Initial Decision Release No. 1371
Administrative Proceeding
File No. 3-17828

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

Rosalind Herman

Initial Decision
April 5, 2019

Appearances: Kathleen Burdette Shields
for the Division of Enforcement,
Securities and Exchange Commission

Rosalind Herman, *pro se*

Before: James E. Grimes, Administrative Law Judge

Summary

I grant the Division of Enforcement's motion for summary disposition. Respondent Rosalind Herman is barred from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Procedural Background

The Securities and Exchange Commission initiated this proceeding in February 2017, when it issued an order instituting proceedings (OIP) under Section 203(f) of the Investment Advisers Act of 1940.[1] This is a follow-on

[1] OIP ¶ I; *see* 15 U.S.C. § 80b-3(f).

proceeding based on Herman's 2016 conviction in the United States District Court for the District of Massachusetts.[2]

This case was previously assigned to another administrative law judge. After Herman answered the OIP, the previous administrative law judge issued an initial decision in April 2018.[3] Two months later, the Commission stayed all pending cases.[4] In August 2018, the Commission allowed the stay to lapse, vacated decisions in all pending cases, remanded all cases pending before it, and ordered that all pending cases be reassigned to a different administrative law judge from the one previously assigned.[5] Following the Commission's August order, this proceeding was reassigned to me.[6]

Following reassignment, I directed the parties to submit proposals for the conduct of further proceedings and to state their availability to participate in a telephonic prehearing conference.[7] The Division submitted a proposal and reported that Herman had not responded to its inquiry.[8] As a result, I adopted the Division's proposal to set a motions schedule, under which motions for summary disposition were due November 19, 2018, oppositions were due December 19, 2018, and replies were due January 4,

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[2] *See* Judgment in a Criminal Case, *United States v. Herman*, No. 1:12-cr-10015 (D. Mass. July 27, 2016), ECF No. 299, *aff'd*, 848 F.3d 55 (1st Cir.), *cert. denied*, 137 S. Ct. 1603 (2017); OIP ¶ II.B.2.

[3] *Rosalind Herman*, Initial Decision Release No. 1249, 2018 WL 1806684 (ALJ Apr. 17, 2018).

[4] *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10510, 2018 WL 3193858 (June 21, 2018).

[5] *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018).

[6] *Rosalind Herman*, Admin. Proc. Rulings Release No. 6013, 2018 SEC LEXIS 2393 (ALJ Sept. 18, 2018).

[7] *Rosalind Herman*, Admin. Proc. Rulings Release No. 6047, 2018 SEC LEXIS 2541 (ALJ Sept. 20, 2018).

[8] *Rosalind Herman*, Admin. Proc. Rulings Release No. 6199, 2018 SEC LEXIS 2852 (ALJ Oct. 16, 2018).

2019.[9] I also directed the parties to participate in a telephonic conference that I scheduled for a later date.[10]

During the telephonic conference, I explained the procedural history of this proceeding to Herman, including that the previous initial decision had been vacated.[11] I also reviewed the motions schedule that I had previously established.[12]

In a December 2018 letter, Herman asked for a two-month extension to file an opposition to a motion for summary disposition the Division had filed in November.[13] Before I could act on Herman's motion, the Commission experienced a five-week lapse in appropriations, which led it to stay all administrative proceedings until January 30, 2019.[14] On February 1, 2019, I granted Herman's motion and ordered that her opposition would be due February 19, 2019.[15] Herman did not file an opposition to the Division's motion.

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed under Commission Rule of Practice 323, 17 C.F.R. § 201.323.[16] In making the findings below, I have applied

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[9] *Id.*

[10] *Id.*

[11] *See Rosalind Herman*, Admin. Proc. Rulings Release No. 6286, 2018 SEC LEXIS 3059 (ALJ Nov. 2, 2018).

[12] *See id.*

[13] *See Rosalind Herman*, Admin. Proc. Rulings Release No. 6438, 2019 SEC LEXIS 72, at *1 (ALJ Feb. 1, 2019).

[14] *See Pending Admin. Proc.*, Securities Act Release No. 10602, 2019 SEC LEXIS 5 (Jan. 16, 2019); *Pending Admin. Proc.*, Securities Act Release No. 10603, 2019 SEC LEXIS 37 (Jan. 30, 2019).

[15] *Herman*, 2019 SEC LEXIS 72, at *1.

