli*, 133 S. Ct. at 1223 (the terms “fine, penalty, or forfeiture” under Section 2462 reach legal remedies that are “intended to punish” wrongdoers) (citing *Meeker*, 236 U.S. at 423).

⁸⁰ *SEC v. Johnson*, 87 F.3d 484, 487 (D.C. Cir. 1996); *see United States v. Halper*, 490 U.S. 435, 447 n.7 (1989) (explaining that “even remedial sanctions carry the sting of punishment”).

⁸¹ *Meeker*, 236 U.S. at 423.

⁸² 15 U.S.C. § 80a-9(b)(2) to -(3).

⁸³ 15 U.S.C. §§ 78o(b)(6)(A)(i), 80b-3(f).

we do not focus on “past misconduct” alone.⁸⁴ Rather, because the remedy is intended to “protect[] the trading public from further harm,” not to punish the respondent,⁸⁵ the “degree of risk [that the respondent] poses to the public” and the extent of the respondent’s “unfitness to serve the investing public” are central considerations to our analysis.⁸⁶ Addressing the analogous remedy of banking disbarment sanctions, the Supreme Court has said that such sanctions are not “punitive” but instead “serve to promote the stability of the banking industry.”⁸⁷ As Congress explained in enacting the original version of the Exchange Act’s officer-director bar in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (the “Remedies Act”),⁸⁸ “persons who have demonstrated a blatant disregard for the requirements of the Federal securities laws” may be subject to bars of this sort.⁸⁹ Courts have recognized that such bars are not a punishment.⁹⁰

Because a bar operates to prevent the respondent from engaging in certain behavior, it is a species of injunctive relief. Injunctions have traditionally been treated as remedial sanctions rather than punitive ones.⁹¹ Because an injunction against future violations is a type of “equitable relief,” a claim for such an injunction is “not barred” by Section 2462.⁹²

⁸⁴ *Johnson*, 87 F.3d at 490.

⁸⁵ *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005); *see also Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *15 & n.71 (Sept. 17, 2015); *cf. SEC v. Subaye, Inc.*, 2014 WL 5374957, at *1 (S.D.N.Y. Oct. 16, 2014) (observing that an officer-and-director bar “is not a punishment akin to a term of imprisonment but an equitable remedy to ensure that the public is not injured by the individual’s conduct in the future”).

⁸⁶ *Meadows v. SEC*, 119 F.3d 1219, 1228 & n.20 (5th Cir. 1997).

⁸⁷ *Hudson v. United States*, 522 U.S. 93, 103-05 (1997) (holding that disbarment is not a penalty and affirming order of permanent debarment from the banking industry and a prohibition on banking activities), *aff’g* 92 F.3d 1026 (10th Cir. 1996).

⁸⁸ *See* Exchange Act Section 21(d)(2), 15 U.S.C. § 78u(d)(2) (1990).

⁸⁹ S. Rep. 101-337, at *21 (1990).

⁹⁰ *See Kelly*, 663 F. Supp. 2d at 286-87 (holding that Section 2462 does not apply to officer and director bars) (collecting cases); *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940) (expulsion from securities exchanges “is remedial, not penal”); *SEC v. Culpepper*, 270 F.2d 241, 248-50 (2d Cir. 1959) (revocation of broker-dealer registration is not “punishment”); *accord United States v. Naftalin*, 606 F.2d 809, 812 (8th Cir. 1979), *on remand from* 441 U.S. 768 (1979).

⁹¹ *See Hecht v. Bowles*, 321 U.S. 321, 330 (1944); *see also, e.g., Reuben H. Donnelley Corp. v. Mark IMktg. Corp.*, 893 F. Supp. 285, 294 (S.D.N.Y. 1995) (rejecting argument that injunctive relief is punitive, because it is “designed to alleviate a specific, prospective harm”).

⁹² *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997); *accord SEC v. Graham*, 823 F.3d 1357, 1360 (11th Cir. 2016) (“Our precedent forecloses the argument that § 2462 applies to
(continued...)”)

Grossman contends that an industry bar is a “penalty” under Section 2462 because there is a low risk that he “would engage in similar harm in the future.” But that misunderstands the analysis: we cannot impose an industry bar *unless* we find that Grossman lacks “‘current competence’” and poses a “‘degree of risk’ . . . to public investors and the securities markets.”⁹³ We address our findings under this standard in our discussion below.⁹⁴ As that discussion demonstrates, we do not justify the relief “solely in view of . . . past misconduct.”⁹⁵

For these reasons, we conclude that industry and officer-director bars are equitable remedies, and thus Section 2462 does not apply to them.

2. *Cease and desist order*

In addition to an industry bar, the law judge ordered Grossman to cease and desist from committing or causing violations, or future violations, of the provisions of the securities laws that

(...continued)

injunctions, which are equitable remedies”); *see also, e.g., United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 289 (3d Cir. 2013) (concluding that under Section 2462, “[i]f the [Environmental Protection Agency] does not object within five years of the completion of a facility’s modification, then it loses the right to seek civil penalties under the statute of limitations, but can still obtain an injunction requiring the owner or operator to comply with the [environmental law] requirements”); *United States v. Telluride Co.*, 146 F.3d 1241, 1244-48 (10th Cir. 1998) (holding that it does “not consider the Government’s request for injunctive relief an action for a ‘civil penalty’ barred by § 2462”).

⁹³ *Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *9 (Mar. 7, 2014) (quoting *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *7 & n.34 (Dec. 13, 2012)).

⁹⁴ *See infra* notes 163-171.

⁹⁵ *Johnson*, 87 F.3d at 490. In *Johnson*, the D.C. Circuit held that a bar based “solely in view of . . . past misconduct” rather than a “showing of the risk [respondent] posed to the public” could constitute a penalty for purposes of Section 2462. *Id.* For this reason, we have at times *not* expressed the view that Section 2462 is categorically inapplicable to bars. *See, e.g., Carley*, 2008 WL 268598, at *21; *Alacan*, 2004 WL 1496843, at *11. But to the extent that we have acknowledged the applicability of *Johnson* in certain previous adjudicatory decisions, those decisions should not be understood as a change from our position expressed above that Section 2462 does not apply to bars based on the risk the respondent poses to the public. Indeed, we have long held that where “the public interest requires that [a respondent] be barred” due to his “‘current competence or the degree of risk [he] poses to the public,’” the bar is “remedial, and therefore not subject to Section 2462.” *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 WL 3299148, at *4 (Dec. 2, 2005).

