

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4400 / May 27, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32131 / May 27, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of

EDGAR R. PAGE
and
PAGEONE FINANCIAL INC.

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

Respondents, a registered investment adviser and its principal, failed to disclose a conflict of interest. After the Commission instituted proceedings, Respondents submitted an offer of settlement, accepted by the Commission, pursuant to which they consented to entry of an Order Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order, and Ordering Continuation of Proceedings to determine what, if any, disgorgement, prejudgment interest, civil penalties, and/or other remedial action is in the public interest. *Held*, it is in the public interest to bar the principal under the Investment Advisers Act and to prohibit him under the Investment Company Act from certain associations with the securities industry, with a right to reapply after five years for permission to associate; revoke the adviser's registration; and order disgorgement of \$2,751,345, plus prejudgment interest, jointly and severally.

APPEARANCES:

Robert Heim, Meyers & Heim LLP, for Edgar R. Page and PageOne Financial, Inc.

Alexander Janghorbani, *Gerald Gross*, and *Eric Schmidt*, for the Division of Enforcement.

Initial decision filed: June 25, 2015

Respondents' petition for review filed: July 15, 2015

Division of Enforcement's cross-petition for review filed: July 24, 2015

Last brief received: November 14, 2015

Respondents PageOne Financial, Inc. ("PageOne"), a registered investment adviser, and Edgar Page ("Page"), its owner and founder, appeal from an administrative law judge's ("ALJ's") Initial Decision ordering that they jointly and severally disgorge \$2,184,859.30, plus prejudgment interest; that Page be subject to a five-year bar pursuant to the Investment Advisers Act of 1940 ("Advisers Act"); and that PageOne's registration be revoked.¹ After we issued our Order Instituting Proceedings ("OIP"), Respondents made an offer to settle their liability, which we accepted. We issued an Order Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order, and Ordering Continuation of Proceedings ("Order"),² under which Respondents consented to (i) the findings of fact and conclusions of law in the Order, but solely for the purpose of this proceeding and any other proceedings brought by or on behalf of the Commission or to which the Commission is a party;³ (ii) cease and desist from committing or causing any violations and any future violations of Sections 206(1), 206(2), and 207 of the Advisers Act; (iii) a censure; and (iv) additional proceedings to determine what, if any, disgorgement, prejudgment interest, civil penalties, and/or other remedial action is in the public interest.⁴

In proceedings after our Order, the ALJ's Initial Decision imposed a five-year collateral bar against Page pursuant to the Advisers Act, revoked PageOne's registration as an investment adviser, and required disgorgement of \$2,184,850.30, with prejudgment interest, jointly and severally against both Page and PageOne. The ALJ declined to impose a civil penalty. Both Page and PageOne challenge the Initial Decision's sanctions, and also raise a constitutional challenge to the appointment of the ALJ.

In a cross-petition for review, Division of Enforcement ("Division") challenges the Initial Decision's imposition of a time-limited collateral bar on Page, as opposed to a permanent bar with a right to reapply after five years. The Division also challenges the Initial Decision for not

¹ *Edgar R. Page*, Initial Decision Release No. 822, 2015 WL 3898161 (June 25, 2015) ("Initial Decision").

² *Edgar R. Page*, Advisers Act Release No. 4044, 2015 WL 1022503, at *1, *7-8 (Mar. 10, 2015) ("Order").

³ Respondents neither admitted nor denied the findings in the Order, except they admitted the findings as to the Commission's jurisdiction over them and the subject matter of these proceedings. *Id.* at *1.

⁴ *See id.* at *7-8.

imposing a bar pursuant to Section 9(b) of the Investment Company Act. The Division does not challenge the revocation of PageOne's registration or the decision not to impose civil penalties.

We base our findings on an independent review of the record, except with respect to the findings determined conclusively in our Order and those additional findings not challenged on appeal.

With respect to Page, we find that the Initial Decision correctly imposed a bar pursuant to the Advisers Act; we conclude, however, that the bar should not be time-limited and expire automatically, but should instead be a permanent bar with a right to reapply to associate after five years. We also conclude that Page should also be subject to an Investment Company Act prohibition with a right to reapply to associate after five years.

With respect to PageOne, we agree with the Initial Decision's revocation of its registration pursuant to the Advisers Act.

We impose an order of disgorgement of \$2,751,345, an amount different than calculated by the ALJ, jointly and severally on both Page and PageOne.

Finally, we reject Respondents' argument that appointment of Commission ALJs is subject to the requirements of the Appointments Clause of the U.S. Constitution.

BACKGROUND

Our Order provided that for purposes of the "additional proceedings" on sanctions, the Order's findings "shall be accepted as and deemed true by the hearing officer."⁵ We presume familiarity with the Order's findings, which are binding on us in this sanctions part of the proceeding, and briefly summarize them and other stipulated facts here.

This matter involves a significant undisclosed conflict of interest between Respondents and a real estate development and management company (the "Fund Manager"). The Fund Manager established three "private investment funds, not registered with the Commission" (the "Private Funds" or the "Funds"). We found that "[s]ometime in late 2008, [Page] agreed that the Fund Manager would acquire PageOne. The parties agreed that [(a)] [t]he Fund Manager would pay the acquisition price of approximately \$3 million in installments over time; and [(b)] [t]he acquisition would not close—and the Fund Manager would not make the final payments of the purchase price—until [Page] raised about \$20 million for the Private Funds."⁶

⁵ See *id.* at *7. Quotations in the Background section are from the Order unless otherwise noted.

⁶ We also found that, "[s]ometime before April 2010, the Fund Manager and [Page] revised the acquisition terms to have the Fund Manager acquire 49% of PageOne for

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In early 2009, “Respondents began recommending that their clients invest in the Private Funds. From March 2009 through September 2011, Respondents’ clients invested approximately between \$13 and \$15 million in the Private Funds.” During “roughly” this time period, “the Fund Manager made installment payments on the acquisition of about \$2.7 million, an amount equal to about 18% of Respondents’ clients’ investments in the Private Funds.” These “down payments” were “memorialized as promissory notes from [Page] to the Fund Manager.”⁷ “The Fund Manager made . . . payments directly to [Page], or to PageOne and other entities and persons, at [Page’s] direction.” “The size and timing of the Fund Manager’s payments were determined, at least partially, by when PageOne clients made investments into the Funds.” The structure of these transactions demonstrated “both (a) [Page’s] explicit agreement to raise money for the Private Funds as part of the acquisition; and (b) the fact that the Fund Manager had limited liquidity,” which meant that it “needed to receive investments from PageOne clients to free up cash to make the acquisition payments.”

Respondents did not accurately disclose the acquisition agreement or the nature and amounts of the Fund Manager’s payments to Respondents. From March 2009 to July 2009, “Respondents remained entirely silent concerning their relationship to the Fund Manager,” even though “[d]uring this time (a) Respondents’ clients invested over \$4 million in the Private Funds; and (b) the Fund Manager paid Respondents approximately \$300,000, equivalent to approximately 7% of the total invested.”

Respondents later made a variety of false or misleading representations about the Fund Manager and the payments. Respondents first revised PageOne’s Form ADV Part II, effective July 31, 2009, by making several false or misleading disclosures about relationships to “unaffiliated private funds,” and about the receipt of “a referral fee of between 7.0% and 0.75% of the amount invested by the client.”⁸ The revision also falsely stated that “[a]ll private investment funds recommended by [PageOne] are managed by unaffiliated investment advisors.”

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approximately \$2.4 million, which was later increased by agreement to approximately \$3 million.”

⁷ Page understood that in the event the acquisition was consummated, the Fund Manager would cancel the notes. Page also understood that he was personally liable for their repayment until the acquisition closed and the Fund Manager canceled the notes.

⁸ The statement calling the Funds “unaffiliated” was misleading because it suggested “no relationship between Respondents and the Private Funds,” even though “the Fund Manager had agreed in principle to acquire at least 49% of PageOne and had made a \$300,000 down payment on that acquisition.” The reference to a “referral fee” was false and misleading because: (i) the “payments to Respondents were simply not fees for referring investments,” but “were down payments on the acquisition of at least 49% of PageOne”; and (ii) while the Form ADV was

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Respondents revised PageOne’s Form ADV effective September 14, 2010, by removing the references to a “referral fee.” “In its place, the revised Form ADV stated that PageOne would charge its clients a 1% annual management fee on money invested in the Private Funds.”⁹ The revised Form ADV falsely or misleadingly stated that the Fund Manager employed Page as a “consultant” and compensated him for his “consulting services,” even though, “[a]s [Page] knew, he was never a consultant to the Fund Manager, provided no consulting services, and, thus, was never compensated for any such services.” Respondents’ final amendment to the Form ADV, effective March 1, 2011, “delet[ed] all references to the Fund Manager and the Private Funds.”

“Over the course of 2010 and 2011, [Page] became increasingly concerned that the acquisition would not close. He understood that he had not been able to raise \$20 million, a condition precedent for the acquisition. And, he knew or recklessly disregarded that the Fund Manager had not been able to otherwise raise sufficient funds to pay the balance on the acquisition price.” We found that “Respondents’ clients made their last investments in the Private Funds in September 2011, shortly after the Fund Manager made its last payment to Page.” Ultimately, “[d]espite paying about \$2.7 million to Respondents, the Fund Manager never consummated its acquisition of 49% of PageOne. . . . In April 2013, the Fund Manager wrote to Page seeking repayment of the promissory notes of \$2,751,345 in principal and \$933,486.32 in interest on the grounds that the acquisition had not closed.”