[16] I take official notice of the district court's docket in *United States v. Herman* and the orders the court issued. *See* 17 C.F.R. § 201.323. I also take official notice of Insight Onsite Financial Solutions' final Form ADV, which is a public official record of the Commission. *See id.*; *cf. Helpeo, Inc.*, Securities

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preponderance of the evidence as the standard of proof.[17] As the Commission directed, in conducting this proceeding, I have given no weight to the opinions, orders, or rulings issued by the prior administrative law judge.[18]

This case arose out of an investment fraud scheme Herman operated with her co-conspirator Gregg D. Caplitz. From 1994 to 2012, Herman was president and CEO of Insight Onsite Financial Solutions, a Commission-registered investment adviser.[19] Caplitz was the adviser's chief compliance officer.[20]

In October 2013, Herman and Caplitz were indicted on charges including investment adviser fraud, wire fraud, impeding the administration of the tax laws, and conspiracy to commit investment adviser fraud, submit false statements to the Commission, commit wire fraud, and defraud the IRS.[21] During Herman's jury trial, the evidence established that Herman induced investment by telling investors that their money would be invested in a hedge fund.[22] But Herman instead used investor funds for her own benefit.[23] And when four investors complained and threatened to report Herman and Caplitz to appropriate authorities, Herman and Caplitz returned approximately $61,000 to them.[24] The jury found Herman guilty of single counts of conspiracy, investment adviser fraud, and impeding the administration of the tax laws, and four counts of wire fraud.[25]

Exchange Act of 1934 Release No. 82551, 2018 WL 487320, at *4 n.37 (Jan. 19, 2018) (taking official notice under Rule 323 of EDGAR filings).

17 *See John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998).

18 *See Pending Admin. Proc.*, 2018 WL 4003609, at *1.

19 Div. Ex. K at 1, 5.

20 *Id.* at 5.

21 Div. Ex. D.

22 Div. Ex. E. at 2.

23 *Id.*

24 *Id.* at 3.

25 Div. Ex. C at 1–2; *see* 15 U.S.C. § 80b-6(1) (investment adviser fraud); 18 U.S.C. §§ 371 (conspiracy), 1343 (wire fraud); 26 U.S.C. § 7212(a) (impeding administration of internal revenue laws).

During Herman's sentencing hearing, the district court increased Herman's offense level because her offense involved vulnerable victims and substantial hardship to at least five people and because she was an investment adviser when her misconduct occurred.[26] The court also heard from Herman's victims.[27] Victim evidence presented during sentencing revealed that Herman's adviser fraud victims included a 75-year-old veteran who lost $500,000 that he had saved so that he could live comfortably in retirement.[28] Further victim evidence indicated that other victims included a cancer patient who has since died, a paralyzed woman, and a man with dementia residing in a nursing home.[29]

The district court offered Herman the opportunity to address the court at the conclusion of her sentencing hearing.[30] Herman initially said she was "extremely sorry," before blaming Caplitz and saying she "had no idea he was stealing money and forging people's signatures," and adding, "I cannot believe and I am horrified by his ruthless and heartless acts."[31] Herman concluded by saying, "I have lost everything I worked 35-plus years for and I hope everyone believes how sorry I am for what Mr. Caplitz did."[32]

Immediately following Herman's statement, the district court sentenced her to seven years' imprisonment and ordered her to pay over $1.8 million in restitution.[33] That figure included nearly $500,000 to the IRS.[34] Nearly all of the balance was to be paid to individuals.[35] The district court then addressed Herman, saying that she was "in denial," and that she "knew what was going

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[26] Div. Ex. J at 15–16.

[27] *Id.* at 6–13.

[28] *Id.* at 8–9.

[29] *Id.* at 12.

[30] *Id.* at 28–29.

[31] *Id.* at 29.

[32] *Id.*

[33] *Id.* at 30–31.

[34] Div. Ex. C at 7.

[35] *Id.* at 6–7.

on was criminal from the get-go, and … knew that [she was] stealing people's money, for years and years."[36]

Conclusions of Law

Under Rule 250(b), which governs summary disposition in 75-day cases, an administrative law judge may grant a motion for summary disposition if "there is no genuine issue with regard to any material fact and . . . the movant is entitled to summary disposition as a matter of law."[37] The Commission has repeatedly upheld use of summary disposition in cases such as this one, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction.[38]

Herman's conviction and the record of her criminal proceeding before the district court establish facts that cannot be challenged in this proceeding.[39] There is therefore sufficient evidence to decide this matter in the Division's favor. Although Herman requested a new hearing,[40] she has not substantively participated in this iteration of the proceeding. And the denials and defenses in her answer filed in October 2017 impermissibly challenge her criminal conviction.[41]

The Advisers Act gives the Commission authority to impose a collateral bar[42] against Herman if, as is relevant here, (1) she was associated with or

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[36] Div. Ex. J at 32.