the law judge found he violated.⁹⁶ Like an injunction, a cease-and-desist order is designed to prevent harm to the investing public by preventing future violations. The purpose of a cease-and-desist order is “simply [to] require[] [defendants] not to violate the relevant securities laws in the future.”⁹⁷ A cease-and-desist order cannot be entered unless the “person is violating, has violated, or is about to violate any provision of” the securities laws, rules or regulations,⁹⁸ and there is “some risk of future violations.”⁹⁹ “Congress intended that cease-and-desist orders be forward-looking, like injunctions,” although cease-and-desist orders require a lower “showing of risk of future violations” than the showing required for an injunction in federal court proceedings.¹⁰⁰ In sum, a cease and desist order is a species of injunctive relief, in that it seeks to prevent future violations that would harm investors.¹⁰¹

Section 2462 does not apply to cease and desist orders. Such an order, intended to prevent future violations—as the D.C. Circuit in *Riordan* held—is a “purely remedial and preventative” remedy, and thus “is not a ‘fine, penalty, or forfeiture’” under Section 2462.¹⁰² Separately, because a cease-and-desist order “focuses on a respondent’s *future* conduct, and is a prospective remedy . . . Section 2462 is no bar to cease-and-desist relief.”¹⁰³

⁹⁶ Although Grossman contends that “[a]ll of the remedies” are time-barred, he offers no specific argument as to the cease-and-desist order, and has waived any challenge to the cease-and-desist order on statute-of-limitations grounds. We nonetheless explain why we find that Section 2462 does not apply to a cease-and-desist order.

⁹⁷ *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010).

⁹⁸ 15 U.S.C. §§ 77h-1(a), 78u-3(a), 80b-3(k)(1); *see also* S. Rep. 101-337 (explaining that “a cease-and-desist order is an administrative remedy that directs a person to refrain from engaging in conduct or a practice which violates the law”).

⁹⁹ *Riordan*, 2009 WL 4731397, at *19.

¹⁰⁰ *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied sub nom. KPMG, LLP v. SEC*, 289 F.3d 109 (D.C. Cir. 2002).

¹⁰¹ *See, e.g., KPMG*, 289 F.3d at 122-23 (finding cease-and-desist order was “no ‘sweeping order to obey the law’ . . . because the terms of the order are limited to the[] provisions [at issue]” and noting, “[i]f the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity”) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)).

¹⁰² *Riordan*, 627 F.3d at 1234-35; *see also SEC v. Quinlan*, 373 F. App’x 581, 588 (6th Cir. 2010) (finding that because “permanent injunction and officer and director bar were remedial rather than punitive,” these forms of “equitable relief [were] not a ‘penalty’ subject to § 2462[]”).

¹⁰³ *Herbert Moskowitz*, Exchange Act Release No. 45609, 2002 WL 434524 at *10 (Mar. 21, 2002).

Grossman has offered no arguments for why Section 2462 should apply to a cease-and-desist order.¹⁰⁴ We therefore follow our longstanding practice in concluding that a cease-and-desist order is an equitable remedy to which Section 2462 does not apply.

3. *Disgorgement*

The law judge rejected Grossman’s argument that Section 2462 applies to disgorgement, and ordered Grossman to disgorge \$3,004,180.65, plus prejudgment interest. Grossman renews before us his argument that Section 2462 bars disgorgement of ill-gotten gains causally connected to misconduct occurring outside the five-year statute of limitations period. We disagree.

In the Remedies Act, Congress expressly authorized us to “enter an order” in an administrative cease-and-desist proceeding for “accounting and disgorgement.”¹⁰⁵ It also authorizes the Commission “to adopt . . . orders concerning such . . . matters as it deems appropriate to implement” its authority to order disgorgement.¹⁰⁶ The Remedies Act, however, does not define disgorgement. We recognize that there is some divergence among the courts as to the meaning of the term disgorgement and in particular about whether disgorgement is a forfeiture subject to Section 2462.¹⁰⁷ Exercising our authority to interpret the term

¹⁰⁴ In *SEC v. Bartek*, 484 F. App’x 949, 956-57 (5th Cir. 2012), an unpublished and therefore non-precedential decision (*see* Fifth Cir. R. 47.5.4), the Fifth Circuit determined that where there was a “minimal likelihood of similar conduct in the future,” an injunction against future securities law violations was a “penalty” barred by Section 2462. But the absence of such a likelihood in a particular case is not a reason to conclude that injunctive relief is generally a punitive sanction; it is a reason to conclude that the justification for relief has not been met. *See, e.g., SEC v. Zale Corp.*, 650 F.2d 718, 720 (5th Cir. Unit A July 1981) (holding that “the SEC’s right to injunctive relief” turns on a showing that “the defendant’s prior illegal conduct, viewed in light of present circumstances, betoken a ‘reasonable likelihood’ of future transgression”); *accord SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004) (requiring the Commission to demonstrate “a reasonable likelihood that [defendants] would violate the securities laws in the future”); *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (holding that “injunctive relief in the federal courts” is not available unless the requesting party “provide[s] proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future”).

¹⁰⁵ Pub. L. No. 101-429 (1990), codified at 15 U.S.C. §§ 77h-1(e), 78u-3(e), 80b-3(k)(5).

¹⁰⁶ *Id.*

¹⁰⁷ *Compare, e.g., Graham*, 823 F.3d at 1363-64 (finding disgorgement to be “a subset of forfeiture” and that “Section 2462’s statute of limitations applies to disgorgement” because “forfeiture and disgorgement are effectively synonymous”) *with, e.g., SEC v. Kokesh*, — F.3d —, 2016 WL 4437585, at *6 (10th Cir. Aug. 23, 2016) (finding that “the disgorgement order in this case is not a forfeiture within the meaning of Section 2462”), and *SEC v. Saltsman*, 2016 WL 4136829, at *29 (E.D.N.Y. Aug. 2, 2016) (finding that “disgorgement is not a forfeiture”).

(continued...)

“disgorgement” that Congress conferred in the Remedies Act, we conclude that disgorgement is an equitable *in personam* remedy distinct from and not equivalent to what courts have held to be the punitive *in rem* sanction of “forfeiture” to which Section 2462 applies.