After we instituted proceedings, Respondents consented to entry of the Order. We found that, as a result of the conduct described above, Page and PageOne willfully violated Advisers Act Sections 206(1) and 206(2), which prohibit fraudulent conduct by an investment adviser; and Advisers Act Section 207, which makes it “unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein.” And we found that Page willfully aided and abetted and caused PageOne’s violations of Advisers Act Sections 206(1), 206(2), and 207.

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effective the Fund Manager made down payments “in excess of 15% of . . . Respondents’ clients[’] invest[ments] into the Private Funds during that time.”

⁹ Page later testified that he did charge clients an annual management fee of between 0.75% and 1% on assets invested in the Funds “just to continually see the [clients] and answer the[ir] questions on [the Fund Manager].”

SANCTIONS

A. Bars For Page

1. *Investment Advisers Act Bar Is Appropriate*

To impose a bar on association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization as a remedy for Page’s violations of the Advisers Act, we must find that (i) Page willfully violated, or aided and abetted a violation of, the Advisers Act, and (ii) the sanction is in the public interest.¹⁰

The findings in our Order have already conclusively established several of these elements: Page willfully violated the Advisers Act; Page aided and abetted PageOne’s violations; and PageOne was an investment adviser (and by implication, Page was one too).¹¹ We also found that Page was PageOne’s “sole owner and principal,”¹² from which it follows here that Page met the broad statutory definition of a “person associated with an investment adviser” because he “directly or indirectly controll[ed]” PageOne as its “partner, officer, or director.”¹³

The only contested criterion is whether industry bars are in the public interest, and we find that they are. In determining whether a bar would serve the public interest, we consider the egregiousness of Page’s actions (including his aiding and abetting of PageOne’s fraudulent conduct), the isolated or recurrent nature of the infraction, the degree of scienter involved, his recognition of the wrongful nature of his conduct, the sincerity of his assurances against future

¹⁰ 15 U.S.C. § 80b-3(f).

¹¹ Our Order found that Page was a primary violator of Advisers Act Sections 206(1) and (2). Because those statutes apply only to “investment advisers,” our Order necessarily determined that Page met the statutory definition of an adviser as one compensated to “advise] others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.” 15 U.S.C. § 80b-2(a)(11); *see also, e.g., Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *9 n.37 (Jan. 16, 2008) (holding advisory firm’s president liable as an “investment adviser” because “his activities cause[d] him to meet the broad definition of investment adviser”) (quotation marks omitted).

¹² Order at *2.

¹³ 15 U.S.C. § 80b-2(a)(17); *see Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *2 n.8 (May 2, 2014) (finding that a “firm’s sole owner, president, and CEO, was . . . a ‘person associated with an investment adviser’”).

violations, and the likelihood that his occupation will present opportunities for future violations.¹⁴ Our inquiry is flexible, and no one factor is dispositive.¹⁵

a. Page’s fraud was egregious, and was not mitigated by his and PageOne’s purported engagement of compliance professionals or their unrelated disclosures.

“Investors in the securities industry place a high degree of trust and confidence in the investment advisory relationship.”¹⁶ As an adviser, Page was a fiduciary with respect to his and PageOne’s clients, and consequently owed “an affirmative duty of ‘utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading’ clients.”¹⁷ Advisers are required as a matter of law to disclose “economic conflicts of interests” to their clients.¹⁸ Page betrayed his clients’ trust and breached his fiduciary duties by failing to disclose—or to cause PageOne to disclose—the relationship with the Fund Manager, the payments either he or PageOne was receiving, or the terms of the acquisition. He did not tell his clients these things because, in his view, it was “too dangerous”; “it would cause thousands of clients to get extremely nervous if I was selling my firm.” This suggests to us that Page decided not to disclose the conflict—in breach of his fiduciary duties—because he would be unable to recruit sufficient investors for the Funds if he made the disclosure. We “consistently view[] misconduct involving a breach of fiduciary duty . . . as egregious.”¹⁹

Respondents’ principal argument against a bar is that Page’s misconduct was not egregious because he delegated his compliance responsibilities to certain professionals.²⁰

¹⁴ See *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981).

¹⁵ *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *11 (Feb. 13, 2009), *petition for review denied*, 592 F.3d 173 (D.C. Cir. 2010).

¹⁶ *Montford & Co.*, 2014 WL 1744130, at *18.

¹⁷ *Id.* at *13; see *SEC v. Washington Inv. Network*, 475 F.3d 392, 404 (D.C. Cir. 2007) (stating that investment advisers act “as fiduciaries” to their clients); see also *supra* note 11 and accompanying text.

¹⁸ *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 *James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *4 (July 23, 2010).

²⁰ Before the ALJ, both Page and PageOne waived the affirmative defense of reliance on the advice of counsel but sought “to show [Page’s] intent and state of mind and good faith” by
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Respondents introduced evidence before the ALJ that PageOne had engaged counsel, but the briefing on appeal does not point to that counsel—or to any other counsel that was engaged regarding the Form ADV disclosures.²¹ Page focuses instead upon the involvement, in preparing those disclosures, of third-party compliance firm National Regulatory Services (“NRS”). But NRS was not Respondents’ counsel. NRS warned PageOne in its contract, which bore Page’s signature, that it was not rendering legal advice and was not responsible for the Form ADVs’ accuracy. Similarly, the NRS representative handling PageOne’s Form ADV told Sean Burke, PageOne’s Assistant Compliance Manager, that he was not Page’s or PageOne’s attorney.

Assuming that engagement of compliance professionals—as compared to counsel—might under some circumstances mitigate the egregiousness of a wrongdoer’s misconduct, Page’s argument is not persuasive. Neither he nor PageOne made a full disclosure of the relevant facts to the compliance professionals they engaged.²² As the ALJ recognized, in at least one instance Respondents “did not provide NRS with adequate information.” In preparing the Form ADV effective September 2010, Burke told NRS to disclose “that Ed [P]age will be compensated as a consultant.” The NRS representative suggested language nearly identical to what was included in the Form ADV, but explained that it was “the best [he] could do without further information re: Ed’s arrangement with [the Fund Manager],” and asked for “any other information” that should be added. Burke never provided the information known to him and Page—that Page was not a consultant to the Fund Manager—that was required to make the disclosure neither misleading nor false. Page’s and PageOne’s decision to engage NRS does not mitigate the egregiousness of their misconduct, because they knew key facts that made the disclosures NRS drafted false, and they hid those key facts from NRS.

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introducing evidence that he had *engaged* counsel for PageOne. In a pre-hearing order, the ALJ admitted this evidence but warned that he was disinclined to find engagement of counsel to be mitigating without knowing what counsel told Page and PageOne—and they introduced no evidence on that point. In the Initial Decision, the ALJ nonetheless “credit[ed], as a mitigating fact in understanding Page’s mental state, the fact that PageOne engaged” compliance professionals such as “NRS, and that Page relied heavily upon NRS and Burke in attempting to fashion sufficient Form ADV disclosures.” But the ALJ said that this mitigated only Page’s and PageOne’s scienter: although the engagement of compliance professionals suggested that Page and PageOne did not “inten[d] to harm clients,” they were still extremely reckless.

²¹ Page and PageOne note that counsel for a counterparty to the transaction—an affiliate of the Fund Manager—provided advice about the transaction. But Page and PageOne never “engaged” their counterparty’s counsel at all—let alone to help with the Form ADV disclosures.

²² Cf. *Hal S. Herman*, Exchange Act Release No. 44953, 55 S.E.C. 395, 2001 WL 1245910, at *4 (Oct. 18, 2001) (finding no reliance on advice of counsel where respondent could not establish that he made full disclosure to counsel).

Page also points to Burke's involvement and contends that the ALJ erred in excluding Burke's investigative testimony. But the ALJ did not *exclude* Burke's testimony. Our Order said that the ALJ "may determine" sanctions based on "the record as it exists on January 31, 2015, including . . . investigative testimony."²³ While Page cited Burke's testimony in the proposed findings of fact, neither he nor PageOne offered it for admission. There was no error in the ALJ finding facts based only on the "transcript[s] of testimony . . . admitted into evidence" and other evidence "accepted into the record."²⁴ In any event, Burke was Page's subordinate and was not an attorney. Because Page ignored his own supervisory compliance responsibilities after delegating them, Burke's role in carrying out those delegated responsibilities could not mitigate the egregiousness of Page's misconduct.

Page argues that the misconduct was not egregious because his and PageOne's clients "will not suffer harm" from their investments. Even if those consequences do not materialize, the "absence from the record of evidence demonstrating any direct customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally."²⁵ The record, however, establishes a likelihood that clients will suffer harm. In letters to investors, the Fund Manager wrote that one of the Funds "lost" 91% of its assets under management in two failed real estate ventures, and that some of the remaining assets had been invested in a now-bankrupt venture. The Fund Manager also wrote that another of the Funds "invested over \$6.8 million" in the same now-bankrupt venture.²⁶ Although the consequences to investors are unclear, the record belies the suggestion that clients will suffer no harm.²⁷

²³ Order at *7.