[37] 17 C.F.R. § 201.250(b).

[38] *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *10 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5 & n.21 (Feb. 4, 2008) (collecting cases), *pet. denied*, 561 F.3d 548 (6th Cir. 2009).

[39] *See Kornman*, 2009 WL 367635, at *8; *James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *4 & nn. 13–14 (Oct. 12, 2007).

[40] *Herman*, 2018 SEC LEXIS 2393.

[41] *See* Answer at 1–2; *see also David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *5 & n.22 (Mar. 21, 2016) (explaining that a respondent in a follow-on proceeding cannot "contest the basis for [her] conviction").

[42] A collateral bar, also referred to as an industry bar, is a bar that prevents an individual from participating in the securities industry in capacities in addition to those in which the person was participating at the

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seeking to become associated with an investment adviser at the time of the misconduct at issue; (2) she was convicted within the ten years preceding issuance of the OIP of an offense involving a violation of 18 U.S.C. § 1343 (wire fraud); and (3) imposing a bar is in the public interest.[43]

Herman's conviction for investment adviser fraud and the Commission's investment adviser registration records establish that she was associated with an investment adviser at the time of her misconduct.[44] This satisfies the first factor.

Less than ten years before the OIP was issued, Herman was convicted of four counts of wire fraud, in violation of 18 U.S.C. § 1343. This satisfies the second factor.[45]

Determining whether imposing a collateral bar would be in the public interest requires weighing the public-interest factors discussed in *Steadman v. SEC*.[46] These include:

> the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree

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time of his or her misconduct. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *1 & n.1 (Oct. 29, 2014).

[43] 15 U.S.C. § 80b-3(e)(2)(A), (B), (D), (3)(A), (f).

[44] Div. Ex. C at 1–2 (conviction for investment adviser fraud); *see* Div. Ex. G at 99–100 (jury instructions stating that the jury would have to find Herman was associated with an investment adviser to convict her of a violation of the Advisers Act). *See also* Form ADV, Insight Onsite Financial Solutions, Signature Page, https://adviserinfo.sec.gov/IAPD/content/viewform/adv112010/Sections/iapd_AdvSignatureSection.aspx?ORG_PK=107651&FLNG_PK=00DB9CB400080156051DA9700327B60D056C8CC0 (last visited Apr. 2, 2019) (Herman signed Insight Onsite's final Form ADV in March 2011 as president and CEO); Div. Ex. E at 2 (noting that the misconduct occurred from 2008 to 2013).

[45] The second factor is also satisfied because Herman's conviction (1) involves the purchase or sale of securities, (2) arises out of the conduct of the business of an investment adviser, and (3) "is punishable by imprisonment for 1 or more years." 15 U.S.C. § 80b-3(e)(2)(A), (B), (3)(A), (f).

[46] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Kornman*, 2009 WL 367635, at *6.

> of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[47]

The Commission also considers the deterrent effect of administrative sanctions.[48] The public interest inquiry is "flexible" and "no one factor is dispositive."[49]

Before imposing a collateral bar, an administrative law judge must determine, based on the evidence presented, whether a bar "is necessary or appropriate to protect investors and markets."[50] I must therefore "'review [Herman's] case on its own facts' to make findings regarding [her] fitness to participate in the industry in the barred capacities."[51] A decision to impose a collateral bar "should be grounded in specific 'findings regarding the protective interests to be served' by barring the respondent and the 'risk of future misconduct.'"[52]

Turning to the *Steadman* public-interest factors, Herman's conduct was egregious. The Commission has held that "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the

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47 *Wulf*, 2016 WL 1085661, at *4.

48 *Id.* General deterrence is relevant but not determinative of whether the public interest weighs in favor of imposing a collateral bar. *See Peter Siris*, Advisers Act Release No. 3736, 2013 WL 6528874, at *11 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014).

49 *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008).

50 *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (internal quotation marks omitted), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016).

51 *Id.* (quoting *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005)).