The order of “accounting and disgorgement” that the Remedies Act authorizes us to enter is a form of equitable relief. Courts have observed that accounting and disgorgement are “essentially the same remedy,”¹⁰⁸ and an “accounting” is a traditional equitable remedy that “ha[s] compelled wrongdoers to ‘disgorge’—*i.e.*, account for and surrender—their ill-gotten gains for centuries.”¹⁰⁹ The Supreme Court and the courts of appeals have likewise said that disgorgement is an equitable remedy that prevents unjust enrichment and restores the status quo ante.¹¹⁰ Indeed, the Supreme Court has long held that an order of disgorgement is “an equitable adjunct to an injunction decree.”¹¹¹ And before Congress expressly authorized the Commission

(...continued)

The Division contended at oral argument that we should not address whether disgorgement is a forfeiture because Grossman waived that argument. We disagree. Despite characterizing disgorgement as a penalty in his briefs, Grossman also cited the district court decision in *Graham*, which had concluded that disgorgement “can truly be regarded as nothing but a forfeiture.” *SEC v. Graham*, 21 F. Supp. 3d 1300, 1311 (S.D. Fla. 2014), *aff’d in relevant part*, 823 F.3d 1357.

¹⁰⁸ *Edmonson v. Lincoln Nat’l Life Ins. Co.*, 725 F.3d 406, 419 (3d Cir. 2013).

¹⁰⁹ *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 1996) (discussing the “ancient remed[y] of accounting”). An “accounting” is an equitable remedy also known as an “accounting for profits.” See Black’s Law Dictionary (10th ed. 2014) (describing an “accounting for profits” as “a restitutionary remedy based upon avoiding unjust enrichment”) (quoting 1 Dan B. Dobbs, *Law of Remedies*, § 4.3(5), at 608 (2d ed. 1993)).

¹¹⁰ See, e.g., *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-400 (1946); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1978-79 (2014); *Monterosso*, 756 F.3d at 1337; *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 n.6 (11th Cir. 2005); *SEC v. Yun*, 327 F.3d 1263, 1268 n.10 (11th Cir. 2003); *CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999).

¹¹¹ *Porter*, 328 U.S. at 398-400 (explaining that “a decree compelling one to disgorge” ill-gotten gains “may be considered as an equitable adjunct to an injunction decree,” for “[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally required and which has given rise to the necessity for injunctive relief”); see also *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960); *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1343-44 (11th Cir. 2008); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-69 (11th Cir. 1996).

to seek disgorgement, courts held that we could seek disgorgement “as ancillary relief in an injunction action.”¹¹²

We have also described our authority to order disgorgement in administrative proceedings as “an equitable remedy designed to deprive wrongdoers of their unjust enrichment and to deter others from similar misconduct.”¹¹³ The legislative history of the Remedies Act supports this interpretation; Congress explained that disgorgement “merely requires the return of wrongfully obtained profits.”¹¹⁴ And courts have held that disgorgement “establishes a personal liability”¹¹⁵ that is not “limited to specific assets traced back to a violation.”¹¹⁶ Accordingly, we view disgorgement, as does the D.C. Circuit, as “an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset.”¹¹⁷ It is an equitable remedy that imposes a personal liability on a defendant in the amount of his ill-gotten gains “regardless whether he retains the self-same proceeds of his wrongdoing.”¹¹⁸

As discussed above, that disgorgement is an *in personam* remedy distinguishes it from the *in rem* sanction of forfeiture. Indeed, interpreting disgorgement as requiring a defendant “to disgorge only the actual assets unjustly received”—as in an *in rem* proceeding—“would lead to absurd results.”¹¹⁹ For example, “a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of disgorgement.”¹²⁰ We do not believe Congress intended our ability to order disgorgement to be so limited.¹²¹

¹¹² See, e.g., *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95 & 103 n.13 (2d Cir. 1978) (Friendly, J.) (observing that “[d]isgorgement of profits in an action brought by the SEC to enjoin violations of the securities laws appears to fit th[e] description” of an “equitable remedy” in which “the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor’s discretion to prevent unjust enrichment”).

¹¹³ *Riordan*, 2009 WL 4731397, at *20; see also *Zacharias*, 569 F.3d at 471-72.

¹¹⁴ H.R. Rep. 101-616 (1990), reprinted in 1990 WL 256464 (emphasis added).

¹¹⁵ *FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013).

¹¹⁶ *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016).

¹¹⁷ *Banner Fund*, 211 F.3d at 617.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Cf. Executive Office for United States Attorneys, United States Attorneys Bulletin Vol. 60 No. 4, at 26 (July 2012) (“Because civil forfeiture is an *in rem* action against specific property, the government may only forfeit the actual ‘guilty’ property, that is, the property that was derived from or used to commit the offense. Thus, the government cannot secure a money

(continued...)

Viewed consistently with this understanding, disgorgement is not what courts have held to be “forfeiture” that is subject to Section 2462. Civil forfeiture is an *in rem* proceeding “against the seized property itself.”¹²² It arose from admiralty, customs, and criminal law, and was used to recover contraband (such as smuggled goods) and instrumentalities (such as ships used for smuggling).¹²³ Historically, therefore, civil forfeiture was used “to take ‘tangible property used in criminal activity.’”¹²⁴ Indeed, the “legal fiction underlying civil forfeiture” is that it is a proceeding “against ‘offending inanimate objects’ as defendants.”¹²⁵

As used in Section 2462, “forfeiture” is a legal term of art that is to be interpreted “in light of [its] history” and has the “meaning generally accepted in the legal community at the time of its enactment.”¹²⁶ Forfeitures “historically have been understood, at least in part, as punishment.”¹²⁷ Indeed, the Supreme Court has held that Congress’s use of forfeiture in Section 2462 refers to a “punitive” sanction.¹²⁸ In contrast, disgorgement is “not punitive,”¹²⁹ and its purpose is “not to inflict punishment.”¹³⁰ Disgorgement cannot be a punishment because we lack discretion to order disgorgement that exceeds the amount obtained through the wrongdoing; being required to disgorge only the amount by which one has been unjustly enriched is not punitive.¹³¹

(...continued)

judgment in a civil forfeiture case or forfeit substitute assets when the specific property derived from or used in the offense is no longer available.”), *available at* <https://www.justice.gov/sites/default/files/usao/legacy/2012/07/30/usab6004.pdf>.

¹²² *United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007).

¹²³ *See United States v. Bajakajian*, 524 U.S. 321, 329-33 (1998). Only in the 1970s and ‘80s did forfeiture become a tool to recover proceeds and profits on proceeds. *See United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 119-123 (1993).

¹²⁴ *Kokesh*, 2016 WL 4437585 at *5.

¹²⁵ *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1218 (10th Cir. 1986).

¹²⁶ *Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994); *Medical Transp. Mgmt. Corp. v. IRS*, 506 F.3d 1364, 1368 (11th Cir. 2007).

¹²⁷ *Austin v. United States*, 509 U.S. 602, 614, 618 (1993).

¹²⁸ *Meeker*, 236 U.S. at 423.

¹²⁹ *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978).