²⁴ Rule of Practice 350(a), 17 C.F.R. § 201.350(a). The Division identified Burke's investigative testimony in a pre-hearing exhibit list but did not seek its admission. That Page and PageOne understood the significance and necessity of compliance with Rule of Practice 350(a) to create the record is evident from their own motion to admit exhibits as evidence.

²⁵ *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *17 (July 2, 2010) (citation omitted); *see Dawson*, 2010 WL 2886183, at *3 (barring respondent in part because his "dishonesty in defrauding his clients breached the trust that is the underpinning of the fiduciary relationship, regardless of whether there was any net loss of money to his clients").

²⁶ Before revealing that one of its investments was now bankrupt, the latter of these Funds had returned to investors the dividends described in the underlying private placement memorandum and returned ten percent of principal invested to investors.

²⁷ Page points out that the clients were accredited and sophisticated, and that they were apprised of risks inherent to investing in the funds. But that does not excuse Respondents' failure to disclose the relationship with the Fund Manager or the conflict of interest, and so neither makes their fraud less egregious.

Page also claims that the misconduct was not egregious because Respondents took “affirmative steps” to disclose a separate conflict of interest. Page alleges that Respondents disclosed that Page would receive “referral fees” through which he “stood to earn 49% of the funds” that PageOne clients invested. This argument is refuted by our Order’s finding that the disclosures about referral fees “materially misrepresented both the nature and amounts of the Fund Manager’s payments,” and that Page and PageOne “knowingly or recklessly failed to tell their clients” the other details about the Fund Manager’s acquisition of PageOne’s equity.²⁸ A fiduciary cannot avoid its obligation of full disclosure by disclosing a different conflict of interest.²⁹ And even if Respondents *had* disclosed a potential conflict of interest related to referral fees, they could not have made that disclosure to clients who invested when the Form ADV at issue was not in effect—either before July 2009 or after September 2010. The egregiousness of the misconduct here is not mitigated by other disclosures either Page or PageOne claim to have made.

b. The remaining Steadman factors support a bar.

Page acted with scienter in violating Advisers Act Section 206(1). The parties dispute whether Respondents’ misconduct was intentional or reckless. The ALJ found that Respondents acted recklessly, and that they would not have engaged NRS had they intended to defraud their clients. The argument is ultimately irrelevant.³⁰ We have found an industry bar to be in the public interest where, among other factors, the respondent’s “degree of scienter” is “at least reckless.”³¹ And here, our Order found that Page violated Section 206(1), for which scienter is a

²⁸ Order at *2. The factual premise that Respondents took steps to disclose the conflict is also faulty. The Form ADV dated July 2009 said that clients could be charged a 7% referral fee, and the private placement memoranda said that the investments could have been locked up for 7 years or more. But Page knew that he would never earn 49% of his clients’ investments in referral fees; he testified that he considered charging the referral fee one time only—not annually—and that in fact he never charged the fee. He also testified that he “never intended this disclosure to have anything to do with the acquisition.”

²⁹ *Cf. SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963) (holding that advisers must “at least . . . expose[] all conflicts of interest which might incline [an] investment adviser—consciously or unconsciously—to render advice which was not disinterested”).

³⁰ We found that Page “told [Burke] that he did not want to disclose the true nature of the agreement with the Fund Manager.” Combined with Burke’s failure to disclose all the facts to NRS, Page’s approach to disclosure indicates to us that Page was trying to conceal his and PageOne’s conduct from NRS. That suggests they acted intentionally.

³¹ *See Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *10 (Jan. 16, 2008) (finding an industry bar to be in the public interest where, among other factors, the respondent’s “degree of scienter” was “at least reckless”).

necessary element that can be demonstrated, at minimum, by extreme recklessness.³² He also aided and abetted PageOne's violations.³³

Page's violations were also recurrent. He asserts that the misconduct was "isolated" because he and PageOne "ceased recommending" the Funds "long before this proceeding was brought," the "only remaining financial relationship" with the Fund Manager is the outstanding promissory notes, and neither Page nor PageOne had previously "worked on a private offering." Between 2008 and 2011, however, both Page and PageOne repeatedly recommended that their clients invest in the Funds without disclosing that the Fund Manager had negotiated to purchase an equity stake in PageOne, or that Page had significant personal incentives to ensure that clients invested \$20 million in the Funds. Page approved four Form ADVs filed with the Commission that did not accurately disclose the conflict of interest. His fraud, and the fraud and violations that he that aided and abetted, were neither one-time nor isolated occurrences.

The ALJ found that Page had made "a sincere, recent, and clear recognition of responsibility." Page settled the issue of liability with the Commission, and later testified that he "accept[ed] full responsibility . . . for not having had a greater hand" in disclosing the conflicts. We accept the ALJ's finding concerning Page's sincerity in accepting responsibility, but aspects of the record raise troubling questions about the violations for which he believes he is responsible. He maintains, for example, that the "basis of Respondents' liability" was their "negligent or reckless reliance upon Mr. Burke and NRS." However, we found that Page "knowingly or recklessly failed to disclose accurately the acquisition agreement as well as the

³² See *SEC v. Steadman*, 967 F.2d 636, 641-42 & n.3 (D.C. Cir. 1992); see also *Aaron v. SEC*, 446 U.S. 680, 695, 697 (1980); *SEC v. Monterosso*, 756 F.3d 1326, 1335 (11th Cir. 2014). Scier is not a required element of Respondents' violations of Advisers Act Sections 206(2) and 207. See *Steadman*, 967 F.2d at 643 & n.5.

³³ See *vFinance Invs.*, 2010 WL 2674858, at *13 (observing that a respondent aids and abets a securities law violation where an underlying violation occurred, the respondent substantially aided the violation, and the respondent provided that assistance with the requisite scienter); see also *Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000) (setting forth elements). Scier can be met by establishing that the actor rendered such assistance knowingly or recklessly. See *Russell W. Stein*, Exchange Act Release No. 47504, 2003 WL 1125746, at *4 (Mar. 14, 2003). One who aids and abets primary violations is "necessarily . . . a 'cause' of" those violations. *Sharon M. Graham*, Exchange Act Release No. 40727, 1998 WL 823072, at *28 n.35 (Nov. 30, 1998), *aff'd*, 222 F.3d 994.

true nature and amounts of the Fund Manager's payments to Respondents,"³⁴ so Page's characterization of his violation is inaccurate.³⁵

Page's position on appeal cast doubts upon whether he "fully understand[s] the seriousness of his misconduct and how it violated the duties of a securities professional."³⁶ The suggestions that others were responsible for the fraud, and that clients were notified of the conflict of interest, come close to challenging the underlying basis for Page's violations. "Denying that there is a factual basis for . . . securities law violations in the [OIP] (something [Page] agreed not to do) does not amount to a meaningful recognition of [his] misconduct."³⁷

Page has offered some assurances against "repeat[ing] [his] mistakes in the future," which the ALJ found "sincere and credible." But "accepting the sincerity of [Page's] assurances against future misconduct does not mean that 'there can be no risk of future misconduct warranting a bar'"; we weigh such assurances "against the other *Steadman* factors in assessing the public interest."³⁸ Moreover, even assuming that the assurances were sincerely made at the time he made them, we have reason to be skeptical of his ability to carry them out at some point in the future.

For instance, Page claims he did not have "any regulatory issues" during his career.³⁹ In fact, Page was disciplined by a state securities regulator in 1989 for transacting business in general securities without a Series 7 license and for selling unregistered securities. Notwithstanding the sincerity of Page's present assurances that he will not commit such misconduct again, "the risk that he would not be able to fulfill his commitment is sufficiently

³⁴ Order at *4.

³⁵ Page also suggests that he and PageOne took "affirmative steps to put their clients on notice" of the conflict of interest by disclosing a nonexistent conflict related to referral fees. As we noted above, this contention has no merit.

³⁶ *Lorenzo*, 2015 WL 1927763, at *13.

³⁷ *Peter Siris*, Advisers Act Release No. 3736, 2013 WL 6528874, at *7 (Dec. 12, 2013), *petition for review denied*, 773 F.3d 89 (D.C. Cir. 2014).

³⁸ *Siris*, 2013 WL 6528874, at *6; *see also, e.g., Kornman*, 2009 WL 367635, at *11 (holding that respondent's assurances against future misconduct, even if accepted as "sincerely given," did not prevent a finding that a bar was in the public interest, when considered in conjunction with the other *Steadman* factors).

³⁹ We regularly impose bars even for individuals with clean disciplinary records. *See, e.g., Marshall E. Melton*, Advisers Act Release No. 2151, 56 S.E.C. 695, 2003 WL 21729839, at *7 (July 25, 2003) (imposing bar based on antifraud injunction despite clean disciplinary record).

great that permanent associational bars are required to protect the public interest.”⁴⁰ Page’s failure to learn from his experience the importance of complying with the securities laws—coupled with the misrepresentation of his disciplinary history—casts doubt on whether he can resist future opportunities for misconduct.

Page’s long career in the securities industry and continuing operation of PageOne suggest that Page would, if permitted, continue to associate with the securities industry. Page has suggested as much: in lieu of an industry bar, “Page has proposed . . . a bar from participating in private placements and acting as a compliance officer, in addition to a cease and desist order.”⁴¹ If Page continued to operate in the securities industry as he clearly intends, he would be presented with further opportunities to engage in misconduct.⁴²

For these reasons, we find that it is in the public interest to bar Page permanently from the industry associations identified in Advisers Act Section 203(f). We address in section A.3 below whether to grant Page the right to reapply for these associations after a certain time.