52 *Id.* (quoting *McCarthy*, 406 F.3d at 189–90); *see also John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *9 (Dec. 13, 2012) ("[T]he Commission must consider not only past misconduct, but the broader question of the future risk the respondent poses to investors."), *vacated in part on other grounds*, Advisers Act Release No. 4402, 2016 WL 3030847 (May 27, 2016).

integrity of its participants and on investors' confidence."[53] This is especially so for investment advisers, in whom clients must be able to put their trust.[54] Given this fact and the fact that investment advisers are fiduciaries who owe their clients "an affirmative duty of 'utmost good faith and full and fair disclosure of all material facts,'" the Commission consistently takes a very dim view of investment advisers and associated persons who defraud their clients.[55]

Herman abused her position of trust by stealing over $1.3 million of her clients' money.[56] At sentencing, the district court increased her offense level because she knew or should have known that her victims were vulnerable.[57] As discussed, one of Herman's victims was a veteran who lost money he had saved his entire life so that he could live comfortably in retirement. Herman's conduct easily qualifies as egregious.[58]

Herman's conduct was not isolated and it was recurrent. She stole from at least 18 victims as part of a scheme that lasted almost five years.[59]

As to scienter, which encompasses an "intent to deceive, manipulate, or defraud,"[60] the district court instructed the jury that in order to find Herman guilty of investment adviser fraud, the jurors had to find that she acted "knowingly, knowing … what she was doing[;] willfully, heedless of the

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53 *Seghers*, 2007 WL 2790633, at *7.

54 *Schield Mgmt. Co.*, Advisers Act Release No. 2477, 2006 WL 231642, at *10 n.56 (Jan. 31, 2006).

55 *James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *3 (July 23, 2010); *see id. at* *4 ("[W]e have consistently viewed misconduct involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary, such as the fraud committed by Dawson on his clients, as egregious.").

56 Div. Ex. E at 2.

57 Div. Ex. J at 16.

58 *See Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 WL 3479060, at *4 (July 11, 2013) (involving $852,000 taken from investment advisory clients).

59 *See* Div. Ex. E at 2; Div. Ex. C at 6–7.

60 *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980).

consequences, with the … intent to deceive, manipulate, or defraud."[61] To find Herman guilty of wire fraud, the jury was instructed that it had to find that she knowingly or willfully engaged in a scheme or artifice to defraud.[62] And to find her guilty of conspiracy to commit investment adviser fraud and wire fraud, the jury had to find that she entered into the conspiracy specifically intending to bring about those frauds.[63] The fact that the jury found her guilty of investment adviser fraud, wire fraud, and conspiracy to commit those frauds establishes that Herman acted with scienter.[64]

Herman has neither made assurances against future misconduct nor demonstrated that she understands or recognizes the wrongfulness of her criminal acts. To the contrary, during her sentencing hearing, she essentially proclaimed her innocence and blamed Caplitz for everything. And the district court rebuked her for being in denial. Herman's denial of responsibility shows that she does not understand the wrongfulness of her actions.

Herman's failure to accept responsibility or show that she understands the wrongfulness of her actions raises the risk that she would engage in future misconduct if allowed to remain in the securities industry. Indeed, the fact of Herman's past misconduct raises an inference that if given the chance, she will cause additional harm to the investing public.[65] This determination is supported by my finding that Herman's conduct was egregious.[66]

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61 Div. Ex. G at 99.

62 *Id.* at 101.

63 *Id.* at 104–05.

64 *See United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000) (holding that scienter is an element of wire fraud); *SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992) (holding that scienter is an element of adviser fraud under Advisers Act Section 206(1)).

65 *See Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 n.50 (July 26, 2013).

66 *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) (holding that a finding of egregiousness "justifies the inference" that misconduct will recur); *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *11 (Jan. 16, 2008) ("The existence of a violation raises an inference that the violation will be repeated, and where the misconduct resulting in the violation is egregious, the inference is justified.").

Finally, imposing a collateral bar will serve the Commission's interest in deterring others from engaging in similar misconduct.

I find that it is in the public interest to impose a collateral bar against Herman.

Order

The Division of Enforcement's motion for summary disposition is GRANTED.

Under Section 203(f) of the Investment Advisers Act of 1940, Rosalind Herman is BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[67] Under that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111.[68] If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occurs, the initial decision shall not become final as to that party.

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James E. Grimes
Administrative Law Judge

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[67] *See* 17 C.F.R. § 201.360.

[68] See 17 C.F.R. § 201.111.