¹³⁰ *Sheldon*, 309 U.S. at 399.

¹³¹ *See Gordon Brent Pierce*, Securities Act Release No. 9555, 2014 WL 896757, at *26 (Mar. 7, 2014) (explaining that statements about disgorgement not being used punitively reflect that “the equitable power of disgorgement may be exercised ‘only over property causally related to the wrongdoing’”), *petition for review denied*, 786 F.3d 1027 (D.C. Cir. 2015); *see also Blatt*, (continued...)

Forfeiture is also not limited to the direct proceeds of misconduct but includes unlimited profits on such unlawful proceeds, *i.e.*, secondary profits or profits on profits.¹³² A respondent in a Commission action cannot be ordered to disgorge any “income earned on ill-gotten profits.”¹³³ In addition, disgorgement is discretionary and is “is not confined by precise contours of statutory

(...continued)

583 F.2d at 1335 (“The court’s power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.”); *Riordan*, 627 F.3d at 1234 (holding that “disgorgement orders are not penalties, at least so long as the disgorged amount is causally related to the wrongdoing”).

¹³² *United States v. One 1980 Rolls Royce*, 905 F.2d 89, 91 (5th Cir. 1990); *accord United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998); *see also United States v. Betancourt*, 422 F.3d 240, 250-52 (5th Cir. 2005); *United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991); *see generally U.S. Dep’t of Justice Manual for Federal Prosecutors*, DOJML Comment 9-110.000C vol.8 p. 202-203 (5th ed. 2009, 2014 supplement).

¹³³ *Blatt*, 583 F.2d at 1335 (distinguishing between “profits and interest wrongfully obtained” that a defendant can be ordered to disgorge and “income earned on ill-gotten profits” that he cannot be ordered to disgorge); *accord SEC v. MacDonald*, 699 F.2d 47, 53-54 (1st Cir. 1983) (en banc); *SEC v. Manor Nursing Ctrs, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972); *see generally* L. Loss, J. Seligman & T. Paredes, *Securities Regulation* § 9.a (2014) (discussing *Blatt* and *Manor Nursing*, and explaining that courts can require disgorgement of fraud proceeds and interest thereon, not “profits earned on these proceeds”). This distinction explains why there is an express time limit on forfeitures but not disgorgement. It is sensible to impose an express time limit for seeking forfeiture of not only wrongfully obtained assets but all profits derived therefrom because such profits from subsequent enterprises could otherwise multiply without bound. But that rationale does not warrant imposing a time limit on disgorgement, because a defendant cannot be ordered to disgorge more than the value of the initial proceeds of his wrongdoing, even if he subsequently obtains profits from those proceeds.

Prejudgment interest on ill-gotten gains does not constitute profits on those ill-gotten gains. Prejudgment interest is only the “time value of money” that was initially obtained from the securities law violation. *SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009). The Eleventh Circuit accordingly distinguishes between “profits and interest wrongfully obtained” that a defendant can be ordered to disgorge and “income earned on ill-gotten profits” that he cannot be ordered to disgorge. *Blatt*, 583 F.2d at 1335. And unlike forfeiture, a defendant pays prejudgment interest at a set rate even if his actual profits on proceeds exceed that rate. In any event, prejudgment interest is not mandatory; a court has equitable jurisdiction to order disgorgement without prejudgment interest. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476-77 (2d Cir. 1996). An award of prejudgment interest is, therefore, not punitive but rather is compensatory in nature. *SEC v. Lauer*, 478 F. App’x 550, 557 (11th Cir. 2012). We address the imposition of prejudgment interest below. *See infra* notes 189-190.

language, but rather serves the broader purposes of equity.”¹³⁴ That makes it unlike forfeiture, which is sometimes mandatory, and always must be carried out in strict accordance with the terms of the authorizing statute.¹³⁵ Indeed, in a case decided soon after the direct predecessors of Section 2462 were enacted, the Supreme Court distinguished between an “accounting for profits” and “forfeiture,” holding that a court’s equity powers included ordering the former but not the latter.¹³⁶

Ultimately, we conclude disgorgement is not synonymous with forfeiture. As such, our interpretation of disgorgement “does not fit” within the meaning of forfeiture in Section 2462.¹³⁷ Consequently, consistent with the longstanding recognition that disgorgement is an equitable and non-punitive remedy, the clear weight of authority supports our conclusion that Section 2462’s statute of limitations does not apply to disgorgement.¹³⁸

By concluding that disgorgement “is a forfeiture” and thus falls within Section 2462, the Eleventh Circuit’s conclusion in *Graham*¹³⁹ is therefore in tension not only with the decisions of

¹³⁴ *SEC v. Contorinis*, 743 F.3d 296, 307 (2d Cir. 2014).

¹³⁵ *Id.*; see, e.g., *United States v. \$38,000.00 Dollars in U.S. Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987) (“Forfeitures are not favored in the law; strict compliance with the letter of the law by those seeking forfeiture must be required.”).

¹³⁶ *Stevens v. Gladding*, 58 U.S. 447, 453-55 (1854). Courts have continued to distinguish between the “equitable remed[y]” of requiring a person to “disgorge” his unlawful gains and “forfeiture.” *Kaley v. United States*, 134 S. Ct. 1090, 1102 n.11 (2014); see also *Contorinis*, 743 F.3d at 306-07 (distinguishing between disgorgement and forfeiture). And although the Supreme Court once described forfeiture as resulting in a “disgorgement of the fruits of illegal conduct,” *United States v. Ursery*, 518 U.S. 267, 284 (1996), the distinct remedy of disgorgement was not at issue in *Ursery*.

¹³⁷ *Kokesh*, 2016 WL 4437585 at *6 (finding that “the nonpunitive remedy of disgorgement does not fit” within the meaning of forfeiture in Section 2462).

¹³⁸ See, e.g., *id.* (disgorgement “is not a forfeiture within the meaning of Section 2462”); *Riordan*, 627 F.3d at 1234-35 & n.1 (disgorgement is not a “forfeiture covered by § 2462”); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (Section 2462 does not apply to the Commission’s requests for disgorgement), *reh’g en banc granted, opinion withdrawn*, 573 F.3d 54 (1st Cir. 2009), *opinion reinstated in relevant part on reh’g*, 597 F.3d 436 (1st Cir. 2010) (en banc); *Rind*, 991 F.2d 1490-93 (“no statute of limitations” applies because disgorgement is “equitable”); see also, e.g., *Saltsman*, 2016 WL 4136829, at *24-29 (holding that disgorgement is not a fine, penalty, or forfeiture); *SEC v. Jones*, 155 F. Supp. 3d 1180, 1188 (D. Utah 2015) (“Section 2462 is simply inapplicable . . . [to] disgorgement” because it “is an equitable remedy and not a civil fine, penalty, or forfeiture”); *SEC v. Jones*, 476 F. Supp. 2d 374, 385 (S.D.N.Y. 2007).