2. *Investment Company Act Bar Is Appropriate*

In its cross-petition for review, the Division argues that, having found that the relevant criteria were met, the Initial Decision should have barred Page from the investment company associations provided for under Investment Company Act Section 9(b). Page does not respond to this argument.

Investment Company Act Section 9(b) allows us to prohibit a 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,” if we find that the person has willfully violated or aided and abetted a violation of the Advisers Act, and that an such a prohibition is in the public interest.⁴³ It is undisputed that Page violated the Advisers Act, and aided and abetted violations of the Advisers Act.

⁴⁰ *Kornman*, 2009 WL 367635, at *11; *see also Jeffrey R. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *6 (Feb. 4, 2008) (“[W]e have accepted Gibson’s assertions, but nevertheless have determined that they do not outweigh the other *Steadman* factors that weigh in favor of barring Gibson from continuing in the industry.”).

⁴¹ Given the nature of the misconduct and the opportunity that continued participation in the industry would present for future violations, a sanction limited to voluntary bars against working on private placements and serving as a compliance officer would provide inadequate deterrence and would therefore insufficiently protect the public. *See Siris*, 2013 WL 6528874, at *6 n.43.

⁴² *Dawson*, 2010 WL 2886183, at *5.

⁴³ 15 U.S.C. § 80a-9(b).

We find that it is in the public interest to permanently prohibit Page from serving in the capacities identified in Investment Company Act Section 9(b), for the same reasons we explained above. Neither party addresses the appropriate length of time for a prohibition under Section 9(b), which may be “permanent[] or for such period of time” is “appropriate in the public interest.”⁴⁴ We impose a permanent prohibition under Section 9(b), subject to the same right to reapply that we discuss in section A.3 below.

3. *Permanent Bars With A Right To Reapply After Five Years*

Having found that a bar under the Advisers Act and a prohibition under the Investment Company Act are in the public interest, we must decide whether to grant Page the right to reapply.⁴⁵ The Division contends that “a right to reapply after five years is appropriate in this

⁴⁴ *Id.*

⁴⁵ The Initial Decision imposed a “five-year associational bar” prohibiting Page from the associations identified in Advisers Act Section 203(f). Initial Decision at 10. This departs from our usual practice. Typically, a so-called “time-limited” bar takes the form of a bar with a right to reapply for consent to associate after a certain period of time. *See, e.g., Eric J. Brown*, Securities Act Release No. 9299, 2012 WL 625874, at *13 (Feb. 27, 2012) (barring respondent from associating with a broker, dealer, or investment adviser, with a right to reapply in non-supervisory capacity after two years), *petition denied sub nom., Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013); *Robert Rodano*, Advisers Act Release No. 2750, 2008 WL 2574440, at *8 (June 30, 2008) (barring respondent from associating with an investment adviser, but providing for a right to reapply after five years).

There is a significant distinction between a true time-limited bar and a bar that includes a right to reapply after a certain period of time. A bar with a right to reapply provides additional investor protection because it requires barred persons to apply for consent to associate prior to re-entering the industry. *See, e.g.,* 15 U.S.C. § 80b-3(f). Our Rule of Practice 193, for example, specifies the procedures to be followed by barred individuals who reapply for association when our order provides for a right to reapply. *See* 17 C.F.R. § 201.193(a). The Rule specifies the standards against which we assess these applications, including the extent to which “proposed supervision, procedures, or terms and conditions” may “prevent a recurrence” of misconduct. *See id.* § 201.193 prelim. note & .193(d). Our “long-standing approach” in applying these standards “reflects the Commission’s statutory obligation to ensure that a request for relief or modification comports with the public interest and investor protection.” *Stephen S. Wien*, Exchange Act Release No. 49000, 2003 WL 23094748, at *4 (Dec. 29, 2003). For barred individuals who seek consent to associate with a member of a self-regulatory organization, we follow a similar process in reviewing such applications under Exchange Act Rule 19h-1. *See* 17 C.F.R. § 240.19h-1.

Page and PageOne respond by pointing out that Advisers Act Section 203(f) does not authorize our practice of providing for a right to reapply. That is mistaken: the statute provides

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case,” and Respondents counter that an Advisers Act bar, if imposed, should last for five years and expire automatically. We believe that Page should be granted the right to reapply, and that his Advisers Act bar should not expire automatically. Page’s misconduct was egregious, as we discussed above, and while it may be permissible for Page to associate with the industry at some point in the future, it is in the public interest that the Commission retain the control over the conditions of association contemplated by our Rule of Practice 193.

Neither party addresses the appropriate length of time for a prohibition under Investment Company Act Section 9(b). If after five years Page can satisfy his burden under Rule 193 of showing that it is in the public interest to permit him to associate under the Advisers Act, it is conceivable that he could do the same under the Investment Company Act, too.

Because we determine that the public interest requires it, we impose a permanent bar under the Advisers Act and permanent prohibition under the Investment Company Act, with a right to reapply after five years.

B. Revocation of PageOne’s Registration

In determining whether to revoke an investment adviser’s registration, we apply the same public interest factors discussed above in connection with Page’s industry bar.⁴⁶ In choosing a remedy we need not “follow any mechanistic formula,” and our choice is due deference as

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that it is “unlawful” for a suspended or barred individual to become “associated with an investment adviser without the consent of the Commission.” 15 U.S.C. § 80b-3(f). Because the statute is silent about when we may grant or deny consent, we have interpreted it to allow time limitations before which a barred individual may not reapply for association. *Applications by Barred Individuals for Consent to Associate with a Registered Broker, Dealer, Municipal Securities Dealer, Investment Adviser or Investment Company*, Exchange Act Release No. 20783, 1984 WL 547096 (Mar. 16, 1984). Our bar orders may therefore provide for a right to reapply after a certain time.

Because we decide that the appropriate sanction is a permanent bar with a right to reapply after five years, we need not address the Division’s argument in its cross-petition for review that the Initial Decision could not have imposed a five-year bar. *See Eric J. Brown*, Securities Act Release No. 3393, 2012 WL 1143573, at *2 (Apr. 5, 2012) (order denying reconsideration) (observing that “a law judge’s opinion ceases to have any force or effect once the respondent files a petition for review”).

⁴⁶ *See Sherwin Brown*, Advisers Act Release No. 3127, 2011 WL 2433279, at *6 (June 17, 2011).

“peculiarly a matter for administrative competence.”⁴⁷ We conclude that the public interest factors supporting an industry bar for Page also support revocation of PageOne’s registration.⁴⁸

PageOne argues revoking its registration would violate the D.C. Circuit’s rule that a sanction is arbitrary and capricious if out of line with administrative precedent.⁴⁹ PageOne does not contend that we have *never* revoked an adviser’s registration in a comparable case; instead, it cites to four cases in which we did not do so. Three involved settlements of liability and sanctions,⁵⁰ but settlements are not precedent.⁵¹ What is more, the “pragmatic considerations” that make it “inappropriate” to compare the sanctions in litigated and in settled cases—such as the cost savings that justify agreeing to “lesser sanctions” in settlements⁵²—apply here because, although PageOne settled on liability, it litigated the question of the appropriate sanctions. PageOne also concedes that the settlements it cites were for “non-scienter” violations; its violations of Advisers Act Section 206(1) involved scienter, which weighs in favor of an order revoking PageOne’s registration. The fourth case PageOne cites, *IMS/CPAs*,⁵³ was fully litigated. That case is not comparable, however, because here the fraud was more financially significant to the wrongdoers, netting \$2.7 million as opposed to \$75,000 in *IMS/CPAs*. Ultimately, the determination of the appropriate sanction depends on the particular facts and

⁴⁷ *Kornman*, 592 F.3d at 186.

⁴⁸ We find for reasons similar to those relevant to Page, as described above, that: (i) PageOne’s misconduct was egregious because it involved a breach of PageOne’s fiduciary duty to its clients; (ii) PageOne acted with extreme recklessness; (iii) its violations were recurrent; (iv) its conduct in these proceedings, through its owner and principal, calls into question the extent to which its settlement reflects recognition of the wrongful nature of its misconduct; (v) it is doubtful that PageOne, through Page, could satisfy its assurances—assumed to be sincere—against future misconduct.

⁴⁹ *See, e.g., Friedman v. Sebelius*, 686 F.3d 813, 826-28 (D.C. Cir. 2012).

⁵⁰ *See Shelton Fin. Grp., Inc.*, Exchange Act Release No. 74044, 2015 WL 153641 (Jan. 13, 2015); *Paradigm Capital Mgmt., Inc.*, Exchange Act Release No. 72393, 2014 WL 2704311 (June 16, 2014); *Focus Point Solutions, Inc.*, Advisers Act Release No. 3458, 2012 WL 3863221 (Sept. 6, 2012).

⁵¹ *See Rodney R. Schoemann*, Securities Act Release No. 2076, 2009 WL 3413043, at *13 n.55 (Oct. 23, 2009) (collecting authority).

⁵² *Michael C. Pattison*, Exchange Act Release No. 67900, 2012 WL 4320146, at *11-12 (Sept. 20, 2012).