¹³⁹ *Graham*, 823 F.3d at 1363.

numerous courts of appeals but also with our interpretation of disgorgement.¹⁴⁰ It is also in tension with the Eleventh Circuit’s prior precedent that disgorgement is equitable.¹⁴¹ Indeed, *Graham* itself recognized that “[S]ection 2462 does not apply to equitable remedies.”¹⁴²

Moreover, *Graham* does not address the “statutory context” and “well-established background principle[s]” that demonstrate why Congress distinguished forfeiture from disgorgement.¹⁴³ Rather, it relied on modern dictionary definitions of forfeiture and disgorgement and rejected potential alternative definitions that did not support its ultimate conclusion.¹⁴⁴ The dictionaries at the time Section 2462 and its antecedents were enacted, however, include definitions of forfeiture that do not apply to disgorgement.¹⁴⁵ And the dictionaries *Graham* cited also defined forfeiture as “the divesting of the ownership of particular property,”¹⁴⁶ which is inconsistent with our interpretation of disgorgement as an obligation to return a sum equal to the ill-gotten gains rather than a requirement to replevy a specific asset. Based on our interpretation, we believe that the decisions in *Kokesh* and *Riordan* correctly held that disgorgement is not a “forfeiture” covered by Section 2462¹⁴⁷ and respectfully disagree with *Graham*’s contrary conclusion and reasoning.¹⁴⁸

¹⁴⁰ See also *Saltsman*, 2016 WL 4136829, at *25 (disagreeing with *Graham* because “disgorgement and forfeiture have distinct legal meanings” and because “disgorgement, unlike forfeiture, fines, or penalties, is not punitive”).

¹⁴¹ *Monterosso*, 756 F.3d at 1337.

¹⁴² *Graham*, 823 F.3d at 1360; see *Nat’l Parks & Conserv. Ass’n*, 502 F.3d at 1326; *Banks*, 115 F.3d at 919; see also, e.g., *Sheldon*, 309 U.S. at 399.

¹⁴³ See *Torres v. Lynch*, 136 S. Ct. 1619, 1626 (2016) (courts must “interpret the relevant words not in a vacuum, but with reference to the statutory context” and “well-established background principle[s]”) (citation and quotation marks omitted).

¹⁴⁴ *Graham*, 823 F.3d at 1363 (citing *Black’s Law Dictionary* (10th ed. 2014), *Webster’s Third New Int’l Dictionary* (2002), and *Oxford English Dictionary* (2d ed. 1989)).

¹⁴⁵ *Black’s Law Dictionary* 508 (1st ed. 1891) (defining “forfeiture” as a “loss of land,” “loss of goods or chattels,” or a set fine, i.e., “a definite sum of money”).

¹⁴⁶ *Webster’s Third New Int’l Dictionary* (2002).

¹⁴⁷ *Kokesh*, 2016 WL 4437585 at *4-6 (disagreeing with *Graham*); *Riordan*, 627 F.3d at 1234-35 & n.1. *Riordan* sought rehearing en banc solely on the issue of whether disgorgement is a “forfeiture,” and that petition was denied without garnering a single vote. See *Riordan v. SEC*, No. 10-1034 (D.C. Cir.), Doc. 1293327, 1298906.

¹⁴⁸ See *Nat’l Cable & Tel. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-984 (2005) (holding that a court’s prior interpretation of a statute may override an agency’s interpretation only if the relevant court decision held the statute to be unambiguous); *Ass’n of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427, 444 (D.C. Cir. 2012) (holding that Ninth

(continued...)

In addition to relying on *Graham*, Grossman contends that the Supreme Court’s decision in *Gabelli* requires us to hold that disgorgement is subject to Section 2462.¹⁴⁹ But *Gabelli* held only that the discovery rule cannot toll an action by the Commission for civil penalties and stated explicitly that it was not addressing disgorgement.¹⁵⁰ In addition, *Gabelli* held that Section 2462 reaches only remedies that are “intended to punish”;¹⁵¹ neither disgorgement nor the other equitable remedies at issue here have that purpose. For these reasons, we do not understand *Gabelli* even to suggest, let alone to hold, that Section 2462 applies to disgorgement.

Grossman also cites case law holding that “disgorgement may not be used punitively,”¹⁵² and offers arguments as to why he believes it is punitive here. The principle he cites, however, is

(...continued)

Circuit’s interpretation of a statute was not “binding law in this circuit” and could not “trump” agency’s interpretation because the Ninth Circuit had not held the statute to be unambiguous).

We observe further that although Grossman could seek review of our decision in this case in the Eleventh Circuit—as the court of appeals for the circuit in which he resides or has his principal place of business—our administrative orders also may be appealed to the D.C. Circuit. See 15 U.S.C. §§ 77i(a), 78y(a)(1), 80a-42(a), 80b-13(a). Given this choice of forum, we issue our administrative orders without knowing in advance which court of appeals will consider any petition for review that may be filed. See *Johnson v. R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992) (where adverse authority exists in a circuit, still the agency “should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion”); Samuel Estreicher and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L. J. 679, 687 (1989) (explaining agency decisions when “the identity of the reviewing court [is] uncertain at the time the agency makes its decision”); cf. *United States v. Mendoza*, 464 U.S. 154, 160, 163 (1984) (explaining that relitigation across circuits ensures that a “final decision rendered” by one circuit does not “freeze[]” “important questions of law”).

¹⁴⁹ Grossman also argues that disgorgement is a “penalty” within the meaning of Section 2462. But the Supreme Court long ago foreclosed the position that disgorgement is intrinsically punitive. *Sheldon*, 309 U.S. at 399 (holding that disgorgement’s purpose is not to “punish[] but . . . to prevent an unjust enrichment”); see also *Zacharias*, 569 F.3d at 471-72 (concluding that disgorgement is not a “penalty” under Section 2462). And the legislative history of the Remedies Act stated explicitly that disgorgement “does not result in any actual economic penalty.” H.R. Rep. No. 101-616, 1990 WL 256464. Disgorgement is therefore also not a “fine” under Section 2462; the terms “fine” and “penalty” in Section 2462 “mean precisely the same thing.” *In re Landsberg*, 14 F. Cas. 1065, 1067 (E.D. Mich. 1870). As we noted above, however, the amount ordered to be disgorged may not exceed the reasonable approximation of ill-gotten gains causally linked to the wrongdoing. See *supra* note 131 and accompanying text.

¹⁵⁰ *Gabelli*, 133 S. Ct. at 1220 n.1.

¹⁵¹ *Id.* at 1223.

¹⁵² See, e.g., *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989).

simply another way of defining disgorgement: we would exceed our authority to impose “disgorgement” if we ordered Grossman to give up more than a reasonable approximation of ill-gotten gains causally linked to the wrongdoing.¹⁵³ We address such arguments below.¹⁵⁴

Even though we conclude that the equitable remedy of disgorgement is not subject to a statute of limitations, this does not mean that the passage of time is irrelevant to our consideration of whether to impose this remedy. The Commission “can and should consider the remoteness of the defendant’s past violations in deciding whether to grant” equitable sanctions, including disgorgement.¹⁵⁵ As with Grossman’s other arguments about the appropriateness of disgorgement, we address the passage of time below.¹⁵⁶

C. *An industry bar, a cease-and-desist order, and disgorgement are in the public interest.*

Having concluded that Section 2462 does not prohibit us from imposing an industry bar, a cease-and-desist order, or disgorgement, we find those remedies are in the public interest here.

1. *Industry Bar*

We may suspend or bar Grossman from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization under Advisers Act Section 203(f) if we find that: (i) he was associated with an investment adviser during the relevant period; (ii) he willfully violated, or willfully aided and abetted the violation of, the Advisers Act or its rules; and (iii) the sanction is in the public interest.¹⁵⁷ In addition, if we find that the latter two elements have been established, we may also suspend or bar Grossman from associating with a broker or dealer under Section 15(b)(6) of the Securities Exchange Act of 1934.¹⁵⁸ Finally, we may prohibit Grossman from certain associations with an investment company under Section 9(b) of the Investment Company Act if (i) he willfully violated or willfully aided and abetted violations of certain other provisions of the securities laws, and (ii) the sanction is in the public interest.¹⁵⁹ Grossman does not dispute

¹⁵³ See *supra* note 131 and accompanying text.

¹⁵⁴ See *infra* text accompanying notes 177-188.

¹⁵⁵ *Rind*, 991 F.2d at 1491-92.

¹⁵⁶ See *infra* text accompanying notes 181-183.

¹⁵⁷ 15 U.S.C. § 80b-3(f).

¹⁵⁸ 15 U.S.C. § 78o(b)(6)(A)(i). Specifically, the Commission may prohibit the person from “serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.” *Id.*

¹⁵⁹ *Id.* § 80a-9(b)(2), (3).

that he associated with an investment adviser, and we have found above that he did so; he also does not dispute that his violations were willful, and we find that they were.¹⁶⁰

In determining whether a bar would serve the public interest, we consider the egregiousness of Grossman's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, Grossman's recognition of the wrongful nature of his conduct, the sincerity of his assurances against future violations, and the likelihood that his occupation will present opportunities for future violations.¹⁶¹ Our inquiry is flexible, and no one factor is dispositive.¹⁶² Nonetheless, the "degree of risk [that the respondent] poses to the public" and the extent of the respondent's "unfitness to serve the investing public" are central considerations to our analysis.¹⁶³ Applying this framework, we conclude that an industry bar is in the public interest.

Grossman's conduct was egregious. Grossman was acting in a fiduciary capacity in which he had a duty to disclose material facts and not benefit himself "except to the extent provided for by fees and compensation the client expressly consents to pay."¹⁶⁴ Grossman breached his duty by repeatedly failing to disclose his receipt of referral and consulting fees paid out of clients' investments. He recommended funds that would enrich himself at his clients' expense. Because "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence," we have treated fraud as "especially serious and subject to the severest of sanctions under the securities laws."¹⁶⁵ We conclude that Grossman's efforts to defraud his clients and abuse their trust demonstrate that he lacks the competence and requisite professional ethics required for him to meet these standards and operate as a fiduciary.¹⁶⁶

¹⁶⁰ In this context, a person acts willfully if in undertaking the acts that make up the violation he "knows what he is doing," even if he does not know "that he is breaking the law." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000). One who acts with scienter also acts willfully. *Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *13 n.139 (May 16, 2014), *rev'd in part on other grounds*, 793 F.3d 147 (D.C. Cir. 2015).

¹⁶¹ See *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

¹⁶² *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *11 (Feb. 13, 2009).

¹⁶³ *Meadows*, 119 F.3d at 1228 & n.20; see *supra* note 86 and accompanying text.

¹⁶⁴ *Feeley & Willcox Asset Mgmt. Corp.*, Securities Act Release No. 8249, 2003 WL 22680907, at *12 (July 10, 2003).

¹⁶⁵ *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 (Sept. 26, 2007) (internal quotation marks and citations omitted).

¹⁶⁶ See *Steadman*, 603 F.2d at 1142 (Commission may consider "violations occurring in the context of a fiduciary relationship to be more serious than they might otherwise be").

Grossman's violations were also recurrent. Between 2003 and 2008, he repeatedly recommended that clients invest in the Battoo Funds without disclosing that those investments generated referral and consulting fees that would enrich him at the clients' expense.

Grossman also acted with a high degree of scienter.¹⁶⁷ As discussed above, Grossman intentionally misled clients to enrich himself. And Grossman's response to OCIE's deficiency letter further demonstrates his scienter. That letter notified Grossman that his conduct was wrongful and gave him an opportunity to cure his misrepresentations. Instead, Grossman failed to fix some deficient disclosures, made new misleading ones, and falsely told OCIE that he had fixed the problem. Grossman also could not have reasonably interpreted the letter's instruction that he "may also need to amend [the] ADV Part II" as tacitly providing him with permission to misleadingly disclose that he "may" receive fees, instead of disclosing that he was receiving fees. Grossman's response to the letter lacked any rational justification other than an intent to mislead his clients.

Grossman's response to OCIE's letter further demonstrates that he poses a risk to the public because he "did not feel bound by the law."¹⁶⁸ Nor has Grossman assuaged our concerns, for he has made no assurances against future misconduct. Grossman says he "is not associated with Sovereign or the Sovereign Entities and Sovereign has since been dissolved and is no longer in existence," but he has not disclaimed any intent to associate with the securities industry.¹⁶⁹

Grossman contends that he presents a low degree of risk to the public, but in our view his current occupation demonstrates a considerable risk. Grossman retains ownership and control over SIPS, an IRA administrator that handles "paperwork, contributions [and] distributions" for IRAs. Grossman's fraud involved receiving undisclosed kickbacks from hedge funds in exchange for advising investors with offshore retirement accounts to invest in those same funds. During the time he was committing this fraud, he owned and operated Sovereign and SIPS together. SIPS was an avenue through which he was able to develop client relationships for his advisory business. His clients testified that they thought SIPS was the same company as the investment advisory business. Although Grossman is no longer associated with an adviser, he continues to interact directly with the investing public through SIPS. Absent a bar, there would be nothing to prevent Grossman from offering advisory services to his SIPS clients or others in

¹⁶⁷ In assessing Grossman's competence and risk to the public, scienter is "highly relevant to a determination of whether the defendant has the propensity to commit future violations." *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 542 (2d Cir. 1973) (addressing injunctive relief).