⁵³ 2001 WL 1359521, at *1.

circumstances of each case and is not dependent on the sanctions imposed in other cases, even if those other cases present some similar facts.⁵⁴

PageOne also points to a statement by Commission staff observing that, as PageOne paraphrases it, “inadequate disclosures of conflicts of interest are a very common issue among many investment advisors.”⁵⁵ It is no defense that others in the industry are also acting improperly.⁵⁶ Revoking PageOne’s registration will offer investors protection from future harm by providing a deterrent against other advisers violating their disclosure obligations.

PageOne next contends that revoking its registration would be inconsistent with our nonbinding Statement Concerning Financial Penalties,⁵⁷ in which we said that imposing monetary civil penalties upon corporations may unfairly harm innocent shareholders who had no role in misconduct. Here PageOne’s sole owner was at the center of its violations. PageOne also focuses on the negative effect that revoking its registration would have on its innocent employees, its broker-dealer affiliates, and those clients who have remained with PageOne. These considerations cannot control, however, because the overriding concern in ordering sanctions is to protect the broader public. In an analogous context, Congress recognized that revoking a broker-dealer’s registration could have “adverse consequences” on the “firm’s customers, public shareholders, and innocent employees,” so it authorized us to impose civil money penalties as an intermediate sanction.⁵⁸ That a firm’s registration may nonetheless be revoked suggests that, under appropriate circumstances, the public interest factors can outweigh the effect revocation may have upon innocent third parties. We find that is the case here. PageOne presents a significant risk of future misconduct, and that risk extends to its clients and counterparties. It is in the public interest to revoke PageOne’s registration.

⁵⁴ See *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 187 (1973); *Michael Batterman, Advisers Act Release No. 2334*, 57 S.E.C. 1031, 2004 WL 2785527, at *4 (Dec. 3, 2004) (“The appropriate sanction depends on the facts and circumstances of each case.”).

⁵⁵ See Julie M. Riewe, Co-Chief, Asset Management Unit, Division of Enforcement, *Conflicts, Conflicts Everywhere – Remarks to the IA Watch 17th Annual IA Compliance Conference: The Full 360 View* (Feb. 26, 2015), <http://www.sec.gov/news/speech/conflicts-everywhere-full-360-view.html>. We also note that “[s]tatements by our staff[] . . . do not necessarily bind this Commission.” *George Salloum*, Exchange Act Release No. 35563, 1995 WL 215268, at *6 n.40 (Apr. 5, 1995).

⁵⁶ See, e.g., *KO Secs., Inc.*, Exchange Act Release No. 48550, 2003 WL 22233255, at *3 (Sept. 26, 2003).

⁵⁷ See *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, Press Release No. 2006-4 (Jan. 4, 2006), <http://www.sec.gov/news/press/2006-4.htm>.

⁵⁸ *Securities Law Enforcement Remedies Act of 1990*, S. Rep. No. 101-337, at 11 (1990).

C. Disgorgement Of Respondents' Ill-Gotten Gains Is Appropriate

Advisers Act Section 203(k) authorizes disgorgement, including reasonable interest, in a cease-and-desist proceeding.⁵⁹ “Disgorgement is an equitable remedy designed to deprive wrongdoers of their unjust enrichment and to deter others from similar misconduct.”⁶⁰ “[T]he amount of disgorgement should include all gains flowing from the illegal activities, but calculating disgorgement ‘requires only a reasonable approximation of [ill-gotten] profits causally connected to the violation.’”⁶¹

We find that disgorgement of the full amount paid by the Fund Manager to Respondents, along with prejudgment interest, is in the public interest.

1. *Scienter Not Required For Disgorgement*

Respondents contend that disgorgement is improper absent “a high degree of scienter.” Respondents offer no authority for their argument, beyond simply citing cases involving a high degree of scienter in which we ordered disgorgement.⁶² Respondents are incorrect: disgorgement is routinely ordered even in connection with non-scienter violations.⁶³

2. *Respondents' Unjust Enrichment*

When “recommendations [are] made despite [a] conflict of interest” that was not “disclosed to . . . clients,” “[a]ll enrichment received as a result of this undisclosed conflict [is]

⁵⁹ 15 U.S.C. § 80b-3(k)(5).

⁶⁰ *Guy P. Riordan*, Securities Act Release No. 9085, 2009 WL 4731397, at *20 (Dec. 11, 2009), *petition for review denied*, 627 F.3d 1230 (D.C. Cir. 2010); *see Zacharias v. SEC*, 569 F.3d 458, 471-72 (D.C. Cir. 2009).

⁶¹ *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *11 (Dec. 5, 2014) (quoting *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010)).

⁶² In one of the cases that Respondents cite, the Court ordered disgorgement from relief defendants who had not been charged with any violation of the law, much less one that involved a high degree of scienter. *See SEC v Martino*, 255 F. Supp. 2d 268, 288 (S.D.N.Y. 2003) (recognizing that the “equitable powers [of disgorgement] extend[] to a person who, although not accused of wrongdoing, received ill-gotten gains and ‘does not have a legitimate claim to those funds’”).

⁶³ *See, e.g., SEC v. Merchant Capital LLC*, 397 F. App’x 593, 595 (11th Cir. 2010) (awarding disgorgement for negligent conduct, and noting that “[d]isgorgement is not dependent on scienter, but is tied instead to the idea of unjust enrichment: the broad idea is that persons not profit from breaking the securities laws”).

unjust.”⁶⁴ Requiring Respondents to disgorge the payments they received would further the equitable and deterrent purposes of disgorgement by making those violations unprofitable.⁶⁵

As our Order found, Respondents received \$2,751,345 from the Fund Manager. The Division sought disgorgement of that full amount, along with prejudgment interest. The Initial Decision reduced the principal disgorgement figure to \$2,184,859.30, primarily because PageOne’s Form ADV stated for a time that it would receive a referral fee of up to 7% for investments in the Funds by PageOne clients.⁶⁶ The Initial Decision reasoned that this statement, although untrue, for a period of time provided notice to investors that Respondents could receive 7% of the amount invested by PageOne clients. The reduction of disgorgement also accounted for PageOne’s disclosure for a time in its Form ADV that PageOne would receive a 1% management fee, which the Initial Decision reasoned provided notice to investors that Respondents could receive 1% of the amount invested by PageOne clients.⁶⁷

In reducing the amount of disgorgement, the Initial Decision reasoned that “disgorgement is an equitable form of relief.” But the public interest in full disclosure of all material conflicts of interest would be served poorly by providing an offset for disclosing irrelevant or nonexistent conflicts of interest. Even though Respondents disclosed a management fee and a nonexistent 7% referral fee, neither of these reflected the undisclosed down payments that Respondents received as part of the undisclosed deal with the Fund Manager. It would be inequitable to allow industry professionals to keep illicit profits from significant conflicts if they concoct and disclose less significant conflicts. We conclude that neither offset is appropriate here, and that the Divisions’ proposed disgorgement figure, \$2,751,345, is the more reasonable approximation of Respondents’ ill-gotten gains.⁶⁸

⁶⁴ *IMS/CPAs*, 2001 WL 1359521, at *12.

⁶⁵ *See, e.g., Schoemann*, 2009 WL 3413043, at *13 (“The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.”) (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 485 F.2d 1082, 1104 (2d Cir. 1972)).

⁶⁶ While the “referral fee” disclosure was effective between July 31, 2009, and September 13, 2010, PageOne clients made \$7,999,400 in investments. The Initial Decision discounted the proposed disgorgement by \$559,958, or 7% of that amount.

⁶⁷ While the “management fee” disclosure was effective between September 14, 2010, and March 1, 2011, PageOne clients made \$652,770 in investments. The Initial Decision discounted the proposed disgorgement by \$6,527.70, or 1% of that amount.

⁶⁸ Page and PageOne ask for two other offsets, but we reject both. First, they request that the amount of their disgorgement be offset to reflect business expenses. We apply the rule that
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Respondents argue that they have not been unjustly enriched because Page remains liable to repay the promissory notes. “Once the Division has shown that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent, who is ‘then obliged clearly to demonstrate that the disgorgement figure was not a reasonable approximation.’”⁶⁹ Respondents filed on March 14, 2016, a “Notice of Supplemental Developments” consisting of state court pleadings, including a summons and complaint, filed by the Fund Manager in actions against Page in December 2015 and January 2016.⁷⁰ These documents do not satisfy Page’s burden of demonstrating that the disgorgement figure was not a reasonable approximation of the amount of unjust enrichment.

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“how a defendant chooses to spend his ill-gotten gains, whether it be for business expenses, personal use, or otherwise is immaterial to disgorgement.” *SEC v. Aerokinetic Energy Corp.*, 444 F. App’x 382, 385 (11th Cir. 2011) (alteration omitted); see *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 WL 183600, at *10 n.35 (Apr. 5, 1999) (collecting authority). Page and PageOne have not even identified the expenses that they say should be offset; they have therefore not met their burden of showing that the calculation of disgorgement was an “[un]reasonable approximation of [their] ill-gotten gains.” *Ralph Calabro*, Securities Act Release No. 9798, 2015 WL 3439152, at *45 n.233 (May 29, 2015) (noting that even if we assumed an offset for expenses were available, Respondents had not established that they were entitled to one).

Second, Page and PageOne ask us to reduce the amount of their disgorgement to allow them to keep the management fees they say they would have earned had their clients *not* invested in the Funds. Page testified that those clients who invested in the Funds were still charged a management fee of between 0.75% and 1% on those investments. See *supra* note 9. There is no authority that would allow them to retain the opportunity cost of their fraud. Allowing this offset would be inconsistent with a core purpose of disgorgement—making violations of the securities laws unprofitable.

⁶⁹ *Riordan*, 2009 WL 4731397, at *20 (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)).

⁷⁰ Respondents have not asked for leave to adduce this as additional evidence under our Rule of Practice 452. 17 C.F.R. § 201.452. But we take official notice under our Rule of Practice 323, 17 C.F.R. § 201.323, of the existence of the state court cases, and of the pleadings attached to Respondents’ filing.

No judgment has been entered in the state court litigation. None of the documents the parties have submitted establishes that Page is in fact liable on the notes.⁷¹ These documents simply reiterate that the litigation is ongoing.

Respondents have neither admitted liability to, nor contended that they have already paid, the Fund Manager.⁷² In fact, Page is contesting the litigation, arguing he is *not* liable on the notes because the Fund Manager's principal had "reassure[ed] [him] that at no time will the [Fund Manager] ever seek to enforce the Notes," and the parties had purportedly memorialized that intent.⁷³ Respondents also argued in their *Wells* submission, introduced into the record here, that nearly \$650,000 had been designated as non-refundable in the event the deal did not close, and that Page is "entitled to keep" the rest as compensatory damages because he "continued to suffer" after negotiations collapsed. We agree with the Division's observation that Respondents are clearly "trying to have their cake and eat it too—refusing to repay the demand, while using the demand as a shield against disgorgement."⁷⁴ Were we to suspend any disgorgement in light

⁷¹ See *Samuel B. Franklin*, Exchange Act Release No. 5603, 38 S.E.C. 113, 1957 WL 52433, at *3 (Nov. 18, 1957) (observing in an appeal from a National Association of Securities Dealers disciplinary order that "it is not our function . . . to decide private contract rights"); see also *Bear Wagner Specialists LLC*, Exchange Act Release No. 53823, 2006 WL 1358131, at *4 (May 17, 2006) (order approving distribution plan) (finding that the question of who "has a claim, contractual or otherwise, to [certain] assets" is a "dispute[] among private parties that [is] best resolved by the parties themselves or through the judicial system").

⁷² Cf. *Montford & Co.*, 2014 WL 1744130, at *23 ("Respondents additionally urge an offset of \$40,000 they assert they paid 'in restitution' to St. Joseph's Hospital as part of a civil suit against Respondents. Respondents failed to provide any documentation to support this claim. The record, consisting of testimony from Montford and a representative of the client, indicates only that Respondents paid \$40,000 to settle the suit. The record contains no information about the basis for this suit or the settlement amount. As a result, we cannot determine the merits of Respondents' offset claim.")

⁷³ The Division responded to Respondents' Notice by filing a document, styled as an "Opposition," attaching an affidavit that Page filed in one of the state court cases. Although the Division did not ask for leave to adduce this additional evidence, as with Respondents' filing we take official notice under Rule of Practice 323 of the affidavit attached to the Division's filing.

⁷⁴ Relying on *FTC v. Loanpointe, LLC*, 525 F. App'x 696 (10th Cir. 2013), Respondents argue that the loans received cannot be "gains." The court in *Loanpointe* affirmed an order requiring disgorgement of interest that a payday lender had unlawfully collected from its clients. *Id.* at 702 n.5. Respondents argue that their gains are like the principal that did not have to be disgorged in *Loanpointe*. But those principal repayments were not ill-gotten gains, while the down payments at issue here were.

of the litigation, as Page suggests, and if he were to prevail in the litigation, he would be able to keep the ill-gotten gains from his misconduct.

Ultimately, this inchoate litigation, whatever its outcome, does not affect our authority to order disgorgement. Any alleged promissory note obligation was incurred in connection with Respondents' fraudulent conduct: "[t]he [undisclosed] acquisition payments were memorialized as promissory notes."⁷⁵ Any money that a court orders Respondents to pay as a result of the promissory notes, which they failed to disclose in violation of the securities laws, would not reduce the disgorgement in this case.⁷⁶

As a result of their misconduct, Respondents had and continue to have the full benefit of their ill-gotten gains. Because Respondents have been unjustly enriched and the required causal nexus exists, they must disgorge the down payments—including the amounts they contend are non-refundable, and any amounts for which repayment to the Fund Manager is disputed—plus prejudgment interest.⁷⁷

⁷⁵ Page would not have received these acquisition payments at all—whether or not structured as loans—absent his fraudulent conduct. Our Order found that Page was aware that the Fund Manager had “limited liquidity” and “needed to receive investments from PageOne clients to free up cash to make the acquisition payments.” Page knew the Fund Manager was selling personal and investment assets to keep his business solvent. Page also knew that PageOne clients' investments were returned to him as acquisition payments: for example, Page received an email in which the Fund Manager's Chief Financial Officer explained that “\$212,000, \$50,000 and \$40,000” had recently been collected from investors, and that Page could be “loan[ed]” the balance after subtracting commissions. Respondents stipulated that those amounts matched the amounts of three PageOne clients' investments in the Funds over the two weeks preceding the email. Our Order also found that Page considered it “too dangerous” to disclose the conflict to his clients. Taken together, the record reflects that Page convinced PageOne clients to invest in the Funds without disclosing the conflict of interest to them, and that the Fund Manager likely would not have made all the acquisition payments had Page and PageOne disclosed the conflicts. The payments Page received from the Fund Manager are thus causally connected to his violations.

⁷⁶ See *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) (denying request to reduce disgorgement, noting that “even if these had been legitimate corporate payments, the practice was still in violation of the Federal securities laws since none of these supplements were disclosed in the company's financial records or filings with the SEC”).

⁷⁷ Respondents contend that they should not have to disgorge the loans because Page could have “[sold] his business for a fair price.” Regardless of whether the sale price had been fairly valued, the amount by which that price exceeded Page's cost basis in PageOne equity still would have been wrongfully obtained profits that we would have required Respondents to disgorge.

3. *Joint And Several Liability Is Appropriate*

PageOne argues it should not be jointly and severally liable for disgorgement. But “joint-and-several liability is appropriate in securities cases when two or more individuals or entities collaborate *or* have a close relationship in engaging in the illegal conduct.”⁷⁸ Each sufficient condition exists here.

Page aided and abetted PageOne’s violations and their misconduct was inextricably entwined.⁷⁹ Once close collaboration is established, the burden shifts to the PageOne “to establish that apportionment” rather than joint-and-several liability “is warranted.”⁸⁰ PageOne has made no effort to carry that burden. The prima facie case of close collaboration justifies joint and several liability.

Page and PageOne also had a close relationship sufficient to justify joint and several liability. Page was PageOne’s CEO, Chief Compliance Officer, and sole owner.⁸¹ Page was also the means through which PageOne committed the fraud. He recommended to PageOne clients that they invest in the Funds; he instructed Burke not to disclose the deal with the Fund Manager; and he approved the materially false and misleading Forms ADV. He also directed that the Fund Manager make payments directly to PageOne. PageOne’s contention that it “never received any” payments from the Fund Manager is contradicted by Respondents’ binding pre-hearing

⁷⁸ See *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. Cir. 2011) (concluding that this legal standard is disjunctive); cf. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475-76 (2d Cir. 1996) (finding joint and several liability for “controlling person” who was “intimately involved” in the frauds at issue).

⁷⁹ See *Montford & Co.*, 2014 WL 1744130, at *23 (imposing joint and several liability on registered investment adviser and its owner, whose “misconduct . . . was inextricably entwined” because the owner had aided and abetted the adviser’s violations).

⁸⁰ *Whittemore*, 659 F.3d at 11-12; see *id.* (noting that this burden-shifting “is justified because . . . [v]ery often defendants move funds through various accounts to avoid detection, use several nominees to hold securities or improperly [derived] profits, or intentionally fail to keep accurate records and refuse to cooperate with investigators in identifying illegal profits”) (quoting *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997)).

⁸¹ See *First Jersey Sec.*, 101 F.3d at 1476 (imposing joint and several liability for a firm and the individual that “owned 100% of the Firm,” because “to the extent that the Firm’s net worth was increased by its unlawful activities, so was [the individual]’s personal wealth”).

stipulations of fact, which demonstrate that the Fund Manager and one of the Funds paid \$939,010 directly to PageOne.⁸²

PageOne contends that it and Page are not alter egos, citing a case applying New York’s standard for piercing the corporate veil.⁸³ We have specifically held that “[e]ven assuming” that the parties are not “alter ego[s],” their collaboration and close collaboration may each be sufficient to make them jointly and severally liable.⁸⁴

PageOne argues that making PageOne jointly and severally liable would be “unduly punitive” because PageOne purportedly received no money from the Fund Manager. Although PageOne need not have received any of the proceeds in order to be jointly and severally liable,⁸⁵ our Order found that “the Fund Manager made . . . payments . . . to PageOne . . . at [Page]’s direction.” PageOne also stipulated before the hearing that it received \$939,010 directly from the Fund Manager.

4. Respondents’ Alleged Inability To Pay

Respondents contend that they should not be ordered to pay disgorgement because they lack the ability to pay. Under Rule of Practice 630(a), we may, in our discretion, consider evidence of ability to pay in determining whether a respondent should be required to pay disgorgement, interest, or civil penalties.⁸⁶ “Ability to pay, however, is only one factor that informs our determination and is not dispositive.”⁸⁷ “The burden of proving financial inability to pay disgorgement falls upon the respondent[s].”⁸⁸

⁸² See *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 677-78 (2010) (holding that “factual stipulations are formal concessions . . . that have the effect of withdrawing a fact from issue”) (quotation marks omitted).

⁸³ *Wm. Passalacqua Builders v. Resnick Developers S.*, 933 F.2d 131 (2d Cir. 1991).

⁸⁴ *Daniel R. Lehl*, Securities Act Release No. 8102, 2002 WL 1315552, at *14 (May 17, 2002).

⁸⁵ See *Gordon Brent Pierce*, Securities Act Release No. 9555, 2014 WL 896757, at *25 (Mar. 7, 2014) (observing that “courts routinely order disgorgement of the entire amount of ill-gotten gains jointly and severally from individuals who received only part of the proceeds of the wrongdoing, or did not receive any of the proceeds at all”).

⁸⁶ 17 C.F.R. § 201.630(a).

⁸⁷ *Gregory O. Trautman*, Securities Act Release No. 9088A, 2009 WL 6761741, at *24 (Dec. 15, 2009) (citations omitted); see also, e.g., *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008) (per curiam) (stating that “[a]t most” a defendant’s ability to pay is one factor to be
(continued . . .)

The ALJ permitted Respondents to submit financial statements, and certain portions of briefing referring to those financial statements, under a protective order.⁸⁹ The ALJ's Initial Decision, however, referred to certain information derived from those financial statements. Here we address that information, which serves as the evidentiary basis for Respondents' inability-to-pay defense, without exceeding the scope of information that the ALJ already made public in his Initial Decision.⁹⁰

We have reviewed Respondents' financial statements. There are omissions and internal inconsistencies in the statements. Respondents did not submit their tax returns for any year before 2014 back to the date of the first violation.⁹¹ In addition, Page's Statement of Financial Condition reports a value for Page's real estate 47% lower than the value Page reported on a personal financial statement he submitted to a bank only seven months earlier.

There are also indications that Page may have trouble paying disgorgement because his stated liabilities exceed his assets. But those indications appear due, in part, to Page's spending on luxury items and other expenses.⁹² Although Page's largest liability is a debt to PageOne, the

(continued . . .)

considered in imposing a civil money penalty or disgorgement for violations of the federal securities laws).

⁸⁸ *Terry T. Steen*, Exchange Act Release No. 40055, 1998 WL 278994, at *6 (June 2, 1998).

⁸⁹ *See* 17 C.F.R. §§ 201.322(a), .630(c).

⁹⁰ The record in an administrative proceeding is presumed to be public, and as we have explained, "the public interest in access to governmental decisions is especially strong." *John Thomas Capital Mgmt. LLC*, Advisers Act Release No. 3951, 2014 WL 5282156, at *3 n.14 (Oct. 16, 2014) (order denying interlocutory review); *see also, e.g., Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.").

⁹¹ *See Trautman*, 2009 WL 6761741, at *24 n.117; *see also* 17 C.F.R. § 201.630(b) (requiring submission of financial records "from the date of the first violation alleged against that respondent").

⁹² In 2010 and 2011, Page bought a Porsche, loaned money to a daughter to fix up a house, gifted large amounts of money, and made another large loan to a daughter "to purchase [a] plane." Page only responds by quibbling about whether he bought "any extravagant items outright," and saying that this focus on his profligate spending "fails to consider" that he was also "paying off substantial amounts of old taxes" and other obligations that he owed.

latter is jointly liable for the disgorgement. Page says that he has taken “substantial steps . . . to reduce his living expenses,” yet there is little evidence of that in the record.⁹³

“Even when a respondent demonstrates an inability to pay, we have discretion not to waive . . . disgorgement, . . . particularly when the misconduct is sufficiently egregious.”⁹⁴ Page’s and PageOne’s misconduct, as discussed above, is egregious and caused significant investor harm. That egregiousness is compounded by Page’s and PageOne’s failure to take complete responsibility for the misconduct, and by the skepticism we expressed above about Respondents’ ability to carry out their assurances that the misconduct would not be repeated.⁹⁵ To the extent that it is appropriate to credit Page’s and PageOne’s alleged inability to pay, the law judge declined to impose civil penalties, as we discuss below. However, with respect to the disgorgement, the scope and nature of the misconduct leads us to conclude in our discretion that waiver is not appropriate.

D. Civil Penalties Not Requested

The ALJ declined to impose a civil penalty, in light of Page’s and PageOne’s alleged inability to pay. The Division’s cross-petition did not seek review of that aspect of the decision, and made no argument for why we should impose a civil penalty. For these reasons, and in our discretion, we therefore do not impose a civil penalty.⁹⁶

APPOINTMENT OF COMMISSION ALJs NOT SUBJECT TO APPOINTMENTS CLAUSE

Respondents argue that the Initial Decision should be vacated and the administrative proceeding should be dismissed because ALJ Jason Patil—who presided over the remedies proceeding and issued the Initial Decision—was not appointed in a manner consistent with the Appointments Clause of the Constitution.⁹⁷ We find that the appointment of Commission ALJs is not subject to the requirements of the Appointments Clause.

⁹³ Page has reported monthly expenses that significantly exceed his already quite high monthly income. He offers no details about his high monthly “household expenses”—a category that does not include his other high expenses for mortgage, food, utilities, automobiles and household maintenance, all of which are listed separately.

⁹⁴ *Trautman*, 2009 WL 6761741, at *24 (quoting *Philip A. Lehman*, Exchange Act Release No. 54660, 2006 WL 3054584, at *4 (Oct. 27, 2006)).

⁹⁵ *See supra* text following note 38.

⁹⁶ *See* 17 C.F.R. § 201.630(a).

⁹⁷ We note that Respondents consented to the Commission’s Order making findings as to liability, which preceded the ALJ’s remedies proceeding, and Respondents “agree[d] that they may not challenge the validity of th[at] Order.”

Under the Appointments Clause, certain high-level government officials must be appointed in particular ways: “Principal officers” must be appointed by the President (and confirmed by the Senate), while “inferior officers” must be appointed either by the President, the heads of departments, or the courts of law.⁹⁸ The great majority of government personnel are neither principal nor inferior officers, but rather “mere employees” whose appointments are not restricted by the Appointments Clause.⁹⁹ It is undisputed that ALJ Patil was not appointed by the President, the head of a department, or a court of law.¹⁰⁰ Respondents therefore contend that his appointment violates the Appointments Clause because, in their view, ALJ Patil should be deemed an inferior officer. The Division counters that he is an employee and thus there was no violation of the Appointments Clause.

As we have previously explained,¹⁰¹ the D.C. Circuit’s decision in *Landry v. FDIC* guides our resolution of this question.¹⁰² *Landry* held that, for purposes of the Appointments Clause, ALJs at the Federal Deposit Insurance Corporation (“FDIC”), who oversee administrative proceedings to remove bank executives, are employees rather than inferior officers. *Landry* explained that the touchstone for determining whether adjudicators are inferior officers is the extent to which they have the power to issue “final decisions.”¹⁰³ Although ALJs at the FDIC take testimony, conduct trial-like hearings, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders, they “can never render the decision of the FDIC.”¹⁰⁴ Instead, they issue only “recommended decisions” which the FDIC Board of

⁹⁸ The Clause provides that the President “by and with the advice and consent of the Senate, shall appoint . . . officers of the United States . . . but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.” U.S. Const. art. II, §2, cl. 2.

⁹⁹ *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991)); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

¹⁰⁰ The Commission constitutes the “head of a department” when its commissioners act collectively. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010).

¹⁰¹ *David F. Bandimere*, Exchange Act Release No. 76308, 2015 WL 6575665, at *19 (Oct. 29, 2015); *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *23-26 (Sept. 17, 2015), *petition for review filed*, No. 15-1416 (D.C. Cir. Nov. 13, 2015); *Raymond J. Lucia Co.*, Exchange Act Release No. 75837, 2015 WL 5172953, at *21-23 (Sept. 3, 2015), *petition for review filed*, No. 15-1345 (D.C. Cir. Oct. 5, 2015).

¹⁰² 204 F.3d 1125 (D.C. Cir. 2000).

¹⁰³ *Id.* at 1133-34.

¹⁰⁴ *Id.* at 1133.

Directors reviews *de novo*, and “[f]inal decisions are issued only by the FDIC Board.”¹⁰⁵ The FDIC ALJs thus function as aides who assist the Board in its duties, not officers who exercise significant authority independent of the Board’s supervision. Because ALJs at the FDIC “have no such powers” of “final decision,” the D.C. Circuit “conclude[d] that they are not inferior officers.”¹⁰⁶

The mix of duties and powers of the Commission’s ALJs are very similar to those of the ALJs at the FDIC. Like the FDIC’s ALJs, the Commission’s ALJs conduct hearings, take testimony, rule on admissibility of evidence, and issue subpoenas. And like the FDIC’s ALJs, the Commission’s ALJs do not issue the final decisions that result from such proceedings. Just as the FDIC’s ALJs issue only “recommended decisions” that are not final, the Commission’s ALJs issue “initial decisions” that are likewise not final.¹⁰⁷ Respondents may petition the Commission for review of an ALJ’s initial decision,¹⁰⁸ and it is our “longstanding practice [to] grant[] virtually all petitions for review.”¹⁰⁹ Indeed, we are unaware of any case in which the Commission has not granted a petition for review. Absent a petition, we may also choose to review a decision on our own initiative.¹¹⁰ In either case, our rules expressly provide that “the initial decision [of an ALJ] shall not become final.”¹¹¹ Even where an aggrieved person fails to file a timely petition for review of an initial decision and we do not order review on our own initiative, our rules provide that “the Commission will issue an order that the decision has

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1134.

¹⁰⁷ *See* 17 C.F.R. § 201.360(a)(1) & (d).

¹⁰⁸ 17 C.F.R. § 201.411(b).

¹⁰⁹ Exchange Act Release No. 35833, 1995 WL 368865, at *80-81 (June 9, 1995); *see also* Exchange Act Release No. 33163, 1993 WL 468594, at *55-59 (Nov. 5, 1993) (explaining that we are “unaware of any case in which the Commission has declined to grant a petition for review”). We reiterated this policy in the context of amendments to our Rules of Practice in 2004 that eliminated the filing of oppositions to petitions for review. We deemed such oppositions pointless, “given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision.” Exchange Act Release No. 48832, 2003 WL 22827684, at *13 (Nov. 23, 2003).

¹¹⁰ 17 C.F.R. § 201.411(c); *see also* 15 U.S.C. § 78d-1(b) (providing that “the Commission shall retain a discretionary right to review the action of any . . . administrative law judge . . . upon its own initiative or upon petition”).

¹¹¹ 17 C.F.R. § 201.360(d)(1).

become final,” and it becomes final only “upon issuance of the order” by the Commission.¹¹² Moreover, as does the FDIC, the Commission reviews our ALJs’ decisions *de novo*.¹¹³ Upon review, we “may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part,” any initial decision.¹¹⁴ And “any procedural errors” made by an ALJ in conducting the hearing “are cured” by our “thorough, *de novo* review of the record.”¹¹⁵ We may expand the record by “hear[ing] additional evidence” ourselves or remanding for further proceedings before the ALJ, and may “make any findings or conclusions that in [our] judgment are proper and on the basis of the record.”¹¹⁶

¹¹² *Id.* § 201.360(d)(2) (emphasis added). An initial decision does *not* become final simply “on the lapse of time” for seeking review. Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004).

¹¹³ We do not view the fact that we accord Commission ALJs deference in the context of demeanor-based credibility determinations to afford our ALJs with the type of authority that would qualify them as inferior officers. *First*, as we have repeatedly made clear, we do not accept such findings “blindly,” and we will “disregard explicit determinations of credibility” when our *de novo* review of the record as a whole convinces us that a witness’s testimony is credible (or not) or that the weight of the evidence warrants a different finding as to the ultimate facts at issue. *Id.* at *10; *accord Francis V. Lorenzo*, Exchange Act Release No. 74836, 2015 WL 1927763, at *10 n.32 (Apr. 29, 2015); *Irfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL 3199181, at *8 n.46 (Nov. 3, 2006); *see also Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) (“The law is settled that an agency is not required to adopt the credibility determinations of an administrative law judge.”). *Second*, our practice in this regard is no different from the FDIC’s and so does not warrant a departure from *Landry*. *Compare [Redacted] Insured State Nonmember Bank*, FDIC-82-73a, 1984 WL 273918, at *5 (June 18, 1984) (stating, “as a general rule,” that “the assessment of the credibility of witnesses” by the ALJ is given “deference” by the FDIC) *with Ramon M. Candelaria*, FDIC-95-62e, 1997 WL 211341, at *3-4 (Mar. 11, 1997) (noting that the FDIC ALJ found respondent to be “entirely credible” but rejecting respondent’s testimony “in light of the entire record”).

¹¹⁴ 17 C.F.R. § 201.411(a); *see also* 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .”).

¹¹⁵ *Heath v. SEC*, 586 F.3d 122, 142 (2d Cir. 2009); *see also, e.g., Anthony Fields*, Exchange Act Release No. 74344, 2015 WL 728005, at *20 (Feb. 20, 2015) (“[O]ur *de novo* review cures any evidentiary error that the law judge may have made.”).

¹¹⁶ 17 C.F.R. § 201.411(a); *id.* § 201.452.

Respondents rely on two decisions in which district courts have found that the Commission's ALJs are inferior officers.¹¹⁷ Both of those decisions reject the D.C. Circuit's reasoning in *Landry* and rely instead on *Freytag v. Commissioner*,¹¹⁸ in which the Supreme Court held that a "special trial judge" of the Tax Court was an inferior officer. But we agree with *Landry* that ALJs are different from the special trial judge in *Freytag*.¹¹⁹ In our view, the greater role and powers of the special trial judges relative to Commission ALJs makes *Freytag*'s holding inapposite here. *First*, unlike the ALJs whose decisions are reviewed *de novo*, the special trial judges made factual findings to which the Tax Court was required to defer, unless clearly erroneous.¹²⁰ *Second*, the special trial judges were authorized by statute to "render the [final] decisions of the Tax Court" in significant, fully-litigated proceedings involving declaratory judgments and amounts in controversy below \$10,000.¹²¹ As discussed above, our ALJs issue initial decisions that are not final unless the Commission takes some further action. *Third*, the Tax Court (and by extension the court's special tax judges) exercised "a portion of the judicial power of the United States," including the "authority to punish contempts by fine or imprisonment."¹²² Commission ALJs, by contrast, do not possess such authority.¹²³ And while Commission ALJs may issue subpoenas to compel noncompliance, they are powerless to enforce

¹¹⁷ See *Hill v. SEC*, 2015 WL 4307088, *16-19 (N.D. Ga. June 8, 2015) (appeal pending); *Duka v. SEC*, 2015 WL 4940057, *2-3 (S.D.N.Y. Aug. 3, 2015) (appeal pending).

¹¹⁸ 501 U.S. 868 (1991).

¹¹⁹ *Landry*, 204 F.3d at 1133 (explaining that the special trial judges at issue in *Freytag* exercised "authority . . . not matched by the ALJs").

¹²⁰ See *id.*

¹²¹ *Freytag*, 501 U.S. at 882.

¹²² *Id.* at 891.

¹²³ See 17 C.F.R. § 201.180. The Commission's rules provide ALJs with authority to punish contemptuous conduct only in the following ways. If a person engages in contemptuous conduct before the ALJ during any proceeding, the ALJ may "exclude that person from such hearing or conference, or any portion thereof," or "summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding." *Id.* § 201.180(a). If there are deficiencies in a filing, a Commission ALJ "may reject, in whole or in part," the filing, such filing "shall not be part of the record," and the ALJ "may direct a party to cure any deficiencies." *Id.* § 201.180(b). Finally, if a party fails to make a required filing or to cure a deficiency with a filing, then a Commission ALJ may enter a default, dismiss the case, decide the particular matter at issue against the person, or prohibit the introduction of evidence or exclude testimony concerning that matter." *Id.* § 201.180(c). Any such ruling would, of course, be subject to *de novo* Commission review.

their subpoenas; the Commission itself would need to seek an order from a federal district court to compel compliance.¹²⁴ In this respect, too, our ALJs are akin to the FDIC’s ALJs that *Landry* found to be “mere employees.”¹²⁵

Based on the foregoing, we conclude that the mix of duties and powers of our ALJs is similar in all material respects to the duties and role of the FDIC’s ALJs in *Landry*. Accordingly, we follow *Landry*, and we conclude that our ALJs are not “inferior officers” under the Appointments Clause.¹²⁶

* * *

An appropriate order will issue.¹²⁷

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

Brent J. Fields
Secretary

¹²⁴ See 15 U.S.C. § 78u(c).

¹²⁵ See 12 C.F.R. §§ 308.25(h), 308.26(c), 308.34(c) (providing that an aggrieved party must apply to a federal district court for enforcement of a subpoena issued by a FDIC ALJ).

¹²⁶ Beyond *Landry*, we believe that our ALJs are properly deemed employees (rather than inferior officers) because this is how Congress has chosen to classify them, and that decision is entitled to considerable deference. See *Burnap v. United States*, 252 U.S. 512, 516 (1920). For example, as we discussed above, Congress created and placed ALJ positions within the competitive service system, just like most other federal employees. Like such other employees, an ALJ who believes that his employing agency has engaged in a prohibited personnel practice can seek redress either through the Office of Special Counsel or the Merit Systems Protection Board. See 5 U.S.C. §§ 1204, 1212, 1214, 1215, 1221. And ALJs—like other employees—are subject to reductions-in-force. See *id.* § 7521(b).

¹²⁷ 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.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4400 / May 27, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32131 / May 27, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of

EDGAR R. PAGE
and
PAGEONE FINANCIAL INC.

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Edgar Page be barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; provided, however, that Page may apply to become so associated after five years; and it is further

ORDERED that Edgar Page 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; provided, however, that Page may apply to become so associated after five years; and it is further

ORDERED that the registration of PageOne Financial, Inc., be revoked; and it is further

ORDERED that Edgar Page and PageOne Financial, Inc., shall, within 30 days of the entry of this Order, pay jointly and severally disgorgement of \$2,751,345, plus prejudgment interest of \$398,483.24, 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