¹⁶⁸ *First City Fin. Corp.*, 890 F.2d at 1229 (holding that evidence that a defendant "did not feel bound by the law" is appropriately considered in determining appropriate relief). Grossman's settlement of a client's arbitration has limited probative value regarding his risk to the public. *Cf. Fisher v. Kelly*, 105 F.3d 350, 353 (7th Cir. 1997) (noting that settlements can occur for reasons "wholly unrelated to the substance and issues involved in the litigation").

¹⁶⁹ *Cf. Canady*, 1999 WL 183600, at *11 (imposing bar despite respondent's "little interest in future employment in the securities industry" and no association for nine years).

the future—or from seeking to reassociate with the industry in addition to running his IRA administration business.¹⁷⁰ Imposing an industry bar would therefore prevent Grossman from expanding his IRA administration business into the advisory business he previously ran in parallel with SIPS and thus limit his opportunities to defraud investors in the future.¹⁷¹

The facts demonstrate that barring Grossman from the securities industry is in the public interest. We therefore bar him from associating with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, and we prohibit him from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.¹⁷²

2. *Cease and Desist Order*

We also find that a cease-and-desist order is in the public interest. Section 8A(a) of the Securities Act, Section 21C(a) of the Exchange Act, and Section 203(k) of the Advisers Act authorize us to impose a cease-and-desist order for violations of those Acts or the rules or regulations thereunder.¹⁷³ In deciding whether to impose a cease-and-desist order, we consider the public interest factors discussed above, whether there is a reasonable likelihood of future violations¹⁷⁴ and “whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings.”¹⁷⁵

Each of the relevant public interest factors discussed above establishes that a cease-and-desist order is in the public interest. Grossman’s continued interaction with investors as an IRA

¹⁷⁰ See, e.g., *Ralph Calabro*, Securities Act Release 9798, 2015 WL 3439152, at *41 (May 29, 2015) (“Absent a bar, nothing would prevent Calabro from reentering the industry.”).

¹⁷¹ Grossman contends that his case is like those in which suspensions and officer-and-director bars were found to be “punitive” absent evidence of a risk of future harm. See *Bartek*, 484 F. App’x at 957; *Johnson*, 87 F.3d at 489. But we find abundant evidence that Grossman poses a risk to investors and that a bar is necessary to protect the public and in the public interest.

¹⁷² We decline to bar Grossman from associating with a municipal advisor or nationally recognized statistical rating organization pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), because the conduct at issue all took place prior to July 22, 2010, the effective date of Dodd-Frank. See *Koch v. SEC*, 793 F.3d 147, 157-58 (D.C. Cir. 2015).

¹⁷³ See 15 U.S.C. §§ 77h-1(a), 78u-3(a), 80b-3(k)(1).

¹⁷⁴ *KPMG Peat Marwick, LLP*, 2001 WL 47245, at *26.

¹⁷⁵ *Koch*, 2014 WL 1998524, at *21 (citing *KPMG Peat Marwick, LLP*, 2001 WL 47245, at *26-28).

administrator compounds the risk of future violations. Grossman’s violations are also recent enough to justify preventative relief given our assessment of the public interest factors, the remedial function served by the need to protect the public in the future, and the unquestionable harm to investors.¹⁷⁶

3. *Disgorgement*

Securities Act Section 8A(e), Exchange Act Section 21C(e), and Advisers Act Section 203(k)(5) authorize disgorgement, including reasonable interest, in a cease-and-desist proceeding.¹⁷⁷ “[T]he amount of disgorgement should include all gains flowing from the illegal activities”;¹⁷⁸ disgorgement must “be a reasonable approximation of profits causally connected to the violation.”¹⁷⁹

There is a causal connection between Grossman’s receipt of certain ill-gotten fees and his violations for failing to disclose his receipt of those fees. Between August 2003 and October 2008, Grossman concealed a significant conflict of interest from his advisory clients—his receipt of referral and consulting fees from the Battoo Funds—in violation of his fiduciary duties and various antifraud provisions of the federal securities laws. During that same time period, he received \$3,407,765.66 in referral and consulting fees. Grossman admitted that he only used his foreign bank account—from which the Division calculated the \$3.4 million figure—for receiving fees from the Battoo Funds. And he does not contest that the figure includes only those fees that the Battoo Funds paid to the account.

Equitable considerations nonetheless lead us to find that disgorgement should be offset by Grossman’s settlement of an arbitration brought by a Sovereign client. Although a respondent’s settlement of private litigation will not always affect disgorgement, “[a] settlement

¹⁷⁶ Some courts have expressed disfavor toward obey-the-law injunctions that specify only the statutes that the defendant must refrain from violating in the future. *See SEC v. Goble*, 682 F.3d 934, 950 (11th Cir. 2012); *Graham*, 2016 WL 3033605, at *3 n.2. We have previously concluded that the holding in *Goble*, based on an interpretation of Federal Rule of Civil Procedure 65(d), applies only to district court actions involving “‘injunctions’ and ‘restraining orders,’” and “not cease-and-desist orders issued in Commission administrative proceedings.” *Montford & Co.*, 2014 WL 1744130, at *21-22.

¹⁷⁷ 15 U.S.C. §§ 77h-1(e), 78u-3(e), 80b-3(k)(5). The OIP also instituted proceedings to determine whether we should exercise our authority to impose disgorgement as part of a civil penalty action. *Compare id.* §§ 78u-2(e), 80a-9(e), 80b-3(j). We do not rely on that authority here because we have held that a civil penalty is time barred.

¹⁷⁸ *Riordan*, 2009 WL 4731397, at *20.

¹⁷⁹ *Id.* (quoting *First City Fin.*, 890 F.2d at 1231).

payment may . . . be taken into account . . . in calculating the amount to be disgorged.”¹⁸⁰

Because the claims at issue in the arbitration overlap with Grossman’s violations, we conclude as an equitable matter that the amount of disgorgement, if any, should be reduced by \$403,585.01, the amount he paid to settle the arbitration.

We “can and should consider the remoteness of the defendant’s past violations” in deciding whether to order disgorgement.¹⁸¹ We conclude that Grossman should disgorge his ill-gotten gains notwithstanding the passage of time between his violations and this proceeding. We find that, contrary to Grossman’s suggestion, the passage of time has not rendered unreliable, or resulted in the loss of, evidence relevant to disgorgement. Grossman points to several instances of supposedly lost or stale evidence, but none of these helps his case:

- Grossman complains that Battoo was unavailable because he fled to Switzerland before the OIP was filed. Yet there is no reason to believe that Battoo would have helped Grossman’s case. To the contrary, the record demonstrates that Battoo was evasive with Grossman even toward the end of their fraud.
- Grossman argues that the passage of time made him unable to recall certain details.¹⁸² But to the extent that these details play any role in our decision to impose sanctions, the relevant facts appear elsewhere in the record. And although Grossman complains of clients’ inconsistent testimony, the record demonstrates that clients consistently testified that Sovereign did not disclose its fees.
- Grossman says that the ALJ should not have relied upon the deposition of client Stephen Richards or the written testimony of client James Davidson. But Grossman did not object to the admission of their testimony.¹⁸³ In any event, our *de novo* review cures any potential evidentiary error, and we are able to reach the same conclusion about the amount of disgorgement and the connection his violation even in the absence of this testimony.

¹⁸⁰ *First Jersey Sec.*, 101 F.3d at 1475; see *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976) (recognizing that a wrongdoer sued on “the same allegations as those made by the SEC” may establish that he has “already relinquished [his] ill-gotten gains” in a settlement).

¹⁸¹ *Rind*, 991 F.2d at 1491-92; see *supra* text accompanying note 155.

¹⁸² Grossman could not recall the funds’ composition; when he received Anchor’s financial statements; the circumstances of the investment adviser public disclosure effective through December 31, 2011, bearing his name; or whether he received a client email in September 2008.

¹⁸³ See Rule of Practice 321(a), 17 C.F.R. § 201.321(a) (requiring objections to admission of evidence be made on the record). Grossman reserved objections made during the deposition, but renews none of them here in arguing that the ALJ should not have relied on the testimony at all.

Grossman next invokes *Joseph J. Barbato*¹⁸⁴ in arguing that the amount of disgorgement ordered by the ALJ must be reduced to reflect only those clients who testified in order to establish “a causal relationship with the alleged violations.” In *Barbato*, we limited disgorgement to amounts traceable to “customers who testified,” because the relevant violations—making unsuitable recommendations and churning—necessarily involved “specific and particular facts about” whether the recommendations were appropriate or the clients had consented to the trades.¹⁸⁵ Unlike in *Barbato*, Grossman violated his fiduciary duty to each and every one of his clients by failing to disclose his referral and consulting agreements. Grossman made no disclosures to any clients, thus establishing the required causal link between all the undisclosed fees that he received and his Securities Act and Advisers Act violations for failing to disclose his fee arrangements.¹⁸⁶ Because these violations fully support an order disgorging those fees, we need not address Grossman’s separate arguments that disgorgement cannot be independently supported by his other violations of the securities laws.

Finally, Grossman says that disgorgement of all his ill-gotten gains should be reduced by his payment of \$1.37 million in taxes to the IRS on those ill-gotten gains. But it is well settled that disgorgement will not be reduced because the wrongdoer has paid an ordinary tax liability.¹⁸⁷ Grossman must seek from the IRS, not us, any relief from the taxes he says he paid on the ill-gotten gains that we are now ordering disgorged.¹⁸⁸

¹⁸⁴ Exchange Act Release No. 41034, 1999 WL 58922 (Feb. 10, 1999).

¹⁸⁵ *Id.* at *13.

¹⁸⁶ *Cf. Kenneth Von Kohorn*, Exchange Act Release No. 35402, 1995 WL 71287, at *6 (Feb. 22, 1995) (ordering disgorgement of “undisclosed fees that were charged to investors”).

¹⁸⁷ *SEC v. U.S. Pension Trust Corp.*, 444 F. App’x 435, 437 (11th Cir. 2011) (declining to “deduct from the disgorgement figure the amount of ill-gotten gains paid to the government in income tax”); *see also SEC v. Orr*, 2012 WL 1327786, at *8 (D. Kan. Apr. 17, 2012). Because this is a well-settled feature of the calculation of a reasonable approximation of ill-gotten gains, Grossman is incorrect that this feature makes disgorgement “punitive” under Section 2462.

¹⁸⁸ *Cf. SEC v. Koenig*, 532 F. Supp. 2d 987, 994 (N.D. Ill. 2007) (“We leave the tax consequences of this decision for Koenig to work out with the IRS.”).

For these reasons, we order Grossman to disgorge his net ill-gotten gains of \$3,004,180.65, plus prejudgment interest calculated pursuant to Section 6621(a)(2) of the Internal Revenue Code¹⁸⁹ and compounded quarterly.¹⁹⁰

An appropriate order will issue.¹⁹¹

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

¹⁸⁹ 26 U.S.C. § 6621(a)(2); *see Platforms Wireless Int'l Corp.*, 617 F.3d at 1099.

¹⁹⁰ Rule of Practice 600(b), 17 C.F.R. § 201.600(b). As we have explained, ordinarily “prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer’s victims.” *Eric J. Brown*, Advisers Act Release No. 3376, 2012 WL 625874, at *16 n.51 (Feb. 27, 2012)).

¹⁹¹ We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 10227 / September 30, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 79009 / September 30, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4543 / September 30, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32298 / September 30, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-15617

In the Matter of

LARRY C. GROSSMAN,

Respondent.

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Larry Grossman be barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and it is further

ORDERED that Larry Grossman be barred from associating with or from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and it is further

ORDERED that Larry Grossman cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933; Section 15(a) of the Securities Exchange Act of 1934; and Sections 206(1), 206(2), 206(3), 206(4) and 207 of the Investment Advisers Act of 1940, and Advisers Act Rules 204-3 and 206(4)-2.

ORDERED that Larry Grossman, shall, within 30 days of the entry of this Order, pay disgorgement of \$3,004,180.65, plus prejudgment interest of \$757,853.75, to the Securities and

Exchange Commission. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds, or transfer them to the general fund of the United States Treasury, subject to Section 21F(g)(3). If timely payment is not made, additional interest shall continue to accrue on all funds owed until they are paid, pursuant to SEC Rule of Practice 600.

Payment of disgorgement shall be (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondents and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary